THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Reportable

Case no: PR 121 / 16

In the matter between:

SOUTH AFRICAN BREWERIES (PTY) LTD **Applicant**

and

ALLAN LONG **First Respondent**

M MBULI N.O. (AS ARBITRATOR) **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

AND:-

Case no: PR 122 / 16

In the matter between:

SOUTH AFRICAN BREWERIES (PTY) LTD **Applicant**

and

ALLAN LONG **First Respondent**

D SONAMZI N.O. (AS ARBITRATOR) Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION Third Respondent

Heard: 13 October 2016

Delivered: 8 June 2017

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out

CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrator – assessment of evidence by arbitrator – arbitrator failing to determine evidence reasonably and rationally – award set aside

CCMA arbitration proceedings – arbitrator failing to make any proper credibility and probability findings – failure to discharge duties and irregular conduct – award reviewable

Misconduct – consideration of evidence as a whole – outcome arrived at by arbitrator unreasonable – only reasonable outcome that misconduct committed – award set aside and substituted

Dismissal – determination of fairness of dismissal – dereliction of duties – dismissal fair in the circumstances

Unfair labour practice – unfair suspension – principles considered – conduct of employer not unfair suspension / unfair labour practice

Unfair labour practice – arbitrator committed material error of law and failed to consider employer's explanations in deciding unfair labour practice – award unreasonable and irregular – award reviewable and set aside.

JUDGMENT

SNYMAN, AJ

Introduction

[1] The matter at hand in this instance concerns two review applications. The one concerns an application by the applicant under case number PR 121 / 16 to review and set aside an arbitration award made by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (the third respondent), relating to the dismissal of the first respondent by the applicant. The other application is an application by the applicant under case number PR 122 / 16 to review and set aside an award by the second respondent in his capacity as an arbitrator of the first respondent in that matter, relating to the issue of suspension of the first respondent by the applicant, prior to his dismissal by the applicant. Both applications have been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] The applications were initially brought in the Labour Court in Johannesburg under case numbers JR 2613 / 13 and JR 977 / 15, respectively. In a written agreement concluded between the parties on 11 April 2016, it was agreed that the applications be jointly determined, and be transferred to the Labour Court in Port Elizabeth for hearing, considering that all the issues giving rise to both the applications took place in East London and in the CCMA in East London. This agreement was endorsed by this Court, and the applications then came before me in Port Elizabeth under the new case numbers reflected above.

[3] Because of different arbitrators dealing with each of the matters, and for the sake of convenience, in this judgment I will refer to the second respondent in respect of the dismissal dispute (under case number PR 121 / 16) as arbitrator Mbuli, and the second respondent in the suspension dispute (under case number PR 122 / 16) as arbitrator Sonamzi.

[4] The matter dealt with by arbitrator Sonamzi concerned the suspension of the first respondent on 21 May 2013, pending disciplinary proceedings to follow. The first respondent considered his suspension to constitute an unfair labour practice under the LRA, and challenged this suspension on this basis, to the third respondent. In an award dated 30 October 2013, arbitrator Sonamzi determined that the suspension of the first respondent was indeed an unfair

[1] Act 66 of 1995.

labour practice, and awarded compensation to the first respondent in a sum of R216 666.67, being an amount equivalent to 2(two) months' remuneration.

[5] Turning then to the matter dealt with by arbitrator Mbuli, this matter concerned the dismissal of the first respondent by the applicant for misconduct on 14 October 2013. The first respondent challenged this dismissal as an unfair dismissal to the third respondent. This dispute came before the arbitrator Mbuli over a number of days in 2014 and 2015, and concluded only in 2015. Following completion of the arbitration proceedings, and in an arbitration award dated 29 April 2015, arbitrator Mbuli found in favour of the first respondent. Whilst arbitrator Mbuli accepted that the dismissal of the first respondent by the applicant was procedurally fair, he determined that such dismissal was substantively unfair. Arbitrator Mbuli consequently directed that the applicant was required to reinstate the first respondent with retrospective effect to the date of his dismissal on 14 October 2013, and pay the first respondent back pay in the amount of R1 080 816.70.

[6] I am satisfied that both review applications were timeously brought and are properly before this Court. I will now proceed in deciding both these review applications by first setting out the relevant facts in this matter, in one consolidated summary, relating to both applications.

The relevant facts

[7] The applicant conducts business as a manufacturer and distributor of beer products. It conducts operations throughout the country. This case relates to its border district operations based in East London.

[8] The first respondent, at the time of his dismissal, was employed as the district manager for the border district. He had occupied that position since 1 January 2008. He was based in East London. In such capacity, he was ultimately responsible for all operations and compliance in the district. In fact, it can readily be said that he would be viewed as the 'managing director' for the district. Part and parcel of these duties included that the first respondent was responsible to ensure that the district complied with all legal requisites in respect of its operations, which included the fleet of vehicles operated by the

applicant in the district. The turnover of the applicant for that district was in excess of R1 billion.

[9] In December 2012, it was brought to the attention of the first respondent that there were irregularities relating to the applicant's vehicle fleet in the border district. In particular, there were fraudulent activities relating to the licencing of the vehicles, and that some of the vehicles were actually operating unlicenced and without the necessary maintenance. The first respondent instructed the fleet manager, Salie Adams ('Adams') and the East London depot manager, Mallane Selikane ('Selikane'), in an e-mail on 21 December 2012, to immediately remedy the situation, as it could present major legal ramifications for the applicant and was a huge risk to the applicant. The first respondent stated that resolving this problem had to be treated as one of 'urgency'. There is however no indication that the first respondent, of his own accord, followed up on what was actually being done about the situation by these managers.

[10] On 7 January 2013, an investigation was conducted by Heinrich Hansen ('Hansen'), the risk manager for the applicant's Cape region, about the issue of the unlicenced trucks. Following this investigation, and on 9 January 2013, Hansen sent an e-mail to a number of functionaries in the border district, including the first respondent, in which a number of trailers were identified and listed that had to be re-licenced. The e-mail also identified discrepancies between the trailers at the depots, and what had been captured on the applicant's SAP master system. What is however important is that this e-mail highlighted the fact that the problem may even be bigger and that there could be even more vehicles that were not licenced, or were not roadworthy, or were not properly captured on the SAP system.

[11] The first respondent then reacted to this e-mail on 10 January 2013. He sent an e-mail instruction to all the persons responsible for fleet management in the district on the same date, recording that the issue was 'extremely urgent', had to take precedence over all operational issues, and that a spread sheet had to be produced to track all activities to remedy the problem, on a daily basis, with updates being provided to the first respondent. However, and once again, other than this e-mail instruction, it does not appear that the first respondent

became directly or personally involved, nor does it appear that he was ever provided with the updates he demanded.

[12] In fact, it appeared that the first respondent did very little about this clear and serious problem. There was minimal interaction between the first respondent and the responsible functionaries about this. On 25 January 2013, the first respondent sends an e-mail to *inter alia* Adams, asking for an update and saying 'time is running out'. The first respondent is provided with an update on 25 January 2013, and he then again follows up with similar e-mails sent on 28 and 29 January 2013. But there is no evidence of further updates forthcoming, nor what the first respondent did about this lack in further feedback.

[13] On the evidence, and on 7 March 2013, Adams sent two e-mails to various parties about the issue of the problems with the fleet. The first respondent was directly copied into these e-mails. The e-mails on face value are contradictory. In one e-mail, which had a spread sheet attached, there were still a number of 'major' problems listed that required attention. It may be mentioned that Adams records in this schedule that trailer number STO 837 was in a bad state and required major repairs. In the other e-mail on the same day, Adams then says that there is now 'light at the end of the tunnel' and suggests that save only for 3 trailers, all the major problems with the fleet are resolved. It appears that based on this latter communication, and despite what seemed to be a contradiction, the first respondent simply accepted that all had been resolved, which turned out to be far from reality.

[14] On 10 May 2013, trailer STO 837 was then involved in a fatal accident. This vehicle was still in a state of disrepair, and unlicenced. This accident then prompted an investigation from the applicant's head office. On 15 May 2013, the first respondent was advised in writing of this investigation, and informed that the applicant was investigating issues of dereliction of duties and gross negligence against the first respondent as a result of this incident and the general management of the fleet. The first respondent was asked to provide a statement as part of this investigation. The first respondent indeed provided such a statement.

[15] A complete fleet audit was then conducted on 19 May 2013. This included an inspection of all vehicles, and a comparison of the vehicles to the information contained on the SAP system as well as documents relating to the vehicles (such as licences). This audit revealed that there were several vehicles that were not roadworthy and did not display valid licence discs. In addition, the report revealed that despite the accident involving STO 837 on 10 May 2013, corrective action had still not been taken thereafter. This report was conveyed to the applicant's head office on 20 May 2013.

[16] Then, and clearly as a reaction to the aforesaid accident and the audit being conducted, the first respondent on 20 May 2013 sends an e-mail to all responsible functionaries in the district, which in essence rehashes the same issues as before, but now implementing some specific control measures he is directly involved in. Again, also, the first respondent asks that all vehicles be properly captured on the SAP system, be made fully compliant, with reports to him personally on steps taken. According to the applicant however, this intervention was too little, too late.

[17] The applicant then decided to conduct an intensive investigation into the entire district. In order to ensure that this investigation would be conducted unhindered and without interference, it was decided to suspend the first respondent. On 21 May 2013, the first respondent was then suspended pending this investigation, by way of written notice. The first respondent was told that was entitled to challenge the suspension if he wanted. It may be added that the fleet manager for the district (Adams) had also been suspended.

[18] On 4 June 2013, the first respondent sent an e-mail to the applicant's sales and marketing director, Wayne McCauley ('McCauley'), complaining about his suspension, and *inter alia* stated there was no 'meaningful' reason to suspend him and that he was not given an opportunity to make submissions prior to his suspension. McCauley disagreed, and answered on 5 June 2013 that the allegations against the first respondent were very serious and needed to be investigated. The first respondent was also informed that the investigation was underway, would be expedited as far as possible, and the first respondent would be informed as soon as it is completed. McCauley also said that the

applicant considered the first respondent's suspension on full pay to be in the interest of the parties, pending the conclusion of the investigation.

[19] It must also be added that the investigations conducted about the fleet in the border district did not only involve the first respondent. In the end, ten individual investigations were conducted that led to eight disciplinary enquiries, two of which related to persons that reported directly to the first respondent.

[20] On 7 August 2013, the first respondent challenged his continuing suspension as an unfair labour practice dispute to the CCMA. In terms of this referral, the first respondent simply contended that his suspension was unfair.

[21] Finally, and on 19 August 2013, the first respondent was served with a notice to attend a disciplinary enquiry to be held on 28 August 2013. Three charges were proffered against him, and categorized, in general terms, to be that of gross dereliction of duties, gross negligence, dishonesty, derivative misconduct, and bringing the company name into disrepute. These charges related to the first respondent's failure and neglect to take appropriate action to attend to the problems with the fleet in the district and to ensure that all these problems were rectified. The dishonesty charge related to presenting false information to the applicant's management on 17 May 2013.

[22] The disciplinary hearing then commenced on 28 August 2013, and continued on 29 and 30 August, 2, 10 and 26 September 2013. In a written determination delivered on 11 October 2013, the first respondent was acquitted on the charge of dishonesty. This charge was therefore of no relevance in the proceedings to follow. In the written determination, the chairperson however found the first respondent guilty of the charges relating dereliction of duties, gross negligence and bringing the company name into disrepute. Pursuant to these disciplinary proceedings, the first respondent was then dismissed on 14 October 2013.

[23] The first respondent prosecuted an internal appeal, filed on 15 October 2013, pursuant to which an appeal hearing was held on 12 November 2013. The dismissal of the first respondent was upheld on appeal, in a written finding handed down on 15 November 2013.

[24] In addition to the first respondent being dismissed, Adams, the fleet manager, was dismissed. The fleet supervisor Marcel Ernston was also dismissed, as well as the two depot managers, Selakane and Allistair Camphor. The first respondent in effect completed the circle of responsible managers where it came to the fleet, so to speak, that were dismissed.

[25] The first respondent referred an unfair dismissal dispute to the third respondent, challenging both the substantive and procedural fairness of his dismissal.

[26] The first respondent's unfair labour practice dispute relating to his suspension came before arbitrator Sonamzi on 23 October 2013, for arbitration. In an arbitration award dated 30 October 2013, arbitrator Sonamzi concluded that the applicant had valid reason to suspend the first respondent. This finding is not the subject matter of any review case, and stands. This being said, arbitrator Sonamzi concluded that the first respondent was not given a proper opportunity to make representations and to show cause, prior to suspension, as to why he should not be suspended, and this was unfair. Arbitrator Sonamzi also concluded that the first respondent's suspension was of unreasonably long duration, and thus became punitive and was unfair. Arbitrator Sonamzi then awarded two months' salary as compensation to the first respondent, in the sum of R216 666.67. These conclusions and award now form the subject matter of the one review application before me.

[27] Turning then to the first respondent's unfair dismissal case, and as stated above, it came before arbitrator Mbuli. Arbitrator Mbuli concluded that the dismissal of the first respondent was procedurally fair. In the absence of a cross review, this finding stands.

[28] Turning to the issue of substantive fairness in the case before arbitrator Mbuli, the first respondent in the arbitration raised a number of grounds on which he contended that his dismissal was substantively unfair. One of these grounds was that the applicant inconsistently applied discipline where it came to disciplining the first respondent. Arbitrator Mbuli considered this alleged ground of unfairness and concluded that the first respondent had failed to make out a *prima facie* case of inconsistency which the applicant had to meet,

and thus dismissed this ground of alleged unfairness. Again, and in the absence of a cross review, this finding of the arbitrator stands.

[29] The other grounds on which the first respondent challenged the substantive fairness of his dismissal was that he did not commit the misconduct concerned, and even if he did, dismissal was too harsh a sanction. Considering these grounds, arbitrator Mbuli reasoned that what the first respondent had been dismissed for was a charge based on dereliction of duty. The arbitrator accepted that the problems with the fleet in the border district indeed existed, as was contended to be the case by the applicant. Arbitrator Mbuli also accepted that there was a failure to take decisive and appropriate action to remedy this, and then identified the issue he had to decide in this respect as being only that of whether this failure could be attributed to the first respondent.

[30] As to the other charges against the first respondent, arbitrator Mbuli identified the issues he had to decide as being whether the first respondent exercised due diligence in dealing with a vendor of the applicant, executed his duties in a proper manner so as to properly protect the applicant's finances and assets against risk, and whether he brought the company name into disrepute relating to labour brokers. None of these issues were however pursued in the later review application, which focussed only on the problems with the fleet. I will therefore not pay any further attention to these charges.

[31] Arbitrator Mbuli concluded that the first respondent did not commit the misconduct where it came to all these charges, with which he had been charged. The reason for finding so, in short, was that, according to the arbitrator, all the failures complained of by the applicant was not the first respondent's responsibility and he did all that could be expected of him. The arbitrator also reasoned that even if the first respondent transgressed, this was a case where progressive discipline was appropriate, and there was no evidence of a break down in the trust relationship.

[32] Arbitrator Mbuli ultimately found that there was no valid reason to dismiss the first respondent and consequently his dismissal was substantively unfair. The arbitrator then directed that the first respondent be reinstated with back pay,

as referred to above. These conclusions form the subject matter of the other review application before me.

[33] I will now proceed to decide both review applications by first setting out the relevant test for review.

The test for review

[34] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution[3] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[4]

[35] Accordingly, in every instance where the constitutionally suffused Section 145(2)(a)(ii) is sought to be applied by a review applicant to substantiate a review application, any failure or error on the part of the arbitrator relied on must lead to an unreasonable outcome arrived at by the arbitrator, for this failure or error to be reviewable. In my view therefore, what the review applicant must establish in order to succeed with a review application in such an instance is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[5] the Court said:

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[2] (2007) 28 ILJ 2405 (CC).
[3] Constitution of the Republic of South Africa, 1996.
[4] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[5] (2013) 34 *ILJ* 2795 (SCA) at para 25.

> '.... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[36] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[6] said:

> '.... in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[37] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[7] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material and issues can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material and issues raised, and the irregularity, failure or error concerned is the only basis to sustain the outcome

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[6] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[7] See *Fidelity Cash Management* (*supra*) at para 102.

the arbitrator arrived at, that the review application would succeed.[8] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[9] it was held:

> '.... the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[38] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration awards of both arbitrators Sonamzi and Mbuli. I will start by summarizing the review grounds raised by the applicant in both review applications.

Grounds of review

[39] A review applicant's case for review must be made out in the founding affidavit, and supplementary affidavit.[10] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[11]:

> '.... The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[40] In the founding affidavit in the review application pertaining to the award arbitrator Sonamzi, the applicant raises five primary review grounds. The first review ground is based on the arbitrator's own finding that the suspension was for a valid reason, and then takes issue with his subsequent conclusion that the suspension had become 'punitive', on the basis that it was irrational and ignored material evidence. The second review ground relates to the fact that arbitrator Sonamzi ignored the fact that by the time the matter was arbitrated, the first respondent had already been charged and dismissed. Thirdly, the

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[8] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[9] (2015) 36 ILJ 1453 (LAC) at para 12.
[10] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27. The supplementary affidavit is filed in terms of Rule 7A(8).
[11] (2010) 31 ILJ 713 (LC) at para 27.

applicant contends that arbitrator Sonamzi misdirected himself in attaching speculative motivations to the reason why the first respondent had been suspended, which was unsupported by any evidence. The fourth review ground concerned a contention that the arbitrator misdirected himself and ignored material evidence in finding that the suspension was unfair because of non compliance with *audi alteram partem*. The final review ground related to the compensation award, which according to the applicant was irrational, an unfair and unjust exercise of the discretion that needed to be exercised, and unduly punitive in nature. The applicant did not supplement these grounds of review in a supplementary affidavit.

[41] Turning next to the founding affidavit in the review application relating to the award of arbitrator Mdluli in the unfair dismissal case, the applicant raised a number of different review grounds, which can readily be summarized into one main ground that arbitrator Mdluli disregarded material evidence relating to the nature of the first respondent's position, his accountability, duties and responsibilities, and what the first respondent had done to discharge these duties and responsibilities. In this context, it is the review case of the applicant that the finding of the arbitrator that the first respondent did not commit the misconduct was unreasonable. As a second main ground of review, the applicant complained that the relief afforded to the first respondent by the arbitrator was arbitrary with the back pay awarded being grossly excessive and punitive, especially considering that the first respondent had found alternative employment with Coca Cola as from 13 November 2013 in a similar position with a similar remuneration package. The applicant filed a notice in terms of Rule 7A(8) and a supplementary affidavit on 8 October 2015, but this supplementary affidavit simply sought to add more factual background to the main review ground that arbitrator Mdluli misconstrued and ignored pertinent evidence, rendering the outcome arrived at to be unreasonable.

[42] I will now proceed to consider the applicant's two review applications, based on the grounds of review, summarized above, starting with the review application in respect of the award of arbitrator Somanzi in the unfair labour practice dispute.

Evaluation: the unfair labour practice

[43] Arbitrator Sonamzi, as a point of departure, correctly identified that where it comes to suspension, what is meant is that an employer requires an employee to vacate its premises whilst the employer is investigating misconduct or poor performance, on the part of an employee. Whilst this is not the only basis upon which an employer could justifiably exclude an employee from reporting for work, such an investigation is certainly proper cause for this.

[44] Arbitrator Sonamzi then seeks to ascribe certain motivations to exist on the part of employers, when suspending employees. He reasoned that suspension is effected to remove an employee from the premises, so as to prevent the causing of further harm by the employee repeating the misconduct, to prevent the employee from interfering with the investigation, to avoid disharmony in the workplace, as an expression of the employer's anger towards an employee and as a means of retribution in that the employer wishes to humiliate or punish the employee. These motivations arbitrator Sonamzi sought to articulate are in part correct, and in part a misdirection, which I will address next.

[45] Suspension is in reality the employer excluding the employee from fulfilling his or her normal duties under the employment contract. It does not have to be an actual exclusion from the workplace. It can also take place with pay, or without pay. But this exclusion has to be for a legitimate reason or purpose. It can never be motivated by anger, retribution or for the purposes of humiliating the employee. A suspension can only be legitimately effected based on one of two basic grounds, the first being suspension as a holding operation, and the second being suspension as a sanction.

[46] Suspension as a sanction follows only as an outcome to disciplinary proceedings, normally as an alternative to dismissal. In *County Fair v CCMA and Others*[12] it was said:

> '... it is possible for an employer and employee (and even a union) to reach agreement on suspension without pay as an alternative to dismissal ...'

[12] (1998) 6 BLLR 577 (LC) at para 28. See also *HOSPERSA and Another v MEC for Health, Gauteng Provincial Government* (2008) 29 ILJ 2769 (LC) at para 17.

[47] As opposed to this, suspension as a holding operation, or otherwise called a precautionary measure, is not a disciplinary measure. It cannot be seen as disciplinary action, therefore all the requirements relating to fair disciplinary action under the LRA cannot find application. In *Koka v Director General: Provincial Administration North West Government*[13], Landman J (as he then was) referred with approval to the following remarks made by Denning MR in *Lewis v Heffer and others* [1978] 3 All ER 354 (CA) at 364C-E:

> 'Very often irregularities are disclosed in a government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and he is suspended until he is cleared of it. No one, as far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. ....'.

Landman J specifically referred to this kind of suspension as a 'holding operation'.[14]

[48] The distinction between suspension as a disciplinary sanction and a holding operation suspension, was also specifically recognized in the judgment of *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[15]. And in *Mashego v Mpumalanga Provincial Legislature and Others*[16] the Court said:

> 'It should be noted that the suspension in this matter was not done in the context of punishing the applicant but rather as a precautionary measure pending the outcome of an investigation. It is generally accepted that an employer has discretionary power to suspend an employee if the presence of such an employee at work is likely to undermine an investigation ....'

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[13] (1997) 18 ILJ 1018 (LC).
[14] Id at 1028E – 1029D. See also *Mabilo v Mpumalanga Provincial Government and Others* (1999) 20 ILJ 1818 (LC) at para 23 – 24; *Perumal v Minister of Safety and Security and Others* (2001) 22 ILJ 1870 (LC) at para 25 – 28; *SA Municipal Workers Union and Another v Nelson Mandela Metropolitan Municipality and Others* (2007) 28 ILJ 2804 (LC) at para 14.
[15] (2012) 33 ILJ 2033 (LAC) at paras 44 – 45.
[16] (2015) 36 ILJ 458 (LC) at para 10.

[49] The Court in *South African Municipal Workers' Union obo Dlamini and others v Mogale City Local Municipality and Another*[17] summarized this distinction as follows:

> 'I will firstly deal with the issue of suspension. I simply cannot agree with Mr *Buirski* that in order for an employer to suspend an employee, the employer must have determined or accepted that misconduct exists. In a nutshell, the existence of misconduct is not a *sine qua non* for an employee to be legitimately suspended. Where an employee is suspended, an employee is not yet disciplined. The only instance where suspension is discipline of an employee is where the suspension is imposed as a disciplinary sanction following disciplinary proceedings. Where suspension is imposed as a precautionary measure, this is a prelude to possible disciplinary action and not disciplinary action itself. This kind of suspension is known as precautionary suspension.
>
> Where an employee is subjected to discipline, the disciplinary action itself is commenced when the employee is called to answer allegations of misconduct. The fact is that an employee can only be called to answer allegations of misconduct if the employer actually knows what this alleged misconduct is, and can identify and describe it with sufficient particularity in a notice to attend the disciplinary hearing presented to the employee. Any suspension of the employee preceding this commencement on this basis simply cannot be the actual conduct of discipline itself, as the purpose of this suspension is to mitigate further risks to the employer because such discipline is contemplated, but has not yet happened.'

[50] It is precisely because of the distinction between suspension as a 'holding operation' and suspension as 'disciplinary action', that Section 186(2)(b) of the LRA is worded the way it has been. The Section defines an unfair labour practice as:

> 'any unfair act or omission that arises between an employer and an employee involving ... the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.'

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[17] [2014] 12 BLLR 1236 (LC) at paras 31 – 32. See also *Manamela Ida v Department of Co-Operative Governance Human Settlements and Traditional Affairs Limpopo Province and Another* [2016] JOL 37301 (LC) at paras 16 – 17.

If suspension was considered to be only disciplinary action, there would be no need to have included the first part of this definition, because it would have been fully covered by 'other unfair disciplinary action' as referred to therein.

[51] Considering there is this distinction, there must be a reason for it. The reason for the distinction is simply that the standards of fairness differs in the two instances. This was recognized in *Gradwell*, where the Court said:[18]

> '... When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration. ... And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation. Provided the safeguards of no loss of remuneration and a limited period of operation are in place, the balance of convenience in most instances will favour the employer.'

[52] It is in my view clear that in the case of a holding operation (precautionary) suspension, there is no requirement, as a general principle of fairness, that an employee must be heard or otherwise be given an opportunity to make representations before it is decided to place the employee on such kind of suspension. Whether such a suspension is fair or unfair is dependent upon three other criteria, which I will next set out.

[53] The first criteria relates to the reason for this kind of suspension, and flows from the very nature of this kind of suspension itself, being that of 'precaution'. 'Precaution' contemplates safeguarding a process or action that is pending. It means that for precautionary suspension to be fair, it must be directly linked to a pending investigation or process, whether relating to misconduct, incapacity,

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[18] (*supra*) at para 44.

or for operational requirements.[19] And then, the suspension must serve to protect the integrity of the investigation or process, or mitigate risks to the employer whilst such an investigation or process is ongoing. It does not serve to dispense punishment upon the employee, but is done in the interest of good administration. The absence of these considerations would mean there is no basis or reason for precautionary suspension, and it would be unfair.

[54] It is not necessary for the employer, at this stage, to substantiate the misconduct or complaints against the employee. All that is required is a reasonable belief on the part of the employer that it exists, even if such belief may be subjective. In *Mashego*[20] it was held:

> '... the case of the applicant is that he was not afforded a fair hearing because the applicant did not deal in the suspension process with the merits of the alleged misconduct. I do not agree with that proposition as a suspension process by its nature is intended to afford the employer the opportunity to investigate the merits and also the demerits of the alleged misconduct. The key aspect in determining the fairness of the suspension is whether the employer had, based on the nature of the allegations, formed a view that the allegations were so serious as to warrant a suspension ...'

And in *Madzonga v Mobile Telephone Networks (Pty) Ltd*[21] the Court said:

> 'The final issue to refer to in this regard is that in effect all that the disciplinary code required is that the respondent must have the belief that the presence of the applicant at work would prejudice the investigation or cause disharmony. I accept that this belief must be reasonable in the light of the actual facts of the particular matter, but this does not mean that this belief must be able to be objectively substantiated at that point in time. What this entails is a reasonable apprehension of risk, in the light of the purpose and scope of the investigation to follow as considered with the nature of the allegations against the employee. The respondent is entitled to its own belief in this respect, as

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[19] See for example *Sephanda and Another v Provincial Commissioner, SA Police Service, Gauteng Province and Another* (2012) 33 ILJ 2110 (LC) which concerned a precautionary suspension only implemented when the disciplinary hearing itself was already well underway, and there was thus no need for a precautionary suspension to be implemented at such a late stage, rendering the suspension unfair.

[20] (*supra*) at para 12.

[21] [2016] JOL 37300 (LC) at para 56. See also *Dladla v Council of Mbombela Local Municipality and Another (2)* (2008) 29 ILJ 1902 (LC) at paras 19 and 21.

basis for the suspension, even if at this stage it may be a subjective belief based on as yet unsubstantiated allegations ...'

[55] When it is true that there is a fair reason for precautionary suspension, the second criteria comes into play. This relates to the issue of prejudice to the employee and is linked to the requirement that the precautionary suspension must be on full pay. Where the suspension is on full pay, prejudice to the employee is curtailed and it will not readily be seen to be unfair.[22] Suspension without pay is of course possible, for example where it is provided for in a contract of employment, collective agreement or agreed disciplinary code and procedure,[23] but then in that case the issue of prejudice would normally be mitigated by a limited period of suspension or other conditions imposed in these regulatory measures, so as to mitigate prejudice. But as a matter of principle, and to satisfy the second fairness criteria in the case of precautionary suspensions, it should be on full pay.[24]

[56] It is often suggested that the mere act of suspension causes a presumption of guilt of the employee with third parties, and the suspension results in reputational harm or professional / career prejudice where it comes to incentive benefits, advancement and the like. Although this may be so, it is my view that these considerations cannot detract from the prerogative of an employer to institute precautionary suspension. If these were valid considerations, then virtually all precautionary suspensions would always be unfair. As long as employer complied with the first requirement of a valid reason as set out above, and the suspension is on full pay, these kind of considerations should not be relevant in deciding the fairness of a precautionary suspension.

[57] In *Madzonga*[25], albeit in the context of an urgent application challenging a suspension, the Court said:

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[22] *Dladla v Council of Mbombela Local Municipality and Another* [2008] 8 BLLR 751 (LC) at para 41.
[23] See *South African Breweries Ltd (Beer Division) v Woolfrey and Others* (1999) 20 ILJ 1111 (LC) at paras 10 and 13; *Sappi Forests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 1140 (LC) at para 8; *Department of Labour v General Public Service Sectoral Bargaining Council and Others* (2010) 31 ILJ 1313 (LAC) at paras 32 – 33.
[24] *Koka* (*supra*) at 1027E – G; *Singh v SA Rail Commuter Corporation Ltd t/a Metrorail* (2007) 28 ILJ 2067 (LC) at paras 8 and 12
[25] (*supra*) at para 41.

> 'The next consideration is the issue of the possible reputational and professional prejudice, together with possible prejudice in job advancement, caused by the suspension of the applicant. I must immediately point out that surely this is the case with each and very suspended employee. This would always be the possible result of any suspension. If this would be a basis for the Labour Court to intervene in suspension proceedings, then virtually all suspension cases would be urgent and directly end up in the Labour Court. This would fly in the face of the clear intentions of the legislature found in specific provisions in the LRA dispute resolution process, and undermine the effective and orderly resolution of employment disputes in the manner prescribed by law ...'

And in *Mosiane v Tlokwe City Council*[26] the Court said:

> '... All employees who get dismissed or suspended and believe that they are innocent, have their reputations tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the employer should justify the charges against them. Should they fail to do so, such employees will be reinstated with no loss of benefits. I accept that some damage to their reputations would have been done. This court however is not in the business of ensuring that an employee's reputation should not be tarnished. If so, it will open the flood gates ...'

[58] Finally, and if there is a fair reason for the precautionary suspension, and this suspension is on full pay, the third fairness criteria contemplates that the duration of this suspension should not be unduly long. For example, and in *Ngwenya v Premier of KwaZulu-Natal*[27] the Court said:

> 'An employee cannot remain on suspension, which is a precautionary measure, for an indefinite period of time and the State gladly pays the employee for doing nothing. I am surprised that the State is willing and able to pay people for doing nothing when it does not have money to pay those performing their duties. If the suspension remains indefinitely and without legitimate reason, the employee is entitled to approach the Court for the

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[26] (2009) 30 ILJ 2766 (LC) at para 17. See also *Dladla (2)* (*supra*) at para 43.
[27] [2001] 8 BLLR 924 (LC) at para 42.

upliftment of the suspension and order the State to allow the employee to resume his duties until such time that the enquiry is held …'

[59] What may be unduly long suspension is a question of fact, which *inter alia* depends on the nature or scope of the pending investigation or proceedings. To illustrate, where the matter concerns contemplated misconduct relating to fraud which needs a detailed investigation and analyses of documents by a third party auditor, is has to be expected the investigation would take longer to complete and a longer precautionary suspension would be justified. On the other hand, where the matter concerns alleged misconduct of assault and the employee was suspended based on ameliorating the risk of further disharmony in the work place, the institution of disciplinary proceedings should not take too long and the suspension would be much shorter. Where it is in question in unfair labour practice proceedings whether the duration of the suspension is too long, the duty would be on the employer to provide an acceptable explanation for the period concerned.

[60] In summary, precautionary suspension, even though it is not disciplinary action, can therefore still be an unfair labour practice, if there is no fair reason for it, if it causes undue prejudice to the employee, or if it endures inordinately long without proper explanation for the duration.

[61] In the case of suspension as a disciplinary action or sanction, then of course all the procedural fairness requirements relating to disciplinary proceedings under the LRA must be observed, which would include *audi alteram partem* and the application of the provisions of Schedule 8 of the LRA relating to fair disciplinary proceedings and sanctions.

[62] I now turn, in applying all the above principles, to the facts of this case, and in particular, the reasoning of arbitrator Sonamzi. It should be clear from what I have said above that anger on the part of the employer or motivations based on humiliating the employee can never be valid reasons for precautionary suspension, however, a pending investigation and disciplinary process would be. This arbitrator Sonamzi properly and correctly appreciated. The arbitrator accepted that there was an investigation process underway, and that the applicant was 'justified' in suspending the first respondent whilst this was

underway. The arbitrator concluded that there was a valid reason for the suspension of the first respondent. In my view, there can be no fault in this reasoning, and the first criteria in establishing a fair suspension has been met.

[63] I may add that the first respondent himself conceded under cross examination that the misconduct as articulated by the applicant to be investigated would indeed be serious misconduct. This would certainly justify suspension pending the conclusion of the investigation.

[64] Arbitrator Sonamzi then dealt with the issue of the duration of the suspension. He concluded that it was unreasonably long, and thus became what he called 'punitive'. This reasoning is in my view fundamentally flawed. Precautionary suspension, as said, is not punitive. The fact that it may continue for longer than what would be considered to be fair, does not transform it into being punitive. Simply put, the duration of the precautionary suspension can either be fair or unfair, and in deciding this *in casu*, as I have dealt with above, would depend on considering the nature of the investigation and the explanation submitted by the applicant for the duration of the suspension.

[65] Arbitrator Sonamzi gave three reasons for his conclusions on the issue of the duration of the suspension being considered by him to be unfair. Firstly, the period from 21 May 2013 to 19 August 2013 (some three months) was considered by him to be too long. Secondly, the applicant did not keep the first respondent 'up to speed' with the progress of the investigation. Thirdly, there was nothing preventing the applicant from having a 'simultaneous hearing' for the first respondent with the other managers also disciplined.

[66] What is immediately apparent from this reasoning of arbitrator Sonamzi is a complete absence of any consideration concerning the nature of the pending process and investigation, as well as the explanation provided by the applicant for the period of suspension. As I have said, these are the most important considerations. I simply cannot accept that in merely not keeping an employee 'up to speed' on what is happening in an investigation, where there is actually a proper ongoing investigation in existence, could be seen to be unfair. Of course, an employee that is not being appraised of what is happening whist he or she languishes on suspension may be justified in retaliating by referring an unfair labour practice dispute based on suspension

to the CCMA. But even in such a case the employer would be entitled to explain why matters were taking so long, and if justified, the suspension period would still be considered to be fair. Finally in this respect, it was clear from the evidence that the first respondent himself, despite initially strongly expressing his dissatisfaction about being suspended, never really regularly followed up on the status of the investigation and the pending disciplinary proceedings contemplated against him. Surely he also had a duty to follow up.

[67] In the circumstances of what actually transpired in this case, especially considering the scope of what had happened as a catalyst to all the events that followed, and the number of senior managers involved, I simply cannot accept that the three month suspension period is unduly lengthy. It was clear from the evidence that throughout this period, there was never a case that the proceedings had stalled or that there was nothing going on. I accept that the investigation was extensive and ongoing. There was at all times action being taken by the applicant, either in the form of the actual investigation, thereafter firstly disciplining other managers involved, before finally turning to the first respondent.

[68] Further, the applicant in my view provided a proper explanation for the suspension period as well.[28] From this explanation, which was in essence uncontested, there was an extensive ongoing investigation which, as I have said above, involved a number of senior employees in the district. Also, head office had to become involved in the matter. There were a number of disciplinary hearings that needed to be held, and the first respondent was at the end of this chain. Considering the first respondent's seniority and position, he would be in the position to influence any investigation, which was a risk to the applicant. Also it was deemed prudent in the interest of what was called 'business continuity' to suspend the first respondent until the end of the process. These are all valid considerations, and as said above, it was accepted by arbitrator Sonamzi himself that the suspension was for a valid reason. In *Madzonga*[29] it was held:

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[28] A portion of the transcript relating to the evidence of Ms Van der Waal is missing, but the explanation offered could be ascertained from the cross examination of the first respondent and Ms Van der Waal which is recorded, the written argument of the parties, as well as the notes of arbitrator Sonamzi.

[29] (*supra*) at para 43. See also *Phutiyagae v Tswaing Local Municipality* (2006) 27 ILJ 1921 (LC) at para 27 – 28.

> 'I also need to make reference to the seniority and influence of the position of the applicant. This was an important issue to the respondent when it considered whether or not to suspend the applicant. The fact is that the investigation the respondent has stated it would pursue would encompass a detailed investigation in the legal department, and as a necessary consequence, interviewing of the employees employed there. Considering that this investigation process is directly aimed at the applicant, it is a matter of simple logic that his continued presence at work would be, at the very least, extremely uncomfortable for the subordinates of the applicant in the legal department. The applicant's seniority also creates a risk that he could be in a position to possibly tamper with evidence or influence subordinates, being a case pertinently made out by the respondent. ...'

In all these circumstances, it is simply untenable to suggest that the suspension period was unduly long to the extent of rendering it unfair.

[69] Arbitrator Sonamzi was critical of the applicant's decision not to have held the first respondent's disciplinary hearing along with the other managers. This criticism is entirely unfounded, and tantamount to undue interference by the arbitrator with the manner in which the applicant chose to roll out disciplinary proceedings. It is simply not for the arbitrator to say who was to be disciplined when and where, and then base a finding of unfairness on this view. The applicant has the right to conduct the process in the manner it considered prudent. It sought to discipline the other managers first, and deal with the first respondent at the end. There is simply nothing wrong or unfair with this.

[70] In all of the above circumstances, the findings of arbitrator Sonamzi where it comes to the duration of the suspension fails to account for material facts. It negated the most important applicable considerations in deciding this criteria relating to the fairness of precautionary suspensions. As such, the findings are materially irregular. Considering what the arbitrator should have considered, the conclusions he arrived at in this respect would be an unreasonable outcome, and thus reviewable.

[71] This then only leaves the issue of *audi alteram partem.* According to arbitrator Sonamzi, it was unfair to suspend the first respondent without giving him the opportunity to first show cause prior to being suspended, as to why he should

not be suspended. This conclusion however fails to recognize the clear distinction between suspensions as part of discipline, and suspension as a precautionary measure. The matter at hand concerned precautionary suspension. As I have fully dealt with above, in the case of precautionary suspensions, there is no right to show cause prior to suspension as to why the employee should not be suspended. As long as the three criteria discussed above are met, the precautionary suspension would be fair. That was certainly the case *in casu*. The arbitrator's reliance on *audi alteram partem* to find the suspension to be unfair is completely misplaced, and thus unsupportive of the conclusion he came to. Equally, this reasoning is reviewable.

[72] I may just add that arbitrator Sonamzi was also critical of the fact that the applicant did allow the first respondent to make representations, only after it had been decided to suspend him. The complete answer to this of course would be that there was no obligation on the applicant to give the first respondent the opportunity to make these representations in the first place. But what I do wish to add is that this Court in *Dladla*[30] has in any event said that to allow an employee to make representations on the issue of suspension after the decision to suspend had been made was in order, where it came to compliance with *audi alteram partem* insofar as it may apply to suspensions, by saying:

> 'In our law, *audi alteram partem* can still be observed after the prejudicial decision ...'

[73] Overall considered, the applicant had a fair and proper reason to suspend the first respondent, which was a precautionary measure. Any prejudice to the first respondent was mitigated by the fact that the suspension was on full pay. The period of suspension, all considered, was not unduly long and properly justified. In the circumstances, the criteria in establishing a fair precautionary suspension had been met. The first respondent's suspension, *in casu*, was thus not an unfair labour practice.

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[30] (*supra*) at para 39.

[74] Accordingly, the conclusion by arbitrator Sonamzi that the first respondent was unfairly suspended by the applicant is unsustainable, on any ground. It is irregularly arrived at, and is not a reasonable outcome. In is founded on a material error of law, having a direct impact on the outcome arrived at, rendering it unreasonable. In *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others*[31] it was said:

> 'Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome. ...'

The error of law perpetrated by arbitrator Sonamzi in this case indeed had the consequence as articulated in the aforesaid dictum in *Du Toit*.

[75] The only reasonable outcome in this case could have been that the first respondent was not unfairly suspended, and that his unfair labour practice claim be dismissed. As such, the award of arbitrator Sonamzi falls to be reviewed and set aside.

Evaluation: The unfair dismissal

[76] I will now turn to the award of arbitrator Mbuli concerning the unfair dismissal of the first respondent by the applicant. I do not intend to rehash in detail all of the facts relating to all the problems with the fleet in the border district. Suffice it to say, in the end, it was undeniable that indeed there were serious problems with the fleet in the district and the management thereof.

[77] As touched on above, abitrator Mbuli rejected the first respondent's case relating to procedural unfairness and the case that the dismissal of the first respondent constituted inconsistent application of discipline. In the absence of

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[31] (2016) 37 ILJ 1819 (LAC) at para 21. See also *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at para 12; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 ILJ 2593 (LAC) at para 30; *Head of Department of Education v Mofokeng and Others* (2015) 36 *ILJ* 2802 (LAC) at para 32.

any cross review, these findings stand and I shall have no regard to these issues any further. Also, and on review when the matter was argued before me, the applicant did not persist with challenging the other charges relating to the labour brokers used and bringing the company name into disrepute. I shall therefore not consider these issues in this judgment as well.

[78] In my view, the only issue that remains to be decided is fairly crisp, and this is whether the first respondent failed in his duties and responsibilities relating to the management of the fleet in the border district, to the extent of it being considered a dereliction of his duties, thereby justifying his dismissal.

[79] As I have said above, there can be no doubt, on the evidence, that the management of the fleet in the border district was in a state of disarray. Difficulties included the use of unlicenced vehicles on public roads, and worse still, the use of vehicles with fraudulent licence disks. There was a problem with maintenance of vehicles. There appeared to be a complete lack of management and control where it came to this fleet. Arbitrator Mbuli himself accepted that all of this was indeed the case. In the end, an unlicenced vehicle was then involved in a fatal road accident. Without doubt, this entire situation was completely unacceptable, and exposed the applicant to material risk and prejudice. The only remaining logical question was – who must be held responsible?

[80] It was undisputed that the first respondent was overall responsible for all operations in the district, which included the management of the fleet. But it was similarly undisputed that he was not directly responsible for the fleet management, *per se*. The district in fact had a fleet manager, being Adams, and a fleet supervisor, being Ernston. These two employees were directly responsible for the management and control of the fleet. It may also be added that both these employees were indeed held accountable by the applicant for the above situation, and both were dismissed. This now leads one to the next step in the enquiry – can these failures by these employees be in any way imputed on the first respondent, to the extent of exposing him to dismissal for gross negligence or dereliction of duties? Or, differently put, does the fact that other managers are directly responsible for the fleet excuse the first respondent from being held responsible and accountable?

[81] In short, arbitrator Mbuli answered the above questions in the negative. According to the arbitrator, the employees directly responsible for the fleet were the accountable and responsible employees. The arbitrator reasoned that although the first respondent was overall accountable for the district, it could not have been expected of him to be entirely hands on, so to speak, having regard to the direct responsibility and duties of the employees responsible for fleet management. As far as the arbitrator was concerned, the first respondent was entitled to place trust in his subordinate employees responsible for fleet management that the tasks concerned were properly carried out.

[82] Arbitrator Mbuli further reasoned that the first respondent had properly dealt with the problems with the fleet by simply giving his subordinates instructions in this regard, and then trusting in them to carry it out. According to the arbitrator, there was no obligation on the first responden to become directly involved and follow up on the resolution of the problems with the fleet. The arbitrator also held that the first respondent had been given reports by his subordinates that all was in order where it came to the fleet, and that he was entitled to rely on those reports without question. The arbitrator further held that it had to be considered that this all happened at the busiest time of the year at the applicant, when all employees were focussing on their primary duties. In short, arbitrator Mbuli accepted that the first respondent had properly discharged his duties, was in essence mislead by his subordinates, and thus committed no misconduct of dereliction of duties.

[83] Arbitrator Mbuli however went further and held that even if the first respondent had transgressed, there was no proper evidence of the break down in the trust relationship and considering that the first respondent was not directly responsible and had in reality been duped by his subordinates, his dismissal, as a sanction, was not justified. According to the arbitrator, the transgression of the first respondent would not be serious enough to justify dismissal. As far as the arbitrator was concerned, this was a case where progressive discipline was required.

[84] At the heart of the applicant's case, in challenging the above reasoning of arbitrator Mbuli, is that the arbitrator failed to have due and proper regard to

what is required of a senior manager such as the first respondent, in the business of the applicant. As touched on above under the review grounds raised by the applicant, it is the applicant's case that it is untenable for a senior manager such as the applicant to simply pass on instructions to his subordinate managers and trust without qualification that these instructions would be carried out. The applicant's case further is that it was equally untenable for the first respondent to simply rely, also without question, on what he is then told about the fleet, without any attempt to check or verify this for himself. The applicant has also taken issue with the fact that the issue with the fleet was not an issue in the normal course of duties, so to speak, but was a unique and exceptional circumstance and problem which required the direct intervention and attention of the first respondent. According to the applicant, arbitrator Mbuli committed what the applicant called a 'fundamental misdirection' in failing to appreciate all of this, rendering his award reviewable.

[85] In assessing the review case of the applicant, it is true that both the applicant and the first respondent called witnesses to testify about what would reasonably and properly be expected of the first respondent, in the business of the applicant. The applicant called an experienced district manager, Peter Pienaar ('Pienaar'), and the general manager for the Northern region (who was also a district manager for five years), being Francois Malan ('Malan'), to testify. The first respondent called his former superior, Johann Krige ('Krige'), who was the general manager for the Cape Region and no longer employed by the applicant, to testify.

[86] Both Pienaar and Malan, on the one hand, and Krige on the other, appeared to have diametrically opposed views of what was expected of the first respondent. As far as Pienaar was concerned, the failure by the first respondent to have become directly and intimately involved in the issue of the fleet problem was a fundamental failure which should lead to his dismissal. Malan (also the appeal chairperson of the first respondent's appeal hearing) said that a district manager in the case such as this, where it comes to these problems with the fleet cannot, just send e-mails and expect tasks to be carried, but had to become directly involved and check for himself what had happened. Krige's view was however that the first respondent did nothing wrong, because the first respondent did address the issue with his responsible

subordinates and was entitled to expect that they carry out their work and not mislead him as to the steps actually taken. According to Krige, there was no need for the first respondent to become directly and personally involved in the issue with the fleet.

[87] Which of these two cases where it came to what was expected of the first respondent, is then to be preferred? Arbitrator Mbuli accepted, without reservation, the testimony of Krige, finding it to be 'clear, credible and coherent'. But unfortunately, and having so found, the arbitrator never dealt with, assessed, or determined the testimony of Malan and Pienaar. In fact, if one reads the award of arbitrator Mbuli where he reasons an outcome, it look as if only the first respondent and Krige testified because the evidence of no one else is dealt with. Arbitrator Mbuli needed to have made a properly reasoned credibility and reliability enquiry and finding, where it came to all the witnesses that testified before him, and in particular Malan and Pienaar. He needed to evaluate the evidence of all the witnesses against one another, and indicate which version he preferred and why. The arbitrator's complete failure to do so is in my view a material failure on his part. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others*[32]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. ....'

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[32] (2011) 32 ILJ 723 (LC) at para 7. In *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5, the Court said the following as to how to assess credibility: '...the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf..., (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. ...a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. ...'

[88] It was thus essential for arbitrator Mbuli to have made these kind of determinations as articulated in *Sasol Mining*, especially considering the directly contradicting views as to what was expected of the first respondent where it came to managing the fleet, which lay at the very heart of this case. The failure to do so means that arbitrator Mbuli acted irregularly by not properly discharging his duties. In *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others*[33] the Court held as follows in finding the award of an arbitrator to be reviewable:

> '.... The second respondent, had he discharged his duties properly, was compelled to determine this conflicting evidence and thus decide what evidence to accept, and what to reject. The second respondent had to assess credibility and probabilities and come to a proper and reasoned finding as to what evidence to accept. The second respondent did none of this ....'

[89] But deciding between two such opposing cases cannot just be done on the basis of the credibility and reliability of witnesses that testify. What must also be considered is the inherent probabilities.[34] The determination of probabilities entails an inference to be drawn from the evidence as a whole, on the basis of what the Court said in *SA Post Office v De Lacy and Another*[35]:

> 'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If it is not, then the inference cannot be drawn' and it must be the 'more natural or plausible, conclusion from among several conceivable ones' when measured against the probabilities.'

[90] It is clear that what was expected of arbitrator Mbuli was to arrive, on a properly reasoned basis, at the most natural, plausible and logical inference,

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[33] [2015] JOL 33126 (LC) at para 37.
[34] See *SFW Group* (*supra*) at para 5; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 34; *Mphigalale v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 ILJ 1464 (LC) at para 12; *Sasol Mining* (*supra*) at para 8.
[35] 2009 (5) SA 255 (SCA) at para 35

out of a number of possible inferences, on the evidence as a whole. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[36] the Court said:

> '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).'

This *dictum* in Bates was applied in *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*[37] 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 ...'

[91] The award of arbitrator Mbuli reflects a complete absence of any reasoning in assessing probabilities, or of conducting any reasoning based on inferences drawn having due regard to all the evidence, as a whole. As stated above, this was indeed expected of him. In *Minister of Safety and Security and Another v Madikane and Others*[38] the Court said the following about these kind of failures:

> '... the inference sought to be drawn could only be drawn in the light of all of the evidence. In my view, the court *a quo* erred in finding that despite the third respondent having ignored evidence material to the issue, his conclusion, concerning the inference to be drawn, was reasonable. The third respondent's conclusion on the inference to be drawn is based on a material misdirection.
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> The court *a quo* was at pains to point out that if it had been dealing with an appeal it would have been more inclined to say that the arbitrator's conclusion on the probabilities was wrong "when all the evidence is properly weighed".

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[36] 1985 (3) SA 916 (A) at 939I-J. See also *Kgoadi v Commission for Conciliation, Mediation and Arbitration and Others* [2014] JOL 31908 (LC) at para 60.
[37] (1994) 15 ILJ 1057 (LAC) at 1064C-E. See also *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* (2000) 21 ILJ 2585 (SCA) at para 9; *Dunlop Mixing and Technical Services (Pty) Limited and Others v National Union of Metalworkers of South Africa on behalf of Nganezi and Others* [2016] 10 BLLR 1024 (LC) at para 75; *National Union of Mineworkers* (*supra*) at para 37.
[38] (2015) 36 ILJ 1224 (LAC) at paras 45 – 46.

> The court *a quo* seemed thereby to suggest, or imply that, because of the test for reviews (which is different to that of appeals) a failure to weigh all the evidence and probabilities, in deciding whether to draw inferences, was reasonable. That approach cannot be correct. The failure to weigh all of the relevant evidence and the probabilities to draw inferences and make findings cannot be said to be reasonable. It is not only wrong not to take into account all of the relevant evidence but is also unreasonable and clearly what a reasonable decision-maker would not do.'

[92] Based on the above, and in summary, it is in my view clear that arbitrator Mbuli's award constitutes a gross irregularity, in that the arbitrator failed to deal with or even consider material evidence, did not rationally and reasonably evaluate and determine the evidence, and made no proper probability findings where it came to which of the mutually contradictory cases of the two parties had to be accepted and why. In effect, all the arbitrator did was to regurgitate parts of the evidence led, when making his ultimate finding, and then simply making conclusions without deductive reasoning. These kind of failures simply cannot be said to be the conduct of a reasonable decision maker.

[93] That being said, and then considering the review test as articulated above, the next question to answer is whether these failures as set out above have the consequence of rendering the outcome arrived at by arbitrator Mbuli to be unreasonable, even on other grounds, if the evidence as a whole, which includes a probability assessment, is then properly considered and done? This would of course entail this Court considering the evidence as a whole, in order to make an assessment which of the two versions are to be accepted applying the *SFW Group* test of credibility, reliability and probabilities.

[94] Before looking at the actual testimony presented, there are two crucial issues to first consider. The first consideration is the actual nature of the problem that arose in this case. In my view, it was not a day to day, normal course operational issue, where one could reasonably say that it cannot be expected that the first respondent as district manager should be aware of all the daily ins and outs of the management and operation of the fleet. I accept that in the normal course, it would be the fleet manager and supervisor that would deal with day to day operational problems and fleet management, and it cannot be

expected of the first respondent, considering all his other overall responsibilities in the district, to follow up in detail on all these activities. But the current problems with the fleet was not a normal operational issue in the normal course. It was a unique and serious problem. It required specific and detailed intervention. This makes the applicant's point that in this specific respect, the first respondent should have paid close and detailed attention, very appealing.

[95] It is clear from the undisputed evidence that by December 2012, the first respondent was very much aware of these problems and how serious it was, and instructed *inter alia* the fleet manager by e-mail in December 2012 to immediately do something about this. But considering the nature of the problem, and the risk it posed to the applicant, this singular intervention by the first respondent by e-mail is wholly inadequate. As a very senior manager, responsible for the entire district, he should have actually dirtied his hands, became directly involved, and ensured the problem was resolved. He should not have left it entirely up to his subordinates, under whose very tenure the problem arose in the first place. With the first respondent's immediate and detailed involvement, the problem with the fleet could easily have been remedied very early in 2013.

[96] But on the undisputed evidence, it is apparent that after having instructed his subordinates as aforesaid, the first respondent himself did very little about the problem. The situation is exacerbated by the very content of the first respondent's December 2012 instruction, which required the maintaining of daily spreadsheet reports about steps taken, coupled with regular updates from his subordinates about progress in resolving the problems with the fleet. These regular reports and updates were not forthcoming, and yet the first respondent did nothing. The first respondent was only spurred into direct action when the fatal accident, involving the unlicensed vehicle, happened in May 2013. But in my view, this belated direct intervention was far too little, far too late. The applicant adopted the view that considering the seniority of the first respondent's position, his overall responsibility, and what was expected of him, he should fall on his sword. In my opinion, this view of the applicant was entirely justified. In any event, the applicant is entitled to set the standards it expects from its senior managers, and then measure and hold these

managers accountable, against these standards. External interference in this regard should only be competent if such standards are grossly unreasonable or simply unattainable. In *Brodie v Commission for Conciliation, Mediation and Arbitration and Others*[39] the Court said:

> 'There was never any issue raised by the applicant that what Andrews testified to be the 'realistic expectation' for the business was in any way unfair or unreasonable in respect what was required of the applicant in this venture. In any event, such standards may only be interfered with if grossly unreasonable or unattainable and no such case was presented before the second respondent (see *Piki and Development Action Group Inc* (2002) 23 *ILJ* 609 (CCMA); *Wentworth and W H Saffer Ltd* (2002) 23 *ILJ* 959 (CCMA)). As the court said in *Sun Couriers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*: 'Employers are entitled to set performance standards and unless shown to be patently irrational or unrealistic, courts will be slow to interfere with them. The required standard in this instance was entirely valid ...
> '

[97] I will turn next to the testimony of Pienaar, who was clear in his testimony about what is expected of the first respondent in the case of a problem such as the one existing with the border district fleet. Pienaar is a currently serving as a senior district manager. Pienaar testified that for a failure such as the one that occurred in this case, the first respondent should have expected to have been dismissed. According to Pienaar, the first respondent needed to personally investigate that the problem had been resolved and had to ensure that the problem was immediately resolved. Pienaar in fact explained how the first respondent should have effectively utilized all the resources and personnel at his disposal to resolve the problem, which according to Pienaar the first respondent simply did not do. Pienaar added that the first respondent should have kept his own manager appraised, throughout, on what he was doing where it came to this problem, which he also did not do. Pienaar summarized the situation as thus:

> 'I would be personally involved. I think that that's important because we're not experts on the fleet and that's important, you know, but you should get your

[39] (2013) 34 ILJ 608 (LC) at para 43.

hands dirty. You need to take accountability for what's happening in your district.'

[98] Malan fully substantiated the view of Pienaar. Malan explained that the physical presence of the first respondent on the ground, for the want of a better description, would in itself place the necessary pressure on subordinates to immediately and properly resolve the problem and would indicate how serious the problem was and how important it was to solve it. Malan further added that the failure of the first respondent in this case was the kind of failure that completely destroyed the trust relationship between the applicant and the first respondent.

[99] When I consider the testimony of Pienaar and Malan as it appears from the arbitration transcript, I can find no feasible reason why that testimony should not be accepted. These witnesses fully corroborated one another in all material respects, where it came to what was actually expected of the first respondent as district manager, and what the consequences of his failure should be.

[100] Pienaar was principally challenged under cross examination on the basis that what he testified to was his own views, and not that of the applicant as a company. But Pienaar remained adamant that how he explained it, is how it should be done by all district managers. He says, and in my view quite appropriately, after some extensive cross examination, the following:

> 'You must understand I say get your hands dirty. What I meant by that to make a – you can't sit back and just hope other people solve your problems. It begins to sit and manage the process. You must go back say, guys give me feedback. What have we done there, what have we done here? You can't just sit there and say. Somebody else do the job for me. You're the senior executive.'

Pienaar also provided proper answers for his view that despite it being the direct duty of the fleet manager and supervisor to manage the fleet on a day to day basis, the district manager always remains accountable. Pienaar was also willing to concede issues such as the December busy period and that the duties of the district manager had a particular emphasis on sales. But Pienaar

provided a proper answer why this did not excuse the first respondent, even though other persons were also at fault.

[101] Overall, Pienaar fared well under extensive cross examination. He answered questions succinctly, and directly. He was not argumentative. As stated above, he made concessions where justified. I could also find no internal contradictions in his evidence, which remained consistent throughout.

[102] Malan was extensively cross examined. In particular, he was pressed to answer for what exact reason, according to him, the first respondent was dismissed, considering he was the appeal chairperson. He answered:

> 'He was fired for the reason that him as a leader should have taken accountability, prevent any illegal conduct and that is the way that he managed the fleet, that's the way of the fleet's condition. So he's go a leadership accountability here to ensure at the end of the day there's no legal transgression.' (sic)

As said, Malan corroborated the views of Pienaar where it came to the need for the first respondent to become directly and personally involved and what was expected of him in his leadership role, in all material respects.

[103] Malan was also prepared to make concessions under cross examination, if justified. For example he conceded that the first respondent was found guilty of gross dereliction of his own duties and not based on some form of collective misconduct. He also conceded that it could not be said that the first respondent actually knew that unlicenced trucks were being used and wilfully turned a blind eye to this, and that he did do some things rights where it came to dealing with the problem. But overall considered, Malan remained consistent in his view that the first respondent should have become personally involved to a far larger degree, remained accountable for what happened, and his dismissal was justified.

[104] Krige testified that sales and service was the focus of the duties of a district manager. But he did concede that the district manager was overall responsible for the fleet as well. Krige testified that as far as he was

concerned, all the first respondent had to do when he became aware of problems with the fleet was to e-mail the responsible manager with instructions to resolve the problem. He stated it was not expected that the first respondent had to follow up on this, once he gave the instruction. Krige however conceded under cross examination that it was up to the applicant to decide where to 'cut off', as Krige called it, responsibility when ultimately holding employees accountable for failures.

[105] Under cross examination, certain aspects of Krige's testimony in the disciplinary hearing were put to him to comment on. When confronted with these extracts of what he said, Krige conceded that the first respondent was accountable 'in full' for the fleet as well. In particular, Krige had used the analogy that a district manager must 'every now and again, they must go and open the cupboards and go and have a look what's inside because you know just because there's no rats there may be. That's part of doing your job' (sic). Krige conceded he made this statement in the disciplinary hearing and stated he still held this view. Krige answers under cross examination, with reference to the first respondent: '... So you know, was he accountable? Yes. Was he part of the solution? Yes ...'. These answers do however seem to contradict his view that all the first respondent had to do was instruct subordinates and then accept what is reported to him.

[106] A pertinent proposition is then put to Krige under cross examination, using the position of depot manager as an example. Depot managers also report directly to the first respondent. It is put to Krige that it would be expected of the first respondent to check on and manage the depot manager and make sure that what the depot manager is reporting to him is correct and that the depot manager runs the depot correctly. Krige agrees with this. It is then put to Krige that if the first respondent did not do this, it would be dereliction of duty, and again Krige agrees. Then, and realising what he just said, and without even being asked a question, Krige states that '... the fact of the matter is that, you know, the question has been identified by Allan and the greater team and was being addressed, so that doesn't constitute a dereliction of duty'. This clearly shows that Krige was not being honest and objective where it came to testifying about what was in reality expected of the first respondent, and

actually contradicted his own views in the interest of coming out in favour of the first respondent in evidence.

[107] In my view, Krige was far from the honest and candid witness arbitrator Mbuli described in his award. His evidence contained several material contradictions. He was predisposed to giving answers that favoured the first respondent, even when those answers were not in response to the actual questions asked and contradicted his own principal views. He sought to evade conceding that what the first respondent did was dereliction of duties, by saying that different managers manage different things, differently, and that in his own opinion, as opposed to what would the actual accepted standard in the applicant, the first respondent did not derelict his duties. When pressed for a proper answer on the issue of dereliction of duties, he became argumentative. And finally, it must be considered that there are contradictions between what Krige said in the disciplinary hearing, and the testimony he gave in the arbitration. At least, and in the end, Krige did concede that the first respondent was indeed accountable for the problems with the fleet, and the situation was one that required the first respondent to take action.

[108] Where it came to the testimony of the first respondent, and as said above, his view was that he did all that could reasonably be expected of him. He stated that he was not directly accountable for fleet management. He testified that he instructed his subordinates, who had the direct responsibility where it came to the fleet, and he was entitled to trust them to carry out the instructions he gave. He stated that when he was told all was in order and the problem had been resolved, he had no reason to doubt this. Taking this testimony as it stands, I must confess that I have several difficulties with this kind of explanation, which I will deal with later in this judgment.

[109] As a witness, the first respondent did not fare as well as Pienaar and Malan did. He was often argumentative. It was put to him under cross examination what Pienaar testified as to what would be required of him, for his answer thereto. His answer was that this was Pienaar's own views, without even recognizing the logic in these views. The first respondent remained adamant that as long as he had capable subordinates to do the work, he was entitled to trust them, and accept that when they say all is in order, it is so. The first

respondent was simply unwilling to concede, in the face of the undisputed evidence that what he was told by his subordinates was not true, that with the benefit of hindsight he actually could and should have done more. Despite contending that he was 'accountable', the first respondent then in effect contradicted this concession by saying that all accountability meant to him was doing what he did in this instance, and instruct subordinates. In the end, the first respondent was asked under cross examination how he, as in effect the managing director of the district, would ensure what is required with regard to the fleet is actually being done, and the following answer is in my view illuminating: 'Myself, I rely on them to tell me that it's being done.' In my view, that tells the story of dereliction of duty.

[110] I have little hesitation in saying that where it came to witness testimony, the testimony of Pienaar and Malan should be preferred over that of Krige and the first respondent. In my view, Pienaar, in particular, properly and truthfully set out what was expected of a district manager such as the first respondent, where it came to the kind of problems with the fleet in the district as existed in this case.

[111] As a matter of general principle, I find it hard to accept that a senior manager such as the first respondent overall completely in charge of a R1 billion business can competently abdicate responsibility like this, especially when confronted with a unique problem such as an irregular fleet. In my view, it was expected of him to become directly involved, and then remain involved, until the problem was resolved, which should, all considered, have been a very short term issue.

[112] Even considering what the first respondent actually did, on his own version, it is my view that this was the proverbial country mile short of what could be considered to be reasonable for a manager in his position. To put his actual interventions in the proper context: (1) he became alive to the problem in December 2012; (2) he sent an e-mail on 21 December 2012 to *inter alia* the fleet manager instructing that the problem had to be 'immediately remedied' with daily record keeping of what was being done and regular reports to him (the first respondent); (3) the first respondent never actually and directly checked that the problem was immediately remedied, and no regular reports

were sent to him which he did not follow up on; (4) the first respondent sent e-mails on 10 January 2013 with further instructions and demanded updates by e-mail on 24, 29 January and 4 February 2013, but there is no evidence (save for one instance on 25 January 2013) that he was ever given updates or that he even followed up on this; (5) On 7 March 2013, the first respondent is sent a report that the fleet issues were dealt with and there is 'light at the end of the tunnel', but this is contradicted by another e-mail from the same manager on the same date saying something else; and (6) the first respondent then left the matter there, accepting all was in order.

[113] What is entirely absent from the above chronology is actual and direct involvement of the first respondent. It simply cannot be ignored that the problems with the fleet arose under the very same managers the first respondent was now entrusting to solve the problem, without his direct involvement. And even when he asks time and again for reports, on his own version, and these are not forthcoming, he still does not get directly involved. Then, and when he is simply told by e-mail on 7 March 2013 that the fleet issues are resolved, without any reference to detail and the kind of particularity the first respondent himself required from the outset, he takes this report simply on face value without seeking to verify if this was in fact so. I believe that all this is a prime example of dereliction of duty. In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)*[40] the Court considered a similar situation and articulated the pertinent question to be answered as follows:

> 'The most prominent unanswered question in the account described above is why and how could the appellant think it was prudent to have preferred the protestations of Van der Walt over the reports from Tsetse when he was already aware that the oral feedback he got from his subordinates was unreliable and had been previously proven to be blatantly false? Second, why did he do nothing to address the abuse of the equipment that rendered it dysfunctional?'

The comparisons to the matter *in casu* is in my view clear.

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[40] (2014) 35 ILJ 2406 (LAC) at para 18.

[114] It is known, as a matter of fact, that the problems with the fleet were never resolved. There was an accident involving an unlicenced vehicle on 10 May 2013, and the first respondent was then only spurred into direct involvement. A head office inspection following that accident showed a number or irregularities with the fleet that still existed. It thus took the accident for the first respondent to appreciate what was always needed. The following *dictum* from the judgment in *Anglo Platinum*[41] is apposite:

> '... It is also perhaps appropriate to remark that the several revelations which emerge from the evidence, not necessarily directly pertinent to the culpability of the appellant, point in the direction of the management of this mine as having much to be embarrassed about. This perspective derives from not only the dereliction evidenced by the conduct of the appellant himself, but from the fact that a fatal accident occurred when two locos collided when the one loco had not been commissioned for service and its driver was uncertified as competent to have control of it. ...'

In this context, how hard could it have been for the first respondent, upon receiving a report on 7 March 2013 that the 'fleet issues' had been resolved, to simply schedule personal detailed inspections at all the depots over a number of weeks (if need to be) to check if this was indeed so. Why would it be necessary for an accident to happen first before decisive action was taken? There can be no proper explanation for the failure of the first respondent in this respect, which is simply dereliction of duty.

[115] I wish to add that at the conclusion of cross examination, the first respondent finally made some concessions. He only made these concessions when being confronted with the proposition that he showed no remorse for what happened. He stated:

> 'Okay, so let me clarify, we did drop the ball on the fleet, okay? That includes me. Yes, I was the district manager as accountable for the district, okay? At that point I was relying people on my executive, to be guiding me and supporting me on this. We all dropped the ball. Yet I was the only person held both accountable and responsible ...'

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[41] (*supra*) at para 43.

This is surely an admission of misconduct. It must also be considered that the contention by the first respondent that he was the only one held accountable and responsible where it came to the fleet is also just not true. As set out above, the fleet manager and supervisor, as well as the two depot managers, were all held similarly accountable and responsible, and were dismissed. The first respondent should face the same consequence.

[116] Therefore, the reasoning of arbitrator Mbuli that the first respondent did all that could be expected of him is thus completely unsustainable. In summary, the problems with the fleet were a unique and particular occurrence, which as a matter of common sense and logic, considering the first respondent's duties and responsibilities towards the district he was the head of, required his direct and personal intervention. The first respondent's effective deferral of the intervention needed to the very subordinates that were the likely cause of the problem in the first place defies comprehension. Had the first respondent become directly and actively involved, and on the ground so to speak, I have little doubt that all the problems with the fleet would have been promptly resolved and none of what was discovered after the accident in May 2013 would have come to pass. The first respondent thus committed dereliction of his duties where it came to the fleet, and in finding to the contrary, arbitrator Mbuli committed a gross and reviewable irregularity.

[117] It was similarly entirely unreasonable and unjustified to conclude that the first respondent was simply entitled to trust what he had been told by his subordinates. Again, this approach loses sight of the unique nature of the problem with the fleet, which needed extra attention, and that the problem arose under the tenure of these subordinates the first respondent now so trusted. Also, and reasonably speaking, the lack of detailed reports forthcoming from these subordinates in the format actually required by the first respondent, despite his frequent e-mails asking for this, should have aroused his suspicions, and must surely have motivated him to become personally involved.[42] And then, when he is told that all is well on the home front, despite the complete lack of detailed feedback and another contradictory report on the

[42] Compare *Pernod Ricard SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1199 (LC) at para 10.

same date from the same manager, it must be expected that he would directly and personally satisfy himself that this is indeed so. The approach propagated by the first respondent in his defence, and then without hesitation ascribed to by arbitrator Mbuli, is in my view, completely irreconcilable with what can reasonably and properly be expected from a senior manager such as the first respondent, occupying the position that he did, when faced with such a unique problem, the existence and scope of which he was fully aware of. In *Anglo Platinum*[43] the Court said:

> 'The appellant's stance in denying culpability for gross negligence betrays a lack of grasp about the nature of his job. He was a manager and was responsible *to manage* the programme of fitment. To this end, ie the management of the programme, he failed properly to apply his mind. Despite the acknowledgment in his testimony that he was required to use judgment, he failed to do so. An inappropriate combination of ignorance of the hard facts that he needed to manage effectively and an undue deference to feedback he knew to be unreliable demonstrates his lack of judgment. He conducted himself like a functionary not as a manager. He misconstrued the practice of the reliance by one manager on another manager for assurances, given orally and informally, and upon which further decisions are made. Such a practice occurs within a particular context of a managerial ethos built upon a high sense of accountability and use of discretionary judgment. …'

In my view, this *dictum* can directly be applied *in casu*. The first respondent's denial of wrongdoing coupled with a complete deferring of the problem to subordinates, in the context where his position and the nature of the problem required his hands on intervention, demonstrates a complete lack of judgment to the extent of being a dereliction of duty.

[118] In my view, it would in any event be completely inappropriate for the first respondent to seek to rely on the consistent failures of the subordinates that reported directly to him as a defence, especially considering that the first respondent was alive to these failures as from December 2012. For the problem to continue for as long as it did, without direct involvement of the first respondent, demonstrates a dereliction of the duty to manage, which is one of

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[43] (*supra*) at para 20.

the first respondent's direct and primary responsibilities. In *Anglo Platinum*[44], the Court held:

> '... it would be a paradox if the appellant could legitimately invoke the failure of the very subordinates he was accountable to manage effectively to exonerate or mitigate his managerial neglect by managing them ineffectively. ...'

[119] In short, and on the evidence as a whole, and taking into account the seniority and nature of his position, it is my view the first respondent indeed committed dereliction of duties. Any conclusion that he did not commit this misconduct is not supported by the relevant principles of law, ignores pertinent evidence, and simply a failure to have proper regard and consideration to all the material facts, as a whole. The consequence of this is an unreasonable award. As said in *Gold Fields Mining*[45]:

> '... Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. ...'

Arbitrator Mbuli, in excluding material evidence from consideration, acted unreasonably. In *Network Field Marketing (Pty) Ltd v Mngezana No and Others*[46] the Court said:

> '... By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties. ...'

The conclusion of arbitrator Mbuli that the first respondent did not commit the misconduct of dereliction of duty thus falls to be reviewed and set aside.

[120] What must next be dealt with is the conclusion by arbitrator Mbuli that even if the first respondent did commit the misconduct concerned, this misconduct was not serious enough to justify the dismissal, that there was no evidence of the break down in the employment relationship, and that progressive discipline

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[44] (*supra*) at para 28.
[45] (*supra*) at para 21. See also *Pam Golding Properties (Pty) Ltd v Erasmus and Others* (2010) 31 ILJ 1460 (LC) at para 6.
[46] (2011) 32 ILJ 1705 (LC) at para 16.

was appropriate. I am afraid that these conclusions are entirely incompatible with the evidence actually on record, which I will now deal with.

[121] It is simply not so that there was no evidence of the break down in the employment relationship. Malan, as former district manager and now general manager, gave clear evidence in this respect, and specifically said that as far as the applicant was concerned, the trust relationship had been 'totally destroyed'. The applicant could not call the first respondent's former direct manager, Krige, because he was no longer in the employ of the applicant and would simply not be in the position to comment about the continued employment relationship between the applicant and the first respondent. Malan was the best and most suitable candidate to give this evidence, considering his position in the applicant, the fact that he was a district manager for five years and had since been elevated to a more senior position, and was the appeal chairperson of the appellant's appeal hearing. He would know exactly what impact the misconduct of the first respondent had on the employment relationship. In *Edcon Ltd v Pillemer NO and Others*[47] the Court said:

> '... The gravamen of Edcon's case against Reddy was that her conduct breached the trust relationship. Someone in management and who had dealings with Reddy in the employment setup, as already alluded to, was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship. All we know is that Reddy was employed as a quality control auditor; no evidence was adduced to identify the nature and scope of her duties, her place in the hierarchy, the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention, eg because of precedent or example to others.'

[122] The first respondent actually accepted under cross examination that as far as the applicant was concerned, the trust relationship had indeed broken down. He never challenged Malan's testimony to this effect. In addition, the issue was also fully dealt with at the disciplinary, and appeal proceedings. It is specifically recorded in the appeal finding that the trust relationship is 'broken

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[47] (2009) 30 ILJ 2642 (SCA) at para 20.

and beyond repair'. There can be little doubt that on the evidence, properly considered, the trust relationship was destroyed. The following *dictum* in *Miyambo v CCMA and Others*[48] is particularly apposite, and in my view supports the case the applicant sought to make out, where it was held:

> 'It is appropriate to pause and reflect on the role that trust plays in the employment relationship. Business risk is predominantly based on the trustworthiness of company employees. The accumulation of individual breaches of trust has significant economic repercussions. A successful business enterprise operates on the basis of trust...'

[123] Arbitrator Mbuli however completely ignores all the evidence relating to the disciplinary and appeal proceedings, as well the evidence of Malan. Instead, the arbitrator relies on the evidence of Krige to substantiate his conclusion that the trust relationship had not broken down. Such reliance is completely misplaced. Once Krige is no longer employed by the applicant, he is simply not in a position to comment about the employment relationship, on behalf of the applicant. It must also be considered that Krige is actually tainted by all the events relating to the border district fleet problems in this case, giving him a motive to downplay its severity, even though he may not be employed by the applicant any longer. But to make matters even worse, Krige actually never said in evidence that the trust relationship between the applicant and the first respondent still existed. The manner in which arbitrator Mbuli dealt with the issue of the trust relationship is therefore simply not the conduct of a reasonable decision maker, and thus reviewable.

[124] Turning then to the seriousness of the misconduct, there can be no doubt it is serious. It led to the dismissal of all the managers directly involved. The problems with the fleet exposed the applicant to significant and material risk. Dereliction of duty in the case of a person that can in essence be considered to be the managing director of a R1 billion business is the kind of misconduct that could competently be seen to justify dismissal. I simply cannot accept the reasoning of arbitrator Mbuli that the misconduct is not serious, and this conclusion of the arbitrator is simply not a reasonable outcome. In my view,

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[48] (2010) 31 ILJ 2031 (LAC) at para 13.

the following dictum in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon*[49], despite dealing with a dismissal for incapacity, can equally be applied in this instance:

> 'I agree with what is said in Smith & Wood *Industrial Law* (6 ed) at 405: "In the realm of dismissal for incapability, it is important that the employer's business should not have to suffer, to the detriment of all concerned, through the ineptitude or inefficiency of a particular employee."'

[125] This then only leaves the issue of progressive discipline. Where it comes to the concept of progressive discipline, the Court in *Timothy v Nampak Corrugated Containers (Pty) Ltd*[50] said:

> '... Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer's organization, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. ...'

[126] The above being the case, there is a formidable obstacle in the way of progressive discipline, in this case, which arbitrator Mbuli did not consider at all. This is the complete lack of remorse and acknowledgment of wrongdoing by the first respondent. The first respondent never came out and admitted that he had a lapse in judgment in dealing with the fleet problem the way he should have. He never apologized to the applicant for what happened, and sought to convince the applicant that irrespective of this admitted failure, he was still a valuable employee and would prove himself to the applicant if given the chance to do so. In *Gold Fields Mining*[51] the Court held as follows in finding dismissal to be justified:

> '... The third respondent committed an act of serious misconduct. He deliberately failed to follow the sampling procedure and was recalcitrant about

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[49] (2000) 21 *ILJ* 501 (LAC) at para 74.
[50] (2010) 31 *ILJ* 1844 (LAC) at 1850A-C.
[51] (*supra*) at para 31.

> his wrongdoing. In such circumstances, his years of service and seniority serve not only as mitigation but also aggravation particularly in the light of the fact that his work has a serious impact on the decision that the employer would take in relation to which area should be mined and the cost implications attached thereto. ...'

Similar considerations apply *in casu*. The misconduct in this instance has serious implications for the applicant. The first respondent knew what needed to be done, and completely failed to ensure it was done. And when confronted with his failure, he sought to blame everyone else, and disputed any wrongdoing.[52]

[127] Therefore, the first respondent exhibited no inclination towards rehabilitation. Instead, the opposite is true. He steadfastly contended he did nothing wrong. He maintained he did all that was expected of him, implying that if such a situation arose again, he would behave in the same manner. Knowing how the applicant felt about what was his duty and responsibilities in this instance, he chose a path of confrontation, instead of conciliation. Considering his level of seniority in the business, all the above circumstances would render completely unfeasible any prospect of progressive discipline. The conclusion by arbitrator Mbuli that progressive discipline may have been possible is simply unsustainable. I consider the following *dictum* from the judgment in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[53] to be a valid consideration *in casu*, where the Court said:

> 'This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. 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

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[52] In *Department of Co-operative Governance, Human Settlements and Traditional Affairs, Limpopo Province and another v Seopela NO and Others* [2015] JOL 32810 (LC) at para 40 the Court said: '...The fruitless attempts by the third and fourth respondents to distance themselves from their statutory duty aggravates the failure ...'.

[53] (2000) 21 *ILJ* 1051 (LAC) at para 25.

> of trust is reposed in an employee, be legitimately entitled to say to itself that the risk to continue to employ the offender is unacceptably great.'

I further find the analogy used in *Independent Newspapers (Pty) Ltd v Media Workers Union of SA on behalf of McKay and Others*[54] particularly appealing, where the Court said:

> 'The analogy of a marriage, used by Mr *Van Zyl*, is perhaps a useful one. It is not unheard of for one partner in a marriage relationship who has been cuckolded to give the other partner a second chance, as it were, in the face of true remorse and a true effort to rebuild the trust relationship.'

[128] In deciding whether the decision to dismiss by the applicant was fair, the 'totality of circumstances' had to have been considered.[55] This 'totality of circumstances' include the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, whether progressive discipline would be appropriate, the effect of dismissal on the employee, the employee's service record, the issue of the nature of the misconduct, any breakdown of the trust relationship, the existence of dishonesty, the existence of genuine remorse, the job function and the employer's disciplinary code and procedure.[56] Considering all these principles, as may be applicable in this case, I have little hesitation in concluding that the first respondent's misconduct justified his dismissal, and any conclusion to the contrary is unsustainable and thus reviewable.

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[54] (2013) 34 ILJ 143 (LC) at 146. See also *Greater Letaba Local Municipality v Mankgabe No and Others* (2008) 29 ILJ 1167 (LC) at para 34

[55] See the dictum of Navsa AJ in *Sidumo* (*supra*) at para 78. See also *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Fidelity Cash Management Service (supra)* at para 94.

[56] See *Sidumo* (*supra*) at paras 116 – 117; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.

[129] In all of the circumstances, I am satisfied that the first respondent committed the misconduct of dereliction of duty, and that based on this misconduct and considering all relevant circumstances, the dismissal of the first respondent by the applicant was indeed fair. The conclusions by arbitrator Mbuli to the contrary are not sustainable on the evidence, and certainly is not a reasonable outcome. The award by arbitrator Mbuli that the dismissal of the first respondent by the applicant is substantively unfair therefore falls to be reviewed and set aside.

[130] Because of the above conclusion I have reached, it is not necessary to consider the applicant's second main ground of review relating to the relief afforded by arbitrator Mbuli to the first respondent.

Conclusion

[131] Therefore, and based on what has been set out above, I conclude that both the arbitration awards in favour of the first respondent, relating to both his suspension and dismissal, simply cannot be sustained. Both these awards fall be reviewed and set aside, which I hereby do.

[132] In the case of the arbitration award of arbitrator Sonamzi, the reasons for my conclusion in this regard in short are that he ignored pertinent evidence and failed to contemplate and then apply material legal principles. If the arbitrator indeed considered the evidence he ignored, and properly applied the requisite legal principles where it came to precautionary suspension, he simply could not have reasonably arrived at the conclusion that he did.

[133] And where it comes to arbitrator Mbuli, he in short ignored pertinent evidence, did not properly evaluate and determine the evidence and probabilities, and never arrived at a properly motivated outcome as to what version / case was to be preferred and why. All considered, if the evidence and probabilities are properly considered, I am satisfied that the ultimate outcome arrived at by the arbitrator to the effect that the first respondent is not guilty of the misconduct of dereliction of duty, is simply not a reasonable outcome. The only reasonable outcome, as I have said above, is that the first respondent is indeed guilty of the misconduct, and that his dismissal was justified, and fair.

[134] Having reviewed and set aside both awards, I see no reason to remit these matters back to the CCMA again for determination *de novo* before another arbitrator. All the required evidence has been led and is on record. The transcripts are complete and all the documentary evidence presented is part of the records before me. I thus have sufficient evidentiary material before me to finally determine both these matters.[57] The applicable legal principles at stake are equally clear, and can be properly applied to the evidence as it stands. I am satisfied that the precautionary suspension of the first respondent did not constitute an unfair labour practice. I am equally satisfied that the first respondent committed the misconduct relating to dereliction of duty with which he had been charged, and dismissal was an appropriate and fair sanction for this misconduct.

[135] I shall therefore substitute the arbitration award of arbitrator Sonamzi with an award that the first respondent's suspension was not an unfair labour practice and that this claim be dismissed. I shall also substitute the award of arbitrator Mbuli with an award that the dismissal of the first respondent by the applicant was substantively fair.

[136] This then only leaves the question of costs. Both parties contended that costs should follow the result. I see no reason not to oblige, as this was what the parties asked for.

Order

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

1. The applicant's review application under case number PR 121 / 16 is granted.

2. The applicant's review application under case number PR 122 / 16 is granted.

3. The arbitration award of the second respondent under case number PR 121 / 16, being arbitrator M Mbuli, which is dated 29 April 2015 and issued under case number ECEL 4161 – 13, is reviewed and set aside.

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[57] See *Blitz Printers* (*supra*) at para 77.

4. The arbitration award of the second respondent under case number PR 122 / 16, being arbitrator D Sonamzi, which is dated 30 October 2013 and issued under case number ECEL 2659 – 13, is reviewed and set aside.

5. The arbitration award of arbitrator M Mbuli dated 29 April 2015 and issued under case number ECEL 4161 – 13, is substituted with an award that the dismissal of the first respondent by the applicant was substantively fair.

6. The arbitration award of arbitrator D Sonamzi dated 30 October 2013 and issued under case number ECEL 2659 – 13, is substituted with an award that the suspension of the first respondent by the applicant did not constitute an unfair labour practice and that the first respondent's claim be dismissed.

7. The first respondent is ordered to pay the applicant's costs, in respect of both cases, under case numbers PR 121 / 16 and PR 122 / 16.

S Snyman