IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR 190/06

In the matter between:

FIRST RAND BANK LIMITED	APPLICANT
AND	
COMMISSIONER S NEGOTA N.O.	1ST RESPONDENT
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	2ND RESPONDENT
W GUDUVHENI	3RD RESPONDENT
T KONE	4TH RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the First Respondent (the Commissioner) under case number LP6019-04 dated 12th December 2005, in terms of which the dismissals of the Third and Fourth Respondents, Mr Guduvheni and Ms Kone respectively were found to have been both substantively and procedurally unfair. It was for this reason that the Commissioner ordered their reinstatement and compensation in the amounts of R69 306.60 and R89 096.52 respectively.

[2] The order which was read on the day this judgment was delivered is corrected to the extent that it ordered the reinstatement of the Third Respondent, who has passed away. The order at the end of this judgment is accordingly varied in terms of section 165 of the Labour Relations Act 66 of 1995 (the LRA).

[3] There are also a number of interlocutory applications which were made in this matter. The interlocutory applications that have been filed since the review application are as follows**:**

a. An application to substitute the Third Respondent, Mr Guduvheni who passed away since the award was issued.

b. The condonation application for the late filing of the answering and replying affidavits.

c. The dismissal of the review application on the ground that the Applicant had delayed in prosecuting the review.

d. A substantive application for costs against the Second Respondent (the CCMA) for failing to properly record the proceedings resulting in the Applicant having to incur costs in reconstructing the record.

Background facts

[4] The Applicant is involved in the banking business which amongst other things involves handling of large amounts of money for members of the public. Because of this, stringent measures have, according to the Applicant, been put in

place to manage the risk accompanying the handling of the clients' money by its employees.

[5] In securing the clients' funds the Applicant has put in place a dual control system which requires the involvement of two people in securing those funds, particularly in relation to depositing and withdrawals of funds by the clients from the ATMs facilities.

[6] According to the Applicant the ATM contains a safe, which houses the cash to be dispensed with when clients effect withdrawals and receive deposits. The employees of the Applicant in opening the safe use both a combination lock and a key lock, a system that is known as the dual control. In terms of this process one employee holds the key and another employee the combination.

[7] Each ATM is allocated a limited cash of R250 000.00 which serves as opening balance and is checked daily by the responsible employee. The ATM produces a printout showing the cash balance available. When the balance in the ATM is lower than the balance allocated to that machine the cash is to be topped up by the responsible employees.

[8] The balancing clerk is required on a daily basis to obtain from the ATM machine the printout. The printout reflects, inter alia, the previous day's balance, the cash loaded, the amount of the withdrawals, and the cash currently in the ATM. It is also the responsibility of the balancing clerk to ensure that those figures reconcile and to carry forward the correct balance for the next day.

[9] The Commissioner in his award gives a detailed account of the evidence of each of the parties' witnesses. The summary of the evidence as presented in the award has not been challenged and therefore, to avoid overburdening this judgment the testimony of the witnesses will not be repeated in this judgment.

The dismissal of the Third Respondent

[10] The Third Respondent, Mr Guduvheni (Guduvheni) who commenced his employment with the Applicant on 2nd February 1979, was at the time of his dismissal employed as an ATM balancing clerk responsible for balancing some six ATM's at the Applicant's branch at Thohoyandou. His duty was to extract the figures on the ATM balancing sheet and verify them against the general ledger. He was dismissed subsequent to an investigation which discovered that the ATM's did not correctly balance. According to the Applicant the investigation revealed that there had been a defalcation of R1 000 680.00 from the six ATM's at the Applicant's branch at Thohoyandou. He was charged with two counts of misconduct. The first count relates to the accusations that he recorded the balancing sheet of the ATM as balancing when it was not. It was also alleged that there were times when the individual ATM's exceeded R600 000.00 and the balance of R800 000.00. The charge further reads as follows:

> *"Instances were noticed where cash checks always conducted by relief custodians when taking over ATM's and this was not reported or corrected by yourself. You always failed to report the various differences to the Branch Administrator and you did not report the unbalanced state*

of the ATM's to your superior until it was too late to do so. Your blatant disregard of the rules and procedures caused losses to the bank of R1, 000, 680, 00."

The second charge concerned the allegation that Mr Guduvheni has on 24 (twenty four) occasions altered or falsified the balance.

The dismissal of the Fourth Respondent

[11] The Fourth Respondent, Ms Kone (Kone) who was appointed by the Applicant, with effect from 5th April 1993, was at the time of her dismissal on 16th November 2004, employed as the Head of Department Front Line Liaison. She was also charged subsequent to an investigation by the Applicant. She was charged and found guilty of failing to carry out laid down rules and procedures by not conducting cash checks on the take over of ATM's including failure to report the differences to her superiors. She was also accused of failing to change the combinations on take over and therefore shared the combinations with another employee. The other charge against her was that she failed to scrutinize the balancing sheets and that she signed them without verifying that the balancing sheets and the cash on hand balanced to the general ledger.

[12] Subsequent to their dismissal both Guduvheni and Kone referred a dispute to the CCMA. The conciliation process having failed, the dispute was referred to arbitration. As indicted above the Commissioner found their dismissals to have been both procedurally and substantively unfair and ordered compensation for both of them.

[13] According to the Applicant its investigation into the alleged misconduct revealed that its branch in Thohoyandou suffered a loss in the amount of R1 000 680.00 due to misappropriation from the ATMs. As a result, 11 (eleven) employees were charged with various forms of misconduct, including Guduvheni and Kone. The disciplinary inquiry resulted in the dismissal of five employees who were found guilty of failing to comply with the security procedures relating to loading and failing to keep account of cash dispensed via the ATMs.

Application for substitution

[14] As indicated earlier the application for substitution was necessitated by the passing away of Guduvheni. The Applicant did not oppose the application but its complaint in this respect concerns mainly the approach adopted by the Respondents' attorneys.

[15] Mr Tiedemann for the Applicant argued that the Respondents' attorney was wrong in her view that because the letter of execution had been issued the application to dismiss as was filed by the Respondents could not proceed without filing the application to substitute. He relied on the provisions of rule 22(5) of the Rules of the Labour Court which reads as follows:

> *"If in any proceedings it becomes necessary to substitute a person for an existing party, any party to such proceedings may, on application and on notice to every other party, apply to the court for an order substituting that party for an existing party and the court may make such order,*

including an order as to costs, or give such directions as to the further procedure in the proceedings as it deems fit."

Because of the belief that the review proceedings should not proceed before the substitution application was heard, the Applicant caused the application for substitution to be set down but did so without notifying the Respondents.

[16] In the light of the fact that the application for substitution of the executrix for the late Guduvheni, I do not have to decide whether the substitution should have been heard before the application to dismiss the review could be heard. However, the approach suggested by the Applicant does seem to me to be very formalist and highly technical. I would align myself to the view expressed in the heads of argument of Guduvheni and Kone that substitution of a deceased with the executor or executrix of the deceased estate in review proceedings is a formality as at this stage the adjudication process has been completed.

[17] The substitution of Guduvheni with the executrix is accordingly granted. I do not however belief that costs should be granted in this regard.

Application to dismiss

[18] The Respondents launched their first application to dismiss the Applicant's application to review the arbitration award during May 2008. In its response to that application the Applicant contended that the application to dismiss was premature because the substitution had not yet been finalized. The other point raised by the Applicant was that its application to compel the CCMA to produce

the record was still pending. It would seem because of this the Respondents abandoned this application.

[19] The Respondents subsequently filed another application to dismiss founded on the complaint that the Applicant had delayed in prosecuting its claim to finality and expeditiously.

[20] I have considered both the applications to dismiss the review application and came to the conclusion that in the circumstances of this case justice would require that the matter be considered on its merits rather than disposing it on a technicality.

The grounds for review

[21] The first ground of review concerns the issue of legal representation. It is common cause that the Applicant objected to the Respondents being legally represented during the proceedings. As soon as the objection was raised, the legal representative of the Respondents read from a document headed *"APPLICATION FOR LEGAL REPRESENTATION."* The document deals with several topics relating to the application for legal representation. The first point raised in that document relates to the questions of law which are relevant to the consideration for granting legal representation. The second point relates to the complexity of the charges proffered against the Respondents. It is stated in that document that the charges proffered against Guduvheni *"are complex involving allegedly millions."* It was further submitted that it would be unfair to expect Guduvheni to *"present these complex set of facts in a proper and coherent*

fashion to the witnesses to be called." In relation to the prejudice that the Applicant was likely to suffer if legal representation was allowed, it was contended that, that was unlikely to happen because of the size of the Applicant and its financial resources including the fact that it has labour practitioners who also litigates regularly at the CCMA.

[22] The complaint of the Applicant is that it was never asked to consent to legal representation and that the legal representative of the Respondents never motivated for legal representation nor did she avail the document from which she read from to the Applicant's representative. The Applicant further contended that it was denied a fair hearing because it was never given the opportunity to respondent to the submission made by the Respondent's legal representative.

[23] The law relating to legal representation in arbitration hearings was prior to the 2000 amendments to the LRA governed by section 140(1) of the LRA. The general rule at that time was that section 140(1) did not permit legal representation in arbitration cases involving misconduct and incapacity. See *Commuter Handling (Pty) Ltd v Mokoena & others [2002] 9 BLLR 843 (LC), Colyer v Essack NO & others (1997) 18 ILJ 1381(LC); Malan v CCMA & Another (1997) 18 ILJ 1381 and Afrox Ltd v Laka & others (1999) 20 ILJ 1732 (LC).*

[24] The 2000 amendments repealed the provisions of section 140(1) of the LRA. The legal position in relation to legal representation in the CCMA is currently governed by rule 25(1)(c) and (2) of the CCMA rules. There are now two

instances under which legal representation could be permitted during CCMA arbitration proceedings. The first instance is where both parties and the Commissioner consent to legal representation. The second instance is where the Commissioner in exercising his or her discretion concludes that it would be unreasonable to expect a party to deal with the dispute without legal representation. In this respect rule 25(1) provides for factors which the Commissioner has to take into account in considering whether or not it would be unreasonable to expect a party to participate in arbitration proceedings unassisted by a legal representative. The factors are:

> "*(a) The nature of the questions of law raised by the dispute;*
>
> *(b) The complexity of the dispute;*
>
> *(c) The public interest; and*
>
> *(d) The comparative ability of the opposing parties or their representatives to deal with the dispute."*

[25] In *Bezuidenhout v Johnston NO & Others [2006] 12 BLLR 1131 (LC)*, the Applicant party complained that the Commissioner allowed legal representation even though it had raised the objection at the beginning of the hearing. In that case, legal representation was allowed after the attorney for the employee submitted to the Commissioner that she (the employee) was unable to represent herself because she was suffering from depression and was therefore medically unfit to represent herself. The Court found that even if it was to be found that the Commissioner may have had regard to incorrect documents, what was

undisputed was that the employee was suffering depression and was medically unfit to represent herself. The key aspect of that decision which is apposite in the present instance is that the Court also took into account in declining not to interfere with the Commissioner's award the fact that the Applicant was represented by someone from the employer's organization which would have levelled the playing field in as far representation was concerned.

[26] In *Tiger Brand Field Services v CCMA & Others [2006] 7 BLLR 694*, the Commissioner adjourned the proceedings to obtain a copy of the Rules of the CCMA, immediately when the objection to legal represent representation was raised. When the hearing reconvened the Commissioner read the provisions of rule 25(1) into the record and thereafter granted permission for legal representation on the basis that there was an agreement between the parties.

[27] The Court in *Tiger Brand Field Services (supra)* found that had the Commissioner executed his duties appropriately he would have included in his inquiry, the inquiry into whether or not there was indeed an agreement between the parties regarding legal representation. In refusing to interfere with the arbitration award on the basis of this complaint Cele AJ, as he then was, found on the facts (at para 62) that the matter did not involve complex issues, was of no public interest and the facts were generally common cause. The Court further found that the Commissioner committed an irregularity but however it was not of such material a nature as to amount to gross irregularity.

[28] In the present case there seems to have been no dispute that after the Applicant objected to legal representation, the Respondents' legal representative applied to be allowed to represent them, and did so by reading from the document referred to above. The record of the arbitration award does not assist in determining why the Commissioner did not afford the Applicant the opportunity to respond or see the document from which the legal representative of the Respondents read from.

[29] The facts in the present instance are not complicated and I do not see why the Respondents would not have been able to deal with them without legal assistance. The Commissioner has not given reasons why he permitted legal representation in the absence of consent by both parties.

[30] In my view the approach adopted by the Commissioner was irregular in that he ought to have firstly ruled that the Applicant be provided with a copy of the document which the legal representative read. And secondly he should have afforded the Applicant the opportunity to respond to the application itself. The question that I now have to answer is whether or not the irregularity was so fundamental that it amounted to gross irregularity to justify interference with the award.

[31] It is a well established principle of our law that it is not every irregularity or misconduct that would justify setting aside an arbitration award. Interference with an arbitration award would be justified where the irregularity or misconduct is so gross as to evidence partiality on the part of the Commissioner. In the absence of *mala fide* even gross mistake may in certain circumstances not justify

interference with an award. See *Amalgamated Clothing & Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (AD).* It seems to me that the irregularity complained of must be of such a nature that it prevented the hearing of the real issues taking place. See *PPWAWU & another v Commissioner, CCMA (Port Elizabeth) & Another [1998] 5 BLLR 499.*

[32] As indicated above it cannot be disputed that the manner in which the Commissioner in the present instance dealt with the objection to legal representation and how he allowed for it, was irregular. However before interfering with the award the question that needs to be answered is whether it was grossly irregular to amount to denial of a fair hearing for the Applicant. In my view based on the authorities and the reasons discussed above it cannot be said that the irregularity committed by the Commissioner in the present instance amounted to gross irregularity that warrants interference with the award.

[33] The complaint of the Applicant is mainly that it was not given its right to be heard regarding the issue of legal representation. The Applicant has not made out a case that it was prejudiced by the manner in which the Commissioner did not deal with this issue of legal representation nor has it made out a case that it was not able to present its case because of the comparable ability between its representative and the legal representative of the Respondents. I have in particular noted in this respect that in the founding affidavit the Applicant's representative states that he has 8 (eight) years of experience in handling labour disputes and has attended at the CCMA *"hundred of proceedings of the respondent through the Republic …"* This means that the Applicant had in a

sense a comparable ability to deal with the issues that arose during the arbitration hearing. It has to be noted that the Applicant's representative was in the company of two other colleagues. For these reasons, in my view, the irregularity committed by the Commissioner does not amount to gross irregularity and it would therefore be improper for this Court to interfere with the arbitration award for that reason.

[34] The second ground of review is based on the complaint that the conduct of the Commissioner demonstrates that he was biased against the Applicant. This ground is based on a number of examples given by the Applicant as instances demonstrating how biased the Commissioner was.

[35] The first instance concerns the 22nd June 2005, when the representative of the Applicant, Mr Cuthbertson suddenly fell ill and had to go and see a medical practitioner who after examination confined him to bed for few days. Mr Armstrong, who accompanied him to the doctor then went back to the hearing, informed the Commissioner about this and handed in the medical certificate. According to the Applicant the Commissioner became irate and agitated when the medical certificate was handed to him and immediately enquired from Mr Armstrong whether Mr Cuthbertson was able to attend the following day hearing. Because the response was not in the affirmative, the Commissioner is alleged to have insisted that it be inquired directly from Mr Cuthbertson whether he was able to proceed with the matter the following day. This, the Applicant interpreted to mean that the Commissioner was questioning the veracity of the medical certificate submitted on behalf of Mr Cuthbertson.

[36] The Respondents denies the version of the Applicant and contended that Mr Cuthbertson was not present when the medical certificate was handed to the Commissioner and relies on what he was told by Mr Armstrong. According to the Respondents it was their attorney who insisted on the Commissioner contacting Mr Cuthbertson on the day in question because they were surprised that he simply disappeared without informing the Commissioner or their attorney.

[37] The other instance that the Applicant relied on in support of its complaint relates to one day during the hearing at about 13h00 when Mr Cuthbertson requested that the Commissioner adjourn for lunch. The response of the Commissioner did not go down well with him because according to him in response to the request for the adjournment the Commissioner repeatedly enquired as to*: "Do we have patients here? And are they diabetics?"* The Commissioner did not adjourn the hearing at that stage.

[38] The other complaint of the Applicant relates to the 23rd November 2005 when Mr Cuthbertson informed the Commissioner that their flight back to Johannesburg was scheduled to leave from Polokwane at 18h00 and therefore needed confirmation that the proceedings would end at 16h00. The Commissioner proceeded with the hearing until 19h10, resulting in Cuthbertson and his colleagues missing their flight and had to hire a car to travel back to Johannesburg. The essence of this complaint is that by not stopping the proceedings at 16h00 the Commissioner compelled the Applicant's representatives and witnesses to maintain unreasonably protracted hearing hours.

[39] The other ground relating to bias which the Applicant relies on relates to the comment which the Commissioner made in his arbitration award. In this respect the Commissioner stated in the award that the Applicant was running its business like the story in the novel *Animal Farm* by George Orwell.

[40] All the above complaints in my view bear no merit and to a very large extent are not supported by the record. The Animal Farm story was in my view used to illustrate by way of emphasis and example the inconsistent application of the disciplinary procedure.

[41] The complaint about refusing to grant a break is also not supported by the record. The record reveals that the Commissioner had on a number of instances granted adjournments whenever requested to do so by any of the parties.

[42] The complaint about missing the flight does not make sense to me. There is no evidence that shows how conducting the proceedings beyond the normal business time prejudiced the Applicant. The Commissioner had sensitized the parties earlier in the proceedings about the need to finish the proceedings within the allocated time. He even suggested starting earlier in morning. It is therefore not surprising that he proceeded with the hearing beyond the usual business time. There is nothing in law or a rule of the CCMA that prescribes the start and end period of the arbitration proceedings on any particular day.

[43] What is strange about the complaint of the Applicant is that at some point, and it would seem to relate to this very issue, its representative requested for an adjournment to arrange for accommodation because they had missed their flight.

The accusation levelled against the Commissioner in this regard does not seem to accord with what transpired as appears on the record. In this regard the record reveals the Applicant's representative having said:

> "*RESPONDDENT:* *Mr Commissioner, can I just ask for a 5 minute nature break please and just to make arrangements so that we can cancel our flights and get a hotel tonight. Because we have obviously checked out. If I can just have a 5 minutes break just to make that arrangement.*
>
> *COMMISIONER:* *Granted*
>
> *RESPONDENT:* *Thank you."*

It is also important to note that it was not only the Applicant's representatives who were made to work long hours on that day and therefore it is difficult to understand the basis for the allegation of biased in this respect.

Irrationality of the award

[44] The third ground of review concerns the rationality of the arbitration award of the Commissioner. In support of this ground the Applicant gave examples of why the award should be regarded as irrational. The first example relates to the evidence about the business of Mr Bobb Steytler's popcorn venture. The Applicant contended that the Commissioner found without any evidentiary foundation at all, that Mr Steytler had resigned from the Applicant, and had agreed to testify in the arbitration on behalf of the Applicant, in order to avoid a disciplinary inquiry and possible criminal charges. The Commissioner reasoned

his finding in that regard, that Mr Steytler had accepted a mediocre and less than lucrative position at a supermarket store upon his resignation from the Applicant. This complaint does not in my view take the case of the Applicant any further because on proper analysis the finding of the Commissioner on this aspect of the evidence has no bearing on the conclusion.

[45] The second example of irrationality of the award, according to the Applicant, relates to the finding that the Applicant did not apply the discipline consistently in as far as the rule was concerned. The Applicant further contended that even if there was inconsistency in the application of discipline the Commissioner, failed to appreciate that he had a discretion concerning the sanction to be imposed.

[46] The Applicant contended that the Commissioner in evaluating the credibility of the Fourth Respondent, failed to consider that she had not in the disciplinary hearing raised defences which she subsequently raised for the first time in the arbitration proceedings.

[47] The fourth ground of review concerns the reinstatement of the Respondents by the Commissioner. The complaint of the Applicant in this respect is that the Commissioner ordered the reinstatement of the Respondents, despite the evidence of the breakdown in the trust relationship.

[48] The fifth ground of review concerns the criticism that the Commissioner exceeded his powers, by making an award specifying the compensation to be paid to Guduvheni and Kone when there was no evidence concerning their monthly remuneration.

[49] The sixth ground of review concerns the complaint that the Commissioner reinstated the Respondents despite the fact that they respectively admitted to failing grossly to adhere to known security procedures and falsification of balancing of the ATMs.

[50] The last ground of review concerns the finding by the Commissioner that the dismissal was procedural unfair because the union representative who represented the Respondents was the Applicant's "lackey" and represented the Respondents simply to legitimize their dismissal.

The arbitration award

[51] I have earlier in this judgment indicated that Commissioner in his award gives a detailed account of the evidence of each of the parties' witnesses and would therefore not be necessary to repeat it. In his analysis of the evidence and the arguments of the parties the Commissioner firstly and correctly so indicates that the onus to prove that the dismissals of the Respondents were fair in terms of section 192(2) of the Labour Relations Act (the LRA), rested with the Applicant. He then finds that whilst the Respondents did not dispute the allegations against them relating to non compliance with the rule, their defence was that the rules were never followed, persistently applied and there was lack of supervision in their enforcement. The Commissioner also found that the discipline in relation to these rules were not consistently applied by the Applicant as some other employees who breached them were either ignored or if disciplined were given warnings and not dismissals.

[52] In relying on the decision in the case of *Cholata v Trek Engineering (Pty) Ltd (1992) 13 ILJ 219 (IC)*, the Commissioner found that it was unfair to dismiss an employee for an offence which the employer have habitually condoned in the past or dismiss only some of the employee found guilty of the same offence. He further found in this respect that the unfairness of the inconsistency was strengthened by the fact that the Applicant failed to discipline one of the employees who was guilty of the same offence as that of Guduvheni. In finding that the 25 (twenty five) years of service of Guduvheni should have served as a mitigating factor against the dismissal sanction the Commissioner relied on the decision in *National Union of Mineworkers & Another v East Rand Proprietary Mines Ltd (1987) 8 ILJ 315 (IC)*, in which it was held that the length of service should serve as a mitigating factor in a misconduct case.

[53] The inconsistency in the case of Kone was found by the Commissioner to have manifested itself in the form of certain employees who were not being disciplined when they had committed the same or similar offences.

Evaluation of the award

[54] I have already dealt with the process aspects relating the complaints about the manner in which the arbitrator conducted the proceedings including the issue of legal representation. In this part of the judgment I will focus on evaluating the arbitrator's findings in relation to the procedural and substantive fairness of the dismissal. I do so in order to determine whether there is a basis for interfering with the award.

[55] The question that arises from the above facts is whether the conclusion reached by the arbitrator falls outside the range of reasonableness so as to attract interference with the award by the Court. In addition to the general assessment of its reasonableness, the award need to specifically be assed with regard to the application of the principle of parity or consistency as applied by the arbitrator to the facts of the case.

[56] The test to determine whether or not a conclusion reached by an arbitrator is reasonable or otherwise is that of a reasonable decision-maker. In terms of *Sidumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ 2405 (CC),* the question to ask in considering the reasonableness or otherwise of an award is, whether the conclusion reached by the arbitrator is one which a reasonable decision-maker could not reach.

[57] In addition to the general test applied in review cases *Sidumo* also deals with the approach which arbitrators should follow when determining the appropriateness of the sanction imposed by the employer. The approach developed by Constitutional Court, confirmed two of the decisions of the Labour Appeal Court in the cases of *Engen Petroleum Ltd v CCMA & others (2007) 28 ILJ 1507 (LAC) and Chemical Workers Industrial Union & others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC).* In those cases the Labour Appeal Court held that the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a CCMA Commissioner decides whether dismissal as a sanction is fair in a particular case. The Commissioner is in terms of those decisions required to decide the issue of the

appropriateness of the sanction in accordance with his or her own sense of fairness. (See *Engen (supra)* at par 117 at 1559 A, - par 119 at 1559 H-I; par 126 at 1562 C-D, par 147 and Sidumo at paras 75 and 76.). The determination of the fairness or appropriateness of a dismissal is an issue to be left to the commissioner and not the employer or the reviewing Court. In this regard it was said in Sidumo (at para. 75) that:

> *"Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."*

[58] In *Sidumo* the Court developed guidelines which Commissioners could use in determining the fairness of the dismissal. The factors which a Commissioner must take into account when weighing whether a dismissal is an appropriate sanction or otherwise, are stated in *Sidumo* (at para. 78) as follows:

> *"In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached; the basis of the employee's challenge to the dismissal, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record.*
>
> *The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other*

factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record."

[59] The above, not being an exhaustive list, the Commissioner would also, in terms of the decision in *Engine*, consider the provisions of sections 188(1) and 192(2) of the LRA, including Schedule 8 of the Code of Good Practice: Dismissal. Section 188(1) requires that the Commissioner must take into account any relevant Code of Good Practice issued in terms of the LRA.

[60] It is apparent from the reading of the decisions of this Court and those of the Labour Appeal Court that, in line with *Sidumo*, the length of service plays a significant role in the assessment of the fairness of a dismissal. See *Shoprite Checkers (Pty) Ltd v CCMA & Others [2008] 12 BLLR 1211 (LAC)* (the judgment of Zondo JP), *Shoprite Checkers (Pty) Ltd v CCMA & Others [2008] 9 BLLR 838 (LAC)* and the soon to be published judgment of Francis J in *Shoprite Checkers (Pty) Ltd v CCMA & Others case number JR1888/08.*

[61] The approach to be adopted when dealing with the issue of parity or the inconstant application of discipline has as stated in the, *South African Transport and Allied Workers Union and Others v Ikhwezi Bus Service (Pty) Ltd (2009) 30 ILJ 205 LC,* received attention from the Court and evolved over many years dating back to the days of the Industrial Court. In that judgment van Niekerk AJ

as he then was, traverses several key decisions relating to development of the legal principles relating to the issue of parity.

[62] In essence the issue of parity relates to the fairness and equal application of discipline by the employer. In this respect an employer has the right to impose different sanctions on employees who may have been involved in the same act of misconduct, subject to the sanction being fair and objective.

[63] In circumstances similar to the present case the Labour Appeal Court, in *NUM and another v Amcoal Colliery t/a Arnot Colliery and another [2000] 8 BLLR 869 (LAC)*, had to determine the fairness of the dismissal of employees who had been dismissed for failing to comply with an instruction. The distinction between that case and the present one is that in that case the employees were all found guilty but only those who had previous warnings were dismissed. In dealing with the issue of parity Mogoeng AJA (at page 875 middle para 19), in Amcoal Colliery, said:

> *"The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It was not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence."*

[64] The Labour Appeal Court, in confirming its decision in *Irvin & Johnson (1999) 20 ILJ 2303(LAC)* held in *Gcwensha v CCMA & Others (2006) 3 BLLR 234 (LAC)*, that**:**

"Disciplinary consistency is the hallmark of progressive labour relations that every employee must be measured by the same standards."

The Court went further to say:

"… when comparing employees care should be taken to ensure that the gravity of the misconduct is evaluated. Turning to the issue of parity the authorities are now clear as to what approach to be adopted when dealing with this issue."

[65] In dealing with the issue of consistency, Du Toit Bosch *et al Labour Relations Law', A Comprehensive Guide,* state the following:

"Consistency however implies treating like cases alike. An employer may thus be justified in differentiating between employees who have committed similar transgressions on the basis of differences in personal circumstances of the employees (such as length of service and disciplinary record) or the merits (such as the roles played in the commissioning of the misconduct)."

[66] In dealing with the same issue it was concluded in *Irvin & Johnson at page 2313 (para 29)* that:

"In my view too great an emphasis is quite frequently sought to be placed on the "principle" of disciplinary consistency, also called the "parity principle" (as to which see e.g. Grogan Workplace Law (4 ed) at 145 and Le Roux & Van Niekerk The SA Law of Unfair Dismissal at 110). There

is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (M S M Brassey 'The Dismissal of Strikers' (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union & others (1991) 12 ILJ 806 (LAC) at 813H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. . .”

[67] In applying the above principles to the present instance I am of the view that the conclusion reached by the Commissioner cannot be said to be one which a reasonable decision-maker could not reach. It is a conclusion that accords with the approach that has been followed by several authorities on how to deal with the issue of parity. In this regard see in addition to the above authorities the following authorities: *National Union of Mineworkers v Free Sate Consolidated Gold Mines (Operations) Ltd (1995) 16 ILJ 1371 (a), SACTU and others v Novel Spinners (Pty) Ltd [1999] 11 BLLR 1157 (LC), Coca Cola Bottling East London v Commissioner for Conciliation, Mediation and Arbitration and others (2003) 24 ILJ 8232(LC).*

[68] It is also apparent from the award that the Commissioner in arriving at his conclusion also took into account the length of service of Guduvheni. Guduvheni who had been with the Applicant for 25 years was dismissed for incorrect balancing of the ATM machine, altering and falsifying the figures. Whilst the Applicant contended that it lost R1 000 680.00, there is no evidence linking the loss to the incorrect balancing done by Guduvheni.

[69] As indicated earlier Kone was charged and found guilty of failing to carry out laid down rules and procedures by not conducting cash checks on the take over of ATM's including failure to report the differences to her superiors. She was also accused of failing to change the combinations on take over and therefore shared the combinations with another employee. The other charge against her was that she failed to scrutinize the balancing sheets and that she signed them without verifying that the balancing sheets and the cash on hand balanced to the general ledger. At the time of her dismissal she had been with the Applicant for a period of over 10 (ten) years. There was no evidence linking Kone to the R1 000 680.00 lost suffered by the Applicant.

[70] **Procedural fairness**: It is apparent from the reading of the Commissioner's award that the unfairness in as far as the procedural fairness of the disciplinary hearing was concerned turned around the manner in which the union representative conducted the case on behalf of the Respondents.

[71] There is no doubt, in my view, that the Commissioner misconceived the enquiry he was supposed to conduct in as far as procedural fairness was concerned. The representative was appointed by the Respondents' own union to represent them. One of the criticisms levelled against the representative by the Commissioner relates to his *bona fides*. Except for the criticism that the trade union representative could not have represented 11 (eleven) people in two days there is no explanation or indication from the Commissioner as to why he regarded his representation as *"a sham and at worst a fluke."* And further why the

Commissioner regarded representation by the union as serving the purpose of legitimating the disciplinary inquiry.

[72] It is evidently clear that the Commissioner in dealing with the issue of procedural fairness misconceived the task he was supposed to perform. The Commissioner ought to have appreciated that the choice of the representative was a matter between the Respondents and their union. The Applicant did not have a say on the appointment of the representative. The Respondents could, if they were dissatisfied with the effectiveness of the representation by their representative, have approached the union and sought his withdrawal.

[73] Turning to the issue of compensation the Commissioner has not in his award provided the calculation upon which the compensation for both Guduvheni and Kone is based on. I have also not been able to find any evidence on the record indicating the same.

[74] Thus in as far as the procedural fairness and compensation awarded to Kone and Guduvheni are concerned; the Commissioner committed an irregularity. The question that then follows is whether the award should be reviewed and set aside on these two grounds alone. In my view the award can still be sustained notwithstanding the finding of the Commissioner regarding compensation and procedural fairness of the disciplinary hearing. If the award was to be reviewed, set aside and remitted back to the CCMA the likelihood is that the outcome in as far as substantive fairness is concerned would remain the same. The finding on procedural fairness would be that the procedure was fair. In the absence of

evidence regarding what Guduvheni and Kone each earned at the date of their dismissals the finding on the rehearing is likely to be reinstatement.

[75] Thus remitting the dispute back to the CCMA would prolong its resolution even further than the 5 (five) years it has taken so far. The appropriate approach to adopt in the circumstances of this case is to review and correct the award of the Commissioner.

Application for costs

[76] In the original notice of motion the Applicant did not pray for costs against the CCMA but did so in the notice in terms rule 7A(8) (a) of the Rules of the Labour Court. The prayer in that notice is that the Court should direct the CCMA to pay the costs occasioned by the reconstruction of the record.

[77] At the beginning of the review proceedings I invited the Applicant to indicate whether or not it still intended pursuing the claim for costs against the CCMA. I indicated to the Applicant my reluctance as a matter of policy to granting costs against the CCMA in circumstances where I was not satisfied that the notice of set down was served on the CCMA. This issue was revisited on the second day of the proceedings and it was agreed between the parties that the CCMA should be afforded an opportunity to be heard on this issue.

[78] On the 30th July 2008, this Court issued an order directing the CCMA to show cause why a costs order should not be granted against it arising from the manner in which the recording under case number LP6019-04 were handled, resulting in the Applicant having to reconstruct the record.

[79] The essence of the Applicant's case in relation to the issue of costs is that it is entitled to costs because the CCMA failed in its statutory duty to provide a proper record, failed to assist in the reconstruction of the record and failed to provide an explanation for such failures.

[80] The brief background to this issue is that the Applicant launched its review application on the 27th January 2006 and pursuant to that the CCMA served its notice in terms of rule 7A(3) of the Rules of the Labour Court on the 1st February 2006. In that notice the CCMA indicated that there were 11 (eleven) cassette tapes for the arbitration proceedings held on 6th May, 22nd June, 21st and 22nd November 2005.

[81] The tapes were then sent to Sneller Verbatim recordings with instructions that they should transcribe them. Sneller Verbatim reverted back and indicated that the record was ready for collection on 4th May 2006. There was some difficulty with the tapes resulting in Sneller Verbatim not being able to transcribe them.

[82] On 11th May 2006, the Applicant sent a letter to the CCMA indicating that it had failed to provide a proper record of the proceedings, in particular that the cross examination of and the testimony of Kone was missing. The Applicant further indicated in this letter that it reserved the right to seek costs against the CCMA.

[83] The Applicant suggested that part of the cause of the problem with the recording was because the Commissioner released the interpreter when he proceeded with the hearing beyond the ordinary working hours. Apparently the interpreter assisted with the recording whilst he was present during the hearing.

[84] The other costs which the Applicant complained it incurred include the use of a typist to transcribe the recordings it made through its own machine during the proceedings. It would appear the Applicant used the transcription from these recordings to reconstruct the record which it then sent to the Respondents for their comments. The Applicant states it also sent the same reconstructed record to the CCMA with the request that it (the CCMA) should confirm whether the reconstruction was the true reflection of what transpired at the arbitration hearing. The CCMA did not respond to this request according to the Applicant.

[85] The reconstructed record revealed that there was no recording of the proceedings on the 6th May 2005. The CCMA was then requested to conduct a search of the tapes and see if they could not find tapes for that day. It was only after several follow ups by the Applicant that the CCMA finally indicated that they were not able to find any further tapes.

[86] On the 31st August 2007, the Applicant filed a notice in terms of rule 7A (8)(a) and included therein a prayer for costs against the CCMA for the reconstruction of the record.

[87] In its answering affidavit the CCMA has detailed its response to the application for costs and states that it had on receipt of the review application promptly delivered the record it had in its possession. In this respect it contended that it had made a genuine attempt in complying with the provisions of rule 7A (3) of the Rules of the Court. The Commissioner's notes which it had in its possession

were also dispatched to the Court together with other documents including the tapes.

[88] The Applicant argued in its heads of argument that the CCMA has a statutory obligation to maintain a proper record of the proceedings and failure to do so constituted breach of such duty and failure to comply with rule 7A (2) and rule 36 of the CCMA rules. It is further argued that the argument by the CCMA that it had limited resources and that an order authorising the costs as claimed by the Applicant would create a precedent that would expose the CCMA to similar claims in the future.

[89] I now proceed to deal with the principles governing the issue of costs. The discretion which the Court has to exercise as to whether or not to grant costs in a matter before it is governed by s162 of the LRA. Section 162 of the LRA reads as follows:

> *"(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.*
>
> *(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account –*
>
> *(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and*
>
> *(b) the conduct of the parties –*

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.

(3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court."

[90] The facts and circumstances in the present case are different in my view to those in the *Rand Water Board v CCMA 2008 JOL 21094 (LC)*, a case on which the Applicant relied on in support of its claim for a costs order against the CCMA. The *Rand Water Board* case is different from the present one in that that case concerned failure by the CCMA to comply with the provisions of rule 7A. In that case the CCMA failed to dispatch the commissioner's hand-written notes and had also initially failed to dispatch the audio tapes to the Registrar of this Court. The CCMA further failed to assist in the reconstruction of the record after the tapes were found to be blank. In fact in that case the CCMA did not respond to the request to assist with the reconstruction. In essence the conduct of the CCMA was found to have been unacceptable in that case.

[91] The authorities are unanimous as to the approach to be adopted when dealing with the issue of a defective or incomplete record of the arbitration proceedings. The responsibility to reconstruct a defective and/or inadequate record rests with the parties and it is a process to be initiated, as a general rule, by the applicant as the *dominis litis.* In *Boale v National Prosecuting & Others 2003 12 BLLR (LC),* the Court held para 5 that:

"It is trite that there is duty on an Applicant to provide a review Court with a full transcript of the proceedings he wishes to have reviewed. The Applicant has failed to provide this Court with the full transcript of the proceedings that he wished to have reviewed. Where an Applicant fails to provide a full transcript of the proceedings the review application must be dismissed. The only exception would be where the tape cassettes are missing or where the parties are unable to reconstruct the record"

[92] The role of the CCMA in as far as the reconstruction of the record is concerned is limited to facilitating an agreement between the parties about those areas in the reconstructed record where there is a disagreement between the parties as to what the true reflection of what happened and what was said during the proceedings. The Commissioner may of course make a ruling on a point which the parties do not agree on but which he or she had recorded in his or her own hand written notes.

[93] As I understand the authorities that have had to deal with the issue of the unavailability or a defective transcription record, there is acceptance that the CCMA's electronic recording will generally not always meet the expectations with regard to the quality of the recording and the safe keeping of cassettes containing the recoding. In *Justice v Herzenberg 2002 (1) SA 103 (LAC),* no costs order was granted against the CCMA, where the tapes had been lost. See also *Life Care Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Others (2003) 12 LAC 1116 and Fidelity Cash Management Services (Pty) Ltd v Muvhango SA (2005) JOL 14293 (LC).*

[94] In my view the facts of this case indicate very clearly that even though the transcript of the arbitration was not of good quality, it cannot be said that the CCMA did not comply with its duty in terms of both rules 7A and 36 of the rules of the CCMA. In terms of rule 36 (2) the CCMA may keep the record of the proceedings by means of legible hand-written notes or electronic recording.

[95] It would not be proper in my view for the CCMA Commissioner, as is suggested in this matter by the Applicant, to receive and comment on the correctness or otherwise of a record as reconstructed by only one of the parties. A party may however forward to the Commissioner for his or her comment those parts of the reconstructed record which both parties may have already reached agreement on. Commenting on the part of the record reconstructed by one party may undermine the independence of the CCMA and may also lead to perceptions of bias.

[96] It is therefore my view that there is no basis for awarding costs against the CCMA in relation to the issue of the record. I may also mention that the granting of costs for typing the transcript of the Applicant's recordings would amount to awarding damages through the back door which in the absence of evidence showing bad faith on the part of the CCMA is impermissible. In terms of s126 of the LRA the CCMA is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising its functions.

Conclusion

[97] I accept that certain portions of the Commissioner's award can be criticised and his findings be regarded as amounting to gross irregularity in that he failed to appreciate the task which was before him. However, I do not believe that justice would in the circumstances of this case be done if the award was to be reviewed, set aside and sent back to the CCMA for a rehearing before another Commissioner. The best approach that would struck a balance in fairness between the two parties is that of reviewing and correcting those parts of the award where the Commissioner failed to appreciate the task before him or where he committed an irregularity or misconduct.

[98] The award of reinstatement in as far as Mr Guduvheni is concerned can no longer stand because of his untimely death and therefore the appropriate relief in his case is compensation. Regard being had to the fact that had he been alive he would have been entitled to reinstatement, the appropriate remedy is therefore the maximum compensation as provided for in terms of s194 of the LRA.

[99] In terms of the costs which are specific to the review application I see no reason why the losing party should in both law and fairness not be required to pay the costs of the other parties.

[100] In the premises I make the following order:

(i) The condonation application for the late filing of the answering and the replying affidavits is condoned.

(ii) The application for costs against the Second Respondent, the CCMA is dismissed with costs.

(iii) The arbitration award issued by the First Respondent is reviewed and corrected as follows:

"*(a) The dismissal of the Applicants, Mr Guduvheni and Ms Kone was procedurally fair.*

(b) The dismissal was substantively unfair.

(c) The Respondent is ordered to reinstate the Applicants retrospectively without loss of salary and benefits."

(iv) The Third Respondent, Mr Guduvheni is substituted with the executrix and for this reason the Applicant is to pay his estate 12 (twelve) months compensation calculated on the salary he received at the time of his dismissal.

Molahlehi J

Date of Hearing : 30th July 2008

Date of Judgment : 5th May 2009

Appearances

For the Applicant : Adv T C Tiedemann

Instructed by : Webber Wentzel Incorporated

For the 2nd Respondent : Ms K Savage of Bowman Gilfillan Incorporated

For the 3rd & 4th

Respondents	:	Riki Anderson (Attorney)
Instructed by	:	Du Toit Attorneys