REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2512 / 2007

In the matter between:

NATIONAL UNION OF MINEWORKERS **First Applicant**

STEWART SOLOMON MANTHATA **Second Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

FRANCOIS VAN DER MERWE N.O. **Second Respondent**

DRIEFONTEIN CONSOLIDATED (PTY) LTD **Third Respondent**

Heard:12 July 2012

Delivered:16 August 2012

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – Test for review – Section 145 of LRA 1995 – Requires the commissioner rationally and reasonably consider the evidence as a whole – determinations of commissioner compared with evidence on record – commissioner's decision entirely reasonable and regular – award upheld

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – assessment of evidence by commissioner – apply balance of probabilities – credibility findings by commissioner – principles stated

CCMA arbitration proceedings – Review of proceedings, decisions and awards of commissioners – application for postponement – refusal of postponement by commissioner – decision upheld

Misconduct – dishonesty – principles applicable to dishonest conduct – conduct of the employee constituting an offence of dishonesty – dismissal justified

Misconduct – procedural fairness – employee contending insufficient particularity of charge and insufficient time to prepare – not compromising overall fair hearing – dismissal procedurally fair

JUDGMENT

SNYMAN AJ:-

Introduction

[1] This matter concerns an application by the applicants to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the first respondent). This application has been brought in terms of

Section 145 of the Labour Relations Act[1] ("the LRA").

[2] The second applicant was dismissed by the third respondent by way of a notice dated 2 August 2005, for misconduct relating to an issue of dishonesty. In an award dated 3 September 2007, the second respondent determined that the dismissal of the second applicant by the third respondent was substantively and procedurally fair, and dismissed the applicants' case. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicants.

Background facts

[3] The second applicant was employed by the third respondent as a human resources officer, commencing employment with the third respondent in 1983.

[4] One of the specific duties of the second applicant was to process medical disability applications of employees of the third respondent that had become medically disabled. This entailed completing the necessary documentation, conducting a comprehensive and structured interview, compiling supporting documents, making recommendations as to the merit of the application for medical disability, and then submitting the same for approval. The approval of a medical disability application has clear benefits for the employee so applying, as the employee, if the application is approved, will receive a package similar to a retrenchment package.

[5] The medical disability application process is shortly as follows:

5.1 There is a distinction between out patients and patients in hospital, when it comes to the process;

1 66 of 1995.

5.2 In the case of patients in hospital, the doctor conducts the medical incapacity interview with the patient in the hospital. The patient's ward and bed is recorded. The medical report is then completed and the HR department of the third respondent is telephonically informed of the medical incapacity. Once so informed, an officer from the HR department will then come to the hospital itself, and interview the employee for medical incapacity there in hospital. The HR officer conducting the interview will complete a medical incapacity interview form in hospital, and this will be signed by the officer and the employee;

5.3 In the case of an out patient, the employee will be referred to the third respondent's service department. The service department will then contact the relevant HR department at the employee's shaft and schedule an interview with the HR officer. The HR officer will then conduct the medical incapacity interview with the employee and complete the relevant form in this regard, which will be signed by both the officer and the employee. A medical report is obtained from the hospital in support of the application.

[6] The events giving rise to this matter concerned one of the employees of the third respondent, being one Fosi Mahlalela ("Mahlalela"). It was common cause from the evidence that Mahlalela was not feeling well, that he wanted to stop working to go back to his home in Swaziland, and that he was looking to be medically boarded so that he could be paid a package and then go home.

[7] It is also common cause that Mahlalela then came to be introduced to the second applicant with regard to his medical disability application. What happened between the second applicant and Mahlalela lies at the heart of the matter, and is the subject of the core factual dispute in this matter, and will be addressed hereunder. In fact, and other than the factual dispute as to what happened between the second applicant and Mahlalela, most of the background facts in this matter are either undisputed or common cause.

[8] This matter came to the fore on 19 May 2005, when one of the third respondent's HR Officers, being Hendrik Mulder ("Mulder"), was contacted by the client services administrator at the Leslie Williams Private Hospital ("the hospital"), being Belinda Robinson ("Robinson"), enquiring about the medical termination of Mahlalela. Mahlalela had in fact attended hospital for treatment on 19 May 2005, but it was found to be recorded on the employee information system that the employment of Mahlalela had already been terminated for medical reasons. As Robinson in the normal course was the responsible person to actually draw up the medical termination letters issued by the hospital, she was concerned, as she had no knowledge of the matter and did not attend to the same. Robinson required from Mulder to investigate the situation.

[9] Mulder then obtained the supporting documents in this matter, which included a medical termination report issued by health services (being the report Robinson would be responsible for).[2] This report was then sent by Mulder to Robinson for comment, and she then informed Mulder that the report was irregular and could not have been done by her. There were six individual irregularities on the form, being a difference in date format, the form was not properly completed, the form had the template of a patient in the hospital ward whilst Mahlalela was an out patient, the signature was irregular, and the patient concerned was never examined or treated by the Dr Dimati referred to. In any event, and in the evidence at the arbitration, it was common cause that this form was entirely irregular and a forgery.

[10] Mulder then investigated the matter further. He sought to interview both the second applicant and Mahlalela on 24 May 2005, being the two persons involved in the process. In this initial interview, the second applicant informed Mulder that it was Mahlalela who brought the medical report to him and asked that he be considered for medical disability. According to the second applicant, in terms of

2 Bundle of documents page 131.

the statement he gave to Mulder, is that he then conducted a proper medical disability application process with Mahlalela, conducted a full and proper interview as required by the process, and that he did not question the medical report.

[11] Mulder, as stated, also interviewed Mahlalela. Mahlalela stated that he went to the hospital where he was examined by a "white doctor" who gave him the report. Mahlalela further stated that he then brought that report to the second applicant. Mahlalela was asked if he could identify the doctor, and he answered that he would be able to.

[12] Mahlalela was taken by Mulder to the hospital. Mahlalela could not identify the doctor. Mulder also procured the attendance record of Mahlalela from the hospital. It appeared that he was never examined on 6 May 2005 as recorded on the report, but was examined only on 17 and 19 May 2005 and was seen by Doctors Swart and Volkers [3]. Also, Doctor Dimati referred to in the medical report was a black female. Mahlalela was then confronted by Mulder with all these facts, and asked to explain himself.

[13] Mahlalela then "came clean", so to speak. He stated that he was feeling sick and did not want to continue working on the mine. He wanted to go home, but also wanted a medical disability package. He said he came into contact with the second applicant, and asked the second applicant to help him with medical disability. The second applicant then told him that he would assist him and he had to return later to collect the documents. Mahlalela said that no medical disability interview was conducted with him by the second applicant. Mahlalela finally said that he did initially not tell the truth, because the second applicant told him to leave immediately and what to say, and that he was scared of the second applicant.

3 Bundle of documents page 142 – 143.

[14] Based on this statement by Mahlalela, Mulder then pursued his investigation further. He drew the attendance (clocking) reports of Mahlalela and the second applicant. He obtained all the documents relating to the medical incapacity interview.[4] The medical incapacity interview form was wholly inadequate and lacking in any particularity. The form also recorded that it was signed at 8 shaft on 9 May 2005. The form is signed by the second applicant, and appears to have been signed by Mahlalela. The clocking reports showed that both the second applicant and Mahlalela clocked in at 8 shaft on 9 May 2005 at about the same time of just after 14h00 (14h03 and 14h05 to be precise), and Mahlalela again clocked out at 14h10.[5] Mulder concluded that it was not possible to have a proper medical incapacity interview in what would be less than five minutes.

[15] Mahlalela told Mulder he did not sign any form with the second applicant. Mulder then investigated the issue of Mahlalela's signature on the medical incapacity interview form. Mulder then procured other documents signed by Mahlalela in the past, and asked him to sign on a blank page as well. Mulder compared all these signatures, and in his own view there were material discrepancies in the signature of Mahlalela on documents he actually signed and the signature on the medical incapacity interview form.[6]

[16] Mulder then went further and sought to investigate other instances of medical incapacities attended to by the second applicant. Of importance to this matter is the issue of one Ramoolla. In this case, the second applicant also conducted a medical incapacity interview, and there was an obvious difference between the purported signature of Ramoolla on the medical incapacity interview form, and other documents actually signed by Ramoolla.[7] According to Mulder, this was once clear to him on a simple perusal of the documents, and indicated a pattern.

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4 Bundle of documents page 120 – 128.
5 Bundle of documents page 151 – 152.
6 For these other documents see bundle of documents page 144 ; 199
7 Bundle of documents page 172 – 183; 198.

[17] The matter has one final nuance. In the documentary evidence, there is a termination notice dated 12 May 2005 in terms of which the employment of Mahlalela appears to have been terminated as a result of medical incapacity, and this document appears to also bear the signature of Mahlalela [8]. Considering the denial by Mahlalela that he signed any documents in this regard, the similarities between the purported signature of Mahlalela on this document and the forged signature on the medical incapacity interview document is immediately apparent. This termination document also bears the second applicant's signature.

[18] According to Mulder, it was then clear to him that the second applicant was involved in dishonest conduct with regard to the issue of the processing of medical incapacity applications. It was decided to charge the applicant with two charges. Only the first charge is relevant to these proceedings, as the second applicant was not found guilty of the second charge in the disciplinary hearing which followed. The relevant charge relevant in this matter is: 'Gross dishonesty in that you fraudulently initiated and carried out a medical interview with Mr Mahlala (sic) on 9 of May 2005.'

[19] The disciplinary hearing took place on 21 July 2005. The second applicant was represented by one of the full time shaft stewards. The disciplinary process was detailed and comprehensive, and the second applicant and his representative fully participated in the same. The hearing endured to 27 July 2005 and on 2 August 2005 the second applicant was then dismissed. A reading of the record in this matter, and in particular the disciplinary hearing record, clearly shows that second applicant received a fair and proper opportunity to state his case and presented all the evidence he wanted to present, in the disciplinary hearing. The second applicant also made written submissions as the merits of the matter in the disciplinary hearing, and made submissions in mitigation. Overall, it has to be said that the second applicant received a fair and proper disciplinary hearing.

8 Bundle of documents page 130.

[20] For the purposes of the arbitration proceedings in this matter, the third respondent also engaged the assistance of a handwriting expert, Landman. Landman gave a written report,[9] and the upshot of this report was that the signature of Mahlalela on the documents he actually signed and the signature as reflected on the medical incapacity interview form was not the same and the latter signature was forged. Landman also concluded that the signature of Ramoolla on that medical incapacity interview form was forged, and that the person who forged the signature of Mahlalela was the same person that forged the signature of Ramoolla. This evidence was before the second respondent in the arbitration, and Landman also testified in the arbitration.

[21] The applicants also raised one procedural challenge in the arbitration. The procedural issue the applicants raised was that the charges against the second applicant contained insufficient particulars to enable him to properly prepare his defense, and he was given insufficient prior notice before the commencement of the disciplinary hearing to prepare for the hearing.

[22] The second respondent subsequently dismissed the applicants' claim, giving rise to these proceedings.

The relevant test for review

[23] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[10] Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker

9 Bundle of documents page 185 – 188.
10 (2007) 28 ILJ 2405 (CC)

could not reach?'

[24] In *Commercial Workers Union of SA v Tao Ying Metal Industries and Others,*[11] O'Regan J held: 'It is clear . . . that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[25] The Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[12] specifically interpreted the *Sidumo* test. The Court held as follows: 'To this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'

[26] In applying the above principles, Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[13] held as follows:

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

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11 *(2008) 29 ILJ 2461 (CC)*
12 (2008) 29 ILJ 964 (LAC)
13 (2010) 31 ILJ 452 (LC)

[27] In *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others,*[14] Basson J held:

> 'Even where the reasoning of the arbitrator may be criticized, this in itself does not render the award reviewable particularly where the ultimate result arrived at by the arbitrator is sustainable in the light of the record. I must, however, qualify this statement by pointing out that there may be cases where, although the ultimate conclusion reached by the commissioner or arbitrator is reasonable, the reasoning adopted by the arbitrator or commissioner is so flawed (even if the ultimate result is reasonable), that it cannot be concluded that the arbitrator duly exercised his or her functions as an arbitrator by taking due consideration of matters that are vital to the dispute. In such circumstances the reviewing court may well be inclined to review and set aside the award.'

[28] Against the above principles and test, the award of the second respondent in this instance must be determined, especially considering the grounds of review as articulated by the applicant.

Merits of the review: substantive fairness

[29] The applicants raised a number of issues as to why the second respondent committed a reviewable irregularity in finding that the dismissal of the second applicant was substantively fair. In broad terms, the applicants contend that the second respondent did not evaluate and determine the evidence properly, his decision to accept the evidence of Mahlalela was irregular and reviewable, the second respondent exhibited bias against the second applicant, and that it was never proven that the second applicant was involved in the falsification of the medical report. The applicants contended that the second respondent was speculating when he came to the conclusions that he did and made assumptions

14 (2010) 31 ILJ 1425 (LC) at para 18.

not supported by the evidence. The applicants also contended that the second respondent misconstrued the issue of the onus, in that the second respondent held it against the second applicant when the second applicant could not provide a reasonable explanation for the discrepancies / irregularities referred to above.

[30] It must always be kept in mind that what must be determined in this matter is an application to review a determination by a CCMA commissioner. This is done by way of the application of the review test as defined above. It is therefore important to consider the actual reasoning of the second respondent, as embodied in the award . In this regard, the first difficulty for the case of the applicants is that from the award, it is clear that the second respondent preferred the evidence of the third respondent's witnesses, and in particular Mahlalela, over that of the second applicant. The second respondent specifically said so, and motivated why he so found. The second respondent made proper credibility findings, as was his duty to do. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni No and Others*:[15] 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.' In this matter, there is simply no basis to interfere with such credibility findings and no proper submissions were made by Mr Maunatlala, who represented the applicants in Court, or in the applicants' heads of argument, as to why such interference would be warranted (see *Rex v Dhlumayo* 1948 (2) SA 677 (A); *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others* (2005) 26 ILJ 876 (LC); *Scopeful 21 (Pty) Ltd t/a Maluti Bus Services v SA Transport and Allied Workers Union on behalf of Mosia and Others* (2005) 26 ILJ 2033 (LC);*Custance v SA Local Government Bargaining Council and Others* (2003) 24 ILJ 1387 (LC)). In this regard, I further refer to *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[16] where the Court said:

> 'The adverse credibility findings against Twala appear to have been justified and reasonable given that her evidence was contradictory on a number of material

15 (2011) 32 ILJ 723 (LC) at para 9.
16 (2012) 33 ILJ 485 (LC) at para 18.

aspects. Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow and Others* *(2004) 25 ILJ 1462 (LC)* at 1468C-D Ntsebeza AJ observed in this regard as follows:

'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. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies... I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[31] The issue of the importance of credibility findings made by commissioner being accepted in this Court on review was made by Mr Snider, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this Court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This Court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the Court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanor and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this Court is simply not in a position to contradict such findings. Even if I do look

into the issue of the credibility findings of the second respondent in this case, I am of the view that the record of evidence in this case, if considered as a whole, simply provides no basis for interfering with the credibility findings of the second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.

[32] I am further compelled to mention, as I pointed out to Mr Maunatlala, that I found the evidence as presented by the second applicant even as it appears on the typed record to be entirely unsatisfactory. The second applicant's evidence, on record, was in my view evasive to say the least. He sidestepped several pertinent questions put to him, and there were material contradictions in his evidence when it came to the critical issue as to when he actually held the medical incapacity interview he alleged he held with Mahlalela, and when the documents were completed and signed. In the end, and when the second applicant could simply not answer what was clearly a difficult situation for him to explain, he simply reverted to standard answers that he did not remember. As opposed to this, Mahlalela's evidence was straight forward and consistent. He never shied away from the fact that he initially lied to Mulder. He remained consistent in his explanation that the reason for this was because (in essence) the second applicant told him to and he was afraid of the second applicant, and this explanation remained steadfast under what, on the record, was vigorous cross examination. On a simple reading of the record of evidence with regard to these two witnesses in the arbitration, the preference by the second respondent of the evidence of Mahlalela over the evidence of the second applicant was entirely rational, reasonable and justified, even if it could be argued that this Court should consider whether such credibility findings were justified and reasonable, or not.

[33] Once the evidence of Mahlalela is to be preferred, this then leaves the applicants

with a difficulty. The reason for this is what actually lies at the heart of this matter. As Mr Snider correctly stated, the charge against the second applicant did not relate to the medical report which on the common cause evidence was fraudulent. The charge related to the fact that the second applicant fabricated the medical incapacity process, and directly linked to that, thus forged the medical incapacity interview form. In this regard, and where it concerns direct evidence by witnesses, there were only two persons who can say what happened. On the one hand is Mahlalela, who said that he was introduced to the second applicant, had asked the second applicant for help to obtain medical incapacity, the second applicant stated he would help him and advised Mahlalela to return on 9 May 2005 to collect the relevant documents which Mahlalela then did. Mahlalela, as stated, was adamant there was no interview and he signed no documents. On the other hand it is the second applicant, who said Mahlalela came to him with the medical report, it was not his duty to question the medical report, and he conducted a full and proper interview with Mahlalela who signed all the documents. If the version of Mahlalela is preferred, the second applicant committed fraud, as simple as that. That is one of the approaches followed by the second respondent in coming to his ultimate conclusion, and in my view properly and justifiably so. I therefore conclude that the second respondent's credibility findings are entirely sustainable and certainly reasonable.

[34] However, the case is not just determined on the basis of credibility. As was said in *SFW Group Ltd and another v Martell et Cie and Others.*[17]

> 'The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

With the issues of the reliability of witnesses and their credibility being out of the

17 2003 (1) SA 11 (SCA) at para [5]

way, this then leaves the issue of probabilities. The second respondent specifically dealt with the issue of probabilities as well.

[35] The second respondent concluded that on the probabilities, the fraudulent medical report did not originate from Mahlalela, the second applicant was either involved in or knew of the untruthfulness thereof, and that the second applicant was involved with the initiation and/or processing of the fraudulent medical discharge of Mahlalela. The second respondent motivated these conclusions, by way of thirteen bullet points. Considering that in the end, it was undisputed that the medical report purportedly from the hospital dated 6 May 2005 was in fact a forgery, the most important probabilities referred to by the second respondent was that (1) it was highly unlikely that Mahlalela would obtain the fraudulent medical report from the hospital and then thereafter report for treatment again; (2) the second applicant had the "knowledge, contacts and experience" concerning matters of this nature; (3) the clocking system showed that on the date of the alleged interview, the second applicant and Mahlalela spent two minutes together, which is insufficient for an interview and completion of documents; (4) the second applicant's explanation for writing No 8 shaft on the form when he contended the interview did not happen was not true; (5) the issue of the fraudulent signatures on the forms of Mahlalela and Ramoolla, which all involved the second applicant, and which were forged by the same person as confirmed by the handwriting expert, indicated that the common denominator was the second applicant and this was more than mere coincidence; (6) the second applicant could offer no explanation for the discrepancies in the signatures, despite conceding that it was clear that it existed ; (7) there was no explanation or indication as to why Mahlalela would want to falsely implicate the applicant; and (8) there was no indication that any other person with the required knowledge could be involved. On the face of it, the probabilities mentioned would justify the conclusion that the second applicant indeed committed the misconduct referred to. The question however now is whether these probabilities arrived at by the second respondent was done on the basis that a reasonable decision

maker could have done, having regard to the evidence before him as a whole.

[36] The difficulty I had with the case of the applicants, in challenging the issue of the probabilities arrived at and considered by the second respondent, and as put forward by Mr Maunatlala, was that the case was more aimed at the creation of reasonable doubt rather that to assess and determine probabilities. The pertinent points made by Mr Maunatlala, which will be referred to hereunder, were all advanced to, in my view, establish "reasonable doubt" as to the involvement of the second applicant in the misconduct. This is however not the proper test in the arbitration proceedings. In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[18] it was held that the inference drawn from the evidence just has to be 'the most natural or acceptable inference', and not the only inference. In *Bates and Lloyd Aviation (Pty) Ltd and Another v Aviation Insurance Co*[19] it was held as follows:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).' (emphasis added)

[37] The locus classicus on this issue is the judgement in *Govan v Skidmore*[20] where the Court held that it was trite law that: ' . . . in general, in finding facts and making inferences in a civil case, the court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt, so that one may, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

18 (2000) 21 ILJ 2585 (SCA) at 9H.
19 1985 (3) SA 916 (A) at 939I-J.
20 1952 (1) SA 732 (N) at 734A-C.

[38] The judgment in *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*[21] adds a further dimension to the enquiry, where it was held as follows:

> 'The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A)). In the present case however no alternative inferences have been advanced which have a foundation in the evidence. It was suggested in argument that one or more of the appellants may have been absent, or may have been unwittingly caught up in the events. This, however, is no more than speculation, as there is no evidence to suggest that this is what occurred. In my view this is pre-eminently a case in which, had one or more of the appellants had an innocent explanation, they would have tendered it, and in my view their failure to do so must be weighed in the balance against them.'

The judgment in *Amalgamated Beverage Industries* means that the second applicant at least had to provide a feasible explanation to contradict the probabilities presented by the third respondent and as referred to above.

[39] In my view, and in applying the above tests to the determination made by the second respondent, this can only lead to the determination that the conclusions arrived at by the second respondent on the probabilities was rational and reasonable, and thus sustainable. There is simply no basis to interfere with such conclusions. The fact is that all the bullet points of probabilities set out by the second respondent in his award are properly founded and grounded in fact, having regard to the evidence on record. These probabilities are probabilities that properly exist, and which can lead to the "natural and plausible" conclusion that the second applicant was involved in the misconduct. It does not have to be correct or only inference, it just has to be the most natural and common sense

21 (1994) 15 ILJ 1057 (LAC) at 1064C-E.

one. The fact that other possible scenarios / inferences may or may not exist simply does not matter, as all the second respondent has to do is to come to a conclusion which appears to be the more natural or plausible conclusion from amongst several possible conclusions even though that conclusion is not the only reasonable one. That is clearly the approach the second respondent followed. I can simply find no cause or reason to interfere, and I uphold the approach and findings of the second respondent.

[40] The above conclusion should be the end of the matter for the applicants. The fact that the applicants may present other possible reasonable conclusions that may be arrived at in considering the facts of this matter is simply not sufficient to interfere with the conclusions of the second respondent. This is in effect what Mr Maunatlala tried to do. He referred to a number of other issues, such as the fact that the second applicant did not know Mahlalela, that the second applicant derived no benefit, the fact that Mahlalela initially did not tell the truth, that it was Mahlalela that wanted to be medically boarded and go home, that Mahlalela did not come looking for the second applicant but was referred to him by one "David", that the second applicant would surely have told Mahlalela not to go back to the hospital if he (the second applicant) had fraudulently medically boarded him, and the second respondent should not have accepted the evidence of the handwriting expert. The point that must be made is that even if all these other contentions do establish another reasonable conclusion, it simply does not matter. The fact remains that the contentions relied on by the second respondent also established a reasonable conclusion and in the absence of the applicants being able to show that the reasonable conclusion relied on by the applicants was actually the most natural, plausible or common sense one, as seen against that of the second respondent, then there is simply no basis or cause to interfere with the conclusion of the second respondent. The applicants have not made out a case that the conclusion of the second respondent was not the most natural, plausible or common sense one. Furthermore, and as stated above, it is in any

event my view that the conclusion of the second respondent was the most natural, plausible and common sense one.

[41] Mr Maunatlala also took issue with the approach of the second respondent that the second applicant was unable to provide explanations for the fraudulent signatures or provided an alternative explanation as to how the fraudulent medical report could have come about, and that should be held against the second applicant. Mr Maunatlala contended that the onus was on the third respondent to prove the misconduct, and this approach of the second respondent was tantamount to the second applicant having to prove his innocence. I cannot agree with these contentions of Mr Maunatlala. As stated above, the third respondent had at least made out a prima facie case. That meant that there was a duty on the second applicant to advance and provide a reasonable alternative explanation. His failure to do so in my view counts heavily against him. It is in fact in these circumstances proper to refer to an explanation in fact advanced by the second applicant with regard to the issue of the fraudulent signature. The second applicant contended in the arbitration that Mahlalela signed the medical incapacity interview form in his presence, but Mahlalela himself deliberately signed a false signature so he could deny the signature. This explanation borders on the ridiculous, considering that the name “Mahlalela” is recorded and it is Mahlalela who wants the incapacity, and thus the one explanation the second applicant could offer was simply untrue. The reliance of the second respondent on the absence of alternative explanations by the second applicant in finding against the applicants is in line with his duty to determine the evidence as required by law, and is clearly reasonable and proper [22].

[42] With all the above being said, I am in any event of the view that a proper and complete consideration of the evidence on record establishes that the second applicant was indeed involved in the processing of fraudulent medical discharge

22 See also *Aluminium City (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2006) 27 ILJ 2567 (LC)

of Mahlalela. This included a fraudulently completed interview form and termination documents, and also, in my view, the fraudulent medical report. This is clearly the most natural and plausible conclusion, in the circumstances, and on the facts. I wish to highlight a few pertinent issues:

42.1 In my view, it is simply unlikely that Mahlalela would know how to go about processing a medical disability employment termination. Mahlalela would not know what medical report to procure and what documents to complete. The fact is that on the face of it, the medical disability claim by Mahlalela was properly conducted and processed, and was it not for Mahlalela attending at the hospital for treatment on 19 May 2005, it would never have been discovered. The only person who could reasonably have attended to all of this was the second applicant, bearing in mind that no other involvement of anyone else was shown on the evidence. It is also my view that the medical report could not have been completed by someone at the hospital, as it would then not have contained the defects that it did. It was however completed by someone who knew what these forms look like, and again, reasonably speaking, this could only have been the second applicant;

42.2 The next important issue was also specifically touched on by the second respondent. This is the fact that if Mahlalela was actively involved in the processing of a fraudulent medical disability claim, he would not have attended at the hospital for treatment on 19 May 2005. This shows that Mahlalela did in fact not know that his termination of employment had been processed and what it meant. It is clear that events were transpiring without his knowledge and involvement. The termination of employment of Mahlalela was effected on the third respondent's system by someone that knew how to do it. Once again, this could only have reasonably been the second applicant;

42.3 The medical disability interview form is also of importance. It was common cause that the second applicant was responsible for it, and completed it. It was also the second applicant's duty to assess the claim, and to recommend it or not. The undisputed testimony was that the third respondent to a material extent entrusted the recommendations made with regard to medical disability applications being successful or not to the second applicant, it being a specific part of his duties. The second applicant, on the form in question, did recommend that the claim of Mahlalela be approved. However, and on the face of the form itself, it appears to be entirely inadequate and lacking in particularity. Then there is the issue of the fraudulent signature of Mahlalela on the form. According to the form, the interview was held on 9 May 2005, but the clocking records of the third respondent showed that the second applicant and Mahlalela spent less than five minutes together on the same day, which is wholly inadequate for the conducting on an interview. Once again, the second applicant was clearly directly involved in all of this;

42.4 The second applicant, being faced with the above difficulty, and with reference to the evidence on record, then seeks to offer a number of versions. The first is that the interview took place on a different date than 9 May 2005, and this date was only the date when the form was completed. The problem of course with this version is that the second applicant and Mahlalela only met on the one day for the "interview" (as alleged by the second applicant), and this explanation would have meant that, considering the second applicant's contention that Mahlalela actually signed the form in his presence, that Mahlalela would have had to return later to sign the form, which did not happen. The second applicant then contended that he could not remember when the form was signed and the interview was held, which explanation in the face of the clocking record is simply unacceptable;

42.5 The second applicant also tried to explain away the completion of the shaft number as number 8 of the form. The second applicant contended that the interview took place at number 7 shaft, and stated that Mahlalela in his evidence also confirmed that the interview took place at number 7 shaft. This explanation was clearly made to get away from the clocking records referred to above, which records entirely negate the existence of an interview. In my view, and considering the evidence on record, the second applicant's explanation in this instance is a deliberate misstatement of the evidence. On the record, what Mahlalela said was that he first met the second applicant at number 7 shaft, and it is there that he said to the second applicant that he wanted medical boarding and that the second applicant then told him to return later the week to collect the documents. Nowhere in the evidence is it recorded as to where Mahlalela actually returned to collect the documents, but it was common cause that he did and that he did meet the second applicant on that day, and there were no further meetings thereafter. This could therefore have only been on 9 May 2005 at number 8 shaft, as this corresponds with the clocking records, the date on the form and the place on the form. In my view, the second applicant's version in this regard was properly rejected. The second applicant added a further explanation that the "practice" was that he completed on the form as the shaft number not the shaft where the interview was held, but where the employee came from (Mahlalela came from 8 shaft), which explanation, on the simple reading of what the form template records, is entirely unacceptable. Boshoff who testified for the third respondent disputed that such practice ever existed, and there is no reason not to believe his evidence;

42.6 This then leaves the issue of the termination of employment form signed on 12 May 2005. This form also bears a purported signature of Mahlalela, which is also fraudulent. It also was completed by, and bears the signature

of the second applicant. When Mahlalela could have signed this document is left entirely unexplained by the second applicant, save where the second applicant stated under cross examination that he "called" Mahlalela later to collect all the forms, which version was never raised or put before and flew in the face of what was really common cause. There were, as stated above, no further meetings between the second applicant and Mahlalela. The most plausible and logical conclusion is that it was again the second applicant that forged this document;

42.7 This then finally brings the evidence of the handwriting expert, Landman, into play, and there is no reason to reject such evidence. The evidence was that the signatures of Mahlalela were forged, and it was the same person who forged the signatures of Mahlalela and Ramoolla. The only common denominator was the second applicant;

42.8 From the above factors alone, it is my view that the most plausible and natural conclusion in this instance is that Mahlalela wanted to receive a medical disability employment termination when he was not entitled to this, and it was the second applicant who assisted him by forging the process to enable Mahlalela to get this. It is my view that the interview was never held by the second applicant, and the second applicant just met Mahlalela on 9 May 2005 to hand him the documents. Mahlalela was not aware of what this meant, which is why he went to the hospital later for treatment. Whatever the motive of the second applicant was for doing this is irrelevant.

[43] As the second applicant in fact committed fraud, his dismissal was justified. In *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others,*[23] it was held:

23 (2010) 31 ILJ 2475 (LC) para [23]

> 'The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. See *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26E-G'

[44] In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[24] the Court held as follows, which in my view is quite apposite to the current matter:

> 'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise'

and:

> 'Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.'

[45] The second applicant clearly did not act with the necessary fiduciary duty, as required by law, especially having regard to his position, and the interests of the employer (third respondent) he was required to serve. In this respect, reference is made to *Sappi Novoboard (Pty) Ltd v Bolleurs* [25] where it was held as follows:

> 'It is an implied term of the contract of employment that the employee will act with

24 (2000) 21 ILJ 1051 (LAC) at para 22 and 25.
25 (1998) 19 ILJ 784 (LAC).

good faith towards his employer and that he will serve his employer honestly and faithfully: *Pearce v Foster and Others* (1886) QB 356 at 359; *Robb v Green* (1895) 2 QB 1 at 10; *Robb v Green* (1895) 2 QB 315 (CA) at 317; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 at 133; *Premier Medical and Industrial Equipment Ltd v Winkler and Others* 1971 (3) SA 866 (W) at 867H. The relationship between employer and employee has been described as a confidential one (*Robb v Green* at 319). The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' (*Premier Medical and Industrial Equipment Ltd v Winkler* at 867H; *Jones v East Rand Extension Gold Mining Co Ltd* 1917 TH 325 at 334). If an employee does 'anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him': Pearce v Foster at 359. In *Gerry Bouwer Motors (Pty) Ltd v Preller* it was said at 133: 'I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him.'

[46] Similarly, reference is made *Carter v Value Truck Rental (Pty) Ltd*[26] where the Court held as follows:

> 'It is trite that, both at common law and under the equitable dispensation created by the LRA, the employment relationship is regarded as one of the highest good faith: *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26B-F; *Standard Bank of SA Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (1998) 19 ILJ 903 (LC) at 913E-H; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para 7 and the copious authorities there cited. The success of any enterprise depends on the absolute integrity and honesty of its employees, and any form of dishonesty or deception potentially may have more serious and far-reaching consequences at executive level: see, for example, *JD Group Ltd v De Beer* (1996) 17 ILJ 1103 (LAC) at 1112-13. 'Honesty' in the employment context does not merely mean refraining from criminal acts; it embraces any conduct which involves deceit.'

26 (2005) 26 ILJ 711 (SE) at par [44].

[47] Clearly, therefore, the third respondent was entitled to dismiss the second applicant, and such dismissal was substantively fair. The second respondent's conclusion to this effect was thus reasonable and justified, and there is no basis to review and set aside this conclusion.

The merits of the review: procedural fairness

[48] As set out above, the case of the applicants when it came to the procedural fairness of the dismissal of the second applicant was the issue of sufficient particularity in respect of the charges against the second applicant and the issue of sufficient prior notice of the disciplinary hearing. It is my view that this case has no substance. I am satisfied that overall, the second applicant received a fair and proper disciplinary enquiry. That is the true and proper test.

[49] The second respondent fully dealt with this issue. The second respondent recorded in his award that the second applicant never raised, in his disciplinary hearing, that he was uncertain with regard to the charges or required clarification in respect of the same. The second respondent further concluded that the second applicant was an experienced industrial relations practitioner. The second respondent finally concluded that the hearing was in any event delayed on a number occasions. All of these conclusions of the second respondent are justified and confirmed by the evidence on record.

[50] The documentary evidence shows that the second applicant was first charged on 25 June 2005 and the disciplinary hearing only commenced on 21 July 2005 and was completed on 27 July 2005, after having been moved on 7 July and 20 July 2005 .[27] In my view, this is more than sufficient time to prepare for the disciplinary hearing. Also, the entire record of the disciplinary hearing was placed before the second respondent and formed part of the evidence in this matter. This evidence shows that the second applicant was properly represented by a union

27 See Bundle of documents pages 163 – 166.

representative of his choice who never raised an issue about there being insufficient time to prepare or at least asked for an adjournment so as to give the second applicant more time to prepare. The record of the disciplinary hearing shows that the second applicant and his representative fully participated in the disciplinary hearing. There is thus no merit in the contention by the applicants that the second applicant had insufficient time to prepare for the disciplinary hearing.

[51] The next issue is the issue of the insufficient particularity of the charge. The second respondent recorded in his award that the manner in which the charge was formulated coupled with the preceding investigation in which the second applicant was involved in, could have left the second applicant with no "reasonable uncertainty" about what was involved and what the allegations of misconduct were that he was required to meet. I agree with this conclusion of the second respondent. The charge is actually quite clear – the second applicant fraudulently initiated and conducted a medical incapacity interview with Mahlalela on 9 May 2005. As Mr Snider for the third respondent correctly points out, this was always the issue, remained the issue, and everyone knew it was the issue. This is clearly evident from the extensive record of the disciplinary hearing.

[52] The final issue to refer to is that the record of evidence in the arbitration clearly showed that the second applicant was indeed an experienced industrial relations practitioner. He had been directly involved in a significant number of disciplinary hearings. He clearly knew what he rights of employees in such disciplinary hearings were. He was simply not an uninformed and ignorant employee, and the second applicant was well versed in disciplinary hearing process. Despite this being the case, the second applicant never, in the disciplinary hearing, raised any issues of procedural irregularity as raised in the arbitration. I conclude from this that the procedural issues raised were simply raised to bolster the applicants' case at arbitration, and were not actually real issues.

[53] On the evidence, in any event, there is simply no indication or any particulars of any prejudice the second applicant may have suffered in the conduct of the hearing because of these issues mentioned.

[54] All the determinations the second respondent made on the issue of procedural fairness are thus determinations a reasonable decision maker could come to, and thus are simply not reviewable. In fact, my view is that there determinations are entirely correct, having regard to the evidence on record.

[55] Even if it may be considered that the issue raised by the applicants could feasibly constitute some or other form of procedural irregularity, this does not by automatic consequence mean that the dismissal of the second applicant was procedurally unfair. Reference is made to *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others* [28], where the Court held as follows:

> 'To some extent, chapter VIII of the Labour Relations Act represents a codification of the jurisprudence that preceded it. The Act itself is silent on the content of any right to procedural fairness, it simply requires that an employer establish that a dismissal was effected in accordance with a fair procedure. The nature and extent of a right to fair procedure preceding a dismissal for misconduct is spelt out in specific terms in the Code of Good Practice: Dismissal in schedule 8 to the LRA.
>
> . . . .
>
> It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

28 (2006) 27 ILJ 1644 (LC) 1651 C-D.

This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956 Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

. . . .

> On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like.'

[56] Reference is also made to *Nitrophoska (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1981 (LC); *Munnik Basson Dagama Attorneys v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1169 (LC); *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) with regard to the above.

[57] In the end, therefore, there is simply no merit in the applicants' contention of procedural unfairness, on the grounds raised. These grounds of review therefore fall to be dismissed. I thus conclude that the dismissal of the second applicant was procedurally fair. The second respondent's conclusion to this effect was thus reasonable and justified, and there is no basis to review and set aside this conclusion.

<u>The issue of the postponement</u>

[58] The applicants in their review application raised one final issue for consideration. This issue concerned the second respondent's refusal of a postponement to the applicants at the conclusion of the arbitration proceedings on 27 August 2007 so the applicant could procure the testimony of their own handwriting expert. The applicants contended that his materially prejudiced the conduct of the applicants' case.

[59] It must immediately be said that this postponement was sought after all the

available evidence in this matter had been led, and the case was in essence concluded. Furthermore, it is trite that a postponement is not an issue of right, but an indulgence sought by the applicants, and as such, must be properly substantiated and motivated. The second respondent is then required to exercise a judicial discretion in determining such indulgence sought. It is apposite to first refer to the judgment in *Carephone (Pty) Ltd v Marcus No and Others*[29] where the Court held as follows:

> 'In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised (*Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9).'

[60] The general principles applicable to postponements was aptly summarized in the judgment of *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society,*[30] where it was held as follows, and which can equally be applied in this instance:

> 'In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:
>
> (a) The trial judge has a discretion as to whether an application for postponement should be granted or refused. (*R v Zackey* 1945 AD 505; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (Nm)).
>
> (b) That discretion must at all times be exercised judicially. It should not be

29 (1998) 19 ILJ 1425 (LAC) at 1439 [54].
30 (2000) 21 ILJ 386 (LC) at 394-5.

exercised capriciously or upon any wrong principle, but for substantial reasons. (*R v Zackey; Myburgh Transport; Joshua v Joshua* 1961 (1) SA 455 (G) at 457D.)

(c) The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles. (*Prinsloo v Saaiman* 1984 (2) SA 56 (O); *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).)

(d) An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made. (Myburgh Transport ; Greyvenstein v Neethling 1952 (1) SA 463 (C).)

(e) The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen The Civil Practice of Superior Court in SA (3 ed) at 453; Myburgh Transport.)

(g) "The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.'

[61] In this case, and applying the above principles, I can find no fault with the manner in which the second respondent exercised his discretion and refused to

grant the indulgence sought by the applicants by refusing the postponement. The record of evidence shows that both parties had the opportunity to make proper submissions to the second respondent in this regard. The gist of the grounds for postponement advanced by the applicants was that their own handwriting expert at the very last minute indicated that he had other commitments and was unable to testify. Despite the fact that this reason is per se unacceptable, as surely a properly arranged and reserved expert witness cannot have last minute alternative commitments, the second respondent nonetheless dealt with the issue. The second respondent took issue with the fact that there was not even an expert witness report prepared that was submitted beforehand, as the third respondent did with its expert witness. The second respondent concluded that the applicants had more than sufficient time to ensure the attendance of an expert witness. The second respondent concluded that the matter had been dragged out and it was in the interests of justice not to prolong the issue any further. All these conclusions of the second respondent, are in my view, a proper exercise of his discretion in respect of the issue of the postponement, and unassailable on review.

[62] I did however consider the issue of the postponement, in any event, on the merits thereof. On the record,[31] the second applicant's attorney states that the hearing date was reserved with the expert. However, and even as at the date of the final hearing, the expert's report had still not been completed, and all that existed was a "rough report", whatever this may mean. The second applicant's attorney further stated that the expert then "made a mistake" when he accepted the instruction and reserved the date, and when pressed by the second applicant's attorney to attend the arbitration, the expert stated that he would not and would attend the other matter he was attending to. The second applicant's attorney then said that he "was considering his options" and may even engage another expert. I find these grounds for seeking a postponement, right at the end of the matter, to be entirely unacceptable. In my view, there was simply no basis in granting the

31 Transcribed record page 277 – 284.

second applicant's request for a postponement, for the following reasons:

62.1 The arbitration actually already commenced at the end of March 2007. The third respondent's expert had testified almost three months before the final hearing in this matter, and the third respondent's expert report had been available to the second applicant for almost two years. It is simply untenable to suggest that at the very end of the case that the matter be further postponed in circumstances where there is not yet even an expert report available, and with no real prospect of such report being prepared soon, seeing the second applicant's attorney was considering engaging another expert;

62.2 Another consideration is the issue of prejudice. The fact is that the third respondent's expert had concluded his testimony. The alternative expert report should have been discovered by then, so it could be put to the third respondent's expert for his comment. To at the final stage of the hearing, and after all evidence of the third respondent had been concluded and presented, to then seek to for the first time introduce an expert report is simply unacceptable;

62.3 On the documents on record,[32] the second applicant was actually forewarned by the third respondent's attorneys as to the issue of the difficulties with its expert witness. It is recorded on 4 July 2007 by the third respondent's attorneys that for the second applicant to now seek to introduce an expert report after the third respondent had closed its case is improper, in bad faith and prejudicial to the third respondent. I agree. It is further recorded that even as at this date, the third respondent has still not even been provided with an expert report, and that the third respondent would be entitled to have such expert report before the matter proceeded,

32 Bundle of documents pages 4 – 5.

at the very least, so it could consult its own expert on it, and possibly recall the expert. Once again, I agree with these statements. On 13 July 2007, the third respondent's attorneys asked for particulars about the second applicant's expert witness, and that it be favoured with the written opinion before the recommencement of the matter on 27 August 2007.[33] On 18 July 2007, the third respondent's attorneys requested that it be furnished with the expert opinion by 6 August 2007, so it could consult its own expert on it and on 20 and 24 July 2007 again asked for the name of such expert.[34] On 7 August 2007, the third respondent's attorneys again asked for the expert report and the expert's particulars, and recorded its prejudice in not having received the same despite several requests.[35] The same request was repeated on 16 and 17 August 2007.[36] Not once was these requests responded to, or complied with by the second respondent's attorney. This conduct is entirely unacceptable.

62.4 The first response from the second applicant's attorney is a letter on 23 August 2007, recording its expert is unavailable, and requesting that the matter be postponed because of this. The second applicant's attorney did not even tender costs for this postponement, still did not provide even the expert report or the identity of the expert, and adopted this approach of a postponement being sought despite recording on 17 August 2007 that the second applicant was ready to proceed with the arbitration [37]. The third respondent objected to the matter being postponed and still the second applicant's attorneys did not even prepare and submit a proper postponement application or even provide the particulars asked for.

62.5 It is clear from the above that the second respondent was entirely justified

33 Bundle of documents pages 9 – 10.
34 Bundle of documents page 15 ; 16 ; 17.
35 Bundle of documents page 23.
36 Bundle of documents page 26 ; 30.
37 See Bundle of documents pages 28 ; 32.

and correct in refusing to allow the matter to be delayed any further.

[63] Accordingly, there is no reviewable irregularity in this instance in the second respondent refusing to postpone the matter on 27 August 2007. I fully agree with the reasoning of the second respondent, and the conclusion he came to. This ground of review of the applicants therefore also fall to be rejected.

[64] Therefore, and in conclusion, there is simply no basis to review and set aside the award of the second respondent, and the award of the second respondent in its entirety is upheld. I can see no reason why costs should not follow the result in this matter.

Order

[65] In the premises, I make the following order:

1 The review application of the applicants is dismissed with costs.

_____

Snyman AJ

APPEARANCES:

For the Applicant: Adv L Maunatlala

Instructed by: E S Makinta Attorneys

Third Respondent: Adv A Snider

Instructed by: Webber Wentzel Attorneys