IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D354/2020

Not Reportable

In the matter between:

LOGANATHAN KISTEN RAGAVAN — Applicant

and

VEESLA SONI N.O — First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL — Second Respondent

ETHEKWINI MUNICIPALITY METRO POLICE — Third Respondent

Heard: 24 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 15h00 on 18 September 2023.

JUDGMENT

ALLEN-YAMAN AJ

Introduction

[1] The applicant's Notice of Motion in this application articulates the following order sought,

> *'1. That the First Respondent has failed tender a fair, rational and reasonable arbitration award. The application is brought on terms of s145 of the LRA read with Labour Court rules and proceedings.*
> *2. That the First Respondent failed to take into account material facts or performed her duties as Arbitrator thus tendering an unreasonable / irrational arbitration award.*
> *3. That the relief sought by the Applicant is to have the arbitration award set aside and relief substituted to be order of reinstated retrospectively.'*

[2] The applicant was not legally represented when initiating his review application, however, appointed attorneys to represent him thereafter.

[3] In his supplementary affidavit, without amending his Notice of Motion as he would have been entitled to do in terms of Rule 7A(8)(a), the applicant concluded his affidavit with what appears to have been an amendment to the relief sought by him, in the following terms,

> *'I humbly submit that, apart from the contentions raised in my first Founding Affidavit, the entire proceedings presided over by the First Respondent falls to be vitiated and:-*
> *a) my dismissal by the Third Respondent in the internal disciplinary enquiry be declared to be unfair, both procedurally and substantively; or*
> *b) the arbitration proceedings of the Second Respondent, presided over by the First Respondent, be set aside and either:-*
> *i. the arbitration hearing commences de novo; and / or*
> *ii. the Third Respondent elects whether or not to proceed with such arbitration hearing de novo; or*
> *iii. this Honourable Court grants such other relief as to it seems meet.'*

[4] As the arbitration award which is the subject of this review application was delivered pursuant to the applicant having challenged the fairness of his dismissal by the third respondent in terms of s191(5), and was not an pre-dismissal enquiry in terms of s188A, the order sought by the applicant to the effect that the third respondent be 'given an election' as to whether it wished to participate in any further arbitration proceedings which may be ordered to be constituted is incompetent.

[5] In the circumstances, the applicant's application will be assessed on the basis that what the applicant actually seeks is an order that the award issued by the first respondent under case number EMD 091910 on 10 July 2020 be reviewed and set aside and substituted with an order that his dismissal by the third respondent on 17 April 2019 was substantively and procedurally unfair. Further, consequent upon such finding, that the applicant seeks to be retrospectively reinstated to his employment, alternatively that his dispute be remitted to the second respondent to be arbitrated *de novo* before a commissioner other than the first respondent.

[6] The application was opposed by the third respondent. The first respondent delivered what was termed an explanatory affidavit to deal with one specific issue raised by the applicant, which will be detailed hereunder.

[7] In the course of these proceedings, prior to the hearing of the matter, the applicant initiated an interlocutory application in terms of which he sought an order that his name, as cited in the pleadings, be substituted. This arose in circumstances in which his name as cited in his application was the name by which he is usually known, but which is not his name as it appears in his identity document. This application was unopposed by any of the respondents and such order will be granted.

Background

[8] The applicant's dismissal occurred in consequence of his having been called to attend a disciplinary enquiry in respect of the following alleged misconduct,

'Count 1

You failed to comply with the Disciplinary Procedure Collective Agreement, Circular no 1/2018 and Conduct and Sanctions.

In that

On 14th, 21st, and 22nd September 2018 you claimed overtime and was paid overtime for allegedly having worked overtime on the roadblock from 18h00 to 02h00 on the respective dates. However, Management alleges that you did not work the period of overtime claimed. Management further alleges that your dishonest claim and the subsequent payment to you is in violation of Clause 1.2.5 which states that employees should conduct themselves with honesty and integrity.'

[9] It was the third respondent's case that the applicant had submitted claims for overtime for the dates in question in circumstances in which he had niether reported for duty nor worked the time as claimed by him. The applicant, on the other hand, denied the correctness of the allegations, and alleged that he had worked overtime for all the periods in question.

Analysis

[10] For a number of reasons, the applicant contended that the award of the first respondent was not that of a reasonable decision maker, in circumstances in which he alleged that the manner in which the first respondent had conducted the arbitration proceedings amounted to misconduct in relation to her duties.

[11] His complaints which were directed at the first respondent relating to the manner in which she dealt with the arbitration were stated in his founding affidavit to have been that:

'She was wrote a minimum in relation to the points raised by the applicant, in contrast to the notes taken by her of the issues dealt with by the third respondent.'

'In certain instances, the applicant was required to draw her attention to him as she was busy with her cellular telephone.'

[12] In his supplementary affidavit, the applicant expanded upon this issue by having alleged that:

.1 The first respondent had, throughout the arbitration, demonstrated by her conduct that she disbelieved the applicant's version and was intent upon finding in favour of the third respondent.

.2 Left her seat to pour herself a cup of tea in the course of the applicant's testimony.

3. Constantly sighed loudly.

4. Rolled her eyes in disbelief in response to certain of the applicant's testimony.

[13] The applicant took a photograph of the first respondent in the course of the arbitration proceedings, without her knowledge and annexed a copy of the photograph to his supplementary affidavit as evidence of the first respondent having been occupied with her cellular telephone. The circumstances in which such photograph was taken were described by the applicant,

'I didn't have to wait long when, while I was testifying, and clearly paying no attention to the evidence I was leading, the First Respondent busied herself with her cellphone, which conduct I secretly managed to photograph using my mobile phone.'

[14] When this review application came before the court on 9 November 2022 the first respondent had not delivered a response to the aforementioned allegations. As it is the practice of the CCMA and Bargaining Councils to deal with review applications on a purely administrative basis, and such applications are not placed before the arbitrators themselves for their consideration, this court directed that a full set of the affidavits in the review application be served on the first respondent personally.

[15] This was done, which elicited an explanatory affidavit deposed to by the first respondent. In that affidavit she made it clear that she did not oppose the relief sought by the applicant insofar as he sought to review the award itself, but that she took exception to the allegations made by the applicant concerning her, which she described as false and misleading. Her response to the assertion

that the taking by her of notes of the evidence led by the parties disproportionately favoured the third respondent was untrue, as was demonstrated by her notes themselves. As to the photograph taken of her, she alleged that she referred to her cellphone during break periods or at other points in time when the parties were not giving evidence.

[16] The applicant denied the correctness of the first respondent's explanation. He reiterated that the applicant had failed to take down any notes when his representative, Mr Shandu, was leading his evidence, which had resulted in Mr Shandu enquiring of the first respondent whether such evidence was being noted. In addition, the applicant alleged that he himself *'indicated to the First Respondent that [he would] take a picture of her.'*

[17] The third respondent's affidavit in response to the issue, delivered pursuant to the delivery of the first respondent's affidavit, was deposed to by Lieutenant-Colonel Naicker, a member of the third respondent who represented the third respondent at the arbitration proceedings. He confirmed the correctness of the assertions made by the first respondent and pointed out that:

17.1 No part of the record corroborated any of the allegations made by the applicant;

17.2 The applicant was represented by an experienced trade union official throughout the arbitration proceedings who would have raised the issues being raised by the applicant in the review proceedings during the course of the arbitration; and

17.3 The existence of the first respondent's notes objectively dispel the applicant's assertion that the first respondent had not paid attention to his evidence.

[18] It may be mentioned at the outset that none of the issues raised by the applicant in relation to the purported conduct of the first respondent were addressed in the applicant's Heads of Argument. Absent any particularity as to where objective evidence which might have established the veracity of the applicant's complaints might have be found in the record, this court considered the entirety

of the transcribed record from which any form of corroboration of the applicant's complaints could be found.

[19] Insofar as the applicant's assertion that the first respondent favoured the third respondent by having paid closer attention to the evidence of the witnesses for the third respondent than those who testified on behalf of the applicant, a cursory examination of her notes demonstrates that the applicant's complaint lacks merit. This court has considered both the transcribed record of the oral evidence led as well as the first respondent's typed notes and has contrasted the two. Nowhere was it evident *ex facie* these two recordals of the evidence led that the first respondent failed to record any aspect of the applicant's evidence that was relevant to the dispute before her.

[20] The applicant's further complaint that the first respondent abandoned the proceedings in favour of pouring herself a cup of tea is likewise not borne out by the transcript of the evidence. The first respondent was twice recorded as having stopped proceedings to obtain a refreshment. In the first instance she asked if anyone objected to her making a cup of coffee, to which the applicant's response was that he was also thirsty. In the second instance, she asked if the arbitration could be paused briefly to enable her to make herself something to drink, and invited the parties to do likewise. In such circumstances, where she expressly stated her intentions and sought the permission of the parties to act on her intentions, coupled with the fact that her notes evince no portions of the evidence as being missing (as a result of her having absented herself from her computer to make tea), it cannot be found that the first respondent acted as alleged by the applicant.

[21] No portion of the transcription refers to an audible sigh or to noises of the like. It is incumbent upon transcribers to record all discernible audio recordings and it would have been a matter of ease for the applicant to have requested the transcription service to ensure that such utterances as had been made by the first respondent were reflected in the transcript, if such utterances had been recorded. This was not done and there is accordingly no objective evidence before this court demonstrating that the first respondent acted as alleged. As

the record itself also fails to reflect any actions taken by either the applicant or his representative which demonstrated that either of them had been disconcerted at such alleged behaviour on the part of the first respondent, nothing before this court suggests that there is any merit to the applicant's complaint.

[22] The same is true of the applicant's assertions that the fist respondent *'rolled her eyes in disbelief'* in response to certain of his testimony. Whilst conduct of this nature would obviously not be evidenced by audio recordings, without anybody at the arbitration having interrogated the meaning of any facial expression assumed by the first respondent at any given time, if indeed her face had not remained passive throughout the proceedings, there is nothing before this court which lends support to his assertions, which were denied by both the first and third respondents. Assuming for the moment, however, that the first respondent's face had not remained passive throughout the proceedings, the applicant would not in any event be in a position to determine the meaning to be attributed thereto. That he may be of the belief that any particular facial expression which may have been adopted by the first respondent denoted her disbelief in his version can be no more than his own opinion.

[23] The applicant's further complaint in regard to the manner in which the first respondent conducted the proceedings related to the alleged use by her of her cell phone at inappropriate times. In this regard, he alleged that he had been required to draw her attention to him whilst she had been busy with her phone and further, that he had caught her in the act of using her telephone during the course of the enquiry and took a photograph of her.

[24] Save for one instance in the course of the arbitration when the first respondent asked the parties that she be excused to enable her to take a call, which permission was given to her to do, there is no evidence that the first respondent behaved as alleged by the applicant. There is also no evidence in the record that he himself had redirected her attention to him during the course of his evidence, nor is there any recording of him having told her that he intended to photograph her whilst she was using her cellphone, as was alleged by him in

the present application. It was, in fact, the applicant's own representative who was taken to task by the first respondent for taking a phone call without the leave of those present, whilst the matter was still being discussed at the end of one of the sittings of the arbitration.

[25] The applicant's ground of review that the first respondent conducted herself other than in accordance with her duties as an arbitrator is founded on no more than his own version that she had acted as alleged and a photograph secretly taken by him of her. As with the other complaints concerning the first respondent's conduct, had she acted as alleged, her absence from attention to the proceedings would have been objectively evinced by the paucity of her notes, which was not the case. In the circumstances, I have no reason to disbelieve the versions of the first and third respondents, both of whom categorically denied that the first respondent had acted as was alleged.

[26] The applicant's final complaint concerning the manner in which the first respondent conducted the arbitration proceedings related to the limitation he alleged had been imposed on him by the first respondent regarding the number of witnesses he was permitted to call. It is correct that throughout the arbitration the first respondent enjoined the parties to curtail their evidence as much as possible; this related to both the evidence given by them and the number of witnesses to be called. It is evident, however, that her comments were made in light of certain directives which had been issued by the second respondent in relation to the number of dates which were to be allocated to matters and the potential for delay in the finalisation of the arbitration in the event that the time allocated was not used effectively. This did not, however, result in the applicant being limited in any way in the number of witnesses he was permitted to call. This was clearly articulated by the first respondent pursuant to a discussion between herself and the applicant's representative concerning the availability of time and the number of witnesses,

'It doesn't matter, you have got five witnesses and my point is we are limited in terms of days. You decide how you want to run your matter, knowing what I have placed on record. The reason I placed it on record is because I don't want parties to come back

to the bargaining council and say "well the commissioner never said a problem, that we called whoever we wanted to call." In this way it is placed on record.'

[27] In all events, in circumstances in which the applicant had intended to introduce the evidence of four witnesses in addition to his own evidence, and only two of those witnesses ultimately elected to testify, no injunction issued by the first respondent regarding the number of witnesses to be called ultimately affected the end result: the applicant testified, as did the only two witnesses he called to testify on his behalf.

[28] Insofar as the reasonableness of the first respondent's decision was concerned, the applicant's complaints related to her treatment of the evidence before her. It is apposite to dispose of the ground of review articulated by the applicant in relation to the first respondent's alleged failure to have had regard to the evidence which had been adduced at the disciplinary enquiry, prior to considering his grounds of review in relation to the evidence led at the arbitration itself.

[29] The applicant alleged that the first respondent failed to take into account certain documentary evidence, including transcripts and statements made which indicated that the third respondent's members who reported to him had confirmed that he had supervised them at the three roadblocks. This allegation has been understood to relate to the evidence given by a number of individuals during the course of the applicant's disciplinary enquiry, the recordings of which were transcribed and introduced by the applicant as a bundle in the arbitration.

[30] In the heads of argument delivered on his behalf in these proceedings the assertion was made that,

'... the first respondent was required to determine the fairness of the employer's decision to dismiss the applicant and in so doing, consider the evidence led at the disciplinary hearing.'

[31] The authority for this proposition was said to have been Palluci Home Depot (Pty) Ltd v Herskowitz and Others (CA31/13) [2014] ZALAC 81. Such reliance

was misplaced, as this case serves only to reiterate the principle that an employer is not permitted to depart from or to embellish upon the reason for the dismissal of an employee at a subsequent arbitration.

[32] The first respondent's statement of the principle involved, made in response to an objection raised to reference to the transcript of the disciplinary enquiry by the third respondent's representative, was correct,

'He can refer to it again to test credibility, it is a de novo case, you are quite right, but he can refer to it if he believes that this witness is dishonest or being a bit dilatory or untruthful, he can refer to it.'

[33] Not only was the first respondent not, without more, required to rely on the evidence led by the applicant's witnesses who testified at his disciplinary enquiry in her assessment of the evidence, she was not entitled to have done so in circumstances in which the witnesses who testified at the disciplinary enquiry had not testified at the arbitration. The extent to which she was required to have had reference to the transcript of the evidence led at the arbitration was limited to those portions which had been placed in evidence before her, in the course of the cross-examination of the witnesses who testified at the arbitration.

[34] The aforementioned ground of review relates to the applicant's further ground of review, being his assertion that the fact that his witnesses who had been intimidated should have been taken into account by the first respondent and that the attempts made by him to secure those witnesses had been unreasonably ignored.

[35] The applicant had asserted that his witnesses had been intimidated, it having been the applicant's evidence that the witnesses in question had been threatened with disciplinary action by Lieutenant-Colonel Naicker if they testified. His evidence in regard to this issue was premised on hearsay as he himself had no personal knowledge of the alleged threats, and relied on certain statements which had allegedly been made to him by certain of the witnesses themselves. When these allegations were tested under cross-examination, it

appeared that the third respondent had formed a view after the conclusion of the applicant's disciplinary enquiry that the witnesses themselves had lied to protect the applicant in the course of that enquiry, and that they had been advised that an investigation would ensue. The last occasion on which this had been discussed had been in 2019 and nothing had come of it.

[36] Nor was the applicant able to explain, given that he had at least 10 members reporting to him at the time when he was employed by the third respondent, why he had been unable to persuade any member, other than those who had testified at the disciplinary enquiry, to testify on his behalf at the arbitration.

[37] In all events, it is not certain what, precisely, any findings in favour of the applicant to the effect that he had attempted to secure the presence of witnesses and that they had been intimidated not to testify would have had on the outcome, being the first respondent's finding that the third respondent had established that his dismissal had been substantively fair. Assuming for the moment that the first respondent had made such a finding, this would not in and of itself had resulted in the evidence of those witnesses that had been given at the disciplinary enquiry having been admitted in evidence at the arbitration, and nor would it have *ipso facto* resulted in the first respondent having been constrained to have accepted the truth of that evidence. The applicant, represented at all times throughout the arbitration by an ostensibly experienced trade union official was at liberty to apply to have the evidence of those witnesses introduced as hearsay, but failed to do so.

[38] The remaining grounds of review relied upon by the applicant relate to the first respondent's treatment of the evidence before her.

[39] The applicant alleged that the first respondent failed to take concessions made by the third respondent's witnesses into account, and also took speculative evidence into account, without specifying the alleged concessions relied upon by him, nor the evidence on which the first respondent was alleged to have placed reliance which could be regarded as speculative. This is presumably because consideration of the transcription of the oral evidence reveals no

concessions made by any of the third respondent's witnesses which could have been said to have advanced the applicant's case, and nor can any of the first respondent's findings be found to have been premised on evidence which was anything other than objective. These issues were not persisted with in argument.

[40] The applicant's further assertion that the first respondent misconstrued issues when she concluded that his version had not been put to the third respondent's witnesses is equally unsustainable. A few examples of the applicant's evidence which was never mentioned to any of the third respondent's witnesses suffice to refute this assertion:

- That the third respondent's persecution of him commenced some time prior to the overtime charges as a result of his involvement in an issue pertaining to counterfeit bank notes;
- That he had witnessed Captain Mokoena having assaulted an inebriated man in the presence of that man's child;
- That members of the third respondent were permitted to leave the roadblock after they had made their first arrest, and to nonetheless claim payment for the full amount of overtime which they had been scheduled to work;
- That the two Superintendents in question had expressly told him that he and his members could leave the roadblocks;
- That Khumalo had expressly advised him to utilise old duty lists to sign members on if the duty list for the overtime in question had not been printed by the time the duty office was closed for the weekend;
- That the correct duty list was not printed timeously approximately twice a month; and
- All aspects of his evidence relating to copies of the pocket books, purportedly of certain of the members who had previously reported to him, which had been included in his documentary evidence.

[41] The applicant has suggested that the first respondent failed to apply her mind to a litany of evidence placed before her, including that she failed to consider:

- That he had been listed amongst the staff on the third respondent's Operational Plan;

- That he was qualified to be placed on the third respondent's voluntary list of staff by virtue of being a Captain;
- That his job description specifies that he only reports to the Senior Superintendent, and accordingly other Captains who were present at roadblocks were only working with him as part of a team;
- That he had been disciplined for all three days on which he had claimed overtime with no differentiation having been applied to the days on which there had been uncontested evidence by numerous witnesses concerning his presence;
- That there was no established policy which specified the procedure which was required to be adhered to for signing members on and off, the standard practice being that this was required to be done at the parade, which he did; and
- All the evidence presented by him which supported his version that he had worked the overtime in question, which included pocket books and the statements of his witnesses.

[42] The aforementioned allegations were either unsubstantiated by the record of the evidence before the first respondent, or irrelevant to the determination which she was required to make.

[43] The only issue for determination by the first respondent was whether the applicant had misconducted himself by claiming overtime in circumstances in which he was alleged not to have worked the periods of time in question, being from 18h00 to 02h00 on the evenings which commenced 14, 21 and 22 September 2018.

[44] The first respondent appreciated that the third respondent bore the onus of establishing the substantive fairness of the applicant's dismissal. To that end, the third respondent was obliged, in the first instance, to establish that the applicant had breached the rule which prohibited the claiming of unauthorised overtime, there having been no dispute between the parties that such a rule was in place in the third respondent's workplace and, being a rule prohibiting

the dishonest appropriation of public funds, was one which was inherently reasonable.

[45] The first three of the third respondent's witnesses, Superintendent Neville Govender, Captain Rafael Mokoena and Captain Zwelebandu Thabethe all testified that the applicant had not worked at the roadblocks in question.

[46] It was either common cause or not in dispute that Driving While Drunk roadblocks take place every weekend within the Ethekwini Municipality, and that staffing thereof takes place by way of a list of individuals who indicate their willingness to work overtime, whose names are included in the Operations Plan, a plan which is authorised in advance of the roadblock in question. The inclusion of a member's name in the Operations Plan does not necessarily mean that the member will work, it happening that such member may not be able to work the roadblock in question for one reason or another. Members whose names are not included in the Operations Plan may nonetheless work if their names are on the volunteer list, and are subsequently authorised to work, which authorisation will take place shortly prior to the roadblock in question.

[47] That the applicant's name may have appeared as having been scheduled to work on any of the third respondent's Operation Plans was irrelevant to the issue of whether he had actually worked on the roadblocks in question as that list was no more than a document prepared for the purposes of provisional authorisation. As such, it did not serve to establish that the members listed therein had worked, or otherwise.

[48] It was also common cause that a parade takes place at the third respondent's Head Quarters at 18h00 prior to the commencement of the roadblock, at which parade the members who are present for duty are signed on. Captains, including the applicant, sign themselves on to duty.

[49] It was the third respondent's case that a single Captain is appointed as the duty officer, whose responsibility it is to parade the members who had reported for duty at its Head Quarters and to sign them onto duty, done by affixing his or her

signature to the pre-printed duty schedule. In respect of the roadblocks which had been scheduled to take place on 14, 21 and 22 September 2018 Captain Mthembu had been appointed as the duty officer responsible for recording attendance, which she had done.

[50] It was the applicant's version that each Captain was responsible for parading and signing on the members under his or her control who had reported for duty. On each relevant occasion a pre-printed duty schedule had not been available for him to use. He had instead utilised old duty schedules which had been lying around in the office he shared with other members, changed the dates, and signed both his members and himself on, after having paraded them. He did not dispute that Captain Mthembu had also signed the members reporting to him on, utilising a pre-printed duty schedule.

[51] The first respondent cannot be faulted for having preferred the third respondent's version. It was, in all respects, the most probable, and was attested to by three witnesses whose credibility could not have been faulted. By all accounts, only one duty schedule is to be printed for each Operation, as to print additional duty schedules for the same shift in an environment such as the third respondent which is highly regulated and audited, would result in disorder and would be susceptible to abuse. It could also not be explained by the applicant, if the standard procedure was that each Captain was responsible to sign his or her own members on, why Captain Mthembu herself assumed responsibility for signing the applicant's members on to duty. The pre-printed schedules which were signed by Captain Mthembu themselves included the additional signatures of the Superintendents who were ultimately in charge of the respective roadblocks, such signatures evincing that they had satisfied themselves that the members listed and signed as having been present by the Captain appointed as the duty officer were in fact in attendance and working at the roadblock in question. Neither of the duty schedules on which the applicant placed reliance bore the signature of either of the Superintendents, Superintendent Govender or Captain Mokoena (who was at the time an Acting Superintendent). The first respondent's acceptance of the evidence of the third respondent's witnesses relating to the procedure which was required to have

been followed as well as the documentation relied upon by the third respondent accordingly cannot be faulted as having been unreasonable.

[52] The applicant did not dispute the evidence of the third respondent's witnesses, Superintendent Govender and Captain Mokoena that he had not reported to either of them for duty at the commencement of the overtime shifts for which each was responsible, and nor did he dispute that he had been required to do so. Under cross examination the applicant conceded that he was ordinarily required to report for duty to a Superintendent.

[53] As to his physical attendance at the respective roadblocks, save for Superintendent Govender having accepted that the applicant had been present at the roadblock on 22 September 2018 for approximately half an hour, the third respondent's witnesses testified that not only had he not reported to the superintendents in charge as he had been required to do, he had not in fact been present.

[54] Superintendent Govender testified that he had not seen the applicant at all at the roadblock which had taken place on 14 September 2018. In amplification of his denial he testified that, had he seen the applicant, he would have asked him why he had not been on parade. He testified further that the applicant had not been allocated a task team nor any deployment in terms of the functions he would have been required to have performed at the roadblock. He explained further that it was improbable that the applicant would not have been seen if he had been in attendance. This was for the reason that he himself moves around the roadblock to deal with problems or enquiries and, if a Captain is not where he was supposed to be, he or she would not have been performing his or her supervisory function.

[55] Captain Mokoena denied having seen the applicant at the roadblock on 21 September 2018, on which occasion he had been the Superintendent in charge. He disputed the applicant's version that he had greeted the applicant that evening and denied that it was possible to be at a roadblock and not be observed, particularly a member with the rank of Captain.

[56] Superintendent Govender testified that he recalled receiving two telephone calls from the applicant on 22 September 2018. In the first, which occurred during the course of the afternoon prior to the commencement of the roadblock, the applicant had enquired as to whether the roadblock would proceed, given that there was then a thunderstorm happening. He advised the applicant that a decision would be made later that day. He received a further telephone call from the applicant later that evening in which the applicant informed him that he was going to be late for duty. He subsequently saw the applicant at approximately 21h00 when the applicant approached him where he was at the stop line. Thereafter the applicant proceeded to the bus area and he next saw him at approximately 21h30 when the applicant informed him that he was going to the station, and would return. He did not do so.

[57] Captain Thabethe had been the Captain in charge of all the roadblocks in question. His evidence in relation to each of the roadblocks was the same: if the applicant had been at the roadblocks he would have been allocated specific duties to perform, which he was not. He had no recollection of having seen the applicant at any of the roadblocks and nor did he recall having liaised with him during the course thereof.

[58] The applicant's version in relation to the evening of 14 September 2018, was that he had attended the roadblock and that, during the course thereof, he had requested Superintendent Govender's permission to sit in a vehicle to remain safe as a result of a thunderstorm which was then occurring, which could potentially have affected his pacemaker. In addition, the applicant called a witness, Delron Buckley, who testified that he had been stopped at the roadblock on 14 September 2018 and that he recalled having seen the applicant, recalled what the applicant had been wearing, and recalled the discussion between them on that occasion.

[59] Insofar as the evening of 21 September 2018 was concerned, it was the applicant's evidence that he spent his time at the roadblock checking on his members, walking around and monitoring statements taken in the 'booze bus'. He specifically recalled having seen Captain Mokoena who had greeted him.

[60] During the evening of 22 September 2018 the applicant recalled again having asked Superintendent Govender for permission to sit in a vehicle to avoid inclement weather which permission was, again, given. Later he requested Superintendent Govender's permission to take a member to the bus stop, which permission was given.

[61] To the extent that the first respondent may have been required to determine the disputed versions concerning whether the applicant had been in attendance at the roadblocks (in circumstances in which the official documentation produced demonstrated that he had not worked, and it had been common cause that he had not reported to either of the superintendents in charge thereof) the applicant is correct that the first respondent was required to determine the disputed versions with reference to the test established in Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others 2003 (1) SA 11 (SCA). The applicant's allegation that she failed to conduct such test is, however, not correct. That she did so is readily apparent from her award.

[62] The starting point in her assessment of the disputed versions was the credibility of the various witnesses. Pursuant to a careful and detailed analysis of the evidence presented by both parties, the third respondent concluded that the third respondent's witnesses were, 'credible and honest.' On the contrary, her conclusion as to the applicant's credibility was that he had been,

'… evasive and elusive. He failed to provide a suitable and plausible explanation and was poor under cross examination.'

[63] Without expressly making a credibility finding against Mr Buckley, the first respondent concluded, in relation to the evidence given by him regarding his having encountered the applicant on 14 September 2018, that,

'It is incredible that, for no particular reason, he recalled the exact date of the roadblock, being 14 September 2018, which was about a year and a half ago. For no ostensible reason he also remembered the precise clothing which was described exactly the same way by the Applicant. In addition, his testimony only accounted for a few minutes of the day, if that was indeed the correct date. In assessing his evidence

with a holistic view, I am not convinced that he was able to recall the exact date, especially when it had no significance to him. I am not comfortable saying he was dishonest but it appeared the [sic] he was fed the date and information.'

[64] The principles, in review proceedings, applicable to the credibility of witnesses were explained by this court in Moodley v Illovo Gledhow and Others (2004) 25 ILJ 1462 (LC),

'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour, and the manner in which they came across.'

[65] Similarly, this court can discern no basis in the present proceedings upon which the first respondent's findings in relation to the credibility of the witnesses who appeared before her as set out in paragraph 66 of the award should be interfered with.

[66] The applicant's case was equally unassisted by the lack of any supporting evidence which could objectively had demonstrated his presence at the roadblocks. The pocket books upon which he relied in his evidence in chief had not only never been put to any of the third respondent's witnesses but were incapable of ready identification by himself, the authors of the contents of the pocket books in question not having testified at the arbitration. The duty registers upon which the applicant himself relied have already been dealt with.

[67] Moreover, and as was pointed out by the third respondent's representative in cross-examination, it would have been a matter of ease for him to have sourced the CTrack record of the vehicles used by him to travel to and from the roadblocks in question and thereby have provided the first respondent with objective evidence which established his whereabouts. He did not do so, having confined his evidence of CTrack records in respect of the vehicles which had been utilised by both Superintendent Govender and Captain Mokoena on the dates in question in an attempt to discredit them.

[68] His approach in regard to the CTrack records of Superintendent Govender and Captain Mokoena demonstrated his approach to his defence as a whole. Having cross examined the applicant concerning his inability to have particularised any of the actual functions he had performed at any of the roadblocks in question, and the various other improbabilities inherent in the version he had presented, the third respondent's represented summarised the applicant's approach to his defence in the following terms,

'So if you look at this whole picture that you painted, when you came here, instead of defending yourself with evidence that you were actually at the roadblocks, you attempted to discredit my witnesses, especially my two superintendents in terms of what date was wrong, where they were, etcetera, am I right?'

[69] In consideration of the evidence presented at the arbitration, the applicant's allegations in these proceedings that the third respondent had failed to prove the allegations against him by having failed to adduce any evidence which established that he had not been at the roadblocks cannot be sustained. The applicant's further complaint that his 'reasonable explanation in respect of his attendance at the roadblocks' had been ignored by the first respondent also cannot be sustained; his explanation was not ignored, it was rationally and reasonably rejected by the first respondent as having been untrue.

[70] In consideration of the totality of the evidence before the first respondent this court finds neither that she failed to apply her mind to the evidence before her, nor that her conclusion that the applicant had been guilty of the misconduct for which had been charged was that of an unreasonable decision maker.

[71] As regards the appropriateness of the sanction of dismissal, it was the applicant's case that the trust relationship had not broken down. In substantiation of this assertion he alleged that pursuant to having been alleged to have committed misconduct, he had been given disciplinary matters to attend to, had been permitted to carry a fire arm, and had been allocated a police vehicle to use. This may well be correct, but none of those issues addressed the basis upon which the third respondent asserted that the trust relationship had broken down. It was the third respondent's case that a member appointed

to the positon of Captain was of necessity required to be trusted to conduct him or herself in an exemplary fashion in the performance of his duties, and that any act of dishonesty destroyed that trust. This was concisely stated by Captain Mokoena in the following terms,

'I personally recommended discipline, I'm glad the employer did and I think he got the correct sanction because the person of captain is getting so much of a salary. One of the duties of a captain is to make sure the members are signed, he cannot be the one claiming the hours he never worked.'

[72] The assessment of the fairness of the sanction of dismissal entails consideration of the issue of whether there has been a breakdown in the employment relationship, whether dishonesty has been found to have been present in the commission of the offence, whether the employee has shown remorse, the function of the job itself, and the possibility that progressive discipline may serve to enable the employee to correct his or her conduct.

[73] In the present instance, the misconduct constituted three fraudulent misrepresentations, for which the applicant showed no remorse. As a member of the third respondent's police services he was expected to conduct himself with both honesty and integrity. Absent any contrition for the commission of this offense, it cannot be said that progressive discipline could have assisted the applicant to have corrected his conduct.

[74] The applicant is, however, correct in his assertion that the first respondent omitted to make any determination regarding the procedural fairness of his dismissal. As this court is in as good a positon as the first respondent to determine this issue, it will be decided.

[75] The applicant's concerns relating to the procedure adopted by the third respondent in the course of his disciplinary enquiry were not elaborated in any detail in the minutes of the pre-arbitration meeting which had been convened between the parties. His testimony, however, revealed two issues upon which he relied in this regard. The first pertained to the failure on the part of the chairperson of the disciplinary enquiry to have adjourned the enquiry in

circumstances in which his representative had not been available due to illness, whilst the second dealt with the delay on the part of the third respondent in finalising the appeal which he had noted against the decision taken to dismiss him.

[76] Pursuant to the commencement of the disciplinary enquiry, the applicant's representative transmitted an email to the chairperson of the enquiry, the third respondent's representative and the applicant himself in which he conveyed his unavailability for certain dates on which the hearing had been scheduled to proceed, being 11, 12, and 13 March 2019. His unavailability was recorded in that email as having been as a result of prior commitments to other union matters, although these were not particularised. He requested that the hearing be postponed to other dates which were then proposed. The chairperson of the hearing became aware of the email for the first time on 11 March 2019, shortly prior to the commencement of the hearing that day.

[77] The chairperson declined to postpone the hearing and advised the applicant to ensure his representative's attendance at the hearing, or to find an alternative representative. When the hearing resumed at 11h00 the applicant had not been able to raise his representative telephonically and, not then having secured alternative representation, was then unrepresented. The chairperson directed that the hearing would proceed, and the third respondent's representative called his first witness, Ms Sharon Perumal.

[78] At the conclusion of Ms Perumal's evidence in chief the applicant was invited to put any questions he may then have had to her, which he declined to do. He placed on record that he was unable to do anything without his representative, and asked to be excused from the hearing until his representative was available. He was informed that the hearing would proceed in his absence and, to that end, the third respondent's representative led the evidence of two further witnesses in the applicant's absence, Ms Sagree Moongilan, and Superintendent Govender.

[79] The applicant returned to the hearing later that afternoon, together with his union representative, in time for the commencement of the third respondent's fourth witness, Mr Bongumusa Gwala.

[80] On 12 March 2019 the chairperson of the hearing made the recordings of the evidence of the three witnesses who had testified in the absence of the applicant's representative (two of whom having testified in the absence of the applicant himself) available to the applicant's representative to afford him the opportunity to listen to the evidence which each had given. Each was subsequently recalled to enable the applicant's representative to cross-examine them, which he did.

[81] In light of the above, the applicant's evidence at the arbitration that the chairperson of the disciplinary enquiry had refused to adjourn the matter on account of his representative having been hospitalised was simply untrue. His representative had previously been ill, however, the reason for his absence as stated by him in his email and as relied upon by the applicant on the morning of 11 March 2019 was merely that his representative had, 'other union commitments'.

[82] In all events, it is clear that the applicant's representative was provided with the recordings of the evidence of the three witnesses in question, and he indicated that he had listened to the recordings and was able to question the witnesses who were recalled for that purpose.

[83] In the circumstances, had any procedural deficiency occurred on 11 March 2019 by the refusal of the chairperson to have postponed the enquiry, such deficiency would subsequently have been cured by the events which followed thereafter, as described above.

[84] As to the second of the applicant's complaints regarding the delay in the finalisation of his appeal, he led no evidence concerning how, precisely, such delay could itself have equated to a procedural irregularity in the conduct of his disciplinary enquiry, nor that it had resulted in any prejudice to him at all.

[85] In consideration of the evidence led at the arbitration concerning the applicant's claim that his dismissal had been procedurally unfair, his claim is found not to have had merit.

[86] For the reasons aforesaid, there is no basis upon which this court could interfere with paragraph 67 of the award in which the first respondent concluded that the dismissal of the applicant had been fair. It is accordingly the finding of this court that the first respondent's award does not fall to be interfered with on review.

[87] The applicant's application will be dismissed.

Costs

[88] Although the third respondent asked for an order of costs upon the dismissal of the applicant's application, this was not persisted in argument. In the circumstances, each party will be required to pay their own costs.

Order

1. The applicant's name, Mervin, be and is hereby substituted with the name 'Loganathan Kisten' wherever same appears on the pleadings and notices herein.

2. The review application is dismissed.

3. There is no order as to costs.

[redacted]

Kelsey Allen-Yaman

Acting Judge of the Labour Court of South Africa

Appearances:

Applicant: Ms J G Bhikha, briefed by T Moodley and Associates Inc

First Respondent: Mr T Kadungure, briefed by Luthuli Sithole Attorneys