THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

REPORTABLE

Case No: C253/2022

In the matter between:

BASIL POGGENPOEL	First Applicant
GRANT PHILLIPS	Second Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER IAN MACKUN *NO*	Second Respondent
A1 HYPER CHICKEN (PTY) LTD	Third Respondent

Heard: 7 May 2025

Delivered: 1 September 2025

Summary: Application to review and set aside the arbitration award of second respondent. Application successful and dispute remitted to the CCMA.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside the arbitration award issued by the second respondent (hereafter "the commissioner"). The commissioner found that the dismissal of the applicants, by the third respondent, was procedurally and substantively fair. The applicants challenge the award.

Material facts

[2] The third respondent is engaged in the retail and wholesale of chicken. The applicants were engaged by the third respondent at its store at Epping, Industria.

[3] The applicants were engaged in managerial, or junior managerial, capacities and both had lengthy periods of service.[1] As managers, they were not required to clock in or out of the workplace. The first applicant was employed as the shop manager, while the second respondent as employed as a receiving coordinator. They reported to Mr Julian Oosthuizen, a director of the third respondent.

[4] The applicants were charged and dismissed for five charges, the most serious of which was the theft, or collusion to commit theft, of monies from the ABSA Automated Teller Machine ("ATM") on the premises. It is therefore necessary to explain how this worked:

> 4.1 The ATM is accessible by customers who may draw cash from their respective bank accounts.

[1] The first applicant had twenty seven years of service, and the second applicant had twenty three years of service.

4.2 The third respondent deposits cash, taken from sales, into the ATM and somewhat later, following a reconciliation process, the bank would reimburse it for the cash drawn by customers.

4.3 At the end of each day, cash is collected from the cashiers and stored in a safe. Early the following morning, the cash is counted and loaded into the ATM. Three employees were involved in the loading of cash into the ATM namely Ms. Pretorius (ATM administrator),[2] Ms De Koker (head cashier) and Ms Manual (cashier).

4.4 The keys to the safe are kept in the back office to which all employees have access.

4.5 Each week[3] the monies in the ATM were "balanced" by Ms Pretorius to determine if the cash matched the employer's records. Ms Pretorius was required to compile what was referred to as the "ATM reconciliation balances" (the "recon balances" or the "recon sheets").

4.6 If the ATM is off the ticket history will reflect that it is 'marked down.' The ticket history reflects that the ATM is 'marked down' when it has been switched off manually, when the power supply has been cut, or when it is running system updates. The ticket history does not indicate which of the three reasons are applicable.

[5] Mr David Owen, the financial director, became actively involved in the financials of the store from about March 2021. He came to believe that large sums of money had been stolen from the ATM over a period of twelve months.

[6] Mr Owen testified that on 4 June an amount of R 44 500, 00 was stolen, on 23 June an amount of R 46 300,00 was stolen, and on 2 July an amount of R 28 000,

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[2] Ms Pretorius was subsequently dismissed for gross negligence.

[3] Record, transcript p13 lines 7 – 22

00 was stolen. The reason for his belief that money was stolen *on these particular days* was explained as follows:

> "I'm just trying to figure out why ….Okay, sorry, I have to go back on that thing, so the reason … so they must have counted it on 4 June and the 18 July and the difference would be the 44 500. 18 June. According to this."

[7] Although Mr Owen did not explain who "they" referred to, the parties understood that Ms Pretorius had compiled the ATM reconciliation balances.[4]

[8] Mr Owen believing that he had detected three weeks when monies had been stolen, viewed the security video footage for those weeks: 31 May to 4 June 2021, 21 June to 25 June, and 28 June to 2 July.

[9] Having viewed the footage[5] Mr Owen noticed that all three security cameras were off for short periods on 23 June and 2 July. According to Mr Owen, this could only have happened with human involvement because at least one camera was connected to a functioning UPS.[6]

[10] Mr Owen testified that the footage showed that Mr Poggenpoel was seen approaching the back office on 23 June - shortly before the cameras shut down.[7]

[11] The ticket history indicated when the ATM was off (marked down):

11.1 4 June from 17h05 to 17h11,[8]

11.2 23 June from 17h01 to 17h07,[9]

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[4] Record, transcript p109 lines 1 – 7

[5] The cameras record and store footage for no more than three weeks before the newer footage overwrites the older footage.

[6] UPS stands for 'Uninterrupted Power Supply'

[7] Testimony of Mr David Owen, Record p122 line 1 – p124 line 5)

[8] On 4 June, the cameras were off from 17h13 to 17h18 (see Arbitration Award at para 143)

[9] On 23 June, the cameras were off from 16h48 to 17h14 (see Arbitration Award at para 143)

11.3 2 July from 17h04 to 17h10.[10]

[12] The ticket history also indicated that the machine was 'marked down' on various other dates and times, many of which would have occurred when no employees were present, either extremely late at night or incredibly early in the morning.[11]

[13] Mr Oosthuizen testified that 17h00 is the end of the work day, and the employees are generally keen to leave immediately. Therefore, so the argument went, to find staff on site after 17h00 was suspicious. The applicants testified that they have to wait until all customers have left the store and, during the time of the pandemic, a cleaner would often only start sanitising around 17h00. The applicants testified that they are often the last to leave and often leave between 17h00 and 17h15.

[14] It was common cause that there is a discrepancy between the time on the camera and the actual time.[12] The applicants contended that the discrepancy was as much as fifteen minutes[13] but third respondent contended the discrepancy was about two minutes.[14] The arbitrator did not resolve this dispute.

[15] The applicants testified that there was frequent loadshedding at that time, and the fridges caused the switches on the distribution board to trip frequently.[15] The applicants testified that this required that all the switches be turned off and then switched up individually. The third respondent alleged that this problem occurred infrequently. The applicants testified that Mr Oosthuizen was not at the store on a regular basis.

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[10] On 2 July, the cameras were off from 17h09 to 17h17 (see Arbitration Award at para 143)

[11] Record, transcript pp143 – 145

[12] Record, transcript p259

[13] Record, transcript p233

[14] Record, transcript p257

[15] Record, transcript p63

[16] The mother of the first applicant, Mr Poggenpoel, passed away on or about 9 August. He therefore took leave and returned to work on 12 August. Shortly afterwards, he was summoned to the office by Mr Oosthuizen. While walking to the office, Mr Oosthuizen confided to him that heads were going to roll. When they arrived, Ms Manuel and Ms De Koker were also present. Mr Oosthuizen asked all of them to sign consent forms to take a polygraph test. The meeting became heated. Mr Poggenpoel was angered that, as a manager, he was being asked to undergo a polygraph test. He was also angered that Mr Oosthuizen had not offered him his condolences for the death of his mother. Ultimately, Mr Poggenpoel refused to sign the consent forms and walked out. Thereafter, Ms Manuel and Ms De Koker exchanged harsh words with Mr Oosthuizen and they also refused to sign the consent forms. After this altercation, despite their lengthy periods of service, Ms Manuel and Ms De Koker never returned to work.

[17] It was common cause that there is no provision in the applicants' employment contracts which required them to take a polygraph test whenever requested. Although the second applicant initially agreed to take the polygraph test, ultimately he also refused to do so. According to the third respondent, Ms Pretorius took the polygraph test and "passed it."

[18] The applicants were disciplined for insubordination for refusing to assist in an investigation into the missing ATM monies, and given final written warnings.

[19] Thereafter, on or about 31 August, the applicants were charged with misconduct. The primary charge was "theft or collusion to misappropriate funds from the company by tampering with cameras and switching off cameras" on 4 June, 23 June, and 2 July. Following a disciplinary hearing, both of the applicants were dismissed.

<u>Arbitration proceedings</u>

[20] On behalf of the third respondent, the following witnesses were called; Mr Oosthuizen, Mr Owen, Mr Schoonraad,[16] and Mr Lurwengu.[17] On behalf of the applicants, both testified on their own behalf. I pick up on certain key themes below.

Polygraph test

[21] The commissioner drew an adverse inference from the applicants' refusal to take a polygraph test, despite the fact that their employment contracts did not require them to do so. He drew the adverse inference in the following circumstances:

21.1 The polygrapher who administered the polygraph test to Ms Pretorius did not testify, nor did anyone else testify about the value or role of the test. Through their representative, the applicants' raised the credibility or reliability of the test,[18] but this did not motivate the third respondent to put up any evidence concerning the credibility or reliability of the polygraph as a test for deception.

21.2 Under cross-examination, Mr Owen admitted Mr Poggenpoel had a good reasons to refuse to take the polygraph test. [19]

21.3 The commissioner, believing our courts recognized that an adverse inference may be drawn from an employee's refusal to undergo a polygraph test, referred to an authority where an employee was contractually obliged to take a polygraph, and nevertheless refused. In that matter, *Fairway at Randpark Operations (Pty) Ltd v CCMA and others*[20] the court opined:

[16] Mr Schoonraad chaired the first disciplinary hearing for the applicants and found them guilty of refusing to assist in the investigation of missing ATM monies.

[17] Mr Lurwengu chaired the second disciplinary hearing for the applicants and found them guilty of theft or collusion in the theft of ATM monies. He also represented the third respondent at the arbitration.

[18] Record, transcript p44

[19] Record, transcript p135

[20] (2016) 37 ILJ 675 (LC) (13 November 2015) at para 26. Historically, our courts and tribunals have adopted disparate approached (see below):

"As an aside I pause to point out that I do not view the authorities to which I have referred above as suggesting that a Court (or arbitrator) may not draw an adverse inference against an employee for a conscious breach of contract,

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(1) In *Sedibeng District Municipality v SA Local Government Bargaining Council & others* (2013) 34 ILJ 166 (LC) at para 36 the court took note of the controversies relating to polygraph testing but acknowledged that our courts "implicitly recognized that polygraph test results do have some probative value and are not worthless".

(2) In *Food & Allied Workers Union on behalf of Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River (2010) 31 ILJ 1654 (LC)* the court held as follows: "In the light of the aforegoing and in the light of the controversy that surrounds the accuracy and reliability of polygraph tests, I am not persuaded that the polygraph is a reasonable or fair alternative to minimize retrenchment. If a proven lie in a courtroom cannot by itself prove that the accused is guilty of a crime, then deception purportedly identified by a polygraph examiner cannot provide anything more than proof of a lie. In the context of a disciplinary process the polygraph can be a useful tool in the investigation process but can never substitute the need for a disciplinary hearing. A polygraph test on its own cannot be used to determine the guilt of an employee. In the context of an arbitration, the results of a polygraph may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. I am, as already pointed out, not persuaded that it constitutes a fair and objective selection criteria or a fair and objective method alternative to minimize retrenchment in the context of s 189 and s 189A of the LRA."

(3) In *NUM & others v Coin Security Group (Pty) Ltd t/a Protea Coin Group* (2011) 32 ILJ 137 (LC) the two applicants were security guards employed by the respondent and had been dismissed for operational requirements after undergoing and failing polygraph tests. It was a term of their employment that they had to undergo polygraphs at the request of the company or the entity at whose premises the company had placed them to do security duties. Before the court hearing, the parties reached a settlement agreement, and the only remaining issue was costs. Steenkamp J noted that the applicants had filed an expert report showing that polygraph testing has not been scientifically shown to be a reliable, accurate and valid means of detecting deception.

Note: I differ with the above authorities to the extent that they endorse the admissibility of the results of polygraph tests into evidence, without more. Admissibility is question of relevance (see *S v Shabalala* 1986 (4) SA 734 (A) at 740). Accordingly, before the outcome of a polygraph can be admitted into evidence, its reliability as a test for deception must be proven. This approach has been endorsed in *DHL Supply Chain (Pty) Ltd v De Beer NO & others* (2014) 35 ILJ 2379 (LAC).

even if it involves the refusal to undergo polygraph testing. I would even go further to suggest that there does not, to my mind, appear to be any authority which prohibits an adverse inference being drawn against an employee who simply refuses to undergo polygraph testing, under the appropriate circumstances."
(own emphasis)

Security camera footage

[22] Mr Owen testified that, when he first viewed the footage, he noticed that, on a few occasions, some of the female employees were seen "entering the back (office) there."[21] He was absent from work for a few days and, when he returned, that footage was no longer there.

[23] The security footage related to four video clips. Two were from 23 June and two from 2 July. The footage showed that:

(1) On 23 June, one video clip showed various items on a table. After an interruption, the items had been moved by unknown persons. In another clip, on that day, the first applicant had entered the back office or holding area where the camera switches are located. Shortly thereafter, the cameras went off.

(2) On 2 July, the cameras were off for a period of ten minutes. At 17h07, the second applicant was seen leaving the store.

[24] The applicants testified that none of the UPS were functional. Mr Oosthiuzen disputed this. Unlike, Mr Oosthuizen, the applicants were present at the Epping store every day.

[21] Record, transcript p103

[25] As previously mentioned, the parties agreed that there was a discrepancy in the time on the cameras (and the actual time) but disagreed on the extent of the discrepancy.

[26] The third respondent undertook to call an expert on its security cameras, Mr Christo Visa[22] but failed to do so.

Recon (balance) sheets and ticket history

[27] The third respondent relied on the recon sheets to establish that monies were missing, and the periods when the monies went missing.

[28] The veracity of the recon sheets depended on Ms Pretorius,[23] who did not testify. The commissioner was alerted that the recon sheets were hearsay[24] - though applicants' representative did not explicitly state that they objected.

[29] The third respondent's witnesses conceded, under cross examination, that the ticket history does not indicate if, or when, the ATM was opened.[25] They also conceded that the recon sheets do not indicate that monies went missing on any particular dates.

Inferential reasoning

[30] It is important to note that, there being no direct evidence of wrongdoing on the part of the applicants, the respondent's case was based on inference. In para 147 of the award, the commissioner states: "The correspondence between the key visual and documentary evidence strongly suggests that the most probable inference is that the power was switched off on the three days in question, the ATM was accessed and theft of monies occurred." The applicants take issue with the inference

[22] Record, transcript p18 (lines 13 – 19), p24 (lines 9 – 15)

[23] Record, transcript p100; Record, transcript pp 372 – 375

[24] Record, transcript p 189

[25] Record, transcript p85

drawn and contend that there was no objective basis for the inference.[26] This is discussed below.

Evidence of the applicants

[31] The first applicant testified that he was innocent of tampering with the cameras, and he was not involved with the theft of monies. He had previously informed Mr Oosthuizen about various irregularities concerning the behaviour of Ms Pretorius in relation to the ATM cash. The first applicant testified that he was not desperate for money because he was managing a large sum of money, just shy of R2 million, from the Road Accident Fund.

[32] The second applicant testified that he too was innocent of tampering with the cameras, and he was not involved with the theft of monies. His undisputed evidence was that he had, years earlier, refused to work directly with the cash component of the third respondent's business.

<u>Legal principles and analysis</u>

[33] The arbitration and the resulting award both constitute administrative action. Section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair. It was in this context that our apex court fashioned the review test[27] applicable to arbitration awards of the CCMA in the following terms: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her*? The test has come to be known as the "*Sidumo* test" or the "reasonableness test."

[34] As to what is reasonable, this must be determined by the circumstances of each case. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*[28] the Constitutional Court held:

[26] Founding affidavit, para 30, pleadings p 18

[27] *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

[28] 2004 (4) SA 490 (CC) at para 45

> "[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

[35] In *Head of the Department of Education v Mofokeng and others*[29] the court again confirmed that where an arbitrator fails to apply his or her mind to the material issues, this will usually indicate that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, when a mistake of fact or law occurs, what matters is its materiality - whether the error had a distorting effect on the outcome.

Analysis of the grounds of review

[36] The applicants allege that the commissioner committed a number of material errors of law and fact, which led to an unreasonable outcome.

[37] The applicants allege the commissioner grossly erred by finding that an adverse inference could be drawn against them for their refusal to undergo a polygraph test. It must be noted that the commissioner made this finding despite the concession by the third respondent's key witness, Mr Owen, that the first applicant

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[29] [2015] 1 BLLR 50 (LAC)

had good reason to object. As to what an adverse inference is one must look to the concept of an "adverse inference" which our court[30] has explained as follows:

> "In the case of the party himself who is available, as was the defendant here, it seems to me that the inference is, at least, obvious and strong that the party and his legal advisers are satisfied that, although he was obviously able to give very material evidence as to the cause of the accident, he could not benefit and might well, because of the facts known to himself, damage his case by giving evidence and subjecting himself to cross-examination. … It is not advisable to seek to lay down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant."
> (own emphasis)

[38] It is apparent that the commissioner elevated the polygraph test to the status of testimony in a court of law, despite the polygraph having been the subject of stinging critiques, by academics[31] and the courts. It is common for employers to use the polygraph as a test for deception, on the basis that psychological conclusions may be drawn based on the physiological responses of employees to a set of questions. As far as evidence is subsequently presented, this is usually done by a polygrapher, with no expertise in psychology. In *SATAWU obo Sekwele and others v Protea Security*[32] Landman J (as he then was) pointed out that the psychological or

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[30] *Galante v Dickinson* 1950 (2) SA 460 (A) at 465

[31] *Polygraph Based Testing of Deception and Truthfulness: And Evaluation and Commentary* (2001) 22 ILJ 819 by Prof. C Tredoux; *The Deception of Polygraph Testing — As a Test for Deception* (2023) 44 ILJ 2139 by R Daniels and J Phillips

[32] Unreported, Labour Court Case No. JS754/2001 (handed down on 24 November 2004)

similar testing of employees is prohibited unless the test has been scientifically shown to be valid and reliable. The court accepted that the polygraph test for deception is, at least, similar to a psychometric test as contemplated by section 8 of the Employment Equity Act No. 55 of 1998. As Landman J pointed out "… a psychometric or similar test which purports to distinguish between honest and dishonest or deceptive employees but which is flawed can work great unfairness especially when it leads to the dismissal and the stigmatization of an employee." Accordingly, absent proof by the respondent that the polygraph is scientifically valid or reliable as a test of deception, the drawing of an adverse inference relating to the test, constitutes a gross error of law. Indeed, in *DHL Supply Chain (Pty) Ltd v De Beer NO & others*[33] the LAC held:

> "*These considerations beg the question about what a failed polygraph test really produces by way of usable information. Only the inference to be drawn from the failure of the test is useful as material to determine probabilities. <u>In the absence of expert evidence to explain what that inference is, either generically, or within the bounds of the specific instance itself, and also to justify the explanation of what that is, there is nothing usable at all that might contribute to the probabilities</u>.*"
> (own emphasis)

[39] The commissioner admitted the recon (balance) sheets into evidence, though the applicants alerted him to the fact that it constituted hearsay evidence. The forms were critical to the third respondent, not only to prove that there *were* shortages but also to prove *when* they may have occurred. The commissioner did not require an application to admit such evidence, and he did not consider the factors relevant to the admission of hearsay, as contemplated by section 3(3) of the Law of Evidence Amendment Act, 1988 ("LEAA").

[40] It is trite that the informality of proceedings in the CCMA does not excuse a commissioner from applying the principles of our law of evidence, which have been crafted and time tested to ensure fairness. In several cases, the Labour Appeal

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[33] (2014) 35 ILJ 2379 (LAC) at paras 30 and 31

Court has pronounced that LEAA is indeed applicable to statutory arbitrations.[34] In fact, the Labour Appeal Court has stated that hearsay evidence that is not admitted in accordance with LEAA is not evidence at all.[35]

[41] In *Ithala Development Finance Corporation Ltd v Zulu and* others[36] ("Ithala") the court held as follows:

> "[10] The learned Madam Commissioner alerted the parties, who were represented legally represented, that the evidence of Mkhize was probably of the nature of hearsay. At that point, Zulu and his legal representative should have objected to the leading of evidence of that nature. Shangase argued that the evidence was admitted provisionally on condition that other witnesses would support it. Nowhere in the transcript is such an important ruling by the Madam Commissioner apparent. As a matter of procedure, when a witness tenders inadmissible evidence, the party against whom the evidence is tendered must immediately object to the tendering of such testimony. Failure to object would imply that there is an agreement as to the admission of such evidence. A decision maker faced with such a situation of objection to the admission of such evidence must do one of two things. Firstly, reject that evidence as being inadmissible. Secondly, provisionally admit such evidence based on certain conditions."
> (own emphasis)

[42] In my view, the statement made in para [10] of *Ithala* is clearly wrong. In the context of court proceedings, that approach may be acceptable, but it is inappropriate in statutory arbitrations where fairness is the standard, and a high number of the litigants are unrepresented. In my considered view, the commissioner bears a responsibility to point out when evidence is hearsay, and to enquire if the

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[34] *Pioneer Foods (Pty) Ltd t/a Essential Foods v Shear NO & others* (2025) 46 ILJ 344 (LAC); *Exxaro Coal (Pty) Ltd & another v Chipana & others* (2019) 40 ILJ 2485 (LAC); *Edcon Ltd v Pillemer NO and others* (2008) 29 ILJ 614 (LAC) at paras [14] to [16]

[35] See *Exxaro Coal* cited in fn. 34

[36] (D615/2020) [2023] ZALCD 13 (24 July 2023)

evidence can be admitted by consent. Absent consent, or admission in accordance with LEAA, such ‘evidence’ is inadmissible.

[43] In any event, I believe that *Ithala* is incompatible with *Exarro Coal.*[37] In that matter, the employee was legally represented but failed to object to the presentation of hearsay evidence by the employer. It was only in the award where the commissioner indicated that the hearsay evidence would be excluded. The appeal court did not treat his failure to object as consent to the admission of hearsay evidence but held that the commissioner ought to have made his ruling promptly to alert the parties whether such evidence is admitted. In the circumstances, the commissioner committed a gross error of law by admitting hearsay evidence, in the absence of an application, and without applying the criteria in LEAA. Evidently, this error of law had a material distorting effect on the outcome.

[44] The commissioner admitted the ticket history into evidence in the absence of an application to admit such evidence, and without applying the criteria set out in LEAA. Importantly, even though the term ‘marked down’ (in the ticket history) was not explained by a witness with direct or personal knowledge of the ATM, the third respondent conceded that ‘marked down’ did not indicate that the ATM was opened, nor did it indicate that the ATM had been switched off manually.

[45] The commissioner failed to resolve the factual dispute concerning the extent of the difference between the time on the camera and the actual time. This was important because the third respondent contended that the cameras were always shut down after 17h00, which was suspicious. In addition, the third respondent submitted that the times when the cameras shut down coincided with the ATM being marked down. In the absence of any discrepancy, when comparing the ticket history with the cameras, the following picture emerges:

45.1 On 4 June, the ATM was marked down until 17h11 and the cameras went off at 17h13;

[37] See fn. 34

45.2 On 23 June, the cameras went down at 16h48, well before the ATM were marked down;

45.3 On 2 July, there was a single minute overlap between the time when the cameras went down and the ATM was marked down.

[46] As mentioned in para 30 above, the commissioner drew an inference based on the alleged "…correspondence between the key visual and documentary evidence". The process of inferential reasoning is explained in *South African Post Office v De Lacy and another*[38] where the court explained:

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

[47] There is no indication from the award that, before drawing the inference, the commissioner assessed all the proved facts. Nor is there any indication why the inference was the most plausible inference from all those that are conceivable. In my view, for the reasons explained below, the inference was improperly and irregularly drawn. The inference was not consistent with all the proved facts, nor was it the most plausible inference. To illustrate this:

47.1 The documentary evidence did not show that money went missing on the particular dates appearing on the charge sheets (4 June, 23 June, and 2 July). Mr Oosthuizen had testified that a report from his brother (Mr Owen) indicated that the monies had gone missing on those dates.[39] However, when

[38] 2009 (5) SA 255 (SCA) at para 35

[39] Arbitration Award, para 38

Mr Owen testified, he conceded that the shortages could not be identified on specific days because balancing occurs once a week.[40]

47.2 A further example shows how the inference was not consistent with all the proved facts. The commissioner found that the monies could not have been stolen by Ms Pretorius because this would have been visible on the security camera footage and would have been detected by Mr Owen. However, Mr Owen did not view all the security footage. He testified that the footage existed for approximately three weeks after it is recorded over. Nor did he testify that all the places where Ms Pretorius handled or counted cash was under surveillance. The first applicant testified that he had seen Ms Pretorius counting money in her office, in the absence of a second person.[41]

47.3 The commissioner did not consider whether, on 23 June, the first applicant had any need to enter the “back office” or “holding area” where the switches to the security cameras are located. No evidence was presented in that regard. The commissioner did not explain why it was more plausible that the first applicant switched off the cameras than that the power went off and the UPS was not working. The commissioner also does not explain why it was more probable that the ATM was switched off (on 23 June) than that it was performing a system update.

[48] The drawing of inferences enabled the commissioner to find that the applicants guilty despite the absence of direct evidence implicating them. The inferences thus had a material and distorting effect on the outcome.

[49] In the result, given the numerous factual and legal errors, all of which had a material distorting effect on the outcome, the arbitration award is one that no reasonable commissioner could arrive at on all the evidence properly before him.

[40] Arbitration Award, para 50

[41] Arbitration Award, para 89

[50] It is in the interests of justice that the dispute be referred back to the CCMA for rehearing *de novo* before a commissioner other than second respondent.

Costs

[51] In this court, costs do not follow the result. I see no reason in law and fairness to depart from this. In the circumstances, it is proper that the parties bear their own costs.

Conclusion

[52] In the circumstances, for the reasons set out above, I make the following order:

52.1 The arbitration award issued by the second respondent under case number WECT12419 – 21 is reviewed and set aside,

52.2 The dispute concerning the substantive fairness of the dismissal of the first and second applicants is referred back to the first respondent for rehearing before a commissioner other than the second respondent,

52.3 There is no order as to costs.

Reynaud Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Adv N Williams
Smit Hendricks Inc

For the Third Respondent:
Adv C Bosch

C & A Friedlander Inc