
SOUTH AFRICA / JUDGMENT

Cummins Emissions Solutions (Pty) Ltd v Matji and Others (JR32/13) [2014] ZALCJHB 297 (5 August 2014) [2014] ZALCJHB 297

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

JR32/13

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR32/13

CUMMINS EMISSIONS SOLUTIONS (PTY) LTD Applicant

and

COMMISSIONER KHOMOTJO DANIEL MATJI First

Respondent

MOTOR INDUSTRY BARGAINING COUNCIL Second

Respondent

NDCAWU obo PRINCE DLAMINI Third

Respondent

Heard: 22 May 2014

Delivered: 5 August 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicant approached the Court to seek an order that the arbitration award issued by the First Respondent (Arbitrator) on 27 November 2012 under the auspices of the Second Respondent (MIBCO) under case number MIPT12785 be reviewed and set aside. In the award, the Arbitrator had found that the dismissal of the Third Respondent (Dlamini) was procedurally fair but however substantively unfair. The Arbitrator had ordered that Dlamini be reinstated with retrospective effect and be paid an amount of R65 460.00 as back-pay.
- [2] The Applicant also sought an order that the award be substituted with one that the dismissal of Dlamini was substantively fair. In the alternative, an order was sought to review and set aside the arbitration award, and remitting the matter back to MIBCO for a fresh hearing before another Arbitrator. The application is opposed.

Background

to the application:

- [3] Dlamini was employed with effect from 2 June 2010. At the time of his dismissal on 8 November 2011, he held the position of machine operator and was also a shop steward.
- [4] Dlamini was charged with and dismissed for misconduct related to dishonesty in that he had added a beneficiary (Megan Blose) to his wholly-sponsored company medical aid package. It was further alleged that in doing so, Dlamini had not followed company procedures in order to conceal the addition of a beneficiary to his employer.

The arbitration proceedings:

- [5] The Applicant led the evidence of three witnesses in substantiation of the allegations against Dlamini. Their evidence is summarised as follows:

5.1 The Applicant subsidized its employees by contributing 100% towards the medical aid scheme held with Discovery Health. Employees have the responsibility of ensuring that the employer is kept informed of any changes to their Medical Aid scheme and their membership status in respect of dependants and monthly contributions. This information comes to the attention of the Applicant when employees complete forms whenever there are changes to be made to their medical aid benefits.

5.2 Employees were further familiarised with the Medical Aid scheme during induction, including on the procedures to notify the employer of changes. All Medical Aid scheme forms are kept at the Applicant's HR Department, and upon completion, should be returned to that department for final authorisation prior to being sent to Discovery Health for processing.

5.3 Dlamini had approached the HR Department in September 2011 and asked for forms in order to add a dependant. He was instructed to complete the Discovery Health forms and to return them to the HR department so that they could be sent to Discovery Health on his behalf. Dlamini upon receiving the forms from the HR Administrator, Brian Makhura, had asked about the procedure to add his child as a dependant and whether he could take the form home as his child was in Durban. He

was allowed to take the form with him.

5.4 Dlamini had completed the forms by adding Blose as a dependant. Instead of returning the forms back to the HR Department, he had faxed them directly to Discovery Health. Discovery Health had processed his forms even though the Applicant had not authorised it and issued two medical aid cards in that regard. The Applicant only became aware of what Dlamini had done when it received medical aid bills and the new cards issued.

5.5 The HR Manager, Lungo Mkhize confronted Blose on 29 September 2011 about being added as a dependant to Dlamini's medical aid benefits. Blose happened to be on an internship programme at the Applicant. Blose's response according to Mkhize was that she was not related to anyone at the Applicant's employ, and that Dlamini had asked her if she wanted to be a beneficiary on his Medical Aid scheme. Blose had also informed Mkhize that she was not related to Dlamini either as a girlfriend, partner or spouse, and that Dlamini had visited her on one or two occasions. Mkhize had also confronted Dlamini about the matter and could not get a clear response from him.

5.6. Mkhize had testified that by adding Blose as a dependant on his Medical Aid Scheme on the basis that she was his fiancé, Dlamini had misrepresented the facts, and that he was charged for not following company procedures in regards to his amendments to medical aid benefits, and by faxing the form directly to Discovery Health when the procedure to be followed was that it should have been returned to the HR Department for authorisation.

[6] Dlamini's case as summarised by the Arbitrator and as also gleaned from the pleadings was as follows:

6.1 He was not aware of the procedures regarding the submission of Medical Aid forms. He had testified that Mkhize had at some stage given him forms and advised him on how to complete them. Personnel from Discovery Health had also held talks with them about how the medical aid scheme worked.

6.2 He had further testified that Blose was his partner, and had known her before she joined the Applicant. Their relationship was strengthened after she had joined the Applicant and they were not staying together. He had agreed to include her in his Medical Aid scheme as a dependant after she was admitted to hospital.

6.3 Blose could have told Mkhize that she did not have a relationship with him out of fear of losing her job, but she had retracted what she had told Mkhize and stated her true version in writing, and confirmed their relationship. Blose had also confirmed at the internal disciplinary enquiry that she was in a relationship with him.

6.4 Having obtained the Medical Aid forms from the HR Department, Dlamini had completed them and faxed them directly to Discovery Health. He was not aware that he had to return them to the HR Department. He had merely followed the procedures as stipulated in the form, which indicated that they should be faxed or e-mailed to Discovery Health.

6.5 He had added Blose as a dependant due to the reason that it was the first time that he had to complete such a form, and having read the form, it only made provision for spouse or partner. He understood the procedure to be that he had to send the form back to Discovery Health as nowhere in his contract of employment was it stated that he should return the forms to the HR Department after completing them.

6.6 Dlamini's witness, Kenneth Sekwatlakwatla, testified during the arbitration process that employees were told to complete the forms and return them to Discovery Health as it was entirely at their discretion as to whether to return them to HR or sent them directly to Discovery Health. There was no rule in the company with regards to how these forms should be completed and processed.

The arbitration award:

[7] Having found that the dismissal of Dlamini was procedurally fair, the Arbitrator proceeded to deal with the substantive fairness of the dismissal in the following manner:

7.1 The Applicant had relied entirely on the evidence of Mkhize who had interviewed Blose, and that Mkhize's testimony was based on what Blose had told her.

7.2 Mkhize did not have first hand knowledge of what she had testified on regarding Blose's relationship with Dlamini, and her testimony in that regard was hearsay. Since the Applicant had not called Blose to testify and to confirm Mkhize's version of events, and further since Blose had also written a statement retracting what she had told Mkhize, the latter's evidence was hearsay, and therefore unreliable. To this end, the Arbitrator had declined to admit the evidence that Dlamini had misrepresented facts when he added Blose as a partner on his Medical Aid scheme.

7.3 The Arbitrator had further not found any motive why Dlamini would include Blose on his Medical Aid when they had no relationship, and further found his explanation to be plausible that Blose did not tell Mkhize the truth, as she was afraid that she could lose her job if she did.

7.4 The Arbitrator further concluded that Dlamini's evidence, that Blose had testified at the internal disciplinary enquiry, and stood by her statement she had made subsequent to talking to Mkhize that she had lied to Mkhize was unchallenged.

7.5 On the charge of failing to comply with company procedures i.e in that Dlamini had failed to return the Medical Aid forms to the HR Department, the Arbitrator had taken into account Mkhize's evidence that all employees are familiarised with the medical aid procedures during induction. He however held that Mkhize was unable to produce written proof of the procedure that required employees to return the forms to HR Department after they were completed.

7.6 The Arbitrator accepted the evidence of Mkhize and the logic in returning the forms back to HR Department since the Applicant contributed 100% towards employees' Medical Aid benefits. He nevertheless accepted Dlamini's version that there was no procedure in place, and since the application forms stipulated that they should be faxed or e-mailed to Discovery Health, it was not unreasonable for Dlamini to believe that he was doing the correct thing by sending the forms directly to Discovery Health instead of returning them to the HR Department.

7.7 The Arbitrator made reference to clause 4 of Dlamini's contract of employment which provides that:

"The Company does have a Group Medical Aid Scheme. The Company will contribute 100% of the monthly cost of membership of the medical aid scheme (Discovery Health). Approval of your application for membership of the scheme is required in advance from Human Resources

Department prior to the Company commencing with the payment of contributions. It is your responsibility to ensure that the Company

is kept informed of changes to the Medical Aid Scheme and your membership status, especially in terms of dependants and monthly

contribution rates".

7.8 Having regard to the above, the Arbitrator held that the rule was clear that approval of an employee's application for membership was required. He however held that; '....there does not seem to be a directive that it is specific for the addition of dependants except that it is an employee's responsibility to ensure that the company is kept informed of the changes to the medical aid scheme. Why was it not made a requirement like in the case of application for membership that approval will be required in advance from HR department for the addition of dependants? I have no doubt that it would have eliminated the confusion'[1].

7.9 The Arbitrator accepted that it was common cause that the application form was submitted without the approval of the Applicant. He however held that there was nothing that bound the Applicant to the addition (of Blose) without its express approval that it would foot the bill. The Arbitrator lamented the fact that no evidence was given to explain the reason Discovery Health had processed the application form without the Applicant's approval, and that the Applicant would only have been bound if it had completed and signed the form also. To this end, the Arbitrator reached a conclusion that the Applicant failed to discharge the onus of proving that the dismissal of Dlamini was for a fair reason related to misconduct.

The legal framework pertaining to reviews:

[8] The test for review is that as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2]. In accordance with this test, the question before the reviewing Court is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach.

[9] The *Sidumo* test and the approach to be followed by reviewing courts in applying that test was further explained by Cachalia JA in *Herholdt v Nedbank Ltd* as follows[3] :

“That test involves the reviewing court examining the merits of the case ‘in the round’ by determining whether, in the light of the issues 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. ... 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 that a reasonable

decision-maker could reach in the light of the issues and the evidence.”

And,

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the

proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable”[4]

[10] The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA & Others*[5] further explained the *Sidumo* test in the following terms;

“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 s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 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.”

And

“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”[6]

[11] In considering whether or not whether the decision that the arbitrator arrived at is one that falls within a band of decisions to which a reasonable decision-maker could come to on the available material, the Labour Appeal Court in Goldfields[7] proposed practical guidelines which a reviewing court should adopt in assessing whether the result of an award is unreasonable. Having cautioned against adopting a piecemeal approach, the LAC favoured an approach in terms of which the review court must pose the following questions:

“.....

(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

employed 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?[8]

The grounds of review and evaluation:

[12] The Applicant’s contention was that the award was reviewable as it represents a decision to which no reasonable decision maker could have come to having regard to the evidence properly before him; that the Arbitrator committed gross irregularities in the conduct of the arbitration proceedings, which rendered the outcome unreasonable; that the arbitrator committed a reviewable irregularity by failing to take account of all the evidence into account; failed to apply his mind and ignored relevant evidence and thereby came to a conclusion that a reasonable arbitrator could not reach on the evidence before him.

[13] Dlamini’s contentions on the other hand were that there was no ‘misdirection’ on the part of the Arbitrator, and that his decision was one which a reasonable decision maker would have arrived at.

[14] The irregularities complained of as appears from the pleadings and summarised in the written heads of argument are as follows;

- [15] There was no basis for the arbitrator to conclude that the entirety of Mkhize's evidence was inadmissible because it was hearsay and contradicted by Blose's written statement. It was further contended that the Arbitrator accepted Dlamini's version in relation to his relationship with Blose on the basis of Blose's testimony during the disciplinary enquiry and her written statement, and that he had placed high probative value on a written statement, in favour of testimony provided by a witness under oath who gave direct evidence.
- [16] Submissions made on behalf of Dlamini in this regard was that the Arbitrator's finding that Mkhize's evidence amounted to hearsay and therefore rejected it could not be faulted on the basis that the Applicant did not call Blose, and further that there was no agreement on the admission of that evidence. It was contended that it was malicious on the part of the Applicant to proceed with the charges against Dlamini when it knew that Blose had changed her version and told it the truth.
- [17] The Applicant's contentions that the Arbitrator committed a reviewable irregularity insofar as rejecting Mkhize's evidence in its entirety, and relying instead on the evidence of Blose as led in the disciplinary enquiry, and further on her written statement, are sustainable based on the following reasons:

17.1 Section 138 (1) enjoins a Commissioner to conduct arbitration proceedings in a manner that she/he considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with minimum of legal formalities. This proposition was accepted by Dlamini in his written arguments. This further implies that given the nature of such proceedings, where hearsay evidence is tendered, it cannot simply be ignored without looking at its probative value, and also other evidence as a whole.

17.2 It is now settled law that section 3(1) of the Law of Evidence Amendment Act 45 of 1988 is also applicable to arbitration proceedings[9]. The section provides that hearsay evidence 'shall not be admitted as evidence, unless the party against whom such is to be adduced agrees to its admission, the person upon whose credibility the probative value of the evidence depends testifies or

"(c) the court having regard to -

- (i) the nature of the proceedings,
- (ii) the nature of the evidence,
- (iii) the purpose for which the evidence is tendered,
- (iv) the probative value of the evidence,
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends,
- (vi) any prejudice to a party which the admission of such evidence might entail, and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

17.3 In dealing with the admissibility of hearsay evidence within the context of arbitration proceedings, Cele AJ (as he then was) stated the following in *Swiss South Africa (Pty) Ltd v Louw NO and Others*[10];

“Depending on circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA. A further aid to the arbitrator in this regard lies in section 138 of the Act. It provides:

‘The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute

fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.’”[11]

17.4 The above approach had found support in *Sisonke Partnership t/a International Healthcare Distribution v National Bargaining Council for the Chemical Industry and Others*[12] where the Labour Appeal Court held that there is no absolute prohibition against the admission of hearsay evidence by a Commissioner in arbitration proceedings, which are meant to be swift and informal[13].

17.5 In this case, it is my view that the Arbitrator was precipitous in concluding that Mkhize’s evidence was hearsay, and also in discarding it completely. Mkhize’s evidence was to the effect that she had held a discussion with Blose, who had denied having had any relationship with Dlamini. This was direct evidence by a witness relating what Blose had informed her, and there was no basis for the Arbitrator to reject that evidence out of hand.

17.6 Central to Dlamini’s case was that he had added Blose as a dependant as he had a relationship with Blose. It was not for the Applicant to disprove this relationship, and as correctly pointed out on behalf of the Applicant, it is indeed Dlamini who was obliged to call Blose to confirm his version. There are crucial elements of this case that the Arbitrator completely ignored in unreasonably arriving at a conclusion that Dlamini’s version was more plausible, and further in rejecting Mkhize’s version.

17.7 Firstly, it was common cause that Blose when initially confronted by Mkhize, had denied any relationship with Dlamini. If there was indeed a relationship between the two, which was legitimate, nothing prevented Blose from disclosing that relationship to Mkhize, and any suggestion by Dlamini that Blose could have lied due to the reason that she was fearful of losing her job is mere redherring.

17.8 Secondly, in the light of this discussion between Mkhize and Blose being common cause, there was no basis for Mkhize’s testimony to be rejected in regards to that discussion, moreso since Blose had denied the relationship, and since Dlamini also sought to proffer an explanation as to the reason Blose could have lied to Mkhize.

17.9 Thirdly, Blose had testified at the internal disciplinary enquiry and recanted what she had told Mkhize. Blose had however as appears from the arbitration proceedings, not availed herself to testify in those proceedings. It is therefore inexplicable that the Arbitrator would place too much emphasis on the fact that Blose had in the disciplinary enquiry, testified and recanted what she had told Mkhize, and thereafter place reliance on her written statement presented in that disciplinary enquiry, and reject Mkhize's version on that basis. The submissions made on behalf of Dlamini that the statement was not challenged hence it was accepted and relied upon by the Arbitrator loses sight of the fact that it could not obviously be challenged in the absence of its author. The fact that this statement was produced by the Applicant in the arbitration proceedings does not imply that it accepted its veracity or truthfulness. On the contrary, it was produced to cast aspersions on Blose's credibility.

17.10 Blose's written statement and testimony in the disciplinary enquiry for all intents and purposes carried little probative value in the light of the arbitration proceedings being *de novo*. In all material respects, that statement should have been treated as hearsay, and its admission rejected on account of Blose failing to avail herself for the arbitration proceedings. I did not understand the record of proceedings to indicate that there was a reasonable or plausible explanation as to why Blose had not attended those proceedings. The fact that the Applicant had indicated to Dlamini prior to the arbitration proceedings that it would issue a subpoena to compel Blose to attend those proceedings is neither here nor there. In these circumstances, by rejecting Mkhize's testimony, and placing reliance on the evidence led in the internal enquiry and a written statement of a person whose credibility was clearly questionable, the Arbitrator committed a reviewable irregularity.

17.11 Even if the Arbitrator's conclusions that Mkhize's evidence was hearsay were correct, in line with the authorities cited above, it would not have been irregular for the Arbitrator to have relied on that evidence, if the purpose for which such hearsay evidence was tendered was to confirm other evidence. This other evidence pertained to that proffered by the Applicant's other witnesses. The Arbitrator would have been guided by the provisions of section 3 of the Law of Evidence Amendment Act, and to have taken into account the nature of the proceedings and other evidence tendered by witnesses on both sides., including Makhura's testimony to the effect that Dlamini took the forms with him having said that he wanted to add a child as a beneficiary to his Medical Aid Scheme.

17.12 Central to a review application is whether the Arbitrator properly identified the dispute he was required to arbitrate. In this case, Dlamini was charged with gross misconduct related to dishonesty in that he had allegedly misrepresented the facts when he attempted to, or added a beneficiary on his company's sponsored medical aid.

17.13 On the facts, it was common cause that Dlamini had indeed added Blose as a beneficiary to his Medical Aid benefits, when Blose was clearly not a spouse or partner. Dlamini had intended to add Blose as a beneficiary under false pretences, and the question before the Arbitrator was whether in the light of that evidence the dismissal for misconduct was fair.

17.14 The Arbitrator had further placed emphasis on the question whether Dlamini had any motive when adding Blose as a beneficiary. The central question should have been whether the Applicant had discharged the onus placed on it to prove that the misconduct in

question was committed, and where this was the case, to have considered the implications of the misconduct in question.

17.15 The Arbitrator's finding that Dlamini did not misrepresent facts when he added Blose as his partner on his medical aid was clearly unsupported by overwhelming evidence adduced by the Applicant. Makhura, one of the Applicant's witnesses had testified that one of the reasons Dlamini had given for taking the form with him was that his child was in Durban. This evidence was clearly important in that even if Dlamini had disputed Makhura's version, there was still no explanation as to the reason he had taken the forms with him when he could have simply completed them and left them with the HR Department. The Arbitrator gave scant attention to this evidence. As it was correctly pointed on behalf of the Applicant, it was clear that Dlamini had taken the forms with him under the pretence of adding his child, when he in fact knew that he intended to add Blose. By failing to take this evidence into account, the Arbitrator failed to properly evaluate the evidence before him.

17.16 The Arbitrator was persuaded that Dlamini did not misrepresent facts that a relationship between Blose and Dlamini existed. As already pointed out, the Arbitrator had placed reliance on Blose's written statement and her testimony in the disciplinary enquiry. Other than this irregularity, the Arbitrator failed to take into account that Dlamini had alleged that the two had been involved over a period of two years, and yet there was no explanation for having waited two years prior to adding her as a beneficiary. At the same time, it was further Dlamini's testimony that their relationship was no longer as steady as before. Again, as correctly pointed on behalf of the Applicant, the Arbitrator should have realised that the relationship was conjured, and designed purely to add Blose as a beneficiary to Dlamini's medical aid benefits.

[18] Employees' conduct involving dishonesty has received attention in this Court and the Labour Appeal Court in numerous instances. In *Toyota South Africa Motors (Pty) Ltd v Radebe and Others*[14] the LAC held that:

"Although a long period of service of an employee will usually be a mitigating factor where such an employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty."[15]

[19] Furthermore, item 3 (4) of Schedule 8; Code of Good Practice: Dismissal, recognizes gross dishonesty as one of the forms of serious misconduct, and John Grogan[16] explains this form of misconduct as follows:

"Dishonesty" is a generic term embracing all forms of conduct involving deception on the part of employees. In criminal law, a person cannot be convicted of dishonest conduct unless that conduct amounts to a recognized offence. However, in the employment law, a premium is placed

on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. The dishonest conduct of employees need not therefore constitute a criminal offence. "Dishonesty" can consist of any act or omission which entails deceit. This may include withholding information from the employer, or making a false statement or misrepresentation with the intention of deceiving the employer...'

In this case, and on the material before the Arbitrator, it was apparent that Dlamini had acted dishonestly, which conduct had manifested

itself by him supplying false information pertaining to medical aid scheme benefits. He acted deceptively from the moment he took the forms from the Applicant's HR Department, completing them and sending them directly to Discovery Health, and further concocting a relationship with Blose that in fact did not exist. He at all material times intended to deceive the Applicant by misrepresenting that Blose was a legitimate dependant when this was not the case. On its own, this type of misconduct was to be met with a sanction of dismissal, as the premium in the workplace is placed on honesty of employees in their everyday engagement with the employer.

[20] The Applicant had further contended that the Arbitrator had committed a reviewable irregularity in dealing with the evidence pertaining to whether Dlamini was aware of the rules and procedures regarding the submission of the forms. In this regard, it was contended that firstly, the Arbitrator contradicted himself by stating that the evidence of Mkhize and the logic for the submission of the forms to HR made sense since the Applicant contributed 100% towards the employees' medical aid, and that it was reasonable that the Applicant should be informed in order for it to make the necessary adjustments or to budget for the medical bill[17]. Nevertheless, in finding that Dlamini was not aware of the rules and procedures, the Arbitrator had proceeded to state that it could not be assumed that employees were aware or could reasonably be expected to be aware when no effort was made by the Employer to make them aware.

[21] The Arbitrator in this regard failed to take into account the material facts placed before him. Firstly, it was the Applicant's

case that all employees were made aware of the rules and procedures regarding medical aid scheme during induction. Secondly, Dlamini had confirmed that people from Discovery Health gave employees a talk on how the scheme worked. Thirdly, clause 4 of the employment contract which Dlamini appeared to rely on specifically stated that it was the responsibility of the employee to keep the company informed of changes to the Medical aid scheme. In this regard, it is clear that by directly submitting the forms to Discovery health, the Applicant would not have known that a beneficiary had been added, and it therefore made sense that employees had to return the forms to the HR Department so that the employer could be aware of any changes as required by clause 4 of the contract of employment. There was therefore no basis for the Arbitrator to conclude that the Applicant had not made any attempts to make employees aware of the procedures or rules.

[22] The Arbitrator misconstrued the nature of the enquiry in this regard by focussing on the fact that Discovery Health had in any event processed the form. The issue was whether Dlamini had followed the rules and procedures regarding the submission of forms, not the consequences of the submission of those forms. To this end, the decision reached by the Arbitrator that Dlamini's conduct of submitting the forms directly to Discovery Health was not mala fide, or that he could not have known of the procedures and the rules is clearly one that a reasonable decision maker could not have

reached on the material placed before him. In effect, the conduct of Dlamini of by-passing the HR Department and directly submitting the forms to Discovery Health was part of the design to misrepresent the facts about the added beneficiary, with the hope that the Applicant would not discover what he had done.

[23] In the light of the above conclusions, what the Arbitrator then had to determine was the appropriateness of the sanction of dismissal. Conclusions have already been made about the question of dishonest conduct on the part of Dlamini. In this regard, it was pointed out on behalf of the Applicant that Dlamini had time to reflect on his actions and had not shown remorse. Dlamini had instead chosen to compound his misconduct and dishonesty with further serious dishonesty and collusion with Blose and had continued being dishonest during his testimony at arbitration proceedings. It was contended that the Arbitrator in arriving at his conclusions had discarded these factors.

[24] I am in agreement with the submissions as made above. In *Motsamai v Reverite Building Products*[18], the Labour Appeal Court held as follows:

'It is now trite that when an Arbitrator arbitrates a dispute, it is the Arbitrator who decides what is the appropriate sanction having regard to: all the evidence presented to him/her; the company's code of conduct; and of course the nature and seriousness of the misconduct. The fact that the decision is that of the Arbitrator does not mean that it can be made in a vacuum. Like any other decision the decision that the Arbitrator arrives at in respect of the sanction must also be one that is reasonable in all circumstances.'

[25] The Applicant's witnesses during the arbitration proceedings, more particularly Mkhize, testified that the conduct of Mkhize was deserving of the sanction of dismissal. Furthermore, even though it is generally accepted that an employer must lead evidence in regard to the issue surrounding a breakdown of a trust relationship[19], in some instances, from the misconduct complained of and if proven, it can be deduced that a trust relationship can never be sustainable

thereafter. Conradie JA emphasised this point in *De Beers Consolidated Mines v Commission for Conciliation Mediation and Arbitration and Others*[20] by stating the following:

'The commissioner characterised the misconduct as serious. Despite that, she concluded that the relationship of trust between the appellant and the employees had not broken down. Where an employee has committed a serious fraud one might reasonably conclude that the relationship of

trust between him or her and the employer has been destroyed. When the employer then asserts that this has in fact happened, it would be startling to hear a commissioner proclaim that, despite what one might expect and despite what the employer says in fact occurred, the relationship of trust had not been broken down. Of course, a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, but in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended'.

[26] The Constitutional Court in Sidumo[21] further held that the arbitrator must determine whether the dismissal was fair as an impartial adjudicator and that the commissioner's

sense of fairness must prevail and not the employer's view .The Constitutional Court had also indicated that a determination of the fairness of a dismissal requires a consideration of a variety of factors including, the totality of the circumstances of the matter; whether what the employer did was fair; the importance of the rule that the employee breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; the harm caused by the employee's conduct; whether additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee and the long service record of the employee[22].

[27] In this case, the Arbitrator failed to take into account a number of important considerations including, the importance of the rule breached, the impact of the nature of the misconduct, the fact that the nature of Dlamini's conduct was actually gross, the fact that he had showed lack of contrition and instead sought to justify his conduct, the fact that Blose lost her employment as a consequence of Dlamini's conduct, and most importantly, the fact that the nature of the misconduct in question invariably destroyed a trust relationship between Dlamini and the Applicant.

[28] In the light of the above, it is concluded that the Arbitrator failed to properly consider the principal issue before him, failed to evaluate the facts as presented at the hearing and came to a conclusion that is not reasonable, or in the words of Sidumo, arrived at a decision which a reasonable decision-maker could not reasonably have arrived at based on the evidence before him.

[29] With regard to the nature of relief to be granted, I am satisfied that having gone through the material presented before the Court, little purpose would be served by remitting the matter back to the Second Respondent (MIBCO) for a hearing de novo. In regards to the issue of costs, it is my view that considerations of law and fairness militate against a cost order in this case.

Order:

- i. The award issued by the First Respondent on 27 November 2012 under case number MIPT12785, and under the auspices of the Second Respondent is reviewed and set aside. That award is substituted with an order to the effect that:

“The dismissal of the Third Respondent (Prince Dlamini) was substantively fair”

ii. There is no order as to costs.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr. SB Sangoni of Norton Rose Fulbright

For the Third Respondent:

Mr. S Mhlungu of Mhlungu Attorneys

[1] At para 78 of the award

[2] 2008

(2) SA 24 (CC) at para 110

[3] [2013] 11 BLLR 1074 (SCA) at para 12

[4] At para 25

[5] Case number JA 2/2012 at para 14

[6] At para 16

[7] At para 20

[8] At para 20

[9] See *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another* (2000) 21 ILJ 1315 (LAC)

[10] (JR 1173/03) [2005] ZALC 107 (28 November 2005)

[11] At para 43

[12] (JA 51/10) [2013] ZALAC 16 (9 July 2013)

[13] At para 27

[14] [2000] 3 BLLR 243 (LAC), at para 15

[15] Referred to by *Woolworths (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (LAC) [2011] 10 BLLR 963 (LAC) at para 48. See also *Miyambo v CCMA and Others* [2010] 10 BLLR 1017 (LAC) paragraph [16], where the Court held inter alia that: “...the presence of dishonesty tilts the scales to an extent that even the strongest of

mitigating factors, like long service and a clear record of discipline are likely to have minimal impact on the sanction to be imposed...whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse.”

[16] Dismissal, (Juta & Co. Ltd First published 2010, republished 2012) at page 188, also referred to in Department of Home Affairs and Another v Ndlovu and Others (DA11/2012) [2014] ZALAC 11 (27 March 2014)

[17] AT para 76 of the Arbitration Award

[18]

[2011] 2 BLLR (LAC) at para 22

[19] Edcon Ltd v Pillemer NO and Others [2010] 1 BLLR 1 (SCA).

[20] (JA68/99) [2000] ZALAC 10 (3 March 2000) at para 17 of the Majority

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[21] (2007) 28 ILJ 2405 (CC) at para 75

[22] At Para 78 – 79

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