IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR243/05

In the matter between:

SOUTHERN SUN HOTEL INTERESTS (PTY) LTD **Applicant**

and

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

MOLETSANE, R, *N.O.* **Second respondent**

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION **Third respondent**

MOKOENA, E **Fourth respondent**

PERSONS LISTED IN ANNEXURE 'A' TO FOUNDING AFFIDAVIT **Fifth and further respondents**

REASONS FOR JUDGMENT

VAN NIEKERK J

Introduction

[1] On 23 April 2009, I made an order reviewing and setting an arbitration award made by the second respondent, to whom I shall refer as "the commissioner", with no order as to costs. I further ordered that the

commissioner's award be substituted by a ruling to the effect that the dismissal of the applicants in the arbitration proceedings was substantively and procedurally fair. I stated then that I would provide reasons for the order. These are my reasons.

[2] The applicant applied in terms of section 145 of the Labour Relations Act to review and set aside an arbitration award issued by the second respondent ('the commissioner'). The application was opposed by the third respondent ('the union') on behalf of the fifth and further respondents, but it was not opposed by the fourth respondent.

[3] The applicant's heads of argument were drafted by Adv. AT Myburgh (Adv. AIS Redding SC appeared for the applicant at the hearing of the application). I am indebted to Adv. Myburgh for his comprehensive heads, on which I have drawn liberally in the preparation of this judgment.

[4] The fourth, fifth and further respondents (there being 19 in total) and to whom I shall refer as 'the employees', were all employed at the Johannesburg International Airport Holiday Inn. Eleven of them were attached to the hotel's food and beverage department, and the remaining four held clerical positions. After having experienced problems with costs of sales in the department and further to having exhausted all conventional means at resolving the issue, the hotel installed video cameras at the hotel in the guest bar, the kitchen, the service bar and the storeroom. The footage was monitored for approximately six weeks in the months of June and July 2003. In mid-July 2003, 36 employees were charged with the unauthorised consumption of company beverages and some with an additional charge of consuming alcohol on duty. Thirty-two individual disciplinary enquiries were convened, after three employees resigned and another absconded in reaction to the charges. Of these 32 employees, two were found not guilty, one (Kele) given a final warning, and the remaining 29 dismissed. The dismissals were effected on different dates during July and August 2003.

[5] Of the 29 employees who were dismissed, 19 of them (the individual respondents in these proceedings) challenged the fairness of their dismissal before the CCMA in arbitration proceedings presided over by the commissioner. At the arbitration, it was common cause that all of the employees were guilty as charged, save for Madimlane and Tema (who contested their guilt), and that but for the company allegedly having acted inconsistently in not dismissing *inter alia* One Peter, Nyembe and Kele, the sanction of dismissal was fair and appropriate. A number of challenges to the procedural fairness of the employees' dismissal were also raised.

[6] The company called two witnesses at the arbitration: the first was Lonie, the IR director of Tsogo Sun Holdings, and the second Carstens, the erstwhile food and beverage manager at the hotel. Four of the employees then gave evidence: they were Nkunzi; Tema; Madimlane; and the fourth respondent, Mokoena. In his award, the commissioner rejected the employees' procedural challenges and found that all of them were guilty as charged. In effect, the commissioner accepted all the company's evidence in relation to the employees' guilt, based as it was on video footages and which revealed that of the 19 employees, seven of them consumed alcohol (in varying amounts, some together with mixers) and thus faced two charges (unauthorised consumption and drinking alcohol on duty); five of them consumed more than one non-alcoholic beverage; and seven of them each consumed one K-way (i.e. soda stream cool drink).

The arbitration award

[7] At the conclusion of the arbitration proceedings, the commissioner handed down an award in which he found that the dismissal of the employees was procedurally fair, but substantively unfair. The sole basis on which he made the finding of substantive unfairness was that

of inconsistent conduct by the company in the application of discipline. In his summary of the law on inconsistency, the commissioner recorded that the law was controversial, but that he would "attempt to reconcile different decisions in order to come with a sober approach that is applicable in to the facts in casu." After referring to the Labour Appeal Court's decision in *SA Commercial Catering & Allied Workers Union v Irvin & Johnson Ltd* (1999) 20 *ILJ* 2302 (LAC), the commissioner recorded that "some doubt" about the correctness of the approach adopted in that matter had been expressed by the Labour Appeal Court in *Cape Town City Council v Mashito & others* (2000) 21 *ILJ* 1957 (LAC). After applying what he considered to be the law to the facts before him (this was done in a single paragraph), the commissioner found that the employees had established inconsistency in both a historical and a contemporaneous sense. The basis for this conclusion was the following:

> *"Inconsistency has been established. I am also of the view that the inconsistency was unfair given that:*
>
> - *Singleton was representing the employer and was not honest when issuing a written final warning in respect of Kele.*
> - *There was no good reason not to dismiss Nyembe and one Peter.*
> - *Lonie testified that consumption of alcohol and non-alcoholic beverages is treated the same.*
> - *Other things being equal, it is unfair to dismiss an employee for an offence which the employer has habitually or frequently condoned in the past or to dismiss only some of a number of employees guilty of the same infraction…"*

[8] Turning next to the question of sanction, the commissioner found that the hotel had failed to apply the sanction of dismissal consistently in that it had failed previously to dismiss Peter, Nyembe and Kele for

similar misconduct and that on this basis, and only on this basis, the employees' dismissal was substantively unfair. The commissioner awarded each of the employees' compensation equivalent to 11 months' remuneration, denying them the reinstatement that they sought because of them having given '*dishonest evidence*' and having '*showed no remorse*'.

[9] In these proceedings, the applicant attacks the commissioner's finding that the employees' dismissal was substantively unfair. The essential grounds of review are that the commissioner committed a gross irregularity (and / or acted unreasonably) in failing to apply his mind to a host of materially relevant considerations that arise from the evidence, and that he made material errors of law.

Relevant legal principles

[10] The legal principles applicable to consistency in the exercise of discipline are set out in Item 7 (b) (iii) of the Code of Good Practice: Dismissal establishes as a guideline for testing the fairness of a dismissal for misconduct whether '*the rule or standard has been consistently applied by the employer*'. This is often referred to as the 'parity principle', a basic tenet of fairness that requires like cases to be treated alike.[1] The courts have distinguished two forms of inconsistency – historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between two or more employees who commit the same misconduct.[2] A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a

[1] See Brassey "The Dismissal of Strikers" (1990) 11 *ILJ* 213 at 229.
[2] See Van Niekerk et al *Law@work* (LexisNexis 2008) at p. 244.

comparator (see, for example, *Gcwensha v CCMA & others* [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See *Shoprite Checkers (Pty) Ltd v CCMA & others* [2001] 7 BLLR 840 (LC), at para 3.) Similarity of circumstance is the inevitably most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of *inter alia* differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.[3]

[11] Further, the Labour Appeal Court has held that employees cannot profit from an employer's manifestly wrong decision in the name of inconsistency. In *SACCAWU & others v Irvin & Johnson Ltd* [1999] 8 BLLR 741 (LAC), Conradie JA held:

> "*Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious,*

[3] *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 545H-I; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at para 20; *NUM & another v Amcoal Colliery t/a Arnot Colliery & another* [2000] 8 BLLR 869 (LAC) at para 6; *Cape Town City Council v Masitho & others* (2000) 21 ILJ 1957 (LAC) at para 13.

> *or induced by improper motives or, worse, by a discriminating management policy…. Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries*."[4]

[12] In *Cape Town City Council v Masitho & others* (2000) 21 *ILJ* 1957 (LAC), Nugent JA held as follows with reference to *Irvin & Johnson*:

> "*While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency…, in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future"*.[5]

This passage (which was relied upon by the commissioner in his award as having cast doubt on the correctness of *Irvin & Johnson*), deals with what an employer must do to protect itself in the future against a claim of historical inconsistency arising from a wrong decision in the past. It is evident from the above principles that there is no confusion in the jurisprudence as it relates to the consistency requirement, nor is there any conflict between decisions of the Labour Appeal Court.

[13] I turn now to the test to be applied by a reviewing court in applications for review. In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, "the reasonableness standard should now suffuse s 145 of the LRA."[6] The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as this: "Is the decision reached by the commissioner one that a reasonable

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[4] At para 29.

[5] At para 14.

[6] At paragraph [106] of the judgment.

decision-maker could not reach?" [7] This formulation, derived from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 (CA), is not particularly helpful. As Prof Cora Hoexter points out, not only does the *Wednesbury* formulation offer no real clues as to the content or meaning of reasonableness, it contains a circular logic - it merely links the reasonableness of the action to the reasonableness of the actor.[8] Prof Hoexter also expresses the concern that, depending on how the test is interpreted, it sets such a low standard for decision-making that it is worthless except as a ground of last resort. These concerns aside, the *Sidumo* formulation also leaves unclear the manner in which reasonableness "infuses" s 145 and, in particular, the nature and extent of its impact on process rather than outcome.

[14] It might be inferred from the *Sidumo* line of reasoning that in an application for review brought under s 145, process-related conduct by a commissioner is not relevant, and that the reviewing court should concern itself only with the record of the arbitration proceeding under review and its result. I do not understand the *Sidumo* judgment to have this consequence. Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceeding was achieved, and a right to intervene if the commissioner's process-related conduct is found wanting. Of course, reasonableness is not irrelevant to this enquiry - the reasonableness requirement is relevant to both process and outcome. Prior to *Sidumo*, in *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as* amici curiae) 2006 (2) SA 311 (CC), Ngcobo J made the point in the following way:

> *"There is obviously an overlap between the ground of review based on failure to take into consideration a relevant factor and one based on the unreasonableness of the decision. A*

[7] At para [110].
[8] Hoexter *Administrative Law in South Africa* (Juta & Co) 2007 at p. 311.

consideration of the factors that a decision-maker is bound to take into account is essential to a reasonable decision. If a decision maker fails to take into account a factor that he or she is bound to take into consideration, the resulting decision can hardly be said to be that of a reasonable decision-maker"

[15] In his judgment in *Sidumo*, Ngcobo J reaffirmed the role of reasonableness in relation to conduct (as opposed to result) in these terms:

> "*It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing … the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145 (2) (a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings*'.[9]

The LAC recently cited this passage with approval.[10] As Davis JA put it:

> "*When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected or where there was … a full opportunity for an examination of all aspects of the case, then there is no gross irregularity"* .[11]

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[9] At para 268.

[10] *Ellerine Holdings Ltd v CCMA & others* (2008) 29 *ILJ* 2899 (LAC).

[11] At p 13. In another recent judgment by the LAC post-*Sidumo*, *Maepe v CCMA & others* [2008] 8 BLLR 723 (LAC) at para 11, the court also confirmed that the failure to have regard to materially relevant factors constitutes a reviewable irregularity.

[16] Since *Sidumo*, the Constitutional Court has again had occasion to consider the role of commissioners and their process-related obligations when conducting arbitrations. In *CUSA v Tao Ying Metal Industries* & others (2008) 29 *ILJ* 2461 (CC), O'Regan J held:

> *"It is clear, as Ngcobo J holds, that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice*.[12]

[17] In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.

[18] With this background, I turn now to consider the challenge to the commissioner's award.

The inconsistency challenge involving 'Peter'

[19] The pre-arbitration minute records that the employees intended to raise an inconsistency challenge *vis-à-vis* '*Peter, whose surname is unknown to the* [employees]*, but who used to work at the* [hotel's] *banqueting department*'. In his evidence-in-chief, Lonie testified that he was aware of this inconsistency challenge, but not of the details.

[12] At para 134.

Despite the commissioner having warned the employees' representatives to put the employees' inconsistency challenges to Lonie under cross-examination, they failed to do so in relation to Peter. In his evidence-in-chief, Carstens would appear to have stated that he was unaware of any incident involving Peter. Under cross-examination, Carstens was referred to a document where it is recorded that it was submitted at Mokoena's internal appeal enquiry that '*recently … Peter was found helping himself and having a sandwich* [and] *he was charged and made to pay for the sandwich*'. In response, Carstens stated that while this issue had been raised on appeal, the company had done nothing to rebut it because it was made in the form of a submission and not given in evidence. Under re-examination, by which time it appears to have come to light that Nkunzi (a cashier) alleged that Carstens had instructed her to charge Peter for the sandwich, Carstens denied his involvement, stated that he did not know who Peter was, and confirmed that, despite being requested to do so on the first day of the arbitration, the union had still not provided Peter's surname. In her evidence-in-chief, Nkunzi appears to have stated that after Peter was caught eating a sandwich, Carstens had asked her to charge Peter and bring him (Carstens) the receipt to prove that she had done so. Under cross-examination, Nkunzi demonstrated herself as an unreliable witness. Despite it being common cause throughout the proceedings up to that point that only two employees (Madimlane and Tema) denied unauthorised consumption, Nkunzi denied guilt (contending that she had been '*tasting*'), then admitted guilt (after having been afforded an opportunity to consult with her representative during cross-examination), only to change her version and then change back again. When it was pointed out to her that the video footage revealed that she had consumed four glasses of K-way cool drink in the space of 41 minutes on 3 July 2003 (from 13h59 to 14h40), she contended that she had been consuming drinks returned by guests (and no longer tasting or testing drinks). This was disingenuous because she was captured on video actually pouring herself the cool drinks from the K-way machine. Indeed, so glaring was Nkunzi's

mendacity that the commissioner intervened at this point to remind her that she had taken the oath to tell the truth. Nkunzi could not provide Peter's surname, and appeared to accept that she had mentioned nothing about Peter at her disciplinary enquiry, with this being borne out by the agreed minutes. For the first time under cross-examination, she contended that Peter had told her of his interaction with Carstens (which was not put to Carstens under cross-examination). It was put to her that Carstens denied her version regarding Peter, but there was no audible response. Asked what she had meant when she stated at her disciplinary enquiry that she had made a mistake and that she was sorry. Nkunzi fell back on the disingenuous contention that she had been '*testing*' the cool drinks. She did not know whether she was sorry, but changed her evidence after having been prompted to do so by Tshabalala, an employee representative who sat in on the proceedings, which the commissioner took him to task about.

[20] The commissioner found as follows:

> "*I am of the view that notwithstanding Nkunzi's lack of credibility when she lied by stating that she had been tasting the cool drinks (i.e. not admitting guilt after having instructed SACCAWU to admit guilt), Nkunzi was able to establish that Peter was not charged let alone … given any form of penalty after he was found in possession of company's items*."

In so finding, the commissioner clearly failed to have regard to the evidence before him, particularly in that:

- Nkunzi's version regarding her actual interaction with Peter, which was presumably accepted by the commissioner, was not put to Carstens under cross-

examination. This constitutes a self-standing ground of review.[13]

- To resolve the factual controversy between Carstens and Nkunzi, the commissioner had to embark upon a balanced assessment of the credibility, reliability and probabilities associated with their respective versions. But the commissioner did nothing of the sort – and instead simply plumbed for Nkunzi's version. In the result, the award is bereft of any reason whatsoever for why Nkunzi '*was able to establish'* her version on this score. Notwithstanding the fact that she '*lied'* about her guilt, which ought to have cast doubt over the balance of her evidence[14], Nkunzi's evidence was patently unreliable, with the commissioner having failed to apply his mind to any of the other material failings in her evidence. There was simply no way that her evidence could be accepted over that of Carstens (whose credibility and reliability was not impeached).

- The commissioner also failed to apply his mind to the fact that Nkunzi had apparently not mentioned anything about Peter at her disciplinary enquiry, a fact that was materially relevant and pointed towards the improbability of Nkunzi's version.

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[13] To rely on evidence in the absence of it having been put to the opposing party's witnesses under cross-examination constitutes a reviewable defect. See in this regard: *SA Nylon Printers (Pty) Ltd v Davids* [1998] 2 BLLR 135 (LAC) at 137I-138A; *ABSA Brokers (Pty) Ltd v Moshoana NO & others* [2005] 10 BLLR 939 (LAC) at paras 38 - 42.

[14] If a litigant lies about a particular incident, the court may infer that there is something about it which he or she wishes to hide and this may add an element of suspicion to facts which were previously neutral (*S v Rama* 1966 (2) SA 395 (A)). The commissioner did not even begin to consider the implications of Nkunzi's lies.

The inconsistency challenge involving Nyembe

[21] Nyembe was employed at the Sandton Sun. On 29 April 2003, Nyembe was apprehended while in unauthorised possession of two cans of Sprite and a packet of Pringles. At his disciplinary enquiry on 7 May 2003, Nyembe pleaded guilty as charged, with the initiator thereupon having called for his dismissal. Nyembe testified (at his disciplinary enquiry) that he suffers from schizophrenia and was being treated at Tara Hospital. On the day in question, he had forgotten his lunch box at home, started hearing voices in his head, and had taken the items because he could not take his medication on an empty stomach. Regarding whether he had thought at the time that he was committing theft, he stated:

> "*No, at that moment well, I wasn't aware because I couldn't think properly but I discovered afterwards that it was wrong."*

[22] On the resumption of the disciplinary enquiry on 8 May 2003, the chairperson held as follows:

> "*… the offence is very serious and the initiator has quite rightly said regardless of what you take … the fact of the matter is theft is theft. The difference in this case though Steward is that you have admitted guilt. You have shown remorse and you obviously are very responsible in your job and in your position and you do admit to having an illness which I have confirmed with some of the managers.*
>
> *And in the light of that, I am going to give you a final warning, which means that if you do, do this again you could be dismissed*" (own emphasis)."

At his disciplinary enquiry, Nyembe had introduced a letter from Tara Hospital, which reflected that he had been a patient at the hospital since October 1994, that he suffered from chronic schizophrenia '*which is a chronic mental illness and needs treatment for life'*, that his '*prognosis is poor, because the disease shows a deteriorating course over time*', and that he was on mediation. During the cross-examination

of both Lonie and Carstens at the arbitration, it was put to them by Mokoena's attorney that it had not been established at Nyembe's disciplinary enquiry that his schizophrenia was the actual cause of his misconduct. This was, however, not a line pursued by the union.

[23] The union's main line of attack, which was explored with Carstens under cross-examination, was that, because the company had given Nyembe the benefit of a 'medical defence', it ought to have done likewise in relation to Ngwenya, Matsi and Mtshali, as they had also raised such a defence internally. In this regard, during their disciplinary enquiries:

- Ngwenya (who was on a final warning for bringing dagga onto the premises) contended that she had drank two brandy and Cokes to '*soothe her throat*' as she was ill;

- Matsi contended that she had consumed (behind the door in the storeroom) a K-way Fanta because she was a diabetic; and

- Mtshali contended that he had consumed (behind the door in the storeroom out of a milk jug) a K-way Coke because he was a diabetic and did so in the process of taking medication (which does not accord with the video footage).

[24] As Carstens made clear in his evidence, in the first instance, these 'medical defences' were not credible and were rejected, and, secondly, they were, in any event, not comparable to Nyembe's case. That the 'medical defences' of the employees in question were not credible is further borne out by the fact that despite having undertaken – in response to a query from the commissioner – to submit proof that Matsi and Mtshali were in fact diabetics, The union failed to do so at the arbitration. In these circumstances, and as a result of the fact that neither Ngwenya, Matsi nor Mtshali was called to testify, these challenges fizzled out. In argument, the point was made by the company that the challenge in relation to Nyembe related only

Ngwenya, Matsi and Mtshali, with this not having been disputed by the union in reply.

[25] The commissioner found as follows:

> "*It was testified on behalf of the* [company] *that in imposing a final written warning, the chairperson of the enquiry took into account (amongst others) the fact that* [Nyembe] *suffers from "chronic schizophrenia illness and needs treatment for life.*
>
> *However, I am not satisfied about the explanation above. It is clear that there was no medical proof that the stealing by Nyembe was caused by his chronic mental illness. On this reason alone, it shows that the chairperson did not apply his / her mind properly. This has resulted in inconsistent treatment*' (own emphasis)."

[26] In so finding, the commissioner failed to apply his mind to the evidence before him and thus committed a reviewable defect, in that:

- The commissioner completely misconstrued the relevance of Nyembe's illness. As the chairperson's finding reflects, Nyembe's illness was considered to be a factor in mitigation of sanction and not a factor absolving Nyembe of guilt (as found by the commissioner).

- There was, accordingly, no need for '*medical proof* [to be produced] *that the stealing by Nyembe was caused by his chronic mental illness*' before his illness could be considered as a factor in mitigation of sanction, and the commissioner's criticism of the chairperson in this regard is entirely unsustainable. Quite obviously, the chairperson applied her mind to the matter, as demonstrated by the minutes. In the result, the commissioner misdirected himself in failing to attach any weight to Nyembe's '*chronic mental illness*', which was a materially relevant

consideration, and legitimately served to distinguish Nyembe's case from that of the employees (whether at the level of guilt or sanction). The implied finding by the commissioner that Nyembe ought not to have been given the benefit of the fact that he was ill, was inconsistent with the thrust of the case advanced by the union in the cross-examination of Carstens, which was to the effect that the three employees in question ought – like Nyembe – to have been given the benefit of a 'medical defence'.

- The commissioner's conclusion that '*this resulted in inconsistent treatment*' is unsustainable for the reasons mentioned above, and because the commissioner failed to apply his mind to the fact that Nyembe's illness was one of a number of factors in mitigation of sanction considered by the chairperson of his disciplinary enquiry. Consideration was also given to *inter alia* the fact that Nyembe admitted guilt and showed remorse.

- Different to Nyembe, of the 19 employees, 12 pleaded not guilty at their disciplinary enquiries and virtually all of them presented disingenuous defences internally, which served to distinguish their cases from that of Nyembe.

- Remarkably, while it was the employees' lack of remorse and dishonest evidence that caused the commissioner to deprive all the employees of reinstatement – which serves to demonstrate the importance thereof[15] – he failed to apply his mind thereto in the context of evaluating the inconsistency challenge involving Nyembe. Notwithstanding the relevance of Nyembe's illness,

[15] This is in accordance with the jurisprudence of the LAC to the effect that dishonest evidence and a lack of remorse render the continuation of the employment relationship intolerable. See in this regard: *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 ILJ 1051 (LAC) at para 25; *Foschini Group (Pty) Ltd v Fynn, Pather NO & CCMA* (unreported LAC judgment, case no. DA1/04, dated 31/01/2006, per Davis JA) at para 21.

these two factors alone were sufficient to distinguish Nyembe's case from that of the employees.

The inconsistency challenge involving Kele

[27] Given the unique nature of its business and the implications of dishonesty by employees, the company adopts a zero tolerance approach to dishonesty. In this regard, Lonie testified that some 80 employees had been dismissed by the company for dishonesty over the past 24 months, and that, during the course of the company's relationship with the union dating back some 20 years, several thousands of employees had been dismissed on this basis. The union also collaborated with the company with a view to combating dishonesty. As mentioned in above, of the 29 employees (including the 19 employees herein and three assistant managers) found guilty herein, only one – Kele – was not dismissed. Regarding the specifics of her case, on 15 July 2003, Kele was charged with unauthorised consumption and called to attend a disciplinary enquiry. Kele's disciplinary enquiry was presided over by Jeremy Singleton, the general manager of the Holiday Inn Garden Court, Sandton and sat on 1 August 2003, 5 August 2003 and 6 August 2003.

[28] On 6 August 2003, having found her guilty as charged, Singleton issued Kele with a final written warning valid for a year. This sanction was imposed despite Carstens (who was the initiator at all the disciplinary enquiries) having called for Kele's dismissal, as he did in all cases where employees were found guilty as charged. In this regard, the minutes reflect Carstens as having submitted to Singleton that:

> "… *I would also like to add that where employees are found guilty of consuming company property, the sanction that is applied is summary dismissal*."

When Carstens and Lonie came to learn of the sanction imposed by Singleton, they were, respectively, '*shocked*' and '*most alarmed*'. As Lonie put it, when compared with company policy and practice, the sanction was nothing short of an '*aberration*'. In the light of this, Lonie commissioned an investigation into the matter. In the process, Kele was suspended on 8 August 2003, and Singleton was interviewed and then counselled about his decision. The conclusion reached was that, although Singleton's decision was manifestly wrong, it had not been taken *mala fide* or dishonestly, such as may have given rise to the company being able to set aside the finding and call Kele to a second disciplinary enquiry without falling foul of the double jeopardy rule. It was repeatedly stated by Lonie that there was no evidence of Singleton having acted *mala fide (*which is borne out by the letters and memorandum addressed below). There was no challenge to this under cross-examination.

[29] In the result, four things occurred – each of which demonstrated the company's *bona fides* and the legitimacy of the problem that it faced. Firstly, an attempt was made to buy Kele out of her employment, but she refused offers of six and 12 months' remuneration, respectively. Secondly, on 25 August 2003, a letter was addressed to Kele recording *inter alia* as follows:

> "*… As you are aware you were found guilty of the offence. However, contrary to the well-established company policy and practice, dismissal was not determined to be an appropriate sanction and you were issued with a final written warning. As you are also aware a number of other employees found guilty of acts of dishonesty have been dismissed.*
>
> *Whilst in some circumstances there may be individual reasons relating to such cases which result in a lesser penalty, the company nevertheless regards the outcome of your case, in the particular circumstances, as an unjustified departure from its well established*

> *policies and practices. The sanction is, accordingly, inconsistent with the policies, practices and values of the company. The chairman of your disciplinary hearing has been counselled accordingly.*
>
> *This letter serves to record the findings of the company's investigation and to clarify to you that any act of misconduct involving an element of dishonesty is regarded by the company in a most serious light and all employees may anticipate that they would ordinarily be dismissed, should they be guilty of dishonest conduct.*
>
> *The company recognises that, in the absence of any deliberate manipulation of the disciplinary process, you are entitled to believe that the case against you has been concluded. We accordingly wish to confirm this to be the case, and you are advised to report for work tomorrow"* (own emphasis).

Thirdly, a memorandum along the same lines as the above was issued to the workforce at the hotel. The memorandum provoked no reaction from the union – with it seemingly being prepared to accept the reaffirmation of the company's zero tolerance approach towards dishonesty, and recording that Kele's case was an unjustified departure from this policy / practice. Fourthly, on 27 August 2003, a letter was addressed to Singleton – which was considered to be a warning and was placed on his file - recording *inter alia* as follows:

> "*… Contrary to the well-established company policy and practice, dismissal was not determined to be an appropriate sanction and you issued Ms Kele with a final written warning. As you are also aware a number of employees found guilty of acts of similar dishonesty have been dismissed.*
>
> *Whilst in some circumstances there may be individual reasons relating to such cases, which result in a lesser penalty, the company nevertheless regards the outcome of this case, in the particular circumstances, as an unjustified departure from its well established policies and practices. The sanction is, accordingly, inconsistent with the policies, practices and values of the company. The explanations provided by you for the departure from established policy and practice*

are not acceptable and do not constitute a valid basis upon which to distinguish this case from any others involving dishonesty.

This letter serves to record the findings of the company's investigation and to clarify to you that any act of misconduct involving an element of dishonesty is regarded by the company in a most serious light and all employees may anticipate that they would ordinarily be dismissed, should they be guilty of dishonest conduct.

You are accordingly advised to take careful note of the findings of the company's investigation. Please be aware that any departure from the company policies and / or practices would only be permissible where relevant factors exist which would justify such a departure or distinguish the circumstances as being different from the norm.

The company recognises that, in the absence of any deliberate manipulation of the disciplinary process, employees are entitled to believe that the case against them has been concluded once a sanction has been determined by the chairman of the proceedings. We have, accordingly, confirmed this to be the case with the employee concerned who has resumed her normal duties.

We trust that you will be mindful of the importance of consistency in the address of discipline and adherence to company policy and practices into the future" (own emphasis).

[30] The commissioner found as follows:

"*It is common cause that* [Kele] *was charged with the* [employees]*, but was however not dismissed but given a written final warning and is currently employed.*

Lonie and Carstens for the [company] *testified that they were shocked by the outcome.*

Lonie testified that the chairperson of the enquiry (Singleton) deviated from the policy and as a result was given a warning letter dated 27 August 2003.

> *In my view, the fact that Singleton was given a warning letter itself shows that Singleton was not honest in coming to the decision of a final warning instead of dismissal. It was not the* [company's case] *that Singleton was honest. If he was honest there was no need for him to be given a warning. You do not give an honest person a warning. As stated above, Lonie and Carstens were shocked by the outcome*."

[31] In so finding, the commissioner failed to have regard to the evidence before him and thus committed a reviewable defect, particularly in that:

- It was never in issue at the arbitration that Singleton had acted dishonestly in not dismissing Kele, with no such contention having been raised in evidence or in argument by either party. The commissioner's finding that Singleton acted dishonestly is thus unsupported by any evidence, and amounts to the commissioner having given the employees the benefit of an unarticulated defence (i.e. a defence / case not advanced by them at the arbitration).[16]

- The commissioner's reasoning that the mere fact that Singleton was issued with the letter in question demonstrated that he must have been considered dishonest is patently unreasonable, because it is devoid of any evidential basis.

- The commissioner's finding that it '*was not the* [company's case] *that Singleton was honest*' is equally in conflict with the unchallenged evidence of Lonie and all the documentation traversed above, and thus devoid of any evidential basis whatsoever.

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[16] Which constitutes, in itself, a reviewable defect. See in this regard: *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* (2007) 28 ILJ 1107 (LC) at para 20; *Rustenburg Platinum Mines v CCMA & others* (2007) 28 ILJ 1114 (LC) at paras 28 – 29.

- Contrary to what appears to have been found by the commissioner, the fact that both Lonie and Carstens were '*shocked*' by Singleton's decision did not imply that they considered him dishonest. Indeed, the investigation, and all the written recordings relating thereto, reflect that the company came to the contrary conclusion. Again, this finding by the commissioner is devoid of any evidential basis. (See para 20 above.)

- The commissioner totally misconstrued the company's case. It was as a consequence of the fact that the company came to the conclusion (after a careful investigation) that Singleton was not *mala fide* in his decision, that the company was prevented from re-opening the case against Kele. If it had come to the opposite conclusion, as the commissioner appears to have found, then it would, in terms of the prevailing jurisprudence[17], have been permitted to set aside Singleton's decision and recharge Kele, which would have resolved the issue.

The commissioner's finding that Singleton was 'not honest' gives rise to the inescapable inference that the commissioner hopelessly failed to apply his mind to the evidence before him. Indeed, the only inference to be drawn from the award is that the finding of dishonesty was contrived with a view to overcoming the decision of the LAC in *Irvin & Johnson* to the effect that, in the absence of *mala fides* or dishonesty by their employer, employees should not be allowed to profit from a wrong decision. This in itself is an act of gross misconduct, warranting the review and setting aside of the entire award.

[32] For these reasons, all of which establish gross misconduct on the part of the commissioner, the commissioner's award was reviewed and set aside. It was not necessary in these circumstances for me to consider the argument that to the extent that the commissioner found in his award that *Masitho* changed the law, as determined in *Irvin & Johnson*,

[17] Gorgan *Dismissal Discrimination & Unfair Labour Practices* (1st ed, 2005) at 296.

he committed a reviewable defect in the form of a material error of law. I take the matter no further than to repeat what I have said above, i.e. that the two judgments are entirely reconcilable, and *Masitho* did not overturn or supersede *Irvin & Johnson*. To the extent that the commissioner thought otherwise, and to the extent that he applied legal principles at odds with the existing jurisprudence, he misconceived the nature of the enquiry that he was required to conduct.

[33] The company submitted that the matter should be finally determined, as opposed to remitting it to the CCMA for a fresh hearing. The LAC and this court have held that they should correct a decision rather than refer it back to the CCMA for a hearing *de novo* in the following circumstances: (i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; (ii) where a further delay would cause unjustified prejudice to the parties; (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or (iv) where the court is in as good a position as the CCMA to make the decision itself. [18] In this matter, the factors listed under (i), (ii) and (iv) were present.

[34] For these reasons, I ordered that the commissioner's award be reviewed and set aside.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of Hearing: 15 April 2009
Date of Judgment: 24 July 2009

[18] See: *Department of Justice v CCMA & others* (2004) 25 ILJ 248 (LAC) at 304, para 48; *Rustenburg Platinum Mines Ltd v CCMA & others* (2007) 28 ILJ 417 (LC) at para 12.)

Appearances

For the Applicant: Adv A I S Redding (SC)
Instructed by: Deneys Reitz Attorneys

For the Respondent: Mr. P Ngoato (Union Official)