THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR541/14

In the matter between**:**

OLD MUTUAL LIFE ASSURANCE COMPANY

SOUTH AFRICA LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

M S RAFEE *N.O.* **Second Respondent**

DR PANDELANI THOMAS MATHOMA **Third Respondent**

Heard: **07 September 2017**

Delivered: **19 October 2017**

Summary: **Review of award in terms of which an employee's dismissal for gross negligence and dishonesty was substantively and procedurally unfair - commissioner failed to consider evidence fully - the Court independently assessed and evaluated the evidence - found that the commissioner's failure to deal with evidence constitutes a reviewable misdirection - replacing the**

award with an order that the dismissal was substantively fair - finding on procedural unfairness upheld.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1], (LRA) to review the arbitration award issued by the second respondent (the commissioner) on 10 February 2014 under case number GAJP9810-13. In terms of the arbitration award, the commissioner found the dismissal of the third respondent (Dr Mathoma) by the applicant (Old Mutual) to be substantively and procedurally unfair and ordered his reinstatement.

[2] This application is opposed by the third respondent only.

Factual background

[3] Dr Mathoma commenced employment with Old Mutual on 1 May 2010. His position was that of a General Manager: Corporate Affairs. He was reporting to Mr Sonn who was at that time the Director: Marketing, Corporate Affairs and Communications for Emerging Markets. Part of Dr Mathoma's responsibilities was the Old Mutual Foundation (OMF) and at that time Mr Sonn was the Chairperson of the OMF.

[4] At the time of his appointment Dr Mathoma was provided with a report that had been prepared by the Mthente Research and Consulting Services (Pty) Ltd (Mthente), a research consulting firm. It is a report on internal audit of OMF carried out by Mthente for purpose of evaluation of the OMF's repositioning strategy and their skills set against international and local

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[1] Act 66 of 1995 as amended.

based practice. Mr Sonn had commissioned Mthente to provide the report after it had submitted a detailed proposal pointing out the work to be performed, the time it would take and the precise costs involved. Upon his appointment Dr Mathoma was required to execute the Mthente report as it constituted the future strategy of the OMF.

[5] On 4 April 2011, Dr Mathoma entered into a research sponsorship agreement with Afriwealth Consulting ('AfriWealth') to provide Old Mutual with two reports, which were described as follows:

> 'The first report will focus on leading corporations and social investment visibility through media reports in South Africa, a trend and analysis';
>
> and
>
> 'The second report will be an investigation into Old Mutual's EVC/CSI projects in rural South Africa, a case study'.

[6] The material terms of this AfriWealth sponsorship agreement are summarised hereunder:

> '1. The parties agree to relate in good faith following the execution of the memorandum of understanding in order to pursue the execution of the envisaged research project including the following elements:
>
> a. The parties agree to pursue the establishment of a working partnership in turn to enable the production of knowledge, exchange of use of information for the purpose of promoting the improvement of quality Old Mutual rural community relations in South Africa and beyond.
>
> b. Specifically, AfriWealth Consulting has been commissioned by Old Mutual (Sponsor) to plan, carry out and submit two basic research reports to the Sponsor in the course of 2011.
>
> c. Subject to Old Mutual agreed modifications, the first report will focus on leading corporations and Social Investment Visibility Through Media Report in South Africa: A Trend Analysis.

d. Further and subject to mutually agreed modifications, the second report will be an investigation into Old Mutual EVC/CSI Projects in Rural South Africa. A case study.

e. Both parties agree that the First Research Project will be supported and funded by the Sponsor (Old Mutual) to the tune of R400 000 (Four Hundred Thousand Rands + 14% VAT) payable on submission of research report by AfriWealth Consulting to the Sponsor.

f. Both parties agree that the Second Research Project will be supported and funded by the Sponsor (Old Mutual) to the tune of R400 000 (Four hundred Thousand Rands + 14% VAT), payable on submission of Research Report by AfriWealth Consulting to the Sponsor.

g. AfriWealth agrees with the Sponsor to submit both reports on or before 5th December 2011, and in the same vein, the Sponsor agrees to pay AfriWealth immediately (within seven working days) after the submission of the Research Reports.'

[7] Mr Sonn testified that Dr Mathoma's intention to enter into an agreement with AfriWealth was never discussed with him, as the Chairman, and amongst the board of trustees of the OMF. The AfriWealth agreement was not preceded by any form of proposal or costing by AfriWealth, such as the undertaking by Mthente before it was commissioned to undertake the Mthente report. In addition to this, Dr Mathoma had put together the AfriWealth agreement himself and had not sought the assistance of Old Mutual's legal department as required by the procurement policy.

[8] On 31 August 2011 at 23h09 at night whilst using his private email address, Dr Mathoma sent Professor Banjo from AfriWealth an example of an invoice for his attention. The next morning at about 05h35 Professor Banjo emailed the invoice for the first AfriWealth report to Dr Mathoma's private email address. The said invoice was dated 31 August 2011.

[9] The invoice was immediately approved by Dr Mathoma, but it was subsequently re-issued due to deficiencies in the invoice having been

detected and then approved by Dr Mathoma on 12 September 2011. The ultimate price that was charged by AfriWealth was R450 600.00 (four hundred and fifty thousand six hundred rand) for the first report. This is despite the contract price having been R400 000.00 including VAT. This invoice was subsequently honoured. The first AfriWealth report was paid before it was received as it was received sometime mid-September 2011.

[10] On 1 September 2011 Mr Ralebitso commenced employment as Director: Marketing, Communications and Corporate Affairs and Dr Mathoma's direct supervisor. On 22 November 2011, the second Afriwealth report and the invoice were sent to Dr Mathoma by Professor Banjo. On 19 December 2011, AfriWealth submitted a reworked invoice for the second report. The invoice was approved by Dr Mathoma the following day, but the invoice was re-issued again and then subsequently approved by Dr Mathoma on 23 December 2011. It is apparent from the invoice that Afriwealth charged R450 032.00 (four hundred and fifty thousand and thirty-two rands) for the second report despite not having charged VAT. The amount of R50 000.00 included in the invoice was accounted for as stationery, printing, etc which had not been contracted for in terms of the agreement. The invoice was subsequently paid by Old Mutual.

[11] Different to the invoice for the first report, the final invoice for the second report contained a breakdown of work purportedly undertaken by AfriWealth in compiling the report and was based on an hourly rate for consultants set by the DPSA. The said breakdown was requested by Dr Mathoma himself who testified that he was uncomfortable with the signing of the invoice in the absence of a breakdown. Glaring in the said invoice is the anomaly in terms of the manner in which Professor Banjo accounted for the work he had performed that led to the report. The invoice reflects that Professor Banjo had worked on the report 24 hours per day for 90 days (at a rate of R1 156.00 per hour), and the three research assistants had worked on the report each for 87 days at 24 hours per day (at a rate of R240.00 per hour).

[12] In arranging the expedited payment of the invoice for the second AfriWealth report at the request of Professor Banjo, Dr Mathoma sent two emails to the finance department which are of relevance:

12.1. On 19 December 2011, Dr Mathoma sent an email to Ms Nel, saying this about AfriWealth:

> 'I was not prepared to pay him until we are happy with the entire report, hence I wanted to accrue the money and pay him next year when he would have made changes. He has now effected the changes and I am happy with them.'

12.2. On 20 December 2011, Dr Mathoma sent an email to Ms Collison saying this about AfriWealth:

> 'I had not [anticipated] that I will pay them [until] next year after they had revised the report to our satisfaction. Now they have done so. We are happy with the product and I am therefore satisfied that we can pay.'

[13] On 23 January 2012, the Group Forensic Services (GFS) received an anonymous tip off to the effect that the expenditure and payment of the first AfriWealth invoice for R450 600.00 was irregular and Dr Mathoma was implicated. From the beginning of February 2012, Dr Tshitereke commenced work as a Senior Manager and the Head of OMF. He reported directly to Dr Mathoma and one of the other direct subordinates of Dr Mathoma was Mr Hadebe who was a Senior Manager: Stakeholder Relations.

[14] On 27 March 2012, the GFS held an interview with Dr Mathoma consequent to a tip off. On 3 April 2012 Dr Mathoma sent an email to Mr Venter, a Group Forensic Investigator in which he explained the reason for the commissioning of the two AfriWealth reports. On 10 July 2012 GFS produced a case report on the matter in which it found that the allegations against Dr Mathoma had not been established. On 11 July 2012, four of Dr Mathoma's direct reportees put in a grievance against him. Amongst them

were Dr Tshitereke and Mr Hadebe. The complaints against Dr Mathoma were wide ranging including several further allegations about the AfriWealth reports.

[15] On 18 July 2011, Dr Mathoma sent an email to Mr Ralebitso, recording threats made by Dr Tshitereke who allegedly orchestrated his dismissal solely because Dr Mathoma had apparently refused to drop a disciplinary case against Mr Hadebe.

[16] On 15 August 2012, another interview was conducted with Dr Mathoma by two GFS investigators, Ms Meijer and Mr Venter. The minutes of the said interview was sent to Dr Mathoma on 17 August 2012 and he made written corrections and then signed. Even though Dr Mathoma disputes the accuracy of the said minutes, they recorded the following:

> 'Dr Mathoma agrees that he did not follow the proper procurement process according to the Old Mutual procurement policy purely because of an oversight on his part and pressure to deliver.
>
> Annelie [Meijer] asked Dr Mathoma if he took time to himself to read the two documents that is the AfriWealth reports and Dr Mathoma responded that he needs to agree that the research document was of poor quality and that he was not vigilant enough to ensure that research was properly conducted and reported on before payments were made.'

[17] On 2 September 2012, the outcome of the grievance that had been lodged by Dr Mathoma's subordinates was issued by Mr Mathebula (an IR Change panellist) who was engaged to consider the collective grievance. In relation to the complaints about AfriWealth's reports, Mr Mathebula found that they were not well-founded.

[18] On 25 October 2012, GFS produced their forensic report in which irregularities in Dr Mathoma's handling of the AfriWealth matter were identified and recommended a disciplinary action against him. On 31 October 2012, Dr Mathoma sent an email to Mr Powell, Head of

Forensics in which he alleged that Mr Venter and Dr Tshitereke were acting in cahoots to get him dismissed.

[19] In November 2012, the second Mathebula report was issued. Mr Mathebula recommended that on the strength of the GFS investigation, Dr Mathoma had a case to answer in relation to AfriWealth and he should be charged accordingly.

[20] In November 2012, disciplinary charges were brought against Dr Mathoma and are as follows:

> 'Charge 1: Misconduct – Gross negligence
>
> In that you failed to completely perform the employer's work by your course of conduct described below which when viewed in totality displays a grossly negligent approach to the performance of your duties.
>
> 1. Despite being aware of the Mthente report commissioned by Crispin Sonn and produced in 2010 and which looked at the strategic direction of Old Mutual Foundation you concluded a contract with Prof Banjo trading as AfriWealth to produce two reports in 2011 which were unnecessary as they covered the same scope as the Mthente report.
>
> 2. You concluded this agreement with Prof Banjo without the authority or knowledge of your seniors.
>
> 3. You failed to follow any proper tender and procurement process in regard to the contract concluded with AfriWealth.
>
> 4. Although both AfriWealth reports were intended to benefit Old Mutual Foundation, you did not raise or discuss the commissioning of AfriWealth reports with the board or any of the trustees of the Old Mutual Foundation nor did they give their approval to proceed.
>
> 5. You utilised your own General Management operational budget to pay AfriWealth despite the fact that the reports you requested were intended for use by the Old Mutual Foundation.

6. You failed to utilise the proper vendor contracting process including usual detailed legal contract prepared by Old Mutual Group Legal Department in concluding the contract between Old Mutual and AfriWealth.

7. You failed to have due diligence done on AfriWealth which would have established that it had been deregistered as a Close Corporation (cc) and that it was also not registered for VAT.

8. You failed to disclose to your seniors that you had therefore incurred liability of 2 x R400 000 which was approximately 10% of your entire R9 million general management budget allocated for the operation of your whole function in 2011.

9. You provided AfriWealth with a pro forma invoice in order for them to then invoice Old Mutual in respect of their first respondent which they did in August 2011.

10. You authorised payment in respect of their first invoice on no less than three different versions of the invoice before receiving any of the first report.

11. The first invoice also incorrectly contained VAT at 14% on the contractual amount due to R400 000 which VAT was also incorrectly calculated as R50 600 instead of R56 000.

12. You authorised payment of AfriWealth's second invoice on 2 versions and when it was pointed out to you by Old Mutual Finance Department that AfriWealth was not in fact VAT registered, you approved a fee of over R50 000 instead for secretarial and typing services for the second report [yet this report did not even extend to 100 typed A4 pages].

13. You incurred actual liability for Old Mutual of over R900 000 in 2011 for work which was both unnecessary and of poor quality (and subsequent analysis show both reports contained significant proportion of plagiarised and acknowledge material drawn from the internet) and without the knowledge or approval of your seniors at that time.

14. Only after the Group Forensic Services Department began to investigate this matter did you contact Prof Banjo and request from him AfriWealth's company profile, background documentation and supporting documentation regarding the invoices.

15. You subsequently agreed that the agreement lacked detail and so posed a risk to Old Mutual as it does not now have any recourse given that the research was not done to specific standard etc.

16. The amounts/fees that you agreed to were not properly thought through nor discussed with AfriWealth during April 2011.

Charge 2: Misconduct – Dishonesty

In that you dishonestly misrepresented to Old Mutual that the information submitted indicated by you was true and correct as follows:

1. You emailed Ms Collison, an employee of Old Mutual Finance Department on 20th December 2011 at 17h52 indicating that AfriWealth had revised their report to your satisfaction, that you were happy with the report and satisfied the Old Mutual can pay AfriWealth; yet on another occasion in your interview with Group Forensic Department indicated you approved the payments to AfriWealth without reading or quality checking the reports they gave you. You further explained that after the new Head of Foundation, Dr Clarence Tshitereke, was appointed during 2012 you handed the due research documents to him and placed the responsibility on him to review the two research papers.

2. In your interview with Group Forensic Department you indicated you used the "Government International Relations and Corporations Terms of Reference" document during April 2011, to determine the rate per report. Yet you only obtained this document in February 2012 [after the Group Forensic Services Department began to investigate this matter] by contacting Prof Banjo to request a more detailed Terms of Reference document to understand the costs and fees associated with both reports.

Alternative to Charge 1 and 2: Misconduct – Breach of common law duty

In that your above actions, conduct and behaviour breached the common law duty owed by the employee to the employer. These include but are not limited to the duty of trust and the duty to always act in the best interest of the employer.'

[21] Dr Mathoma's disciplinary hearing was conducted on 3, 7 and 13 December 2012 and 15 January 2013. Ms Sarah Christie (an IR Change panellist) was the chairperson. Dr Mathoma was represented by an attorney, Mr Mabuza. On 4 February 2013, Ms Christie issued her findings wherein she found Dr Mathoma guilty of gross negligence and dishonesty and recommended his dismissal. Dr Mathoma was accordingly advised on 8 February 2013 and his dismissal took effect on 28 February 2013.

<u>The arbitration proceedings</u>

[22] In relation to substantive fairness, the issues for determination were whether:

22.1. Dr Mathoma was grossly negligent and / or dishonest;

22.2. discipline was applied consistently; and

22.3. dismissal was the appropriate sanction (the latter two issues arising only in the event of a finding of guilt).

[23] In relation to procedural fairness, the issues for determination were whether Dr Mathoma's dismissal was procedurally unfair on account of one or more of the following contentions:

23.1. the company failed to lead evidence at the disciplinary enquiry to establish that the employment relationship was destroyed;

23.2. Dr Mathoma was not afforded the opportunity of submitting evidence in mitigation of sanction;

23.3. the company did not seek dismissal as a sanction at the disciplinary enquiry;

23.4. Ms Christie travelled in a car with Old Mutual's representative after the enquiry on 3 December 2012;

23.5. Ms Christie did not submit her findings to the parties at the same time;

23.6. there was irregular contact between Ms Christie and Old Mutual around the amendment of Ms Christie's findings; and

23.7. the notice of the disciplinary enquiry was not issued in terms of procedure, in that the charges were not explained to Dr Mathoma.

<u>Summary of evidence</u>

[24] Old Mutula's evidence can be summarised as follows:

24.1. Mr Sonn testified that the AfriWealth agreement was not preceded by any form of proposal or costing by AfriWealth, such as that undertaken by Mthente before it was commissioned to undertake the Mthente report. In addition to this, Dr Mathoma had put together the AfriWealth agreement himself and had not sought the assistance of Old Mutual's legal department as required by procurement policy. Dr Mathoma was required to execute the Mthente report as it constituted the future strategy of the OMF.

24.2. The AfriWealth reports added no value as they contained information that was already in Old Mutual's possession. Some of the chapters in the AfriWealth's first report were a "cut and paste" from the Mthente report. Dr Mathoma never discussed his intention to enter into an agreement with AfriWealth with Mr Sonn, management team and/or the board of trustees of the OMF in line with Old Mutual's culture. Old Mutual has a fairly rigorous process to understand the value for money spent and the manner Dr Mathoma conducted himself did not commensurate with that process and standard.

24.3. On the conspiracy advanced by Dr Mathoma to the effect that Dr Tshitereke was somehow responsible for his dismissal, Mr Sonn testified that it was implausible. Dr Tshitereke was appointed by Dr Mathoma himself, who acknowledged in his evidence that they knew each other prior to both joining Old Mutual, and was junior in rank to influence senior level decisions.

24.4. Under cross-examination, it was put to Mr Sonn that Dr Mathoma did not need approval to spend the R900 000 on the AfriWealth reports as the money came from his so-called discretionary pot. In response, Mr Sonn disputed this, stating that the cost of the reports came out of Dr Mathoma's media and promotion budget. He explained that the discretionary pot was a funding mechanism that was created by the previous CEO where, subject to consultation, the funds were used to fund *ad hoc* requests by different organisations such as the government or individuals like Ms Graça Machel for the funding of events. As such, the discretionary pot was not a slush fund that Dr Mathoma could use as he pleased, with the expenditure always being subject to internal consultation and controls.

24.5. The evidence of Ms Meijer and Mr Venter primarily related to the interview which they had conducted with Dr Mathoma on 15 August 2012, and the drafting of the minutes of the interview. They corroborated each other that the minutes accurately recorded what transpired during the interview.

24.6. Mr Venter was adamant that he had taken the minutes to Dr Mathoma in his office on 17 August 2012, and that Dr Mathoma had read through them, made a few handwritten amendments and then signed them. Mr Venter disputed the version put to him under cross-examination to the effect that Dr Mathoma had been present in a meeting with Mr Ralebitso at the time that Mr Venter brought him the minutes, and that Mr Ralebitso had become impatient and advised Dr Mathoma to sign the minutes, and then make any amendments later.

[25] Dr Mathoma's evidence can be summarised as follows:

25.1. He had authority to approve the R900 000 expenditure on the AfriWealth reports as his authorisation limit had been increased from R500 000 to R5 million. Dr Mathoma did, however, concede under cross-examination that he had accepted at his disciplinary enquiry that his limit was R500 000 since he was not aware that his limit had been increased when he authorised the payment of the AfriWealth reports.

25.2. He commissioned the AfriWealth reports to do two things which the Mthente report did not do; to look into what leading corporations were doing and the creation of Economically Viable Communities (EVCs).

25.2.1. On the scope of the first AfriWealth report, Dr Mathoma testified that what he wanted to know from AfriWealth was what distinguished the CSI strategy of the top 10 corporates from Old Mutual's in view of the fact that they are successful and their programs so visible. However, he was unable to point out whether the first AfriWealth report dealt at all with this fundamental issue under cross examination.

25.2.2. Dr Mathoma, realising that report did not deal with the fundamental issue, stated, for the first time that the report was a work in progress, and that the question would have been answered in the final report and strategy that would have been delivered by Dr Tshitereke and Professor Banjo.

25.2.3. Under cross examination, Dr Mathoma acknowledged the following deficiencies in the first AfriWealth report:

25.2.3.1. Chapter 1 (running to 16 pages) was no more than a desk to review of literature on CSI;

25.2.3.2. The whole of chapter 2 (running to 16 pages) is a cut and paste from the Mthente report;

25.2.3.3. Chapter 3 (running to 26 pages) contains mostly information taken off websites, including bar graphs and pie charts, with the only original content in the entire report being at pages 38 to 39 of this chapter, that is a table reflecting the total number of CSI media reports received by the top 10 corporates;

25.2.3.4. Chapter 4 and 5 (totalling 15 pages) are extracts from writings of leading thinkers on CSI; and

25.2.3.5. Chapter 6 (running to three pages) was a slightly longer version of the executive summary at the beginning of the report.

25.2.4. On the second AfriWealth report, Dr Mathoma confirmed the accuracy of what he stated in his email to Mr Venter on 3 April 2012 about the purpose of the report. As Dr Mathoma had recorded:

> ‘The second report focused on the future and I wanted them to help us with the development of our future CSI strategy that would put us in the same ranking as or even better than the leading corporations surveyed in the first study. I asked them to make the linkages with the Government’s national priorities, the Masibambisane Rural Development Initiative (MRDI) initiated and led by the President of the Republic, and our Imbizo programme done with the support of our Black Business Partners (BBPs), especially Wipihold. I also wanted the new strategy to include the revitalised roles of the Provincial Management Boards (PMBs) who are at the coalface of our interaction with the communities.’

25.2.5. When Dr Mathoma was asked whether the second report achieved these objectives to justify expending R400 000 on it, his answer was that ‘we were on a journey, this was part of a journey and the conclusion was the strategy’. He was also expecting Dr Tshitereke and Professor Banjo to work on the reports, incorporating ‘empirical evidence’ that would have been delivered by Professor Banjo to produce a final report. As a result, he was satisfied that he did achieve his objectives.

25.3. The costs of the AfriWealth reports came from his discretionary pot and as such there was no need to follow procurement process or consult with anyone in the absence of a policy regulating this expenditure. Under cross-examination Dr Mathoma was confronted with the fact that he had not said this at his disciplinary enquiry.

25.4. In relation to the interview on 15 August 2012, he denied that the contents of the minutes were a true reflection of what he had said during the interview.

25.4.1. It emerged during cross-examination that Dr Mathoma's version of defence as advanced by his legal representative at the disciplinary enquiry was that the reason he did not engage the legal department was because he was overstretched at the time. That is consistent with Ms Meijer and Mr Venter's evidence on what Dr Mathoma had said during the 15 August 2012 interview. Dr Mathoma's response was evasive, stating that 'I did not say that I am overstretched I said these are other things that I am doing'.

25.4.2. He also disputed Mr Venter's version of the circumstances surrounding his signing of the minutes of the interview on 17 August 2012. He stated that he had been in a meeting with Mr Ralebitso at the time and was pressured to sign the minutes and then deal with Mr Venter later.

25.4.3. However, under cross-examination, Dr Mathoma, conceded making handwritten amendments on the very page on which the two damaging statements allegedly made by him are recorded. He also conceded that his version that he signed the minutes under pressure from Mr Ralebitso was different from a version he gave at his disciplinary enquiry.

25.5. On the issue of his relationship with Dr Tshitereke, it was Dr Mathoma's evidence that it had deteriorated from May 2012 onwards and he considered Dr Tshitereke to have been behind his dismissal. Under cross examination, it was put to Dr Mathoma that, since the allegations of his gross negligence and his dishonesty had already arisen by the end of December 2011, the deterioration of his relationship with Dr Tshitereke from May 2012 could not have had any bearing on the alleged acts of misconduct that took place in 2011 to substantiate his conspiracy theory.

25.6. Regarding the issue of inconsistency, he referred to the incident where Ms Zondo had incurred some R2.7 million in expenditure when her authorization limit was only R500 000.

25.7. Dr Mathoma conceded that, given the seniority of his position and the fact that he worked in the financial sector, if he had acted negligently with company funds and could not be trusted to give a proper explanation for his conduct, the company would have been entitled to dismiss him.

25.8. On the charge of dishonesty, Dr Mathoma testified that he had requested the Head of Group Procurement, Ms Heidi Kinciad, whether it was appropriate for him to ask the finance department to accelerate payment of AfriWealth. When Dr Mathoma was questioned about the false statements in his emails to Ms Nell, on 19 December 2011, and to Ms Collison, on 20 December 2011, to the effect that changes to the second AfriWealth report had been effected to his satisfaction, his response to this was that he had sought permission from Ms Kinciad and discussed with Mr Ralebitso. This explanation was not helpful to Dr Mathoma because he had testified that the discussions with Ms Kinciad and Mr Ralebitso pertained to the accelerated payment and not the quality of the report. Clearly, the contents of these two emails were deceiving since the report had not been revised.

25.9. Regarding the R50 000 charged in the invoice for the second AfriWealth report for stationeries, printing, photocopying USB, secretarial and editorial services, Dr Mathoma stated that he had noticed it, and had, nevertheless, approved payment despite the fact that no such amount had been contracted for in the AfriWealth agreement.

25.10. It was put to Dr Mathoma that the standard of diligence shown by him in approving the AfriWealth invoices fell so far short of the standard expected of a senior manager in a financial services company that this, in itself, warranted dismissal, Dr Mathoma disagreed.

25.11. Dr Mathoma conceded that Old Mutual was reasonably entitled to expect that he would only authorise payment for a report once he was satisfied that it had been delivered and completed, up to the standards expected by him.

25.12. Regarding the procedural challenges, the commissioner correctly dismissed the claim that the charge sheet was not read to Dr Mathoma since he is highly literate.

25.13. On the claim of the trip to the airport, Dr Mathoma admitted that Ms Christie had informed them that she was going to travel to the airport with Mr Estie, and his legal representative did not object. Regarding Ms Christie having corrected two errors in her report, Dr Mathoma was adamant that she had been placed under duress to do so. Dr Mathoma further argued that Old Mutual breached its own disciplinary code in both incidents.

[26] Nothing much turned on the evidence of Dr Mathoma's three witnesses being Ms Bonisiwe, Ms Zandile and Ms Matodzi; save to show that he continued to help employees of Old Mutual post his employment.

Findings by the commissioner

[27] On the question of whether Dr Mathoma was grossly negligent and dishonest, the commissioner made the following findings:

> '56. The two reports that had been commissioned by the Applicant in his agreement with Professor Banjo are central to this dispute. On the face of the reports there are certainly many issues that can be commented upon without being an expert. None of the parties called expert witnesses. The spelling mistakes, the format, the syntax errors and grammatical gremlins and cut and paste are clearly patent. Further, the need for bar and pie charts over a period of 10 years reflect the same data reconfigurated in a different model. The extent to which that was necessary appears, on the face of it, not to be the case.
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> 57. The reports, according to the Applicant were firstly, to fill the gap of the Mthente report and secondly, that the Afriwealth report 'flow from' the Mthente report and all the reports were effectively 'working progress' (sic). This would have all culminated, according to the Applicant, in his broader vision of seeking the Respondent being placed in the top 10 companies and later as a number one. This evidence was uncontested and therefore must stand.
>
> 58. The payment made from the discretionary pot relates to the issue of whether or not, firstly, the Respondent had a policy for the use of the discretionary pot. The Applicant was at pains during cross-examination to explain that there was no policy, neither was there any policy produced during the course of these proceedings. Perhaps that is the reason why it was called a discretionary pot that was placed at the sole disposal of a person placed in the position of the Applicant.
>
> 59. Mr. Crispin Sonn testified that the Applicant had an amount of R500 000.00 that he could spend clearly in his discretion, which he did. I cannot agree with Mr. Crispin Sonn that the Applicant was required to consult with him or the management team or with the Board of Directors. The Applicant held a very senior position and it was for that reason that he was given the discretion. To now

interfere with this discretion appears to have its origin in the malice that was harboured in the heart and head of Dr Clarence Tshitereke.

60. Further evidence of this interference of the discretion can be found in the conclusions reached in the first report of Mr. Johnny Mathebula and what motivates the same author to come to a different conclusion some two months later appears to fit in with the Applicant's proposition, being the conspiracy theory. In my view, for the same author to come to two different conclusions in a period of two months' time which are effectively poles apart seems to support the Applicant's conspiracy theory.

61. The Applicant placed facts before this arbitration of discretionary spending regarding 3 x R300 000.00 and the payment to the Mapungubwe Institute (see paragraph 27 above). I find that the Applicant's conduct was neither grossly negligent nor dishonest.'

[28] Despite having found Dr Mathoma not guilty of misconduct, the commissioner still dealt with the issue of inconsistency and was of the view that:

'62. Whether discipline was applied inconsistently as alleged by the Applicant. The fact of the matter indicates that the Respondent had acted inconsistently in applying its discipline as there was an example given by the Applicant of how his line manager had effectively protected a subordinate in circumstances where the expenditure incurred was much more than what occurred in the Applicant's case.

62. Ms. Nthabe Zondo had signed off the sum of R2.7 million and she was protected by Mr. Mohole Ralebitso. This occurred despite Ms Zondo having submitted a letter of resignation.'

[29] On the issue of procedural fairness, the full text of the commissioner's findings is as follows:

‘64. On procedure, there can be no justifiable reason why the chairperson did not give the Applicant an opportunity to present mitigating factors nor can it be considered appropriate for the Respondent’s representative to argue that the Chairperson ‘fairly made the recommendation that she made on the strength of the evidence that had been led before her’. If that indeed were the case, then there would be no need to present mitigating factors after finding an employee guilty.

65. It is also clear that although the Respondent had not called for the dismissal of the Applicant, the chairperson nonetheless chose to go down that route.

66. For the chairperson to have informed the Applicant and the Applicant’s representative that she would be travelling with the Respondent’s representative on the 3rd December 2012 is clearly irreconcilable with what may be considered impartial. The perception of bias is certainly justified if a chairperson of a disciplinary enquiry informs either side that the chairperson would be travelling with their opponents.

67. The chairperson was required to, in my view, perform in terms of the agreement that was reached at the end of the disciplinary hearing by communicating to both parties. She instead chose not to communicate with the Applicant. This then led to a further perception of bias in that it was the Respondent’s representative who asked the Chairperson to ‘correct’ the findings (as there were two specific gaps in the findings) which was later done. The conduct of the Chairperson led the Applicant to harbour a reasonable apprehension of bias.’

[30] Following, the commissioner ordered that Dr Mathoma be reinstatement retrospectively and with back-pay equivalent to 12 months’ salary.

Legal principles

[31] The Labour Appeal Court (LAC) has, in recent decisions, conclusively

endorsed the refined and clarified operation of the *Sidumo* test articulated in *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*[2] and *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration.*[3] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others,*[4] citing *Head of the Department of Education v Jonas Mohale Mofokeng and Others*[5] with approval, the following was stated:

> ’Significantly, as was held by the SCA in *Herholdt* and endorsed recently by this Court in Head of the *Department of Education v Jonas Mohale Mofokeng and Others* “for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result”. Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator “must not misconceive the inquiry or undertake the inquiry in a misconceived manner”, as this would not lead to a fair trial of the issues. In further approval of Herholdt, this Court in Mofokeng stated that:
>
>> ‘Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.’ [Footnotes omitted]

[32] In *Fort v COEGA Development Corporation (Pty) Ltd and Others,*[6] the LAC

[2] [2012] 11 BLLR 1074 (SCA). At para 13 the court stated that “…The *Sidumo* test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner.”
[3] [2014] 1 BLLR 20 (LAC).
[4] [2015] 5 BLLR 484 (LAC); (2015) 36 ILJ 1511 (LAC) at para 16.
[5] [2014] ZALAC 50; [2015] 1 BLLR 50 (LAC) at paras 30-32.
[6] [2017] ZALAC 50 at para 51.

dealing with the evaluation of the evidence by the commissioner, likewise, stated the following:

> '[51] It must immediately be said that there is no merit in the argument that the Court a quo was conducting a process of reverse reasoning. In the end, the conclusion reached by a trier of fact must account for all the evidence presented at the trial and by parity of reasoning during the arbitration. In *S v Trainor*[7] Navsa JA provided the following useful guide and principle with regard to the evaluation of evidence:
>
> > 'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach…is illogical and wrong.'
>
> [52] The SCA held that an assessment of the evidence based on demeanor, without regard to the wider probabilities, constitutes a misdirection. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* the Constitutional Court pronounced that the advantages which the trial court enjoys should not be over-emphasised 'lest the appellant's right of appeal becomes illusory'. The truthfulness or untruthfulness of a witness can rarely be determined by demeanor alone without regard to other factors including the broader probabilities. In that case the Court applied the principles enunciated in *R v Dhlumayo and Another* in particular the following instructive guidelines:
>
> > '10. <u>There may be a misdirection on fact by the trial</u>

[7] 2003 (1) SACR 35 (SCA) at 41 para 9.

Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate Court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.'[8] [Emphasis added]

Grounds of Review

The commissioner failed to deal with evidence presented on dishonesty charge

[33] Old Mutual argued that the commissioner failed to deal with the charge of dishonesty brought against Dr Mathoma. Even though this charge has two elements, it would seem that Old Mutual abandoned the second element as its evidence at the arbitration and submissions in this Court mainly focused on the false statements that Dr Mathoma had made to the finance department in procuring payment of the invoice for the second AfriWealth report in December 2011.

[34] The evidence of Dr Mathoma in this regard is reflected in paragraph 33 and 34 of the award and is also outlined above. The commissioner found Dr Mathoma not guilty of dishonesty without explaining how he arrived at that conclusion. As such, the commissioner misdirected himself as his finding is not supported by reasons based on evidence.

[8] See also *National Union of Mineworkers* and *Another v Commission for Conciliation, Mediation* and *Arbitration* and *Others* referred to by the Court (2015) 36 ILJ 2038 (LAC) at 2044 -2045 para 14.

[35] Had the commissioner applied his mind to the evidence before him, Dr Mathoma would have been found guilty of dishonesty for the following reasons:

35.1. Dr Mathoma conceded under cross examination that the contents of the second AfriWealth report had not been changed when he wrote both emails. He tried unsuccessfully to hide behind Ms Kinciad and Mr Ralebitso as in his own version the discussion he had with Ms Kinciad and Mr Ralebitso pertained to his request for the accelerated payment without insisting on changes to the report.

35.2. Clearly, the contents of these two emails were deceiving. Furthermore, this version flies in the face of Dr Mathoma's earlier version to the effect that since he was using a discretionary pot, he did not need to consult or discuss his actions with his senior colleagues.

[36] I agree with Old Mutual's submission that, in failing to deal with a central issue or question for determination, the commissioner misconceived the true nature of the enquiry, and thereby committed a gross irregularity. On this ground alone, the award stands to be set aside.

The commissioner failed to decide several elements of the gross negligence charge

[37] The commissioner was plainly obliged to consider all the evidence in relation to all the elements of a charge of gross negligence.

[38] At paragraph 56 of the award, the commissioner correctly established that the Afriwealth reports were the crux of the matter. He also accepted that the reports were not of good quality as they were riddled with spelling mistakes, bad formatting, grammatical and typographical errors. That the information was cut and paste and that reconfigured data therein was unnecessary. Had he properly applied his mind, the commissioner would have found that, by accepting the two AfriWealth reports without insisting on improvements and

approving payments for the shoddy work, Dr Mathoma indeed acted in a grossly negligent manner.

[39] Much was made of Dr Mathoma's authority to use the discretional fund/pot to pay for the AfriWealth reports. Old Mutual led evidence to show that, during the GFS interview on 15 August 2012, Dr Mathoma admitted to having been negligent in failing to follow the procurement process and failing to ensure that the reports were adequate before authorising payment. The commissioner accepted Dr Mathoma's version without assessing the credibility of the witnesses; their reliability; and the inherent probabilities of the two conflicting versions.

[40] Dr Mathoma's evidence to the effect that since he was using his discretionary pot, he could thumb suck a figure to be expended on services procured without satisfying himself that such expenditure has value and is in the interest of Old Mutual, is irrational. Mr Sonn testified that the discretionary fund was an *ad hoc* funding mechanism that had to be used subject to consultation and accountability in terms of practice. In my view, the source of funding for the reports could not have exonerated Dr Mathoma from exercising a degree of care expected of a senior manager in his position.[9]

[41] The commissioner accordingly misdirected himself once again.

AfriWealth reports being a work in progress and this being uncontested

[42] The commissioner readily accepted the evidence of Dr Mathoma that he approved payment of about R900 000 for both AfriWealth reports regardless of the quality of the work produced and pertinently, because they were work in progress as uncontested. The commissioner ignored the following material facts:

42.1. That this version emerged for the first time during Dr Mathoma's cross-examination. As a result, it was never put to Mr Sonn under

[9] *Stocks Civil Engineering (Pty) Ltd v Rip NO and another* [2002] 3 BLLR 189 (LAC) at para 92.

cross-examination. It is well established that a failure to put to a witness the version of witnesses of the opposing party who are yet to testify is a reviewable irregularity.[10]

42.2. That this version is highly improbable as Dr Tshitereke was yet to be employed when Dr Mathoma approved the payment for the reports. Also, it contradicts Professor Banjo's evidence at the disciplinary enquiry that he never submitted any draft reports.

42.3. That this version contradicts Dr Mathoma's evidence in chief to the effect that the reports were helpful and contributed in the development of the CIS strategy that Dr Tshitereke presented to the OMF's Board of Trustees on 12 March 2012. That strategy, according to Dr Mathoma, endorsed the recommendation by AfriWealth on the creation of Economically Viable Communities which became part of his score card. Evidently, adoption of the strategy concluded the assignment and there was no need for any further 'empirical evidence' from Professor Banjo as alleged by Dr Mathoma.

[43] The commissioner's finding that Dr Mathoma's evidence in this regard was uncontested, constitutes a reviewable misdirection.[11]

Dr Mathoma's conspiracy theory

[44] The commissioner made two findings in support of Dr Mathoma's conspiracy theory:

44.1. Firstly, the company's action in disciplining Dr Mathoma amounted to it interfering with the discretion afforded him to spend his discretionary pot, and 'appears to have its origin in the malice that

[10] *SA Nylon Printers (Pty) Ltd v Davids [1998] 2 BLLR* 135 (LAC) at 137I-138A; *Absa Brokers (Pty) Ltd v Moshoana NO and others* [2005] 10 BLLR 939 (LAC) at paras 38-42 and *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* (2010) 31 ILJ 452 (LC) at 462 para 20.
[11] *Tao Ying metal Industry (Pty) Ltd v Pooe NO and others* [2007] 7 BLLR 583 (SCA) at para 45.

was harboured in the heart and head of Dr Tshitereke' (para 59 of the award).

44.2. Secondly, the fact that Mr Mathebula came to different conclusions in his first and second reports over the space of two months 'seems to support [Dr Mathoma's] conspiracy theory' (para 60 of the award).

[45] In essence, the commissioner found that the disciplinary action against Dr Mathoma was devoid of merit as it was a consequence of a malicious action by Mr Tshitereke and the conspiracy theory. It was submitted on behalf of Old Mutual that both of these findings are unreasonable, as they were reached without any consideration of the material evidence that refute such a proposition.

[46] *Collins* dictionary defines a conspiracy theory as 'a belief that a group of people are secretly trying to harm someone or achieve something'.[12] The term is usually used to suggest a belief in the likelihood of that happening. In the context of the present matter, Dr Mathoma's evidence attributed his dismissal to Dr Tshitekere, the lead conspirator, and Dr Mathoma's subordinates, including Mr Hadebe. The commissioner accepted this proposition as probable on the strength of the 'Mathebula conflicting reports'. In my view, this finding is untenable given the fact that the commissioner failed to consider Old Mutual's evidence, *inter alia*, that:

46.1. The incidents that led to Dr Mathoma being charged with gross negligence and dishonesty happened between 4 April 2011 and 20 December 2011. This was a period before Dr Tshitereke's appointment in January 2012, and months before the deterioration of the relationship between Dr Mathoma and Dr Tshitereke in May 2012.

46.2. The Mathebula reports dealt with the collective grievance against Dr Mathoma. Nothing turns on the outcome of the Mathebula reports as

[12] https://www.collinsdictionary.com/dictionary/english/conspiracy-theory

the charges brought against Dr Mathoma flowed from the GFS forensic report submitted on 25 October 2012.

46.3. Mr Sonn's evidence that the conspiracy theory was far-fetched since Dr Tshitereke was a substantially more junior employee in rank and as such could not have influenced the decisions of senior management.

[47] In any event, the case against Dr Mathoma could have been determined on the basis of the following objective facts that were before the commissioner:

47.1. Dr Mathoma commissioned AfriWealth to conduct the studies;

47.2. He authored the AfriWealth agreement and the emails to the finance department;

47.3. He received and approved the reports and invoices from AfriWealth; and

47.4. He corrected and signed the minutes of the GFS interview on 15 August 2012.

[48] It is clear from the above that Dr Mathoma's conspiracy theory was implausible.

The commissioner's inconsistency finding is unreasonable

[49] Old Mutual argued that the commissioner's finding of inconsistency in paragraphs 62 to 63 of his award is patently unreasonable because Dr Mathoma was not similarly situated to Ms Zondo, because the charges against him far exceeded simply concluding a contract above his limit of authority as Ms Zondo had done.

[50] It the light of the commissioner finding Dr Mathoma not guilty, it was not necessary to deal with the issue of inconsistency. Nonetheless, his finding is correct since Dr Mathoma's evidence in this regard was not disputed.

[51] It is my view, however, that, given the circumstances of this case, a finding of inconsistency in relation to one element of a charge of negligence could not have justified a finding that the dismissal was substantively unfair. Dr Mathoma also faced a charged of dishonesty, a dismissible misconduct ordinarily.

*The commissioner's findings of procedural unfairness are unreasonable***.**

[52] Old Mutual argued that there was nothing wrong with Ms Christie not following a two-stage process, involving separate hearings into guilt and sanction since the issue of penalty was explored during argument at the disciplinary hearing and Dr Mathoma was at liberty to advance his mitigating factors at that stage. Furthermore, that Dr Mathoma was afforded an appeal enquiry which, in a sense cured the procedural defects.[13]

[53] Conversely, Dr Mathoma argued that Old Mutual was bound by its own Disciplinary Code. In this regard, his counsel referred to the Old Mutual Disciplinary Code, in particular Clauses 18 and 21. In terms of Clause 21, the mitigating factors have to be addressed only after a verdict of guilty and it is unfair for the chairperson to decide the sanction before considering the mitigating factors.

[54] Old Mutual argued further that it is perverse for the commissioner to have found that Ms Christie's disclosure that she was going to give Mr Estie a lift gave rise to a perception of bias. That, similarly, on a proper assessment of the facts, no reasonable perception of bias arose from the fact that Dr Mathoma did not receive the findings simultaneously with the company having received them (in so far as this occurred) or from the fact that Ms

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[13] See generally, *Slagment (Pty) Ltd v Building Construction and Allied Workers Union and others* (1994) 15 ILJ 979 (A) at 992A-I.

Christie corrected two minor errors in her findings at the request of the Old Mutual.

[55] Again, It was pointed out by Dr Mathoma's counsel that the above behaviour by the chairperson and Mr Estie violated Clause 18 which provides, *inter alia,* that the chairperson must not be biased; the case should not be discussed between the presenter and chairperson apart from necessary logistics; the chairperson and the presenter should refrain from having any discussions by themselves in private as this creates a perception of bias; The chairperson may not travel to and from an incomplete enquiry in the same motor vehicle as any other party involved in the enquiry; and should these people be on the same flight, they may not be seated in the same immediate vicinity.

[56] Whilst it is trite that there are circumstances where it is acceptable for the *audi alteram partem* rule to be observed after the decision has been taken, in this case,[14] Old Mutual failed to lead evidence to show that the appeal was sufficiently fair as to have the effect of curing the procedural defects especially since they are not merely technical. Dr Mathoma led evidence that he was prejudiced since the appropriateness of the sanction of dismissal was determined without consideration of his mitigating circumstances.[15]

[57] Pertinently, the chairperson of the disciplinary enquiry must conduct the proceedings in an impartial and fair manner and it must be apparent to the parties appearing before her/him especially the accused employee.[16]

[58] In this case the conduct of the chairperson in travelling with the prosecutor during the sitting of the disciplinary enquiry and communicating with Old Mutual after submitting her ruling but before delivering it formally to the

[14] *Cabinet for the Territory of South West Africa v Chikane* 1989 (1) SA 349 (A) at 379 F-G and in *Administrator Transvaal and others v Traub and others* 1989 (4) 8A 731(A) at748 G-I and 750 B-F; *Slagment (Pty) Ltd v Building Construction and Allied Workers Union* (1994) 15 ILJ 979 (A) at 992 A–I; *Nasionale Parkeraad v Terblanche* (1999) 20 ILJ 1520 (LAC) at paragraphs 10–14; *Jerry's Security Services CC v CCMA and others* [2001] 7 BLLR 751 (LC);
[15] *Rand Water Board v CCMA (2005) 26 ILJ 2028 (LC) at 2032.*
[16] *President of the Republic of South Africa and others v South African Rugby Football Union and others* [1999] ZACC 9; 1999 (4) SA 147 (CC) para 48; *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3)) [2000] ZACC 10; 2000 (3) SA 705 (CC).

applicant was not only inappropriate, but is contrary to and violated Old Mutual's guidelines aimed at protecting the integrity of the disciplinary procedure. Therefore, Dr Mathoma's apprehension in this regard was reasonable.

[59] The commissioner's finding on procedural fairness cannot be faulted and is accordingly reasonable.

Conclusion and relief

[60] In the premises, the commissioner's finding that Dr Mathoma was not guilty of gross negligence and dishonesty is untenable and falls short of a reasonable decision maker's standard. Even though the finding of the commissioner on inconsistency cannot be faulted, it is only limited to one aspect of the charge of negligence (the limit on authority to procure services) and as such does not justify a finding that the dismissal was substantively unfair.

[61] The parties seek that the matter to be finally determined by this Court. I now deal with the charges, appropriateness of the sanction and procedure.

Was Dr Mathoma guilty of dishonesty?

[62] As stated above, Dr Mathoma conceded under cross examination that the contents of the second AfriWealth report had not been changed when he wrote both emails. When he was challenged on this aspect during cross-examination this is how he fared:

> 'MR TODD: …So you are telling Cheryl and Heidi that you had asked …Professor Banjo to effect some changes in the report, is that what you are telling them?
>
> MR [DR] MATHOMA: I had and as I just explained that I, we were excited that Mrs Khandi and Professor Banjo was going to work, this was my understanding, … to do cleaning up and also to do the finalisation of the structure to work on the draft.

MR TODD: Shall we read the next sentence Dr Mathoma? – I was not prepared to pay him until we were happy with the entire report.

MR [DR] MATHOMA: Yes.

MR TODD: - Hence I wanted to …accrue the money and pay him next year when he would have made changes. See that?

MR [DR] MATHOMA: (Indistinct).

MR TODD: I am just continuing, this follows – I was not prepared to pay him until we are happy with the entire report have I wanted to accrue the money to pay him next year when he would have made changes. Do you see up to that part?

MR [DR] MATHOMA: Yes.

MR TODD: And then you say this – He has now effected the changes and I am happy with them. - Do you see that?

MR [DR] MATHOMA: Yes. I see that.

MR TODD: that was untrue Dr Mathoma.

MR [DR] MATHOMA : What?

MR TODD: That Professor Banjo has made changes and that you were no happy with the changes.

MR [DR] MATHOMA: No That is not true. It is not true and I do not agree with you.

MR TODD: it is false.

MR [DR] MATHOMA: It is not that is why I say, you know, you have got to understand the context of how we get (indistinct) and this is me and my manager, after having a discussion and then I became paid and said good procurement, what we do in this kind of situation, I would show later on also

> an email where Heidi Kinciad was saying to me she is even worried because a whole lot of people who were not even implementing the procurement policy…'

[63] It is apparent from above that Dr Mathoma was evasive in his responses and gave illogical explanations. In fact, that is how he conducted himself throughout his cross examination, evasive and argumentative. Dr Mathoma authored both emails and what he asserted therein was false because at that time no changes had been effected in the second AfriWealth report as it was 'work in progress'.

[64] I am convinced that Dr Mathoma's conduct was deceitful.

<u>Was Dr Mathoma guilty of Gross Negligence?</u>

[65] The crux of Old Mutual's negligence charge is summarised in the following proposition put to Dr Mathoma during his cross examination:

> 'We say that you conducted yourself, in fact it is generous to you to say it was grossly negligent, when you engaged Afriwealth, in the way that you engaged them, where you paid them, in the way that you paid them. In approving the invoices that you approved for them, in accepting that this work in these two reports constituted or met the requirements that you had set.'

[66] Old Mutual mainly relied on the evidence of Ms Meijer and Mr Venter who conducted an interview with Dr Mathoma on 15 August 2012 as part of GFS investigation. Dr Mathoma disputed the accuracy of the said interview.

[67] Ms Meijer and Mr Venter corroborated each other regarding issues that were addressed with Dr Mathoma on 15 August 2012 and the accuracy of the minutes. Mr Venter testified that on 17 August 2012 he took the minutes of the said interview to Dr Mathoma who read them, made written corrections and then signed. He was adamant under cross-examination that Dr Mathoma was alone in his office when he handed him the minutes.

[68] Dr Mathoma, on the other hand, insisted that the minutes were not a correct reflection of the interview. He denied that he made the following pertinent admissions:

> 'Dr Mathoma agreed that he did not follow the proper procurement process according to the Old Mutual procurement policy purely because of an oversight on his part and pressure to deliver.
>
> Anneli Meijer asked Dr Mathoma if he took time to himself to read the two documents that is the AfriWealth reports and Dr Mathoma responded that he needs to agree that the research document was of poor quality and that he was not vigilant enough the ensure the research was properly conducted and reported on before payments were made.'

[69] Under cross-examination, confronted with his version of defence at the disciplinary enquiry that the reason he did not engage the legal department to assist in the drafting of the AfriWealth agreement was because he was overstretched at the time, Dr Mathoma mumbled and evasively stated that 'I did not say that I am overstretched I said these are other things that I am doing'. That version is clearly consistent with Ms Meijer and Ms Venter's evidence of what he had said during the interview on 15 August 2012.

[70] On the circumstances surrounding his signing of the minutes of the interview on 17 August 2012, as stated above, Dr Mathoma, conceded making handwritten amendments on the very page on which the two damaging statements allegedly made by him are recorded. He also conceded that his version that he signed the minutes under pressure from Mr Ralebitso was different to a version he gave at the disciplinary enquiry.

[71] Ms Meijer and Ms Venter's evidence is further corroborated by the following objective facts:

71.1. The AfriWealth agreement, *ex facie*, states the terms of engagement and the expected outcomes from studies. Dr Mathoma conceded that the reports did not cover his desired outcome. He also conceded that the reports were of poor quality but was expecting Professor Banjo and Dr Tshitereke to work on the drafts. This version on defence is novel and stands to be rejected. Professor Banjo's evidence at the disciplinary enquiry was that after submitting the reports he expected Dr Mathoma to revert back to him if he had problems with the content of the reports and that never happened.

71.2. Dr Mathoma authorised payment of AfriWealth's first invoice on 31 August 2011 but only received the report on 12 September 2011. Typically, Dr Mathoma approved payment for services he was yet to receive and as such could not have satisfied himself that the outcome was commensurate with the money expended. The second AfriWealth invoice was approved and paid despite the substandard report.

71.3. The second AfriWealth invoice reflects a breakdown of service and computation of hours' work. It showed that Professor Banjo and his assistants worked 24 hours per day over a period of 90 days in order to justify a cost of R400 000. Dr Mathoma conceded that AfriWealth's calculations were illogical but he approved the payment, after consulting with Mr Ralebitso, because he was excited to work with Professor Banjo and was expecting to have a long term relationship.

[72] Following the above, Dr Mathoma's credibility as a witness was seriously dented. He failed to take responsibility for manner in which he procured services of AfriWealth; approved payment of their invoices and accepted their reports despite being of substandard quality and did not address the issues they were contracted to cover. Probabilities show that Dr Mathoma failed to meet the requisite standard of care expected of him as a senior manager.

[73] In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section),*[17] the LAC, dealing with gross negligence of a senior manager, stated the following:

> '[20] The appellant's stance in denying culpability for gross negligence betrays a lack of grasp about the nature of his job. He was a manager and was responsible to manage the programme of fitment. To this end …he failed to properly apply his mind. Despite the acknowledgement in his testimony that he was required to use judgment, he failed to do so. An inappropriate combination of ignorance of the hard facts that he needed to manage effectively and an undue deference to feedback he knew to be unreliable demonstrates his lack of judgment.'

[74] As addressed more fully elsewhere, I am satisfied that Dr Mathoma was grossly negligent.

<u>Was dismissal an appropriate sanction?</u>

[75] On appropriateness of the sanction of dismissal, I considered the seriousness of the misconduct of gross negligence and dishonesty and that ordinarily they are dismissible transgressions. Additionally, I looked at the following mitigating and aggravating circumstances:

75.1. Evidence in mitigation indicates that Dr Mathoma was a good and loyal employee with a clean disciplinary record, he saved Old Mutual large sums of money, he performed carious tasks for the Head Office; he had received number of commendations from dignitaries such as Mr Reolf Meyer and Minister Lindiwe Sisulu, he continued assisting his former colleagues even after his dismissal.

75.2. Old Mutual, on the other hand, argued that Dr Mathoma accepted under cross-examination that if he was found guilty of the charges brought against him dismissal would be an appropriate sanction; he was a senior manager employed in the financial service sector; he

[17] [2014] ZALAC 24; (2014) 35 ILJ 2406 (LAC) at para 20.

displayed no remorse whatsoever;[18] he gave false evidence at the arbitration;[19] and provided contradictory explanations in his evidence. Mr Sonn testified also that Dr Mathoma could not be trusted and relied upon to operate at the level of a Group Manager.

[76] In *Fort*,[20] addressing the trust issue, the LAC stated the following:

> "[97] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others,*[21] this Court restated the consistently adopted approach, laid down in the jurisprudence of the Labour Court in *Standard Bank SA Ltd v CCMA and others*[22] to the effect that it is <u>one of the fundamentals of the employment relationship that the employer should be able to place trust in their employees to discharge their responsibilities dutifully. A breach of this trust in the form of conduct involving dishonesty, as in this case, is one that goes to the heart of the employment relationship and is destructive of it. The sanction of dismissal must be seen as a sensible operational response to risk management in the particular enterprise</u>.' [Emphasis added].

[77] Old Mutual, operating within the financial service sector, is not unreasonable in expecting its senior manager to exercise a high standard of care and to demonstrate utmost good faith in dealings. I am convinced that dismissal is an appropriate sanction.

<u>Procedural Fairness</u>

[78] On procedural fairness, having found that the commissioner's finding in this regard was beyond reproach, I am of the view that a compensation of three months' salary is just and equitable, having considered that Dr Mathoma was

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[18] *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and others* (2010) 31 ILJ 2475 (LC) at para 27 – 29.
[19] *Leonard Dingler (Pty) Ltd Ngwenya* (1999) 20 ILJ 1171 (LAC) at para 78; *De Beers Consolidated Mines Ltd v CCMA and others* (2000) 21 ILJ 1051 (LAC) at para 25.
[20] Above n 8 at para 97.
[21] (2008) 29 ILJ 2581 (LAC) at 2585 para 16.
[22] (1998) 19 ILJ 903 (LC).

dismissed for serious charges (gross negligence and dishonesty) and the extent of the procedural defect (mitigation and perception of biasness).[23]

Costs

[79] With regard to costs, since both parties partially succeeded, it is reasonable that each party pays its own costs.

Order

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

1. The arbitration award issued under CCMA case number GAJB9810-13 is reviewed and set aside and replaced with the following order:

   1.2. The dismissal of Dr Mathoma is substantively fair but procedurally unfair.

   1.2. Old Mutual is ordered pay the applicant a compensation equivalent to three months' salary to be paid within one month from the date of this judgment.

2. There is no order as to costs.

P. Nkutha- Nkontwana

Judge of the Labour Court of South Africa

[23] *Johannesburg City Parks Ltd v Toli NO and Others* (2012) 33 ILJ 1456 (LC) at para 14.

Appearances:

For the applicant:	Advocate Anton Myburgh SC
Instructed by:	Bowman Gilfillan
For the third respondent:	Advocate F Snyman
Instructed by:	Dirk Fourie Attorneys