



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D962/12

In the matter between:

VUMELUYISE VINCENT NGCOBO

Applicant

and

MINISTER OF CORRECTIONAL SERVICES

FOR THE REPUBLIC OF SOUTH AFRICA

First Respondent

COMMISSIONER DR R.J.T. MCCANN

Second Respondent

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

Third Respondent

Heard: 8 JULY 2014

Delivered: 7 October 2014

Summary: practice and procedure – arbitration award – review of – serious misconduct - commissioner’s findings upheld – review dismissed.

JUDGEMENT

HARKOO, AJ

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent (“the commissioner”) under case number PSG91-09/10. In the application the applicant also seeks condonation for the late filing of the papers.

[2] The application is opposed by the first respondent.

[3] At the outset of these proceedings, the legal representatives of both the applicant and the first respondents have agreed that this Court shall adjudicate the merits of the review application, taking into consideration all the papers filed herein and make a ruling that will be applicable to both the review of the award and the application for the condonation of the late filing of the papers. I shall therefore deal primarily with the review application.

Background

[4] The applicant was employed by the Department of Correctional Services (“the Department”) since 12 September 1977. Since June 2008 he held the position of a Correctional Officer Grade 1 as a Disposal Clerk in the reception office at

the Servontein Correctional Service Centre. He was under the supervision of one Mr E C Crause.

- [5] During 2008, there were allegations by the Department against the applicant of theft, fraud, corruption or any combination thereof in an amount of R1,174,439.40. The first respondent claimed that the amount had gone missing between the period from about 2002 to about 2007 in the Disposal Section at the Servontein Centre. An investigation was conducted by one Mr G.J.Diedericks of the KwaZulu-Natal Regional Office Inspectorate of the first respondent and his recommendation was that the applicant be charged with the alleged missing monies and/or for such alleged theft, fraud, corruption or any combination thereof.
- [6] They appeared to be some difficulties pertaining to the applicant attending a disciplinary enquiry and the enquiry was ultimately held in his absence, resulting in his dismissal on 27 June 2008. Thereafter the applicant lodged an appeal but did not receive any reply to his appeal from the Department. He then referred an unfair dismissal dispute to the third respondent for conciliation and arbitration. The second respondent, being the commissioner, made the following award:
- [7] It is found that the dismissal of Mr. V.V. Ngcobo, the applicant, by the Department of Correctional Services as the respondent party in this matter was procedurally unfair but substantively fair.
- [8] It is consequently found that a dismissal is the appropriate sanction as the trust relationship has been damaged beyond repair.
- [9] Due to the extent of the substantive unfairness in this matter, no compensation is awarded for the finding of procedural unfairness.'

It is this award that the applicant seeks to review.

The arbitration hearing

- [10] The arbitration hearing commenced on the 27 November 2009 and continued over a period of some 12 days until the 30 July 2012. The applicant was represented by a union official Mr J.S.Dlamini from POPCRU while the Department was represented by advocate S.E.Ndlovu, the Regional Coordinator for Legal Services KZN and Deputy Director for the Department.
- [11] At the arbitration hearing, the Department presented the evidence of Mr Rightwell Stimbiso Mchunu, the chairperson of the disciplinary enquiry. He testified that he was the Head of a Correctional Centre and chaired disciplinary hearings on a regular basis.
- [12] He stated that the applicant presented a number of sick notes asking for postponements, with postponements being granted. He eventually made a ruling that they should proceed with the matter. He stated that the sick notes from doctors were questionable and raised suspicion pertaining to the validity.
- [13] He testified that he informed the applicant to call the doctor as a witness at 13h00 on 24 June 2008, when the matter was scheduled to continue, but the applicant had not done so after five postponements had already been made. By not doing so he was of the view that the applicant had waived his rights to be heard.
- [14] He nonetheless postponed the enquiry once more to the 25 June 2008 to give the applicant another opportunity to attend. The applicant did not attend and he then decided to proceed in the absence of the applicant.
- [15] He stated that on the documentation and testimony submitted to him at the disciplinary hearing, in the absence of the applicant, he found the applicant guilty as charged and imposed a sanction of dismissal.

- [16] He stated further that a sworn statement signed by the applicant on the 30 January 2008 was submitted to him by the Department, being B-1 page 137-138, where the applicant confessed that he was responsible for the loss of State money of R1,157,291.35. In this statement the applicant explained exactly how he manipulated the system and misappropriated the money. This explanation was furthermore confirmed by the evidence of other persons who had done the investigation.
- [17] The second witness for the Department at the arbitration was Mr Enrique Crause. He is employed as a supervisor at the Disposal Office at Servontein Correctional Centre and has been there since 1995. This office is responsible for the prisoner's cash and records. The applicant was the person specifically in charge of the prisoner's cash.
- [18] He stated that a member in charge of a specific work span would have a G313 form, which is completed on a daily basis and submitted to the member in charge of spans, Mr M Mpanza, who would then ensure that all the lists were received and would then give them to the applicant who would in turn capture the information onto the computer system. The applicant would then obtain a G324 form from the system. Such form would have the prisoner's name and the amount that each prisoner earned for that specific month on it, with a grand total for each span list. Thereafter the applicant would submit the G324 form to him and another senior official for checking and signing. The G324 forms would then be combined by the applicant and submitted together with a sundry payment form with a grand total for the gratuity for that specific month to the finance office at Servontein. Mrs Botha at the finance office would then capture the amounts and Head Office would then pay the amount into the prisoners cash account held by ABSA Bank. Mrs Botha would also inform the applicant the date on which the money would be paid into the prisoners cash account.
- [19] He stated further that each section had a B34 register which would contain the number of the inmate and the amount available on his specific G349 cash card

and would also provide the total amount the inmate had purchased for a specific month. After the purchases were done the applicant and his assistant, Mrs Mthembu, would update the G349 cash card, with this mostly being done by Mrs Mthembu and checked by the applicant. The amount paid out to the inmates would be transferred from the prisoners combined cash accounts held at ABSA Bank, by making a withdrawal slip from the prisoners cash account to the Servontein Members Club ("the Club"). The applicant and three or four other people were able to sign such withdrawals, with two signatures by senior officials including him, being required. The cash book would then be updated by the amount that was transferred from the business cash account to the Club as soon as the money was received from Head Office.

- [20] He further stated that the reconciliation of the accounts were done on a weekly basis and also on the last day of the month, mostly by the applicant. The reconciliations were checked by himself or any other senior official. He never experienced any problem with the reconciliation but at that stage they would not have had the bank statement which was received once in every two or three months. The applicant was the person responsible for the safe and kept the safe key in his possession.
- [21] He stated that he became aware of the discrepancies between the G324 forms and the amount claimed from the Head Office only when it was pointed out to him by Mr Diedericks, one of the inspectors for the region who had done an inspection of the prisoners' cash.
- [23] He confirmed that as the supervisor of the Disposal Office he was accountable to check the relevant records, but stated that he had not done so due to the fact that the applicant was an expert in that field and hence he had merely affixed his signature to the documents. He further stated that while he had taken the contents of the safe from the applicant from time to time, he had not taken the safe key which remained in the position of the applicant. He also checked and verified sundry payments for gratuity for the period March 2004 to

October 2007 in an amount of R2,005,398.01 but acknowledged that there had been no documents to the amount and that there had been a difference of R667,337.78 between the sundry payments and the amounts reflected on the G324 forms for the same period. He was also not aware that the Club had not been paid in full on a monthly basis and that there was a shortage of R31,265.00.

- [24] He stated further that it was not possible to pick up on the reconciliation register that there was a discrepancy as the totals corresponded. The applicant was the only person who knew that the amount requested from Head Office was being inflated. This became evident only when Mr Diedericks added up the specific items on the G324 forms.
- [25] The third witness who testified on behalf of the Department was Mrs Rozelle Botha, who stated that she works at the Finance Office in Servontein and has been doing so for the past 16 years, where she does budget processing payments, receipts and petty cash.
- [26] She stated that the sundry payments forms for the period between 2002 and 2007 had come from the Records Office after they were compiled, checked and authorized. She checked the totals together with the supporting documents and then captured them on the system. The applicant brought the documents to her. There ought to be three signatures on the documents; one from the person who had compiled them, one from the person who checked them, and one from the person who authorised the payments. She would check that the subtotals corresponded with the grand totals. After the payments were captured onto the system they would then get a disbursement number and a date from the system. It would normally take four working days for the monies to be transferred into the bank account.
- [27] The fourth witness for the Department was Mr George Diedericks who was employed as the Inspectorate of the Regional Commissioner. He has been

employed in this position for a period of five years. His duties included doing inspections at all correctional centres on various issues including all policies and procedures and the implementation.

- [28] During an inspection at the Disposal Section at Servontein Prison, he found that the amounts requested for prisoners cash under the G324 forms and the sundry payments were much higher than the amount that ought to be requested as per the number of prisoners that had actually worked for payment. He stated that the applicant had not given him an explanation for the discrepancy.
- [29] He reported the discrepancy to Regional Corrections at the Head Office of the Regional Commissioner, whereafter a team was appointed to investigate the discrepancy; he was appointed as part of this investigation team, with Mr I Zulu being the head of this investigation team. From the investigation, it was found that between February 2002 and October 2007, payment amounts on the G324 forms were inflated and an amount in excess of R1-million could not be accounted for. It was found that an amount of R1,190,348.74 was not correctly banked over this period and a further amount of R31,265.00 was not paid to the Club at Servontein Prison for the prisoners purchases.
- [30] He stated that the G324 forms as well as the sundry payment forms were compiled monthly by the applicant. Even when the applicant was not at work, he, the applicant, was brought into the office to complete those documents. A further irregularity that became evident was that over weekends, whilst the paperwork was done with regard to the handing over of the safe keys, the keys remained in the applicant's possession.
- [31] He stated further that the managers of the institution had randomly approved the sundry payments without adding the subtotals on every G324 form and without counting the money. An inflated amount from the sundry payments was captured into the computer system and while the money was paid into the

business bank accounts, the physical money that came in weekly from the prisoner's families was removed and in that way the accounts were manipulated so that the books balanced.

- [32] He testified further that the offenders were not allowed to have cash in their possession, so when a family member provided money for an offender a Z267 form was completed and given to the family member. The cash made available was then taken to the safe and added to the G349 card for the offender to use as purchases at the shop in the institution. That same amount was then entered against the offenders name in the cash book. The Z263 was the receipt book where receipts were given to the offender's family. The applicant was responsible for updating the G349 cards and reconciling them with the cashbook. However, when the investigation started some of the cash books went missing.
- [33] He further testified that the investigation showed that a lot of money was not accounted for. The investigation team was particularly shocked as some of the inspectors involved in the investigation used the services of the applicant in the region to do other investigations for them and to conduct courses on prisoners cash as he, the applicant was regarded as an expert in this field.
- [34] He testified that over the period from February 2002 to October 2007, the inflated amount which disappeared was in the region of R16,000.00 per month, with this being a continuous pattern rather than a once off loss of money. He initially thought that there may have been a system error, but he checked the system and found that there was nothing wrong with the system; it was simply a result of the manipulation. A reconciliation had been done by taking a specific amount and then inflating the sundry request for that specific amount so that the books of account would then balance. During this period from February 2002 to October 2007 in amount of over R1.1 million was physically received from the offender's families with the receipts for that amount but it was found that only just in excess of R5,000.00 was physically banked. The applicant was

responsible for banking the cash. Within two weeks of the fraud had been detected R30,000.00 in cash was deposited, which gave an idea of the amount that was being received. He confirmed that the applicant was responsible for compiling the data and was 100% responsible for the losses. He further confirmed that the applicant had taken for himself, the cash that can come in from the families of the offenders in the prison.

- [35] He further testified that the trust relationship with the applicant had broken down beyond repair and that the Department could no longer trust him.
- [36] The fifth witness for the Department was Mrs. Johanna Duvenage who is currently stationed at the Servontein Correctional Services and has been working at the Club for approximately 20 years. Her responsibilities were to ensure that the correct financial procedures were followed at the Club and that all the administration is done correctly.
- [37] She knew the applicant as a colleague at the Servontein Prison where he worked with offender's purchases and their money. They have an invoice and for every inmate who buys an invoice is made out. At the end of the month, the invoices will be totaled by the applicant and checked against the books of the Club.
- [38] She stated further that the applicant used to go to the bank at the end of the month to draw the money to pay the Club, but he never paid the full amount; consequently every month a balance was carried over. She confirmed that only the applicant had been paying such amounts to the Club. She understood that the applicant was an expert in his field and that he had trained other people in the Department about prisoner's cash; hence she had no reason to believe anything was wrong. She stated further that after the investigation started the shortfall due to the Club was paid.

- [39] The sixth witness for the Department was Mrs Bongekile Mthembu, who works in the Accounts Office where she commenced around the middle of 2007. She worked with the prisoner's cash section in 2007. Most of the work she did with prisoners cash was dealing with the G313 forms concerning payment of prisoners' gratuity and helping them buy at the shop. The supervisor was the applicant. She had worked there for approximately one and a half years.
- [40] She stated that the G313 forms was a list showing how many days the prisoners had worked and what they had earned. She counted the days that they had worked, as reflected on the G313 forms, and passed it on to the applicant who would then enter this information onto the computer. She would then take the G324 forms and enter the respective amounts on the G349 cards for each prisoner. There after the G349 cards were taken to the Club shop so that the prisoners could then buy the items.
- [41] She testified that the applicant compiled the G324 forms every month and would give it to her to sign, which she did without checking; she only checked the totals as she trusted the applicant. She was of the view that this process was normal for her to do. She said that he had not been trained to complete such G324 forms; hence she relied on the applicant to tell her what to do.
- [42] She stated further that sundry payments were compiled by the Finance Officer, Mrs Botha. She had been requested to sign the sundry payment forms by the applicant. The persons responsible for signing such sundry payment forms once it came from Finance was herself, the applicant or Mr Crause, whoever was there on that day.
- [43] With regard to the G324 forms, she stated that the applicant would just bring the G324 forms 20 and ask her to sign it. She would ask him if it was correct and did not think that someone would manipulate the figures. She further stated that she did not know how the system was manipulated.

- [44] The applicant testified that between 2002 and 2008 he was one of six officials working at the Disposal Office at Servontein Correctional Services. The other five were Mr S D Gwala, Mr N Ndlovu, Mrs Mthembu, Mr Mbanza and Mr Crause.
- [45] He confirmed that one of his responsibilities in the Disposal Office was dealing with prisoners cash. He gave a detailed explanation as to how the prisoners cash system works, with some of the money the prisoners obtained coming from work that they had done in the present and the other money coming from cash been provided by relatives. The supervisor responsible for checking and balancing the books on a daily basis was Mr Crause, but when Mr Crause was absent he would then assist. Reconciliations were done every week and then the overall reconciliation was done at the end of a month which was also verified and signed by the Head of the Prison. Mr Crause generally signed in the space provided for the Head of the Prison. Every month the books were then balanced, with a certificate being issued confirming that everything had been properly conducted for that month. That certificate was then kept with the cash book so that they could continue with the finances for the following month.
- [46] He testified that they had moved to a cashless system where the prisoners were no longer allowed to have cash on them. Instead they were given a voucher to go and purchase items from the tuck shop. Such a voucher amounts would then be deducted from the prisoner' G324 card. After calculating the amounts used by the prisoners in conjunction with the person at the Club they had then paid the money to the Club.
- [47] He stated that Mrs Duvenage had being lying when she said that he personally owed her money for the Club. They calculated what had to be paid and then that amount was paid. He stated that if he owned money, his seniors and colleagues in office would know that there was a certain amount of money owing to Mrs Duvenage. There was no arrangement that he could make with

Mrs Duvenage as the tuck shop was owned by the Club and he was working for the Office. Furthermore the head in the office was Mr Meyer, who was also the chairman of the Club, who would have known if there was money that he owed to the Club.

- [48] He disputed the evidence of Mr Crause and stated that Mr Crause checked everything that he had done and had not just signed the documents without first checking them.
- [49] He stated that they had not banked all the inmates' money because the inmates could need that money any time and only banked it when there was too much money in safe.
- [50] He denied that he kept the safe keys with him for the period from 2002 to 2007. He stated that when he left on occasions they had done a handover which included a reconciliation of what was in the safe, following which he handed over the book and the key to someone else before leaving. Mrs Mthembu, Mr Gala and the other two he worked with had then taken over and continued in his absence. He denied that he went away with the safe keys when he was off duty.
- [51] He stated that he never used any of the inmates' money for his personal benefit. Instead all such monies were deposited into the inmates' accounts and everything balanced. He had no idea why he was charged for embezzling R1.1 million.
- [52] He stated that no formal disciplinary hearing had been instituted against him before the arbitration but could recall that on 23 June 2008 he attended a pre-arbitration meeting at Pietermaritzburg. At that stage he learned of the case against him. He was on sick leave at the time and not in a condition to attend to his case. A doctor's note was produced confirming that he was still sick and the case was then postponed.

- [53] He testified that on 24 June 2008 he attended the hearing and told the chairperson that he was sick; the shop steward produced a sick note. He said that the chairperson stated that the case was continuing and that if he was really sick he would not be there. The chairperson made a ruling that the matter would proceed at 13h00 on that day as he, the chairperson, had to go somewhere else. The reason why he had come to the case on that day was to report that he was sick because the initiator told him the day before that he must come and explain his position to the chairperson. The chairperson was aware that he was still sick as was his employer. There after he left and could not tell really what happened. He was taken home by the shop steward. He did not attend the hearing later that day and was not aware of any adjournment. It was only a week later that the shop steward told him that the case had continued.
- [54] Thereafter, on the shop steward's advice, he prepared an affidavit indicating that he was sick which the shop steward presented to the initiator. He then received a letter at home which stated that he was dismissed.
- [55] He was then advised by the shops steward to lodge an appeal, which he did. He stated that he ought to have been paid until the outcome of his appeal, but was shocked to find that on 15 July 2008 he was not paid.
- [56] He denied that he was trying to avoid the disciplinary hearing by pretending to be sick.
- [57] He confirmed that he compiled the totals per section for the G324 forms. The sub-totals were the totals of all the sections that had worked. He added all the subtotals together to come up with one total sum. Once the documents were prepared and were given to his supervisor to check; the supervisor at the time being Mr Crause.

- [58] As he did not get a response to his appeal, he referred the dispute to the Bargaining Council.
- [59] The second witness for the applicant was Mr Nkosenathi Mthembu, who testified that on 23 June 2008, he received a call from Mr S N Ndlovu, the applicant's attorney, who asked him to assist him on 24 June 2008 by fitting the applicant from his home and taking him to the hearing with a letter confirming that the applicant was not well; the purpose being to request a postponement of the hearing due to the applicant's ill health.
- [60] On 24 June 2008, he fetched the applicant and took him to the hearing where he explained to Mr Moore, the initiator why he was there. The initiator requested that he explain the position to the chairperson. He then explained the position to the chairperson who informed him that he, the chairperson had to attend a meeting and that he wanted to see them at 13h00.
- [61] However, as the day went by, the applicant began to talk as a person who is mentally disturbed. He then decided to take the applicant back home as he was not sure what medication the applicant was on. He did not know where to find any officials as they had all parted ways when the chairman said that they should meet at 13h00. He therefore did not inform any of them when he left with the applicant.
- [62] As the days went by he heard rumours that the applicant's case was still in progress. He then advised the applicant to make an affidavit stating that he was not well. He then presented this affidavit to Mr Moore, the initiator.
- [63] The third witness for the applicant was Mr Rudolph Vosloo, whose position was that of a Regional Support User at the Regional Offices of the Department. He had known the applicant for almost 20 years; they used to work on related cases on prisoner's cash, conducting courses. He conducted training with the

applicant regarding prisoners' cash at various centres, doing approximately three to four such courses a year with the applicant.

- [64] He stated that when the applicant was away with him on such courses, the monthly returns would still have been submitted by Servontein. Thus the supervising office usually has the responsibility to submit such early conciliation to the Regional Office or to the Head of the Prison.
- [65] He knew the applicant's supervisor, Mr Crause. He stated that Mr Crause ought to have known about the prisoners' cash as he had done the relevant courses and was the supervisor in the office at the time.
- [66] He confirmed that all the management areas made submissions to him about such prisoners' cash. Usually the supervisor would sign the early conciliation and in this case it was Mr Crause from Servontein who had generally done so from that institution.
- [67] He did not find any discrepancies in the business cash from 2001. However, he did not check these as he had only received the reconciliation figures which usually simply state that there are no discrepancies. He would just receive the large amounts of income, expenditure and the amount in the bank; the details would be controlled at the institution office level.
- [68] When shown some discrepancies for a specific month on the G324 forms between the specific amounts and the final total, he stated that at the Regional Office he would not be able to see such a discrepancy as they would only receive the total amounts and not the specifics.
- [69] He stated that it was only brought to his attention that something irregular was occurring when Mr Diedericks pointed the discrepancy to him, that the G324 forms were not balancing.

[70] He stated that there were no discrepancies on the reconciliations that he had seen but conceded that there were discrepancies when it was pointed out to him at the arbitration hearing.

[71] He also confirmed that the pages relating to the G324 forms were not numbered and conceded that there could be missing pages on the G324 form.

The arbitration award

[72] The third respondent, in reinstating the second respondent made in the following award:

‘30. The dismissal of the employee, Sthembiso Nhlapo is found to be substantially unfair and procedurally unfair.

31 The employer, Ethekwini Municipality Housing is directed to reinstate the applicant in its employment on terms and conditions no less favourable to him than those which applied on the date of his dismissal on 28 July 2011;

32 The respondent is directed to pay the applicant (the second respondent) arrear salary in the amount of R108,000 (one hundred and eight thousand) within 30 days of receipt of this award;

33 The applicant is directed to report to work within 5 days of receipt of this award’.

It is this award that the applicant seeks to review.

The review

[73] The documents placed before this Court are voluminous, consisting of some 2000 pages and very much in disarray, with some documents being duplicated and some not in place. An important document, being a sworn statement by the applicant, referred to as 'Exhibit B-1, page 138', which was placed before the chairperson of the disciplinary enquiry and before the Commissioner at the arbitration hearing, appeared to be missing in the court file and subsequently surfaced. This document was referred to by the first respondent in its Heads of Argument, and argument in regard thereto was presented at this hearing.

[74] It is necessary to record the contents of this document which is headed: 'SWORN / CONFIRMED STATEMENT OFFICIAL' and which reads as follows:

'I (Full names and Surname) Vumeluyise Vincent Ngcobo

Hereby voluntarily without being unduly influenced in any way, declare the following:

1.

First I would like to state that I have more than 30 years of service in the Department of correctional services of which I executed my duties loyally and honestly.

2.

I would like to request the Investigating Team led by Mr Zulu IS, to recommend to the Regional Commissioner that I be medically boarded and that no serious disciplinary steps to be taken against me. For that I commit to diverge all the truth surrounding

the loss of prisoner's cash. I further comment to cooperate with the investigating team on any information regarding this.

3.

I am the supervisor cash office, dealing with all prisoner's cash related matters. I have been in the post for almost 13 years. I have dedicated my time to serve correctional services and in addition to that I have assisted the Regional Office with training in the region of prisoner's cash issues.

4.

I hereby confess that I am responsible for the loss of state money of R1 157 291.35 as informed by the investigating team. I agree that the gratuity claim has been inflated monthly in order for the claim to be larger than the actual amount and then I would further inflated the expenditure for purchases in order to be able to balance the books. I agree that the money was taken as cash from the safe, after the registers has been forged and manipulated, so that it will reflect that everything is correct.

5.

G313's was received monthly by myself from labour clerk, I will then capture the information on the computer to generate the G324 (gratuity of the G324 and retain the last copy with totals. Thereafter I will capture the correct information as per G313 and printed the correct G324. I will remove the last page of the correct G324 and attached the retained copy of the manipulated G324. The Sundry Payment Advice was compiled based on the sub totals for each span list of which the last copies of that span list

was the manipulated copy and that is how the G324 was manipulated.

6.

After the claim has been paid to the prisoner's bank account, the reconciliation will show a surplus then I will inflate or create fictitious purchases from the purchaser register in order to offset a surplus and that is how the money was taken out.

7.

The supervisors at disposal are not conversant with prisoner's cash, knowing that, I will compile the sundry payment and they will just signed without checking or very find the transactions. The same will happen with the reconciliation, I will compile and they will just sign without verifying the information.

8.

Payment to the club was done as per Electronic Fund Transfer (EFT) on a monthly basis. No invoices was issued by the club, money was only transferred based on the availability of funds from the bank as a result not full amount for the purchases for the month was paid, hence the outstanding amount due to the club of R31,265.00. Club was not issuing us with these receipt of the amount paid to them as per EFT, we were relying on the bank copy transfer document as a source document.

9.

Monies that were receipted from visits were handed over to me from time to time. Those moneys whenever banked since some

of the monies were used for internal transaction like releases as well as when inmates wanted to hand over cash to relatives and others will form part of my takings.

10.

I was responsible for the safe and safekeeping of all documents relating to prisoners cash i.e. G349 cards, cash and registers, etc as a result I'm not responsible for all documents that went missing, some of the documents were taken by inspectors Mr Diedericks JG and was never brought back (altered by hand).

11.

When ever I am on leave I will be called to come and assist with prisoner's cash activities since the officials at the office is not conversant with the prisoner's cash activities. At times I report back from leave, I would find incomplete transaction to finalise and that is all because of lack of capacity in the office.

12.

I can state that none of the officials that signed, either as compilers, checkers or authorizes has anything to do with the loss of cash, I am solely responsible and they were not part of this.

13.

I would further like to state that I was tempted by ignorance, lack of knowledge of my superiors and non involvement of managers to commit this act which happened as a result of financial problems on my part. I acknowledged that the act I committed is

not acceptable and I plead to the department, not to destroy me. I humbly apologise and request for leniency when my matter is being dealt with because of my 30 years of honest service as well as the contribution I have made in the region regarding prisoners cash issues.

That is all I wish to state.'

This document is dated 30 January 2008, it appears to be signed by the applicant before a Commissioner of Oaths.

The parties were requested to file this document being the sworn statement by the applicant. Thereafter the parties were directed to file further submissions, if they intended to do so, within 10 days from the directive which was delivered on the 11 July 2014. No further submissions were placed before this court.

The grounds for review

- [75] The applicant submits that the second respondent committed a gross irregularity by simply accepting the evidence tendered on behalf of the Department and concluding that the dismissal of the applicant was substantively fair.
- [76] The applicant contends that whilst he was employed by the Department, he was one of five members working within the Disposal Unit, the totals of the amounts reflected on the G324 forms were automatically calculated and determined by entering the daily working hours of each prisoner onto the computer, at all times he worked under the supervision of Mr Crause, Mr Crause did not find any discrepancies; and the second respondent elected to selectively place undue weight on Mr Crause's evidence.

[77] The applicant further submitted that the second respondent applied his mind to the relevant issues in ultimately arriving at his conclusion and seeks to have the award set aside.

The test for review

[78] In *Sidumo and Another v Rustenburg Platinum Mines and Others*¹ Navsa AJ, held that:

‘In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of the dismissal on the employee and his or her long-service record. This is not an exhaustive list.’²

‘To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.’³

The Constitutional Court held further that in the light of the constitutional requirement (section 33 (1) of the Constitution⁴) that everyone who has the right to administrative action that is lawful, reasonable and

¹ (2007) 28 ILJ 2405 (CC) also reported at (2007) 12 BLLR 1097 (CC).

² At para 78.

³ At para 79.

⁴ The Constitution RSA of 1996

procedurally fair, '...section 145 of the LRA⁵ is now suffused by the constitutional standard of reasonableness'. The Court set the threshold test for reasonableness of an award or ruling as follows: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'⁶

[79] The Labour Appeal Court in *Gaga v Anglo Platinum Ltd & Others*⁷ stated the following:

'Where a Commissioner fails properly to apply his mind to material facts and unduly narrows the enquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a Commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the grounds of its being a latent gross irregularity, permitting a review in terms of section 145(1) read with 145(2)(a)(ii) of the LRA...'⁸

[80] In essence therefore, a commissioner is obliged to properly apply his or her mind to all the relevant and material facts and arrive at a decision that can be reasonably justified, having regard to the evidence placed before him or her. Where a commissioner makes a finding that is based on speculation, or is not supported by evidence that is sufficiently reasonable to justify the decision, or

⁵ Act 66 of 1995.

⁶ At para 110.

⁷ (2012) 33 ILJ 329 (LAC).

⁸ At para 44 *supra*.

that cannot be sustained on any factual, legal or equity based standard, the commissioner arrives at a decision which no reasonable decision maker could reach.

Analysis of evidence and arguments raised

[81] In so far as the procedural aspect of the disciplinary hearing is concerned, the applicant alleges in his founding affidavit that the second respondent concluded that the disciplinary hearing was procedurally fair⁹. This is not correct. The second respondent clearly found that the disciplinary hearing was procedurally unfair and his reasoning is set out in the award. Considering the evasive conduct of the applicant resulting in a number of postponements, the suspicion of the validity of the sick notes is understandable. Whilst this court may not entirely agree with the Commissioner, his decision is not one which a reasonable decision maker could not reach. There is therefore no reason to interfere with the award in so far as the second respondent's finding on the procedural aspect of the disciplinary hearing is concerned.

[82] As regards the discrepancies with the funds during the period between February 2002 to October 2007, the applicant initially indicated that the books of account balanced and that they were signed off by his superior, Mr Crause. However, he conceded the discrepancy when it was pointed out by Mr Diedericks when the specific amounts were calculated. The further fraudulent misappropriation of the funds was substantiated by the applicant's own witness, Mr Rudolph Vosloo, who confirmed that as the supporting pages to the G324 forms were not numbered, it was possible that the pages could be altered so that the totals balanced. The second respondent correctly found that the funds were fraudulently misappropriated.

[83] Insofar as whether the applicant was the person responsible for the fraudulent misappropriation of the funds, the applicant having conceded the discrepancy

⁹ Founding Affidavit, par 6.49

attempted to exonerate himself by indicating that he was one of six officials working at the Disposal Office at Servontein Correctional Services. However, it was quite apparent from his own evidence that he was personally responsible for compiling the G324 forms. In a detailed and well reasoned analysis of the facts placed before him, the second respondent found, on a balance of probabilities, that the applicant had perpetuated the fraud and consequently concluded that there was a substantively fair basis for the applicant to be found guilty.

- [84] The second respondent's conclusion is substantiated by the sworn statement made by the applicant in the document referred to as 'Exhibit B – 1, page 138'. It is relevant to note, that neither the contents of this document, nor the document itself was disputed by the applicant.
- [85] The second respondent correctly determined that the appropriate sanction for the offence was dismissal as the trust relationship had been grossly impaired as a result of the actions of the applicant and appropriately concluded that, 'taking the extent of the fraudulent behaviour into account, it is concluded that it would not be fair to award any compensation for the procedural irregularity' on the part of the Department.
- [86] In view of the above, I am satisfied that the second respondent applied his mind objectively to the issues before him and reached a decision that is justified by the evidence placed before him.
- [87] The outcome is not one which a reasonable decision maker could not reach; there is therefore, no reason for this Court to interfere with the award.
- [88] In view of the findings of this Court on the merits of this matter, I see no point in granting the application for the condonation of the late filing of the review papers. The condonation application therefore falls to be dismissed.

[89] Insofar as the issue of costs is concerned, I see no reason why the costs should not follow the result.

ORDER

[90] I therefore, make the following order:

90.1 The application for the condonation of the late filing of the review application is refused

90.2 The application for the review of the award is dismissed;

90.3 The applicant is ordered to pay the costs of this suit.

Harkoo, AJ

Acting Judge of the Labour Court of South Africa.

APPEARANCES:

For the Applicant: Mr M Mdlotsi

Instructed by: A P Shangase & Associates

For Respondent: Advocate J Goldstone

Instructed by: State Attorney (KwaZulu-Natal)

LABOUR COURT