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25/08/21
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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2543/19

In the matter between:

Q4 FUEL (PTY) LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First respondent**

COMMISSIONER DIALE NTOANE, N.O. **Second Respondent**

NTM obo DANIEL MAGAGULA **Third Respondent**

Heard: 8 July 2021

Delivered:(In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 25 August 2021.)

JUDGMENT

HULLEY, AJ

Introduction

[1] Mr Magagula, who was employed by the applicant as a driver, was dismissed for failing to stop at a stop street. The question the second respondent (the arbitrator) had to consider was whether this was fair. He answered it in the negative.

[2] The applicant approaches this Court to review and set aside the arbitrator's award. Due to some of the issues raised in this review and certain observations I intend making, it is appropriate that I take a somewhat circuitous route, commencing with the disciplinary enquiry.

[3] At the hearing of this matter there was, despite proper service on the third respondent, no appearance on behalf of Mr Magagula. I decided to proceed with the matter.

The disciplinary enquiry

[4] A set of minutes was handed up to the arbitrator at the arbitration proceedings. It was stated on behalf of the applicant that the minutes accurately reflected what had transpired at the disciplinary hearing. This was disputed by Mr Magagula's representative. I do not consider it necessary to go into that dispute in any detail. It had no impact upon the outcome of the arbitration and has no impact upon my findings.

[5] It appears from the minutes that no witnesses were called on behalf of the applicant. Instead, the applicant's representative in the disciplinary enquiry, a Mr Johan Combrink, handed up a video recording and stated that it demonstrated that Mr Magagula had failed to stop at a stop street.

[6] Mr Combrink stated as follows (my translation):

> "On 15 June 2017 at 13h11, at the T-junction with R50 at the BP Garage in Bapsfontein, Daniel failed to stop. He crossed over the stop street and turned left. There is a recording of the truck's camera that proves it."

[7] According to the minutes, Mr Magagula then questioned Mr Combrink. He enquired whether he had interfered with other traffic. Mr Combrink stated that he had not. He also enquired what the Code (presumably the Disciplinary Code) stated regarding crossing a stop street without stopping. The minutes reflect that Mr Combrink stated that it was reckless and dangerous driving. (I have considered the Disciplinary Code of the applicant that was before the arbitrator. It does not contain any provision that stipulates that a failure to stop at the stop street constitutes reckless and dangerous driving.) When asked whether Mr Magagula was the only person who crossed over a stop street, Mr Combrink stated that he had no evidence of any other drivers having done so.

[8] Mr Magagula denied that he was guilty of the charges. He explained that he had stopped at the Bapsfontein Service Station to purchase food. On his way out, he drove passed another truck and proceeded slowly. He explained that he "*was not concentrating [on that] and was only checking for other motor vehicles. There were none and so I continued.*" (my translation). He stated that he had over 30 years' driving experience and acknowledged that he was familiar with the rules of the road and was required to stop at the stop street.

[9] That, according to the minutes, was the sum-total of the evidence led at the disciplinary enquiry. The matter adjourned for the chairperson to consider the evidence and make his findings.

[10] When the matter reconvened, the chairperson confirmed his findings. He found that Mr Magagula was negligent and reckless. He recorded that Mr Magagula was driving a 40,000-litre truck and that the consequences of an accident with such a dangerous freight were dire.

[11] The matter was then postponed to present evidence in mitigation and aggravation. Mr Magagula stated that he was 58 years old and only seven years from retirement. He was married with two children, aged 12 years and 10 years old. He expressed remorse.

[12] In aggravation, Mr Combrink stated that it was unacceptable to cross over a stop street with a full freight of petrol. The relationship of trust, he said, had broken down.

[13] The minutes reflect that on 10 July 2017 the hearing reconvened for the purpose of conveying the outcome of the chairperson's deliberation. The minutes reflect that the chairperson summarily dismissed Mr Magagula with immediate effect.

[14] Included in the arbitration bundle is a letter dated 4 July 2017 from Mr Combrink addressed to Mr Magagula. Given the content of that letter I can only assume that the date recorded on it was incorrect. It refers to the proceedings that apparently took place on 4, 7 and 10 July 2017. It records that Mr Magagula was found guilty of negligent and reckless driving and that it was decided "*in the light of the seriousness of the transgression*" and the fact that "*no corrective action is appropriate and that it has become untenable to continue with the employment relationship*", therefore he was summarily dismissed.

The arbitration proceedings

[15] At the commencement of the arbitration proceedings, Mr Magagula's representative noted that he was challenging both the substantive and procedural fairness of the dismissal. In a brief opening address, he stated:

> "Commissioner, let's start [with the] procedural issues. [Mr Magagula] was denied [access to] a [video] footage during … as an evidence during his … during the disciplinary hearing, when he requested documents. He was also denied interpretation and then the chairperson was also biased. And then substantively, the matter, the issue is that the allegation that he failed to stop was due to the instruction from the employer. He was given a reasonable

> instruction that the area, it's a hijacking zone, therefore he is not allowed to stop. That is our matter that is … and the sanction, commissioner, is also … it is very harsh. And the inconsistency in terms of the same. There are workers who are violating the same rules and they are still working, and there are also workers who don't stop in that area and they are not even taken to task. Two types of categories."

[16] He explained that he would call two witnesses, Mr Magagula and Mr Shadrack Shuping. The applicant called two witnesses, Mr Dirk Ackermann, and Mr Combrink. I have already made reference to Mr Combrink's role at the disciplinary hearing.

[17] The evidence led by the applicant was extremely limited. Mr Ackermann testified regarding the procedural fairness. He was the chairperson of the disciplinary enquiry. He handed up the minutes of that enquiry, read portions of the minutes into the record and expanded upon them. Mr Ackermann was cross-examined on his alleged failure to provide Mr Magagula with the video footage and with the services of an interpreter. He denied the allegations. When asked why he did not impose a written warning as a sanction for the alleged misconduct, he stated that it was "*because the transgression, the misconduct, is a dismissible offence*". Mr Ackermann was also cross-examined on the substantive aspects of the dismissal but denied that such evidence was led before him.

[18] There are additional aspects regarding Mr Ackermann's testimony that I will deal with below.

[19] Mr Combrink was the applicant's fleet manager. His evidence in chief comprised in large measure of him merely reading various documents into the record, some of which was translated by the applicant's representative (on the request of the arbitrator). Despite several nudges from the arbitrator to get the applicant's representative to widen the scope of Mr Combrink's testimony, virtually nothing further was added. The video footage was then played and Mr

Combrink explained where the cameras were mounted and what one was able to observe from the recording. It appears from Mr Combrink's testimony that there were four cameras, two of which were mounted inside the cabin of the truck, and two on the outside. One of the cameras mounted inside the cabin, was focused on the face of the driver, whilst the other was directed towards the road and provided a view of the traffic and the road. The other two cameras were mounted on the outside of the vehicle, one providing a view to the left rear and one providing a view to the right rear of the truck. He offered very little on what he observed from the footage other than to state that "*there's the stop street. Mr Magagula doesn't stop, and just turned*".

[20] Under cross-examination Mr Combrink's attention was drawn to a communique dated 29 October 2014 that read:

> "It has come under our attention that the R25 Road from Bapsfontein to Bronkhorstspruit is a high risk area, you are not allowed to stop anywhere on this road".

[21] He confirmed that he was the author of the document but denied that it had anything to do with the offence in question. According to him it related to the R25 whereas the misconduct in question related to the R50. It was suggested to him that the entire area was considered by management to be a high-risk area, but he denied this. It was put to him that some employees had not been disciplined for failing to stop in that area and, further, that other employees who had stopped in that area were dismissed.

[22] Mr Combrink's attention was drawn to a memorandum issued to all drivers by management which provided that:

> "6. All traffic offences are for your own account and will be deducted from your salary. If you receive a traffic offence for speeding and it exceeds 90 kilometres per hour, this will be regarded as gross negligence and a written warning will be issued to the guilty person. Therefore, do not speed, it is in your own and the company's interest."

[23] He contended that this was not applicable to the present matter because it was concerned with speeding.

[24] When asked what he understood by negligence, Mr Combrink explained that "*negligence is negligence*".

[25] In his testimony in chief Mr Magagula explained that approximately two weeks before the incident leading to his dismissal he had an altercation with Mr Combrink. The owner of the applicant questioned why Mr Magagula drove a bus with smooth tyres. Mr Magagula explained to the owner that he had reported the smooth tyres to Mr Combrink who stated that there were no further tyres to put on the bus. It is not clear what the owner's response was, but he then telephoned Mr Combrink. After doing so, he advised Mr Magagula that he should return to the depot to replace the tyres. Mr Magagula explained that when he approached Mr Combrink to replace the tyres, Mr Combrink exclaimed: "*Jy, Daniel, piemp my. Ek gaan jou kry.*" (My translation: "You have snitched on me, Daniel. I will get you [for that].")

[26] Mr Magagula explained that the instruction of 29 October 2014 was issued after an attempted hijacking on Mr Shuping. Subsequently Mr Raphael Maduna was dismissed for stopping (in violation of the instruction) in that area.

[27] As regards his failure to stop at the stop street as alleged in the charge sheet, Mr Magagula testified that as he approached the stop sign, he reduced his speed and drove "*very, very slowly*". After executing a left turn, he accelerated and drove off. According to him, several drivers were hijacked in the Bapsfontein area but Shuping was apparently the only one who was pursued by potential hijackers.

[28] Mr Magagula testified regarding the alleged procedural irregularities. He stated that he had requested the services of an interpreter but was told by Mr Ackermann that he was wasting the employer's time. He explained that he was not comfortable with Afrikaans but Mr Ackermann pressurised him into

proceeding because, as Mr Ackermann explained, the matter had dragged on for too long. Mr Magagula also testified that he had requested the services of Mr Simon Msweni but because Mr Msweni was unavailable, he was instructed to use the services of Mr Johannes Magolego instead. He claimed that Mr Magolego could confirm that he had requested the services of an interpreter.

[29] Mr Magagula also complained that the chairperson would "*addresses a person as if he is addressing an animal*". Despite undertaking to provide examples of what this meant, he did not appear to be able to explain what he had in mind.

[30] Under cross-examination Mr Magagula explained that although the instruction of 29 October 2014 referred to the R25 it specifically spoke of a high risk "*area*". On his understanding, this went beyond the actual road and included the area surrounding the R25, which included the R50, where the stop sign was located. Mr Magagula provided the arbitrator with a map he had sketched which depicted the R50 and the R25. According to this sketch, it appears that the R50 intersected perpendicularly with the R25 to form a T-Junction with the R25. Thus, on his view, although the two roads were different roads, they were in the same area.

[31] There was some ambivalence on Mr Magagula's part as to whether he had or had not stopped at the stop sign. Initially, he claimed to have stopped, but later testified he had slowed down when he executed the left turn at the stop street. He acknowledged that he was aware that he was required to stop at the stop street and had failed to do so.

[32] Mr Shuping was called to testify about the attempted hijacking on him. He explained that the incident occurred in the vicinity of the R25. To escape the potential hijackers, Mr Shuping travelled straight through a stop sign without stopping. After his experience the applicant issued the 29 October 2014 communique warning drivers not to stop along that road. It is difficult to follow Mr Shuping's evidence in places, but it appears that according to him the stop

street where Mr Magagula failed to stop was located on the R50 approximately 500 metres from the point at which it intersects with the R25. Mr Shuping explained that Mr Maduna was also dismissed for failing to stop along the R25.

[33] In cross-examination, it was suggested to Mr Shuping that the instruction given to drivers not to stop along the R25 did not mean that they could ignore stop streets or robots. Mr Shuping claimed that on his understanding the instruction meant that they were not to stop at stop streets. It was then suggested that on his understanding there would be chaos and accidents on the road. He did not know whether this was correct.

[34] When Mr Magagula closed his case, the applicant applied for leave to re-open its case to rebut what its representative referred to as new evidence that the applicant had not had an opportunity to deal with. The applicant's representative did not indicate how many witnesses he intended to call or who they were, but the intended witness was to rebut the new evidence raised by Mr Magagula that Mr Combrink had threatened to get even with him for informing on him. The applicant's representative stated that he wanted the witness to clarify the dispute relating to the instruction regarding the R25 and whether it covered also the R50 and also to "*explain [to] the commissioner how the [applicant] controls its vehicles and I want him to tell you how many incidents of not stopping has been reported since this notice went out*". The new witness would also testify about the reasons for Mr Maduna's dismissal.

[35] In an *ex tempore* ruling the arbitrator dismissed the application. He found that Mr Magagula's representative had indicated at the outset that both procedure and substance were in dispute. In so far as the procedure was concerned, said the arbitrator, it was explained on behalf of Mr Magaugla that he would challenge the fact that he had been denied access to video footage and the services of an interpreter. Insofar as the substance was concerned, Mr Magagula's representative indicated that Mr Magagula had acted on instructions, that the sanction was too harsh and that there was no consistency.

[36] It was then agreed that closing argument would be by way of written submissions.

The arbitration award

[37] The arbitrator found that the applicant had failed to prove that the dismissal of Mr Magagula was substantively fair and ordered the applicant to reinstate Mr Magagula

> "to the position he held prior to his dismissal with the same terms and conditions that prevailed prior to his dismissal. The aforementioned reinstatement must be preceded by payment for loss of earning[s] from the date of dismissal to the date of reinstatement being 01 November 2019 calculated as follows: R12,000.00 per month x 27 months equals R324,000.00 (three hundred and twenty four thousand rand only). The aforementioned amount must be paid on or before 25 October 2019".

[38] In coming to his conclusion, the arbitrator noted that there were only two stop streets or signs on the Delmas Road in Bapsfontein:

> "[The] R25 Road crosses Delmas Road from south to north towards Bronkhorstspruit. This is the same stop street where the applicant [third respondent] did not stop; and this is the very same stretch of road where the drivers were ordered not to stop because it was a high risk area."

[39] Noting that the instruction not to stop along the R25 was given by Mr Combrink who then, he said, subsequently "*charges a driver for stopping on the very road he instructed them not to stop*", in his view is alarming. He then reasoned:

> "I am inclined to believe the applicant [third respondent] when he says his dismissal was not about stopping or not stopping at the stop street; but it had more to do with the incident involving tyres. I cannot find any other reason why drivers can be told not to stop; and when they comply with the instruction then they are dismissed. The reason for the dismissal is clearly not failing to stop at the stop sign. This charge was just a smokescreen to dismiss the applicant [third respondent] for the underlying reason which could not stand as a charge at the disciplinary enquiry."

[40] The arbitrator considered this to be an abuse of power which inflicted "*untold suffering to the drivers and their families*" as a result of which Mr Magagula had been out of work for two years "*without any valid reason*". He considered it unfair for Mr Combrink, having been reprimanded by the owner, to then take it out on the drivers.

The grounds of review

[41] The applicant challenged several aspects of the award. In a nutshell, they are these:

41.1 The arbitrator came to the wrong factual conclusions. The communique of 29 October 2014 referred to the R25; whereas the charge against Mr Magagula related to his failure to stop along the R50. In any event, the instruction contained in that communique did not mean that drivers were not required to stop at all at stop streets.

41.2 He should have allowed the applicant to reopen its case because the version advanced by Mr Magagula had not been put to the applicant's witnesses when they testified.

41.3 The arbitrator "*favoured*" Mr Magagula's case *"for no apparent reasons"* and thereby displayed bias which prevented a fair hearing of the matter. This included, for instance, the arbitrator's view that the alleged failure on the part of Mr Magagula to stop along the R50 was merely a ruse and that the true reason for his dismissal was Mr Combrink's vindictiveness for the altercation they had two weeks before he failed to stop.

41.4 The arbitrator "*failed to investigate and or to apply his mind to the cause of the delays*" in finalising the arbitration. "*Had he done so, he would have concluded that the delays*" were caused solely by Mr Magagula and his representatives. In failing to have regard to this, the arbitrator had effectively punished the applicant for the conduct of Mr Magagula and his representatives.

41.5 The evidence of Mr Shuping regarding the reasons for Mr Maduna's dismissal was hearsay.

[42] According to the written submissions of the applicant, its case "*in a nutshell is that the Award is irrational and unreasonable and that another Commissioner would have not have come to the same findings*".

[43] In argument before me, Mr *Coetzee*, who represented the applicant in these proceedings, stated that if I were to come to the conclusion that the award stands to be reviewed and set aside, I should preferably substitute the decision of the arbitrator.

The law relating to reviews

[44] The applicant contends that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings. This is a ground of review contemplated in section 145(2)(a)(ii) of the Labour Relations Act[1] (LRA).

[45] The concept of a gross irregularity committed in the conduct of the proceedings is one that has its origins in certain colonial statutes.[2] After the establishment of the Union it was adopted as a ground for the review of inferior courts[3] and of awards issued by arbitrators in private arbitrations.[4]

[46] The meaning assigned to that term and the circumstances in which a court will interfere with an award under those statutes is different from the approach adopted by this Court in the context of the review of awards under section 145(2)(a)(ii) of the LRA. The difference in meaning and application reflects the nature of the function performed by a private arbitrator as opposed to that performed by a statutorily-imposed arbitrator.[5] Different considerations arise. I do not, however, deem it necessary to go into these differences. The present matter does not call for it.

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[1] No. 66 of 1995, as amended.
[2] For a discussion on this see *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), at 292F – 293B
[3] Section 24(1)(c) of the Supreme Court Act 59 of 1959 which has now been repealed and replaced with s. 22(1)(c) of the Superior Courts Act 10 of 2013
[4] Section 33(1)(b) of the Arbitration Act 42 of 1965
[5] *SA Police Service v Erasmus & another* (2018) 39 ILJ 460 (LC)

[47] In *Herholdt v Nedbank Ltd.*[6] the Supreme Court of Appeal clearly outlined the nature of the test in so far as it applied to reviews under the LRA:

'[10] The height of the bar set by the provisions of s 145(2)(a) of the LRA is apparent from considering the approach to reviews of arbitral awards under the corresponding provisions of the Arbitration Act 42 of 1965. The general principle is that a 'gross irregularity' concerns the conduct of the proceedings rather than the merits of the decision. A qualification to that principle is that a 'gross irregularity' is committed where decision-makers misconceive the whole nature of the enquiry and as a result misconceive their mandate or their duties in conducting the enquiry. Where the arbitrator's mandate is conferred by statute, then, subject to any limitations imposed by the statute, he exercises exclusive jurisdiction over questions of fact and law.

[11] Since the inception of the CCMA various courts have sought to construe those provisions to provide a more generous standard of review, that is, one more easily satisfied. That culminated in this court, in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration*, holding that PAJA applied to CCMA arbitrations and had, by necessary implication, extended the grounds of review in respect of their awards. This meant that a reviewing court could, in addition to the requirements under s 145(2)(a) of the LRA, review the award for reasonableness. It would do so by examining the 'substantive merits' of the award, not to decide whether the decision was correct, but to determine whether the award was rationally related to the reasons given by the arbitrator. Once it was found that the award was appreciably or significantly infected with bad reasons it fell to be set aside irrespective of whether it could otherwise be sustained on the material in the record.

[12] That decision was taken on appeal to the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* and overruled in two respects. First it was held that, although a CCMA award involved administrative action, it did not fall within PAJA. Second the court enunciated an unreasonableness test that differed from the test adopted by this court, namely, whether the award was one that a reasonable decision-maker could not reach. That test involves the reviewing court examining the

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[6] *Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae)* 2013 (6) SA 224 (SCA)

merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.

[13] The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the *Sidumo* test. And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that . . . awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. 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.

[14] After *Sidumo* the position in regard to reviews of CCMA arbitration awards should have been clear. Reviews could be brought on the unreasonableness test laid down by the Constitutional Court and the specific grounds set out in ss 145(2)(a) and (b) of the LRA. The latter had not been extinguished by the Constitutional Court but were to be 'suffused' with the constitutional standard of reasonableness. What this meant simply is that a 'gross irregularity in the conduct of the arbitration proceedings', as envisaged by s 145(2)(a)(ii) of the LRA, was not confined to a situation where the arbitrator misconceives the nature of the enquiry, but extended to those instances where the result was unreasonable in the sense explained in that case. Beyond that there was no reason to think that their meaning had been significantly altered

provided they were viewed in the light of the constitutional guarantee of fair labour practices.'

[48] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[7], Waglay JP stated the test as follows:

'[13] The right to review an arbitration award on process related grounds has been a topic of recent discussion and debate. 2 It has been regarded as a different species of review to that postulated in Sidumo. Sidumo requires the reviewing court to ask the question: is the decision made by the arbitrator one that a reasonable decision maker could not reach on the available material? 3 This has been interpreted by some to suggest that the Sidumo test deals only with the result or outcome of the arbitration proceedings, and that it remains open to review an award on process related grounds.

[14] Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s 145 of the LRA but that the constitutional standard of reasonableness is 'suffused' in the application of s 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.

[15] A 'process related review' suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by

[7] (2014) 35 ILJ 943 (LAC)

the arbitrator to take material facts into account, or by taking into account facts that are irrelevant, and the like. The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s 145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process related review.

[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

[17] The fact that an arbitrator committed a process related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of

the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries.

[20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or consideration of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health & another NO v New Clicks SA (Pty) Ltd & others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork.

[22] Based on the above, what is clear in this matter is that the arbitrator properly allowed each of the parties to state their case and lead their evidence but he misconceived the nature of the enquiry, which was to

> determine the fairness of a dismissal for misconduct. He concluded that the third respondent's dismissal was premised on poor performance and not misconduct. Poor work performance and misconduct are by definition two distinct and diverse concepts.'

Consideration of the arbitration award

[49] I have several difficulties with the approach adopted by the arbitrator. In the first instance, it is not at all clear to me from the evidence that the stop street at which Mr Shuping failed to stop was the very same stop sign at which Mr Magagula had failed to stop. My understanding of the evidence of both Mr Shuping and Mr Magagula was that they considered it to be in the same *vicinity*, but not necessarily the same stop street.

[50] In any event, I do not think that the instruction that was provided by management can be understood to mean that a driver was not permitted to stop *at all*, including at stop streets and at traffic lights. If such an instruction had indeed been given, it would undoubtedly have been unlawful and there would have been no obligation to comply with it. In my view, the instruction was intended to mean that they were not to stop along this road for periods that would increase the risk of being hijacked. This meant that they were not allowed to stop at petrol stations, to pick up or drop off passengers or to bring the vehicle to a halt so that the risk of a hijacking was increased.

[51] Of course, there is a reasonable possibility that the drivers may honestly have understood the instruction in this manner and that this was not pure opportunism as suggested by the applicant. In a country such as South Africa, where one is dealing with a host of different people with diverse cultures, upbringings, socio-economic circumstances, educational levels and so forth, one must always entertain the possibility that the perceptions, processes of reasoning and beliefs of other people may be vastly different to one's own or

others from one's own background. As stated by the Constitutional Court in *SARFU*[8] in an admittedly different context:

> 'A further and closely related danger is the implicit assumption, in deferring to the trier of fact's findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life experience differs fundamentally from that of the trier of fact.'

[52] The arbitrator's finding that the charge preferred against Mr Magagula and his subsequent dismissal was merely a ruse by a vindictive Mr Combrink is also problematic. As the applicant complains, this version was not put to Mr Combrink and he accordingly had no opportunity to respond to it. In *SARFU* the Court noted:

> '[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.
>
> [62] The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.
>
> [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is

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[8] *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), at par. 79

to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where "a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box."

[65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case....'

[53] As noted in *Small v. Smith*[9]:

> 'It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.
> Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct.'

[54] It must also be borne in mind that the applicant had applied for what it referred to as leave to reopen its case to deal with this new evidence. There are established principles in the High Court[10] and the Magistrates' Court[11] regarding such applications. In *Mkwanazi*, *supra*, Holmes JA explained:

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[9] *Small v Smith* 1954 (3) SA 434 (SWA), at 438 E – G
[10] *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A), at 616 B – 617 D; *Oosthuizen v. Stanley* 1938 AD 322
[11] Rule 29(11)

'The considerations which usually fall to be weighed, in an application by a plaintiff under Rule 28 (11), include the following:

(i) The reason why the evidence was not led timeously.

(ii) The degree of materiality of the evidence.

(iii) The possibility that it may have been shaped to relieve the pinch of the shoe.

(iv) The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than to put the parties to the expense of proceedings *de novo*.

(v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still in medias res as it were.

(vi) The healing balm of an appropriate order as to costs.

(vii) The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and opening the indeterminate way to litigation de novo in all its tedious amplitude.

(viii) The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client.'

[55] The principles laid down in those courts are all informed by the fact that pleadings are exchanged before matters proceed to trial. As such, each party should be aware of what issues are in dispute and what evidence the other intends or is likely to lead.[12]

[56] In arbitration proceedings before the CCMA and bargaining councils, there are generally no pleadings filed. It is thus necessary for parties to give a reliable indication of what their case is so that the other party can adduce evidence properly and without undue interruptions and delay. This may be done by holding a pre-arbitration conference and agreeing upon a minute or by providing an opening statement. Generally, in dismissal disputes, because the *onus* to prove the fairness of the dismissal is upon the employer, the employer party will testify first, followed by the employee party.

[57] If, after the employer has already presented and closed its case, the employee in presenting his or her own case relies upon facts or issues not previously alluded to and with which the employer has not dealt with, the arbitrator must in fairness allow the employer an opportunity to do so. No question arises of the employer seeking leave to reopen its case. Instead, the employer was never called upon to meet such a case in the first place and must be considered not to have closed its case. It follows that no formal application need be made and, upon satisfying himself that new evidence has been led with which the employer has not had an opportunity to deal, the arbitrator should allow the employer to deal with such new evidence without further ado. The arbitrator has no discretion and the employer is certainly not called upon to show that the arbitrator should have regard to the factors referred to by Holmes JA in *Mkwanazi*, *supra*, in exercising that discretion.

[58] *Nkomati Joint Venture v Commission for Conciliation, Mediation & Arbitration & others*[13] provides a useful illustration of the above. In that case the employee was dismissed after pleading guilty in an internal disciplinary hearing. In unfair

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[12] *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA), at 620 C – D; *Annex Distribution (Pty) Ltd and Others v Bank of Baroda* 2018 (1) SA 562 (GP), at 578F
[13] (2019) 40 ILJ 819 (LAC)

dismissal proceedings before the CCMA the employer testified first during which it led limited evidence relating to the fairness of the sanction. When testifying, the employee denied that he was guilty of the charges and presented his case on this basis. The employee ultimately closed his case without any application from the employer to reopen its case. In a unanimous judgment Murphy AJA held:

> '[21] ... Once that happened, the appellant needed to lead evidence on the merits of the charges. Yet the commissioner found that Smith had placed the merits of the three charges in dispute and that the dismissal was consequently substantively unfair because the appellant had failed during the arbitration proceedings to prove that Smith was guilty of these charges. She arrived at this conclusion without advising the appellant that it needed to consider reopening its case in order to lead evidence on the merits of the three charges. Sefularo's cross-examination of Smith indisputably indicated that he mistakenly believed that he did not have to deal with the merits of the three charges. It was at this stage that in fairness the commissioner should have applied a helping hand and told Sefularo that the appellant was entitled to reopen its case. The failure to do that constituted a gross irregularity in the conduct of the arbitration proceedings, which resulted in an unreasonable outcome rendering the arbitration award reviewable in terms of s 145(2)(b)(ii) of the LRA.'

[59] Both parties were unrepresented in *Nkomati*, which is why the '*helping hand*' needed to be applied. What is, however, clear from the above passage is that no question arose of the employer having to apply for leave to reopen its case to lead further evidence; it was there for the asking.

[60] That having been said, I am of the view that the appropriate course for the arbitrator to take on the facts of this case was to have no regard to such evidence rather than to take it into account but refuse the applicant the opportunity to deal with it. This was grossly unfair and I have little doubt that it was this apparently incongruent approach that inspired the applicant's view that the arbitrator was biased. I do not, however, consider that this was sufficient

evidence of bias. The arbitrator was wrong, but his error was motivated by his view that he was dealing with an application to reopen the case, not bias.

[61] If the evidence which Mr Magagula sought to introduce was weightier and did not seek merely to attribute an improper motive to Mr Combrink, I may have come to a different conclusion. On the facts of this case, however, I consider that it was inappropriate to allow such evidence without it having been properly put to Mr Combrink.

[62] In any event, I am of the view that there was a more obvious approach to this matter and one which the arbitrator seems to have had in mind.

[63] It was clear on Mr Magagula's own version that he failed to stop at the stop street, as he was obliged to in terms of the rules governing motorists who travelled on the road. The applicant's case was that Mr Magagula's failure to stop at a stop sign amounted to gross negligence and that his conduct had rendered a continued employment relationship intolerable. As stated at the outset of this judgment, the question is whether this is fair.

[64] Negligence is a failure to comply with the standard care that would be exercised by a reasonable person in the circumstances.[14] The test is objective in the sense that one must compare the conduct of the employee against the hypothetical reasonable employee. The test also incorporates an element of subjectivity in the sense that one has regard to a reasonable person in the position of the employee. Grogan suggests that in applying this subjective element, one must consider the conduct of a reasonable employee with the same skills and experience as the employee who has been charged. I have little difficulty with this as a general proposition. But that should not be overstated. Where an employee is employed on the understanding (express or implied) that he or she must measure up to a certain standard, it can hardly lie in the employee's mouth to complain that the standard was too high. The answer to such a complaint is that the employee should not have accepted the

[14] John Grogan, *Dismissal* (2002), p. 122

offer of employment in the first place. Whatever the case may be, I do not think these considerations arise in the present case. In my respectful view, the employer has failed to prove negligence.

[65] Our courts have repeatedly observed that the failure to comply with Road Traffic Regulations, does not necessarily mean that a motorist is therefore negligent.[15]

[66] In *Rawles v Barnard*, *supra*, Davis JA, after finding that the defendant had travelled at a speed of 40 miles per hour in an area where the speed limit was 30 miles per hour, noted:

> 'This pace is not necessarily negligent at a place where there is no traffic even though it is in breach of the Motor Ordinance .... In my opinion it depends entirely on the circumstances of the particular case; the statutory regulation or ordinance may be a guide to the court in arriving at a conclusion as to whether there has been negligence or not in a particular case.'

[67] This is entirely in keeping with common sense. Since the enquiry is whether the employee failed to show that standard of care which a reasonable employee in his or her circumstances, would have, the existence of a statutory provision designed to regulate such conduct may be a guide to determining whether the employee has deviated from the standard of a reasonable employee.

[68] Mr *Coetzee* impressed upon me that in considering the conduct of Mr Magagula I should have regard to the conduct of an employee with a specialised driver's licence and not merely an ordinary driver. I have little difficulty with this but the fact remains that no evidence was led by the applicant to show what was necessarily expected of a professional driver with a special licence who was driving a 40,000-litre petrol tank. Other than to suggest that he ought to have stopped at the stop street, the applicant led no evidence of the standard he was required to meet.

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[15] *Rawles v Barnard* 1936 CPD 74; *Bellstedt v South African Railways and Harbours* 1936 CPD 399; *Steenkamp v Steyn* 1944 AD 536; *Hodgson v Hauptfleisch* 1947 (2) SA 98 (C); *Sander Company Ltd v South African Railways and Harbours* 1948 (1) SA 230 (T); *Knoetze v Rondalia Versekeringsmaatskappy van SA Beperk* 1979 (1) SA 812 (A)

[69] On the evidence that was presented it seems that Mr Magagula when approaching the stop street slowed down to a sufficiently safe speed to execute the left-turn manoeuvre in a manner that was safe having regard to the condition of the road and other motorists on the road. In my view, the employer presented insufficient evidence to suggest that the failure to stop at the stop street constituted negligence, much less that it constituted gross negligence.

[70] Furthermore, as previously noted the applicant had issued a memorandum in which it noted that speeding in excess of 90 kilometres per hour "*will be regarded as gross negligence*" and that a driver who was issued with a ticket by the traffic authorities for such offence would be given a written warning. Unlike the case of failure to stop at a stop street (which is not expressly dealt with in the Disciplinary Code), this memorandum does demonstrate the standard the applicant demands of drivers and what it regards as gross negligence. What is more, it lays down a sanction for such gross negligence, viz. a written warning. Each case should obviously be decided upon its own facts. However, if travelling at an excessive speed is regarded as gross negligence warranting a written warning, I fail to see how (all else being equal) a failure to stop at a stop street could attract a greater sanction. I must, of course, not be understood to state that the failure to stop at a stop street would in all circumstances be less serious than exceeding a speed limit.

[71] Given the facts of the case and the fact that Mr Magagula had (or had not been shown not to have) conducted a proper observation before proceeding through the stop street at a safe speed and in a safe manner, it seems difficult to understand on what basis it was considered appropriate to charge him at all. It is probably for this reason that the arbitrator found the evidence of the prior altercation an attractive explanation. As I have already observed, it was not appropriate or fair for him to have done so. It is sufficient to observe that he was not guilty of the charges and that his dismissal was substantively unfair.

[72] On the question of the appropriate relief, the arbitrator came to the conclusion that reinstatement coupled with full back pay was appropriate. If the dismissal was substantively unfair, then reinstatement is appropriate unless any of the

considerations contained in section 193 (2) of the LRA is present. Mr Magagula sought reinstatement and none of the other circumstances is present. The applicant does not challenge reinstatement. The applicant's challenge is directed at the amount of compensation awarded. It points to the fact that the arbitrator failed to have regard to the cause of the delay and questions why it should have to pay for this.

[73] On the facts presented before me, it seems that the dispute had initially been withdrawn on 17 November 2017. On 3 October 2018, he applied for the reinstatement of the matter. There was some suggestion that the removal of the matter had not been on his instructions. On 6 March 2019, the commissioner charged with considering the application reinstated the matter.

[74] Section 194(1) of the LRA provides:

> "(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal."

[75] In these circumstances, it may well be that full back pay was not just and equitable. One would, at the very least, have expected the arbitrator to explain why he considered it just and equitable to order the applicant to pay full compensation where a substantial portion of the delay was not attributable to the applicant. The arbitrator does not, however, appear to have been alive to this issue.

[76] The applicant states in its founding affidavit that the arbitrator had "*failed to investigate and/or to apply his mind to the cause of delays to finalise the arbitration*". Nowhere does it suggest that this issue was argued before him.

Instead, the suggestion, as I understand it, is that he ought of his own accord, to have enquired into the cause of the delay. As has already been noted, a commissioner must, in appropriate circumstances, provide a "*helping hand*". I do think the present is such a case. Quite apart from the fact that the applicant was represented by an employer's organisation, I do not think that the delay is so obviously excessive that it can be said that he ought to have enquired about its cause. In any event, if he had made enquiries and had been given the reasons for the delay, the arbitrator would still have retained a discretion. It is not a foregone conclusion that he should have excluded the portion of compensation for the period when the matter was withdrawn. I am not persuaded that the award of compensation is one that a reasonable commissioner could not have arrived at.

[77] In all the circumstances, the application falls to be dismissed. Further, I can see no reason to award costs in this matter.

En passant

[78] There is a further, unfortunate matter, to which I should refer. It will be recalled that in his opening address Mr Magagula's representative, contended that Mr Ackermann, the chairperson of the disciplinary enquiry, was biased. This issue was not raised in the answering affidavit in the present proceedings and I accordingly do not make a final finding on this issue. Until now, what I have deliberately refrained from mentioning is that Mr Ackermann also represented the applicant at the arbitration proceedings. This was undoubtedly a most injudicious thing to do and obviously raised the spectre of bias.

[79] Mr Coetzee argued that there was no reason to doubt Mr Ackermann's impartiality at the disciplinary enquiry and his subsequent appearance for the applicant, whilst perhaps unethical, cannot provide proof of bias at the relevant time. I am not persuaded by this contention but since I do not intend making a final finding, do not reject it.

[80] Whatever his state of mind may have been at the disciplinary enquiry, Mr Ackermann's attitude at the arbitration left much to be desired. When the procedural fairness of the disciplinary enquiry was challenged, he submitted himself for cross-examination. The record shows that he was belligerent and impertinent towards the arbitrator, both as a witness and as a representative. As a witness, when questioned on a matter that had not been raised before him as chairperson, he objected strenuously to the question. The employee's representative was, of course, entitled to cross-examine him on issues that had not been raised at the disciplinary enquiry. He disagreed and demanded that the arbitrator make a ruling.

> "APPLICANT REPRESENTATIVE: Now, let's go to page, let's go to page 22.
> COMMISSIONER: Of what?
> APPLICANT REPRESENTATIVE: Of the applicant bundle. Now, the last paragraph. Can you read this last paragraph for the record?
> MR. ACKERMAN: Commissioner, I need to just put to the record that this is the first time that I have seen this. This was not submitted to me during the hearing.
> COMMISSIONER: Yes.
> MR ACKERMAN: I also did not, in my evidence in chief, make use or mention this. My question to you, is, is it fair for me going to answer questions on something that I have now been confronted with for the first time?
> COMMISSIONER: If you don't feel comfortable answering the question, it's fine – he may not ask you.
> MR ACKERMAN: No, I want you to make a ruling please, sir. Is it fair …(intervened)
> COMMISSIONER: Oh, no, it is not for me to dictate.
> MR ACKERMAN: No, I am not asking you to dictate. I am just asking … (intervened)
> COMMISSIONER: As the commissioner, I don't dictate to people to answer questions they don't want to answer. I can't do that.
> MR ACKERMAN: Commissioner, can I then ask you, do you agree with me that I did not give evidence in regard to the last paragraph on 22?
> COMMISSIONER: If that is what you are telling me, it is your evidence, then … (intervened)
> MR ACKERMAN: Commissioner, then my next question is – are you going to take it into consideration should I agree to answer questions on this?

> COMMISSIONER: I am going to consider everything that has taken place here.
> MR ACKERMAN: Including this?
> COMMISSIONER: Including that. If you answer, the answer will be taken into consideration. Why shouldn't I not take it into consideration?
> MR ACKERMAN: Because I was … I did not … Let me ask you this way. Will you allow me to cross-examine the applicant on, on, on issues that he did not give evidence on?
> COMMISSIONER: If he says I don't know anything about that, it's his evidence. Then it will have to … (intervened)
> MR ACKERMAN: Commissioner, my question is very simple. Are you going to allow me to cross-examine the applicant on issues that he did not give evidence on?
> COMMISSIONER: Why should I stop him?
> MR ACKERMAN: Thank you very much. Continue. You want me to read this into the record."

[81] Mr Magagula's representative expressed concern about Mr Ackermann's attitude as a witness. This led to a further exchange between Mr Ackerman, as the witness, with Mr Magagula's legal representative. The latter wailed that he was under cross-examination and was required to answer his questions. Mr Ackerman did not accept this. He insisted that as a witness he had certain rights and required that the arbitrator come to his aid. He demanded of the arbitrator:

> "You agree, I have rights? I am asking you. do you agree? Commissioner, do you agree I have rights?"

[82] When Mr Magagula's representative objected to a question posed by Mr Ackermann, without waiting for the arbitrator's ruling, he asserted "no, you can't".[16]

[83] When Mr Magagula's representative observed that the charge sheet itself did not refer to the R50, he responded *"Well, I've got a surprise for you. The R50*

[16] See Transcript at p. 153, ll. 6 to 7

is the road to Delmas ..." and later *"there is only one road and that's the R50, for your information".*

[84] At the conclusion of the employee's case, Mr Ackermann applied for leave to reopen his case. The arbitrator pointed out that it was not permissible for him to "*just say I want to call the witness*" but that he had to comply with the rules and make a formal application to re-open the applicant's case. I have already mentioned that the arbitrator was wrong in adopting this attitude. Instead of enquiring as to the nature of the application, Mr Ackermann's response was: *"Oh, so I must ... okay, so I must guess".*

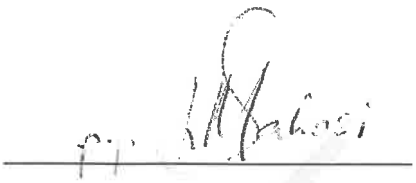
[85] When Mr Magagula's representative tried to cross-examine Mr Combrink on the authenticity of the recordings, what he considered to be gaps in the recordings and whether Mr Combrink was qualified to speak on the video recordings, Mr Ackerman repeatedly interrupted the question. Eventually, in desperation, the representative pleaded "*Commissioner, allow me to cross-examine I am worried about my learned friend his conduct is really ... (intervened)".* When the representative suggested that the video footage was capable of being "*cut and paste*" he objected that there was "*no evidence that this footage has been cut or paste. I don't know where he gets that information*". As it so happens, I do think that there was sufficient information presented to demonstrate that there was tampering or potential tampering with the recording, but that is not relevant to the question of whether Mr Magagula was entitled to challenge the authenticity. He was.

[86] Against this backdrop, there certainly appears to be sufficient evidence to make a finding that there was a perception of bias. Nevertheless, I do not make any final findings on this issue other than to note that his behaviour left much to be desired.

[87] In the premises the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.



G.I. Hulley

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Dirk Coetsee
Instructed by:	Dirk Coetsee Attorneys
For the respondents:	
Instructed by:	