THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2600/13

In the matter between:

WANDILE MALOKA	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER VUSI MGWENYA	**Second Respondent**
SOUTH AFRICAN REVENUE SERVICE	**Third Respondent**

Heard: **4 February 2016**

Delivered: **31 August 2016**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The Applicant seeks to review and set aside the arbitration award issued on 10 November 2013 by the Second Respondent (the Commissioner), in terms of which it was found that his dismissal was fair. The Third Respondent (SARS) opposed the application, and despite its objections in its answering papers that the Applicant's reliance on the provisions of section 158(1)(g) of the Labour Relations Act[1] (LRA) in bringing this review application was

[1] Act 66 of 1995

misplaced, the Applicant nevertheless insisted in his replying affidavit that the application was properly formulated to comply with those provisions.

Background:

[2] The Applicant was employed from 24 April 2010 by SARS as a CBCU Inspector and was stationed at the Lebombo border post (Between RSA and Republic of Mozambique). He was dismissed on 22 April 2013 following upon a disciplinary enquiry into allegations of misconduct involving;

> *"Bringing SARS name into disrepute in that upon or about the 12 December 2012 and at or near Nelspruit whilst wearing CBCU uniform, you were found in possession of a horn and thereafter arrested for illegally trading or intending to trade with a horn. You had the intention of trading/selling in order to benefit an amount of R700 000,00 from the said horn and thus damaging the image of SARS".*

[3] Having been subjected to a disciplinary enquiry and thereafter dismissed, the Applicant lodged an appeal, citing one of the grounds as being that he was a first offender and ought to have received a warning. The appeal was turned down on 13 May 2013, and he thereafter referred a dispute to the CCMA alleging that his dismissal was substantively fair.

The evidence led at arbitration proceedings:

[4] SARS had called upon its sole witness, Warrant Officer Given Sibanyoni of the SAPS' Organized Crime Unit. His testimony was that on 12 December 2012, he received a tip-off that a transaction involving the sale of a rhino horn was to take place in the parking area of Shoprite/Checkers in Nelspruit. Information received was that the alleged perpetrators would be driving a BMW vehicle. Upon Sibanyoni and his colleague arriving at the area, they had seen the vehicle in question with two individuals inside. One of them was the Applicant who was then partially dressed in official SARS' uniform (black trousers, boots and a grey t-shirt).

[5] Upon confronting the two individuals and requesting them to open the boot of the vehicle, the Applicant then proceeded to open it and immediately informed the police officers that there was a rhino horn inside a cooler box. A horn was found inside the cooler box wrapped in a plastic bag. The Applicant was promptly arrested and taken for questioning in relation to allegations that he may have been involved in the illegal dealing of rhino horn. Upon arriving at the local police station, an expert was then asked to test the horn to determine whether in fact it was indeed a rhino horn. The tests revealed that the horn was that of a *cow* and the Applicant was then released.

[6] The Applicant was the only witness in his case. His version of events was that on 12 December 2012, he and his friend went to meet an unidentified individual at the Shoprite/Checkers' parking area. This individual came, spoke to them and left. Thereafter, police officers came to his vehicle and asked him to open its boot for inspection. At the time, he was wearing a SANDF t-shirt and black SARS' pants, and had taken off his SARS' shirt.

[7] A cooler box was found inside the boot of his vehicle and upon being asked what was inside, the Applicant stated that he did not know. One of the police officers then retrieved a SARS' shirt from the back of the vehicle and showed it to the other police officer. The Applicant and his friend were then arrested and taken to the police station. An examination was conducted on the horn found in the boot of his car and it was found to be that of a cow. He was requested to write a statement, and testified that at the time he did so, the horn had already been tested and he was aware that it was not a rhino horn. He was thereafter released. Upon returning to work the next day, he was also asked to write a statement. Under cross-examination, and upon being asked the reason he had agreed to deliver the horn in return for payment of R700 000.00, his reply was that he was off duty, and had thought that the horn was for medicine.

[8] SARS' contention was that prior to being released, and *before* he was informed that the horn was that of a cow, the Applicant had made a statement[2] in terms of which his version was as follows;

Sometime in November 2012 whilst at the local petrol filling station, an unknown person approached him and asked him whether he still worked at the border post. Upon him confirming that he still was, the individual then asked him for his contact details and promised to call him at a later stage. The following day whilst on duty the said individual had contacted him and asked to meet him at the Komatipoort BP garage. He duly met this individual as arranged and he was informed that his assistance was required to pick up somebody at the Mozambique border post.

[9] Whilst at the garage, another individual came into his vehicle with a bag containing cash and asked for the 'stuff' which was not available then. The following day he again met the individual who had initially contacted him at a different place, and they were joined by another individual known as 'Alfredo' from Mozambique, who had cocaine in his possession and demanded cash for it. No transaction however took place. Some three days later, the said 'Alfredo' contacted him and told him that he had 'a lot of stuff', including rhino horn. At

[2] Pages 137 – 144 of the Bundle

some point, the Applicant met with the individual who had initially contacted him and an arrangement was made to meet 'Alfredo' at Mbuzini. Having met 'Alfredo', they were then showed a rhino horn and were told to pay R20 000.00. The Applicant paid R10 000.00 (which he had borrowed from a friend) whilst his contact paid the balance and they were given the horn. The horn was kept at the Applicant's friend's (Nhlanhla) place. The Applicant and Nhlanhla, then took the horn to Nelspruit to sell to another person who had promised them R700 000.00 for it and whom they were to meet near Shoprite Checkers. Having met the 'buyer', the latter told them that he needed to inspect or test the horn first before the transaction could be concluded. After the 'buyer' left, they were then arrested.

[10] Upon being released at the police station and on reporting for duty, the Applicant made a second statement[3] in the form of an affidavit on 13 December 2012 at the behest of SARS. In the second statement the Applicant reiterated having been approached by an individual who was this time known to him. The same individual had asked for his contact details and contacted him a day later and asked to meet him at the local BP garage. This individual asked him to assist in meeting and fetching somebody from Mozambique. The Applicant had initially refused to do so and was again contacted by this individual to meet with him at another place (Ka-Maqhekeza). The Applicant drove to that place to meet this individual, who asked him to transport his 'staff', without mentioning what it was and assured him that there was nothing illegal about the request.

[11] The said individual again contacted him on 12 December 2012, and an arrangement was made to meet after 14h00. Without having taken off his uniform, the Applicant then drove to Malelane to meet this individual. Upon meeting him, this individual told him that he was required to transport a *cow horn*, and that he would receive a share of R700 000.00 thereafter. The Applicant then agreed to these arrangements, and the horn was then retrieved from this individual's vehicle and placed in the Applicant's vehicle. The Applicant had then called his friend Nhlanhla to accompany him to Nelspruit to meet the 'buyer', who had informed him to meet him near the Shoprite Checkers. Upon his arrival at the agreed place, the 'buyer' came and inspected the horn, and said that he was coming back with the cash. It was subsequent thereto that they were then arrested.

[12] The Applicant's friend, Mr. Nhlanhla Mahlalela also made a statement with the police. His version of events was that on 12 December 2012 at about 15h45 he got a lift from the Applicant to Malelane. The Applicant however informed him that he was first going to meet someone at or near the Shoprite/Checkers' parking area. The Applicant then met the

[3] Pages 159 – 162 of the Bundle

individual concerned and the three of them went to inspect the Applicant's vehicle boot where there was a cooler box. The individual who was met then said that he would come back, and thereafter they were arrested. Mahlalela denied any knowledge of the horn and did not even know where the Applicant got it from.

The review test:

[13] In terms of the review test as articulated in *Sidumo and Another v Rustenburg Platinum Mines and Others*[4], the question this court should determine is whether the decision reached by the commissioner is one that a reasonable decision- maker could not reach in the light of the material before him or her. Musi JA recently in *Rustenburg Platinum Mines Limited (Amandelbult Section) v NUM obo Monageng and Others*[5] further explained the test as follows;

> *'It is well settled that the review standard, in cases such as this, is reasonableness. If the decision of the commissioner falls within the band of reasonable decisions that a commissioner could make, then, courts should not interfere with the decision. The court must thus enquire whether the decision falls within a range of possible justifiable decisions that could be reached based on the facts before the decision-maker and the law. Courts will sometimes be tempted to interfere because they would have decided the issue differently. They should however show deference to the commissioner, because he/she has been entrusted by the legislature to arbitrate and decide labour disputes that are properly referred for arbitration. Deference however does not mean that the court should not properly enquire into the facts that make a decision reasonable or otherwise.'*

Is the Commissioner's award reviewable?

[14] Despite insisting in his replying affidavit that he relied on the provisions of section 158 (1) (g) of the LRA[6], in bringing this application, the Applicant in his written heads of argument then proceeded to state that he placed reliance on both those provisions and those of section 145 of the LRA[7]. It is trite that the provisions of section 158 (1) (g) of the LRA only applies when

[4] (2007) 28 IJL 2045 at para [110]

[5] (JA12/2015) [2016] ZALAC 21 (26 May 2016) at para [11]

[6] Which provides that;

'1. The Labour Court may-

(g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law'

[7] Which provides that:

'1. Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) Within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) If the alleged defect involves corruption, within six weeks of the date that the applicant discovered the corruption.

2. A defect referred to in subsection (1) means-

(a) That the commissioner-

those of section 145 are inapplicable. Effectively, the latter provisions apply to the review of arbitration awards, whilst those of the former provisions do not[8]. The Respondent pointed out that the Applicant had failed to establish any grounds for the review and setting aside of the award, within the meaning of 145 of the LRA. Thus the only ground upon which the Applicant could possibly rely on is that of reasonableness in line with the *Sidumo* test.

[15] It is accepted that in motion proceedings, a party ought to stand and fall by its pleadings, and that a case can neither be made out in replying affidavits nor in written heads of argument. In his founding affidavit, the Applicant initially placed reliance on the provisions of section 145 of the LRA, and it is inexplicable as to the reason that in his supplementary affidavit he would have wanted to disavow those provisions and rely on those of section 158 (1) (g) of the LRA. To the extent that no basis had been laid for the Applicant to demonstrate that the provisions of section 145 are not applicable in this case, ordinarily, the matter ought to be dismissed on that basis.

[16] Dismissing the application on that technicality will however not bring an end to this dispute, and it is my view that to the extent that SARS acknowledged that even in the absence of sustainable grounds within the meaning of section 145 (2) of the LRA, the only basis upon which the merits of the application could be determined was that of unreasonableness, if any. For the sake of expedience and completeness therefor, I intend to approach the Applicant's grounds of review along these lines.

[17] The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others* held that in assessing whether the result of an award is unreasonable, the reviewing court should not adopt a piecemeal approach, and must further enquire whether;

> *"…….. (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect*

(i) committed misconduct in relation to the duties of the commissioner as arbitrator
(ii) committed a gross irregularity in the conduct of arbitration proceedings or
(iii) exceeded the commissioner's powers.'

[8] See the minority judgment in Sidumo at para [187] where Ngcobo J held that;

"I pause here to refer to the history of s 158(1)(g). This provision originally used the words 'despite s 145' instead of 'subject to s 145'. Prior to the decision of the Labour Appeal Court in Carephone, there were conflicting decisions of the Labour Court on the question whether the Labour Court has the power to review arbitral awards under s 158(1)(g). The one line of decisions held that there was no such power. However, a majority of the decisions of the Labour Court held that there was such power. As the Labour Appeal Court pointed out in Carephone, apart from the language of the provision, the reasoning in favour of the application of s 158(1)(g) found justification in the view that the grounds of review under s 145 were limited in scope and did not give expression to the right to just administrative action in s 33 of the Constitution. In Carephone the Labour Appeal Court construed the word 'despite' in s 158(1)(g) to mean 'subject to', this being 'a lesser evil than ignoring the whole of s 145' and held that the review of CCMA arbitration awards must proceed under s 145 of the LRA. The legislature subsequently intervened and introduced an amendment in line with the decision in Carephone."

of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[9]

[18] Thus in line with the principles set out in *Goldfields*, the task of the review court is to ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at[10].

[19] It was common cause that upon being confronted at the Shoprite/Checkers parking area, the Applicant and Mahlalela were taken to the local police station for questioning, and were thereafter released after statements were taken from them. The question therefore as to whether they were 'arrested' or not is neither here nor there for the purposes of the principal issue for determination before the Commissioner. What was relevant is that the Applicant and Mahlalela were detained or taken to the police station for questioning and had made statements. It therefore follows that the mere fact that the Commissioner concluded that the Applicant was arrested even if the Applicant holds a contrary view cannot be a sustainable ground to review and set aside the award.

[20] A fundamental flaw in both fact and law pertains to the Applicant's argument that the Commissioner made an incorrect finding that at the time of his arrest he was in SARS' uniform. The standard of proof in misconduct arbitration proceedings is that of a balance of probabilities, and not proof beyond reasonable doubt as it was contended on his behalf. It follows that there is no merit in his attack on the Commissioner's finding that at the time of his arrest he was in a SARS' uniform. It was common cause that the Applicant was employed by SARS. At the time of his arrest, and on his own version before the Commissioner, he was partially dressed in SARS' uniform (black pants and boots), and a SARS' shirt belonging to him was found in the back of his vehicle. All of these factors by all accounts linked and associated him with SARS.

[21] The Applicant's other complaint was that the Commissioner was biased in that he did not ask him any questions regarding the payment of R700 000.00 for the horn. This complaint arises from the Commissioner's findings that the Applicant had agreed to deliver a horn to someone

[9] [2014] 1 BLLR 20 (LAC) at para [20]
[10] At para [16]

in Nelspruit where he would be paid R700 000.00 upon delivery and thereafter be paid a portion thereof. The Commissioner further found that Applicant had the belief at the time that the horn was that of a rhino until tests were done, and his version that he knew all along that it was a cow's horn was not convincing in that he was told that the 'buyer' would pay R700 000.00 for it. The question the Commissioner asked, was why would any person pay that amount for an ordinary cow horn.

[22] In relation to this very issue, the Commissioner further found that the Applicant at no stage mentioned to the police that what he had was a cow horn, and at arbitration proceedings, his version was that at the time he was apprehended, he was asked what was inside the cooler box, and his response was that he did not know. The Commissioner found that there was no reason to reject the statement made at the police station despite it being not in the form of an affidavit. That statement revealed that he was in possession of a rhino horn.

[23] I did not understand the Applicant's case to be that the Commissioner did not give him a full opportunity to have his say in respect of the dispute. The complaint that the Commissioner was biased solely on account of not having asked him questions about the payment of R700 000.00 for the horn is equally without merit. The Applicant was represented by an attorney in the arbitration proceedings, and it was for the latter to ask him all the pertinent questions. A commissioner cannot be accused of being biased simply because he or she had not asked witnesses particular questions during proceedings.

[24] Significant however with the Commissioner's finding is that the Applicant at the time and before the horn was tested, had the belief that what he had was a rhino horn. The Respondent's contention was that the inference drawn by the Commissioner relating to the plausibility of the Applicant's alleged belief that he would receive R700 000.00 for a cow horn is justifiable in that the Applicant could not reasonably have believed that he would receive that sum of money for a cow horn which he in any event initially identified to the SAPS and in his first statement as a rhino horn. It was also submitted on behalf of the Respondent that even though the Applicant was ultimately not charged for dealing in rhino horn, this did not detract from the fact that he had intended to involve himself in this illegal conduct whilst wearing part of his uniform and whilst employed as a law enforcement officer.

[25] The Applicant's version at the arbitration proceedings, and his other two versions from his written statements do not add up. In fact, his version at the proceedings is so far-fetched and implausible that the Commissioner was correct in rejecting it. It is improbable that he could

not have known about the horn that was found in the boot of his vehicle, and his version that he and his friend had merely gone to the meeting place to meet the unnamed individual for unknown reasons does not make any sense. It is improbable that the Applicant could have taken the effort to drive from work to Nelspruit to meet someone he did not know and for reasons he did not know.

[26] The Applicant's initial statement at the police was made voluntarily and without any form of coercion. It is clear from that statement that the Applicant was involved in an attempt to trade in what he believed to be a rhino horn with the hope of getting a share of the R700.000.00. Unfortunately for him, this is one of those deals where he was clearly hoodwinked into believing that what was sold or given to him for trading was a rhino horn when in fact it was a worthless cow horn.

[27] The Applicant's version that he always knew that it was a cow horn is not supported by his initial response to Nsibanyoni when he was accosted and questioned at the parking area, and the contents of his initial statement made at the police station. Until he was informed that the horn was that of a cow, at no stage, contrary to his assertions, did he even state to the police that what he had was a cow horn. Other than these factors, to the extent that there is any iota of credibility in his version, it did not make sense during the arbitration proceedings, for him to testify that he did not know about the horn or where it came from, and to in the same vein, concede that he had agreed to deliver the horn to someone in exchange for R700 000.00, as he believed that it was for medicine.

[28] There is therefore no merit in the Applicant's contention that the Commissioner had speculated in the award that his conduct showed that he intended to involve himself in illegal activities by participating in rhino horn trading, whilst the horn in question was established as that of a cow. The inferences drawn by the Commissioner from the evidence placed before him cannot be faulted. It is apparent from the evidence before the Commissioner that at the time that he made a statement with the police, he genuinely believed that what he had was a rhino horn, and his subsequent versions in his second statement or at the arbitration proceedings were contrived and far-fetched.

[29] It was further submitted on behalf of the Applicant that selling and trading in cow horn was not illegal, and that the Commissioner therefore committed misconduct by making a finding that he was fairly dismissed for bringing SARS into disrepute when it had been established that he had not committed any criminal offence, nor had he contravened SARS' disciplinary

rules or policy for being in possession of a cow horn. The Respondent's response was that even though no illegal activity actually occurred, the crux of the misconduct was the intention to engage in unlawful activity, which at all material times the Applicant believed he was involved in (i.e. trading in rhino horn) and that the fact that the trade was ultimately not illegal is completely irrelevant to his intention at the material time.

[30] It might be so that the selling or trading in cow horn is not illegal. The facts of this case are however such that until it was established that the horn found in the Applicant's vehicle was that of a cow, he genuinely believed it to be a rhino horn. He had, as an employee of SARS, and whilst partially dressed in its uniform, engaged himself in activities which he believed to be involving the sale and trade of rhino horn. When regard is had to the statement he had made at the police station, he and his friend had invested R20 000.00 in the transaction. To the extent that he had willingly engaged himself in such illicit activities (*albeit* there was no rhino horn involved) with the hope of getting a share of R700 000.00, and further to the extent that on his version as per his statement, the 'contact' person had approached him in his capacity as a SARS' employee, he was clearly involved in conduct that impacted on his employment relationship with SARS.

[31] It is further irrelevant that no rhino horn was traded or that the Applicant was off duty at the time. The conduct he was involved impacted on SARS' name and reputation. The court has also held in a variety of cases that off-duty misconduct can constitute a valid reason for dismissal[11]. This is even more pertinent where the employee's misconduct constituted a criminal offence, or where the employee's behaviour involved gross dishonesty and corruption, and where the nature of such conduct was to destroy the relationship of trust between the employee and the employer[12]. This approach is in line with Item 7(a) of Schedule 8 of the Code of Good Practice: Dismissal, which provides that the contravention of a rule regulating conduct in the workplace or *of relevance* to the workplace as being capable of being the subject of disciplinary action. The test for determining *relevance* to the workplace is that the employer must have a legitimate interest in the conduct or activities of the employee outside working hours or outside the workplace, and that there must be a link or nexus between the conduct complained of and the employee's duties, the employer's business or the workplace[13].

[11] See Custance v SA Local Government Bargaining Council & Others (2003) 24 ILJ 1387 (LC)
[12] See City of Cape Town v South African Local Government Bargaining Council (SALGBC) and Others [2011] JOL 26801 (LC)
[13] See Grogan: Dismissal at 285

[32] Lagrange J in confirming the above approach in *Dolo v Commission for Conciliation, Mediation and Arbitration and Others*[14] held that;

> *"The applicant contends she committed no wrong against her employer. This is correct: her involvement in the fraudulent scheme did not concern any non-performance of her duties or other act of misconduct in the workplace. However, being a party to such a scheme held implications for her suitability to occupy a position in which she was entrusted to deal with the employer's cash when her job required it. The first principle a person who is determining whether or not a dismissal for misconduct is unfair must consider in terms of Item 7(a) of the Code of Good Practice: Dismissal is "whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace" (emphasis added). What the emphasized portion makes clear, is that misconduct outside the workplace and outside of working hours may have a bearing on an employee's continued suitability for employment. In each instance, a multiplicity of factual considerations can determine whether the employee's conduct outside the workplace holds implications for their continued suitability for employment or some form of corrective discipline. In* ***Hoechst (PTY) Ltd v Chemical Workers Industrial Union & Another (1993) 14 ILJ 1449 (LAC)****, Joffe JA (as he then was), held:*
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> > '1. *Where misconduct does not fall within the express terms of a disciplinary code, the misconduct may still be of such a nature that the employer may none the less be entitled to discipline the employee. Likewise the fact that the misconduct complained of occurred away from the work-place would not necessarily preclude the employer from disciplining the employee in respect thereof... In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties'.*" (Authorities omitted)

[33] In this case, the Commissioner had correctly made a finding that Applicant was approached as he worked at the border post (As evident from the statement made at the police station). The Applicant had agreed to be part of illegal activities, had met his associates and was arrested while in his work uniform. His conduct was clearly connected to the SARS' legitimate interest and had affected its good name and reputation. It needs to be added that the conduct of the Applicant, but for the fact that the horn turned out to be that of a cow,

[14] (2011) 32 ILJ 905 (LC) at paragraph [19]

bordered on criminality and involved dishonesty and corruption. Such conduct clearly had an impact on the employment relationship, especially in the light of his position as a law enforcement officer. Even more profound in this case was the Applicant's dishonesty throughout the arbitration proceedings, with contrived and improbable versions, intended to mislead the Commissioner.

[34] In the light of the above, it follows that there is no merit in the Applicant's contentions that SARS acted unfairly by charging the Applicant with bringing its name into disrepute. Contrary to the Applicant's assertions, these charges were not blanket nor meaningless. They were appropriate in the light of the misconduct in question. It is further not a requirement for the purposes of the charge in question for the Applicant to have made a public statement or issued a statement about SARS's activities, nor was it necessary for evidence to be led to demonstrate that indeed a conviction resulted from the conduct in question. This narrow interpretation of the charge of bringing a company's name into disrepute in circumstances where an employee commits misconduct outside of working hours cannot be sustainable in the light of the above authorities and principles set out therein. The Applicant's mere conduct in this case, considering the nature of his job and the business of SARS was sufficient for the charge to be sustained.

[35] The remaining issue to be determined is whether the Commissioner's conclusions on the appropriate sanction was reasonable. The Constitutional Court in *Sidumo*, held that a Commissioner had to consider the full extent of the relevant personal and surrounding circumstances which includes the nature, the importance and purpose of the rule breached, the nature and extent of the breach, the reasons for the imposition of the sanction of dismissal, the basis of the challenge thereto, the harm or potential harm caused or likely to be caused by the breach of the rule, further conduct, including disingenuousness surrounding the commission of the breach and the disciplinary and arbitration processes, a complete lack of remorse and re-commitment to the values of the appellant, the effect of the breach on the trust relationship, the capacity for the resuscitation of a workable employment relationship, the effect of the dismissal on the employee, and his or her service and disciplinary record[15].

[36] In this case, and determining the appropriateness of the sanction of dismissal, the Commissioner took into account that the position of the Applicant required high levels of trust given the nature of his work activities, which included keeping the warehouse, protecting the

[15] At para [78]

SA economy through proper clearance of goods and the collection of duties and taxes. He had concluded that the Applicant's involvement in the illegal activities even outside of working hours had destroyed the trust relationship, and that the dismissal was therefore substantively fair.

[37] It is my view that the conclusions of the commissioner on the issue of sanction are unassailable. The Applicant's position was akin to that of a law enforcer, and as correctly pointed out by the Commissioner, it required high levels of honesty and integrity. His conduct by all accounts had hallmarks of criminality, which impacted negatively on the image and reputation of SARS. Even more disturbing with the facts of this case is that until his arrest and after it was established that the horn in question was that of a cow, the Applicant was at all material times under the mistaken belief that he was going to benefit trading in rhino horn. If not, why would he as per his statement at the police station, have paid R10 000.00 towards that transaction? It is common knowledge that the decimation of our rhino population through relentless poaching in both private and public national parks has reached crisis point. The impact thereof for future generations cannot even be imagined. It therefore becomes extremely disconcerting when public servants and SARS' officials in particular, who are supposed to be protectors of our national assets, are the very same people who want to feed and be enriched from this national crisis. Such conduct is disgraceful and should be condemned unreservedly.

[38] The Applicant as can be gleaned from the record had pleaded leniency at the internal disciplinary enquiry on the basis that he was a first offender. Leniency however is not there for taking, and does not come cheaply. At no stage as can be gleaned from his second statement, or from his evidence during arbitration proceedings did the Applicant show any form of contrition. His approach to the arbitration proceedings was not only to continue with his concocted versions, but also to portray a haughty attitude. As far as he was concerned, to the extent that he was off duty, or no criminal prosecutions emanated from his conduct, and since in any event what he had was a cow horn, there was no basis for SARS to charge, let alone dismiss him. At no stage, including as far as his contentions in this application are concerned, did he acknowledge the error of his ways or show any inclination to re-commit to the values of SARS. In these circumstances, he displayed no capacity for the resuscitation of a workable employment relationship with SARS, and the fact that he was a first offender can never mitigate the effects of his conduct on that employment relationship.

[39] To summarise then, having had regard to the Commissioner's award and the conclusions reached therein, I am of the firm view that there is nothing to suggest that he failed to

consider the principal issue before him. I am satisfied that the Commissioner had properly identified the nature of the dispute he was required to arbitrate and had dealt with the substantial merits of that dispute. The Commissioner had correctly evaluated the facts, and came to a conclusion which was reasonable to justify the decision he had arrived at. There is therefore no basis for this Court to interfere with that decision. It therefore follows that the application ought to fail.

[40] In regards to the issue of costs, it is trite that the court in making any award in this regard would take into account the requirements of law and fairness. In the light of the conclusions reached in regards to the merits of the review application, I am of the view that this application was ill-considered and should never have seen its day in court. In these circumstances, SARS should be entitled to its costs.

[41] Accordingly, I make the following order:

Order:

1. The application to review and set aside the arbitration award issued on 10 November 2013 by the Second Respondent is dismissed with costs.

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Tlhotlhalemaje, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Marius Scheepers of Marius Scheepers & Co Attorneys
On behalf of the Third Respondent:	Muzi Khoza of Edward Nathan Sonnenbergs INC