THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JA 47/22

In the matter between:

QUINTON BRAUNS **First Appellant**

VANNESA BRAUNS **Second Appellant**

YOLANDA SCHOEMAN **Third Appellant**

and

TREVOR WILKES NO **First Respondent**

THE SAFETY AND SECURITY SECTORAL BARGAINING COUNCIL **Second Respondent**

SOUTH AFRICAN POLICE SERVICES **Third Respondent**

Heard: **31 August 2023**

Delivered: **18 January 2024**

Coram: **Molahlehi ADJP, Musi JA and Malindi AJA**

Summary: The issue on appeal concern the dismissal of the review application by the Court *a quo*. The three appellants were dismissed for dishonesty and their dismissals were found to be fair and justified by the Commissioner because the charges proffered against them had elements of dishonesty and thus destroyed the trust relationship between the parties. The appeal having

lapsed, was reinstated by this court. This Court agreed with court *a quo's* finding that the award of the Commissioner was one which a reasonable decision maker could reach and accordingly dismissing the appellants review application. The appeal stands to be dismissed.

Evidence-Commissioner accepting evidence based on a confession which had been reduced to writing by a magistrate. Principles governing admission of evidence based on a confession restated. The contention that the confession was invalid because it was made before the first appellant had all the details regarding the charges rejected. The Court noted that in arriving at the decision as he the Commissioner did took into account the totality of the evidence including that in the confession.

JUDGMENT

MOLAHLEHI ADJP

Introduction

[1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (per Moshoana J) in terms of which the appellants' application to review the arbitration award of the Safety and Security Sectoral Bargaining Council (SSSBC) was dismissed with no order as to costs.

[2] The appeal having lapsed, the appellants requested that it be reinstated. The request was granted considering that it was unopposed and it was in the interest of justice to do so.

Background

[3] In July 2016, the third respondent, the South African Police Services (SAPS), dismissed the three appellants for dishonesty. The three appellants, Mr Quinton Brauns, Vanessa Brauns and Yolanda Schoeman were employees of the SAPS based at Brakpan, Gauteng.

[4] At the time of his dismissal the first appellant was, employed as a financial clerk, and his duties involved the management of work and remuneration for

work done on public holidays, monitoring medical accounts for pensioners, coordinating and controlling the budget and financial expenditure at the police station, monitoring and calculating prisoners' meals per month including tracking the budget. He was charged with ten counts of fraud. It was alleged that he unlawfully, intentionally, defrauded and prejudiced the State by misrepresenting that he and the other two appellants were entitled to overtime payment while knowing that they were not entitled to such payment. He was also charged with conspiring with the other two appellants to commit a crime.

[5] The second appellant, Mrs Brauns, was an administrative clerk employed as such in the loss control management section dealing with civil claims and damages of State vehicles and improvement of data integrity. She was charged with six counts of fraud in that she unlawfully, intentionally, defrauded and prejudiced the State by way of misrepresentation of not revealing or informing the SAPS that she received an amount of R202 418.02 overtime, which was not due to her. She was also charged with conspiracy to commit fraud by conspiring with the first and third appellants to defraud the SAPS.

[6] The third appellant, Mrs Schoeman, was a personnel officer responsible for verifying information on leave application forms, and processing and finalising leave applications of employees. She was charged with three counts of fraud in that she unlawfully, intentionally, defrauded and prejudiced the State by way of a misrepresentation by means of an omission in that she failed to reveal to the SAPS that she received a total amount of R8 984.52 as payment for overtime, which was not due to her. She was also charged with conspiring to commit fraud with the first and second appellants.

[7] The charges proffered against each of the appellants were in terms of regulation 20(z) of the SAPS disciplinary regulations promulgated in accordance with the provisions of section 24(1)(g) of the South African Police Service Act[1].

[1] Act 68 of 1995.

[8] The appellants are related to each other, with the first and second appellant being husband and wife and the third appellant being the sister-in-law of the first appellant.

[9] There is no dispute that the unauthorised payments were made into each of the appellants' bank accounts. The payments were effected through the computer enabled access credentials to the SAPS payment system of other employees without their knowledge. It is also common cause that the appellants did not work overtime for which they were paid.

[10] It is further common cause that the first appellant made a confession about his fraudulent conduct before a magistrate.

[11] The appellants were suspended without pay on 4 May 2016, following the discovery of the alleged dishonest conduct. They were all charged with misconduct, found guilty and dismissed. Their attempt at overturning their dismissal through the internal appeal process was unsuccessful. Following that outcome, the appellants filed an unfair dismissal dispute with the second respondent, the SSSBC. The dispute was referred to arbitration after conciliation failed. The SSSBC Commissioner found the dismissals of all the appellants to be substantively fair and accordingly dismissed the review application.

The case of the SAPS

[12] The SAPS, in support of its case, which is that the dismissals of the appellants were substantively fair, presented the evidence of several witnesses. The essence of the version presented against the first appellant was that he captured and approved overtime payments for the benefit of the other two appellants, his wife and his sister-in-law. The version was also that the second and third appellants had knowledge that they received the payments but that they were not entitled to the amounts paid to them for overtime.

[13] The first witness for the SAPS was Commander Smith (Ms Smith), who testified how she discovered the fraudulent conduct of the appellants, initially, through a

note in an envelope she found underneath her office door. She discovered, when she read the note, that there were certain members of the SAPS who were alleged to have fraudulently received overtime payments since October 2015 which was not due to them.

[14] After reading the contents of the note, Ms Smith appointed Captain Bold (Ms Bold) to investigate the allegations contained in the note. The investigation revealed that the people who were alleged to have been involved in the scandal were people employed at the SAPS in Brakpan. It further revealed that the service numbers referred to in the note were those of the first and second appellants.

[15] On 12 April 2016, Ms Bold, Ms Smith and the first appellant met in an office where the first appellant, who was emotional and crying, apologised for disappointing his family and the SAPS management. He then requested to meet with the Station Commander, Brigadier Manyathela. He again apologised for what he did in the meeting with Brigadier Manyathela.

[16] According to Ms Smith, arrangements were then made for the first appellant to appear before a magistrate for him to make a confession. He appeared in this regard before Magistrate Parson.

[17] Ms Smith testified during cross-examination that Captain Bold was appointed to investigate the scandal despite being implicated in some of the overtime transactions. She further conceded that the first appellant's user number was used whilst he was on leave. She, however, stated that the first appellant had attended the workplace whilst he was on leave as he used to accompany his wife to work and remained there for some time.

[18] The second witness for the SAPS was Captain Bold, who testified briefly that she was called by Ms Smith to her office on 6 April 2016 and informed her about the discovery of the fraudulent transactions concerning overtime. She explained how the overtime system at the SAPS worked. The investigation, according to her, revealed that none of the appellants were entitled to receive

overtime payments. Both the first and second appellants claimed overtime, even when they were on leave.

[19] Ms Bold further stated during cross-examination that the first appellant opened a case against her at the Tsakane police station concerning the issue of the alleged fraudulent overtime claims. The prosecutor declined to prosecute.

[20] The third witness for the SAPS was Ms Anderson, a senior accounting clerk. Her testimony, in brief, is that she was informed that her password was used for a fraudulent overtime claim. She further stated that on 15 April 2016, whilst at the parade, the first appellant stood up and apologised to management in the presence of everybody for his misconduct and acknowledged that what he did was wrong.

[21] The fourth witness for the SAPS was Ms Harris, a senior clerk. She confirmed what was said by Ms Anderson that the first appellant stood up at the parade and admitted to having wrongly captured things which Captain Bold did not authorise.

[22] The fifth witness for the SAPS was Magistrate Parson, who reduced the first appellant's confession to writing. She explained the procedure she followed in taking down the confession. This included writing down what the first appellant told her and thereafter reading it back to him. She stated that the essence of the appellant's confession was that he took money that did not belong to him. According to her, the first appellant explained his conduct as follows:

'Ek het finansieel strain gegaan, ek het oortyd gecapture en geapprove op iemand ander se naam Kaptein Bold sonder haar consent. Ek kon nie die geld in my eie rekening betaal nie het ek dit in my vrou se rekening betaal. Die oortyd was nie aan my verskuldig en die geld ook nie. Ek het geweet ek mag dit nie doen nie, ek is bereid om the geld terug betaal, ek het vanaf laas jaar November af tot Februarie 2016 gedoen en dit beloop plus minus R10 000-00, dit is al.'

The case of the appellants

[23] The first witness for the appellants, Mrs Brauns, who did not dispute that despite her not working overtime, she received an undue amount. She, however, contended that she did not know that the payments were for overtime. She assumed that it was for some legitimate purpose.

[24] She admitted, under cross-examination, to having received payment into her bank account. She, however, contended that it may well have been either back pay on medical aid, pay progression or a salary increase. This is why she never reported the matter to the SAPS.

[25] She further contended that contrary to practice, she never received any text message or salary advice informing her of the payments. In order to explain this departure from practice she stated that she never received any information about the payments, which happened between July 2015 and March 2016.

[26] The second witness for the appellants was Ms Schoeman, who also testified that she did not know about the payment being made into her bank account. She similarly stated that she thought that the money could have been for medical aid, back pay, pay progression or increase-related payments.

[27] The third witness for the appellants was the first appellant, Mr Brauns, who, as indicated earlier, was responsible for capturing public holidays, medical reports of prisoners, and monitoring the budget. He testified how the capturing and authorisation of overtime is done at the SAPS. According to him, the process entails capturing overtime transactions on the system, and after that, overtime has to be authorised by a Captain, a Colonel or someone in senior management. The capturing process involves using a user number that starts with the digit '90' and a Persal number. Without these numbers, a person cannot access the system.

[28] The first appellant disputed having captured the overtime in question and contended that he was on a fifteen days leave at the time of the capturing and authorisation of the overtime.

[29] The first appellant stated that he was told by Ms Smith what to say to the magistrate during the confession. According to him, he was told in this regard to say that he captured and approved over time using Captain Bold's password. He stated further that he was told to say that he would pay the overtime money back.

[30] In response, during cross-examination, as to why he did not inform the magistrate that he was influenced to say what he said, he stated that it was because he thought Colonel Smith was helping him to ensure that criminal charges would not be proffered against him. In response to the question by the magistrate whether the money was due to him, he said, *"ek het geweet die geld was nie verskuldig aan my nie"*.

The arbitration award

[31] Following the outcome of the disciplinary hearing, the appellants referred a dispute to the SSSBC, alleging that their dismissal was unfair because there was no evidence to prove the charges against them.

[32] The appellants were, throughout the arbitration hearing, legally represented.

[33] In dismissing the appellants' application, the Commissioner reasoned:

'[73] That the applicants (appellants) had benefited from the payment of overtime in respect of which they had not worked and therefore in respect of which they were not entitled (it) to (sic) any such payment.'

[34] The Commissioner further made the following findings:

'(i) The first appellant had the opportunity and the motive to capture and approve the payment for the overtime not worked by the appellants.

(ii) The first appellant was at work half an hour earlier than the other finance department employees. Further, on a Sunday morning when the four

transactions were captured, there is documentary proof that he had been on duty alone.

(ii) The first appellant, without justification, deliberately caused overtime payments to be made where none were due.

(iv) There was no lack of parity in the application of discipline against the appellants, as all members of the relevant departments who were alleged to have been involved in the transactions were charged and disciplined.

(v) The appellants did not place in dispute the existence of a rule prohibiting their conduct, and the rule was valid and reasonable; further, they were aware of the rule that the SAPS had consistently applied.

(vi) The sanction of dismissal was in the circumstances justified because the charges proffered against the appellant's elements of dishonesty and thus destroyed the trust relationship between the parties.'

In the Labour Court

[35] In their review application, the appellants complained that:

35.1 The Commissioner failed to consider the material presented before him, misconceived the nature of the enquiry and thus arrived at an unreasonable outcome; and

35.2 The finding that the dismissals of the second and third appellants were substantively fair was unreasonable.

[36] The appellants raised further grounds of review in their supplementary affidavit and contended that:

36.1 The Commissioner failed to properly analyse and consider the evidence presented to him, misconceived the nature of the enquiry, misdirected himself on either the facts and the law or both and thus arrived at unreasonable results;

36.2 The Commissioner failed to properly consider the fact that both the 2nd and 3rd applicants offered to pay the monies; and

36.3 The Commissioner did nothing to properly consider the fact that the appellants had clean disciplinary records and their dismissal for a first offence was too harsh.

[37] The Labour Court found that the Commissioner's arbitration award was reasonable and dismissed the applicants' review application accordingly. It found that the review was an appeal in disguise and that the appellants were on a balance of probabilities guilty as charged. Accordingly, the arbitration award was found to be one that a reasonable decision-maker could make. It further rejected the appellant's contention that the SAPS applied discipline inconsistently.

Before this Court

[38] The appellants challenged the outcome of the review application and contended that:

38.1 The Court *a quo* erred in failing to find that the Commissioner misconceived the nature of the inquiry and thus arrived at an unreasonable result;

38.2 The Court *a quo* erred in failing to find that the Commissioner ignored relevant evidence and considered irrelevant evidence;

38.3 The Court *a quo* erred in accepting the basis on which the Learned Commissioner relied on the first appellants' purported confession; and

38.4 The Court *a quo* erred in failing to find that the Commissioner failed to find the sanction of dismissal was extremely harsh.

Evaluation

[39] The duty of the Commissioner in arbitrating the dispute in this matter was to decide whether the dismissal of the appellants was fair. He was enjoined to do so by considering all the facts and the circumstances without having to decide afresh what to do or deferring to the decision of the SAPS.

[40] It is trite that the reviewing court will be justified to interfere with the outcome of an arbitration award in an instance where the Commissioner failed to identify the real issue(s) between the parties or mischaracterised the nature of the dispute between them. A failure to properly characterise the nature of the dispute between the parties is regarded as gross irregularity.

[41] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*,[2] this Court held that the inquiry does not end with the establishment of gross irregularity but rather with whether the final outcome or result was unreasonable. In other words, in a process-related irregularity, the Court will be justified to interfere with the arbitration award if the award is one that a reasonable decision-maker could not have made.

[42] In my view, the Commissioner in the present matter did not misconstrue the nature of the enquiry he was tasked to conduct. The approach he adopted in dealing with the issue before him was correct in that the conclusion reached is one that a reasonable decision-maker could have reached. He cannot be accused of having failed to properly identify the dispute he was required to resolve.

[43] The evidence proffered by the SAPS on record demonstrates that the appellants were guilty as charged. It is in this respect not in dispute that the second and third appellants received money, that they did not work for. Their explanation was that they did not know what the money was for but assumed that it was deposited into their accounts for some other legitimate reasons. This was disputed by Captain Bold, who, in her testimony, indicated that, if it were

[2] [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC).

official SAPS money, there are various ways in which the appellants would have been made aware of the payments even before they received the money.

[44] In the heads of argument, the appellants contended that the Commissioner's conclusion contradicted his evidential findings. This is based on the Commissioner's finding that Captain Bold's *"evidence to be less than reliable because she was somewhat evasive in answering questions around claims capturing and approval of overtime to herself"*.

[45] Although the Commissioner was critical of Captain Bold's testimony, it is not the only evidence that determined the outcome of the arbitration award. In weighing the evidence before him, the Commissioner took into account the testimony of Ms Smith and the confession by the first appellant. In this respect, Counsel for the appellants did not take issue with the Commissioner's criticism of the evidence of Captain Bold. He also conceded that the first appellant's admission at the parade had to be considered.

Is the decision of the Commissioner reasonable?

[46] As indicated earlier, the Commissioner properly considered the principal issue before him, evaluated facts and arrived at a reasonable decision that the dismissal of the appellants was fair. Accordingly, his decision that the dismissals of the appellants were substantively fair fell within the ambit of a reasonable award as required by the provisions of section 145 (2)(a)(ii) of the Labour Relations Act[3] (LRA) and the authorities.

Did the Commissioner ignore relevant evidence and give weight to irrelevant evidence?

[47] The test in a review application is not whether the decision of the Commissioner is correct, as would be required in an appeal, but rather, as already stated earlier, whether the decision of the decision maker is reasonable. In arriving at his decision, the Commissioner in this matter was required to consider the conspectus of all the material before him, the

[3] Act 66 of 1995, as amended.

circumstances of the case, and the seriousness of the misconduct. Other factors which he had to take into account in seeking to arrive at a reasonable decision are the importance of the rule, the consistent application of the rule by the SAPS, the harm caused by the misconduct, knowledge of the rule by the appellants, the reason for imposing the sanction of dismissal, the appellants' disciplinary records and the relevant mitigating factors.

[48] I do not agree with the appellants that the Commissioner, in arriving at his decision, considered irrelevant evidence and ignored relevant evidence. Even if that were to be the case, it is trite that an arbitration award will not be vitiated by mere errors of fact or law on the part of the Commissioner. In assessing whether failure to apply his mind, reliance on irrelevant considerations or ignoring material factors by the Commissioner, the Court has to enquire into whether the arbitrator has undertaken the inquiry in the wrong manner or arrived at an unreasonable decision.

[49] I have already indicated that the Commissioner properly identified the principal issue he had to determine. Accordingly, the Commissioner's finding that it is highly unlikely that any persons other than the first appellant would have any motive to capture and approve payment for overtime not worked could not be faulted by the court *a quo*.

Did the Commissioner adopt an incorrect approach in accepting the evidence of the confession?

[50] For the reasons that appear below, there is no dispute that the statement that the first appellant made before the magistrate is a confession. The first appellant freely and voluntarily confessed to events and facts associated with the offence for which he was charged, found guilty and dismissed. The issue raised by the first appellant is whether the confession was valid. Put differently, the question raised is whether it complied with the requirements of admissibility as evidence.

[51] It is trite that a confession is a statement in which a person acknowledges that he or she has committed one or more offences or crimes. In criminal law, a

confession is a statement acknowledging all the facts necessary for conviction of a crime. In both criminal and civil cases, including labour matters, it is a statement made against the interests of the person making the statement. It is defined in the Cambridge Dictionary[4] as *"the act of admitting that you have done something wrong or illegal"*.

[52] In criminal cases, section 217(1) of the Criminal Procedure Act[5] (CPA) provides:

'Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence.'

[53] In *R v Becker*[6], the Appellate Division held that a confession means *"an unequivocal acknowledgement of guilt…"*. In *S v Yende*[7], the Court held that in order to decide whether a statement amounts to a confession, the statement must be viewed in its totality.

[54] To prevent false and coerced confessions from leading to wrongful convictions, the law in criminal cases requires that a confession be confirmed by other evidence. In this regard, the prosecution has to prove the guilt of the accused beyond reasonable doubt.

[55] An essential element in labour disciplinary proceedings is that a confession is an acknowledgement, on the part of an employee, of a fault, wrongdoing or breach of a rule.

[56] It is trite that an employee may be found guilty of misconduct upon proof on the balance of probabilities in labour matters. In other words, an employer has the

[4] *Cambridge English Dictionary*, (Cambridge University Press, Cambridge 2013) 4th edition.
[5] Act 51 of 1977.
[6] 1929 AD 167 at 171.
[7] 1987 (3) SA 367 (A).

onus to prove that the confession was made and is valid. A confession is said to be valid if it is freely and voluntarily made without undue influence, coercion, or intimidation from the employer or any other person. The other requirement for a valid confession is that the employer has to show that the confession was clear and unambiguous and that the employee understood the consequences of the confession.

[57] In assessing the admissibility of the confession, the taking of the statement and the statement as such should not be looked at in a vacuum but rather against the background and the circumstances under which the statement was taken. A further principle governing confessions in labour matters is that a valid confession does not, without more, justify an employee's dismissal.

[58] A confession does not amount to a plea of guilty on the part of the employee, and thus, the employer is still, even in the face of a valid confession, required to follow a fair procedure and determine if there exists substantive reason to terminate the employment relationship. In other words, the employer has to show that the dismissal was an appropriate sanction in the circumstances of the case.

[59] In this matter, the appellants contended that the Commissioner's reliance on the confession of the first appellant was misplaced because at the time it was made, the first appellant:

‘Was emotionally threatened with criminal prosecution and operated under the oblique notion that he was ostensibly liable on account of his User ID having been used in the transactions.’

[60] It was further argued in the heads of argument that the confession was made before the first appellant managed to consider the evidence, especially the fact that he was not at work when transactions were performed.

[61] It is evident from the reading of the record that the respondent placed the contents of the confession before the arbitrator to advance its case that the

dismissal of the appellants was substantively fair. In seeking to satisfy the admissibility requirements of the confession (like any other document), the respondent presented the oral evidence of the magistrate who took the confession. It is clear that the evidence was presented to authenticate and show the origins of the confession.

[62] It is trite that failure to satisfy the requirements of the admissibility of a document would render the contents thereof hearsay evidence. The other inquiry the Commissioner had to conduct was whether the confession was voluntary and freely made.

[63] In admitting the first appellant's confession, the Commissioner reasoned as follows:

'The document handed in as a confession contains several questions by a completely independent magistrate enquiring into the voluntary nature of the statement, and there is no indication that the statement was involuntarily or not made in the 1st applicant's full and sober senses.'

[64] The Commissioner further reasoned:

'It therefore means that the statement made by the Magistrate Parsons was authentic and can be relied on for exactly what was said there. The Magistrate's evidence was that she had been at pains to ensure that the applicant was informed of his rights and asked several questions to ascertain that there was no undue influence or thread.'

[65] In my view, the Commissioner cannot be faulted for the approach he adopted in dealing with the issue of the confession by the first appellant. He complied with the requirements of the admission of the written statement and, more importantly, it being a confession whether it was freely and voluntarily made.

[66] There is no evidence that any of the members of the SAPS said to the first appellant that he paid the money into his bank account and those of the other

appellants. There is no evidence that anyone threatened him if he failed to make the confession to the magistrate.

[67] He stated the truth by explaining how his conduct unfolded and into whose account the money was paid. The version of the SAPS that the statement to the magistrate was freely and voluntarily made was never challenged.

[68] In arriving at his decision as he did, the Commissioner considered the evidence of the confession and other evidence presented by the respondent. This includes the admission made by the first appellant at the parade. He, in this respect, states in paragraph 68:

‘This brings me to a consideration of the admissions made by the 1st applicant even before the statement to Mrs Parsins. The 1st admission took place at the parade in front of several of his colleagues, who have testified. He has not challenged the evidence that he had said that he had mistakenly captured "things" incorrectly and disappointed management.’

[69] The Labour Court can thus not be faulted for agreeing with the Commissioner that:

‘The evidence, inclusive of the confession by the first applicant, undoubtedly demonstrated that the applicants manipulated the system and wrongfully paid themselves overtime pay that was not due to them.’

<u>Can a confession be invalid because it was made in fear of a criminal prosecution?</u>

[70] The question of whether a confession may be rendered invalid based of fear of criminal prosecution depends on the circumstances of each case. In *Mudau v S*[8], the Supreme Court of Appeal (SCA) held that the confessions made by the appellants to the police were inadmissible because they were induced by the fear of being charged with a more serious offence and the hope of receiving a lesser sentence if they were to make a confession. The court found that the

[8] [2013] ZASCA 56; 2013 (2) SACR 292 (SCA).

police officers who obtained the confessions acted improperly and violated the appellants' right to a fair trial. The Court also found that the confessions were not confirmed by a magistrate or a justice of the peace, and that there was no other independent evidence to corroborate them. The Court, therefore, set aside the convictions and sentences of the appellants.

[71] This means that a confession that is based on fear of criminal prosecution may be considered involuntary or influenced by a promise or threat and, therefore, inadmissible or unreliable. This will, however, not be the case where the confession is voluntary and corroborated.

[72] In *S v Mokoena*,[9] the SCA held that the confession made by the appellant to the police was admissible, even though he was afraid of being prosecuted for another offence. The court *a quo* found that the appellant's fear was not induced by any promise or threat from the police and that he made the confession willingly and knowingly. The court also found that the confession was confirmed by a magistrate and that there was other evidence to support it. The court, therefore, upheld the conviction and sentence of the appellant.

[73] In the present matter, as indicated earlier, the first appellant voluntarily and freely made the confession before the magistrate.

[74] The contention that the confession was invalidated by the fact that it was made before the first appellant managed to consider the evidence, especially the fact that he was not at work when transactions were performed, is unsustainable and has no merit.

Is an employee entitled to information relating to the charges before confessing?

[75] The charges of misconduct against the first appellant were based on the evidence gathered by the SAPS, including the confession. The charges against the first appellant could have been amended or dropped by the SAPS at any

[9] [2009] ZASCA 14; 2009 (2) SACR 309 (SCA).

time before the commencement of the disciplinary hearing, depending on the strength of the evidence and the availability of witnesses.

[76] A confession is extra-curial and generally forms part of an investigation into an employee's misconduct; thus, it is not made by first finding out what information the employer has and only then making the confession.

[77] While a confession can significantly impact the charges proffered against an employee, it is not the only factor determining the outcome of the disciplinary inquiry. An employee who confessed to an offence can still plead not guilty to the charges or even challenge the confession itself, including its reliability at the disciplinary inquiry. An employee can also present evidence and argument to prove his innocence, including mitigating the severity of punishment.

[78] Therefore, the contention that the confession is invalid because the first appellant did not have information relating to the charges against him before making the confession has no merit.

Was the sanction harsh?

[79] The appellants contended that the dismissal was an extremely harsh penalty because they all had a clean disciplinary record and they had offered to repay the money in terms of the SAPS policy.

[80] It is generally accepted that not every act of dishonesty justifies a dismissal. It has also been accepted that an act of gross dishonesty does seriously impact negatively on the trust relationship between the parties in the employment relationship. However, as appears from the authorities the issue of the impact of dishonesty on the employment relationship has to be determined on the merits of each case.

[81] In dealing with the issue of dismissal sanction, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[10] held that:

[10] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 79.

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

[82] In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others*,[11] this court, in dealing with the issue of the fairness of a dismissal, held that:

'[25] In determining the fairness of a dismissal, each case is to be judged on its own merits. Item 3(4) of the Code of Good Practice recognises that dismissal for a first offence is reserved for cases in which the misconduct is serious and of such gravity that it makes continued employment intolerable, with instances of such misconduct stated to include gross dishonesty. When deciding whether dismissal is appropriate, the Code requires consideration, in addition to the gravity of the misconduct, of personal circumstances, including length of service and the employee's previous disciplinary record, the nature of the job and the circumstances of the infringement itself. Other relevant considerations include the presence or absence of dishonesty and/or loss and whether remorse is shown.

[26] The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely. Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is *"a sensible operational response to risk management"*.' [footnotes omitted]

[11] [2016] ZALAC 55; (2017) 38 ILJ 881 (LAC) at paras 25 - 26.

[83] In my view, the decision of the Commissioner relating to the dismissal sanction cannot be said to be extremely harsh because in arriving at the decision, the Commissioner considered the facts and the circumstances relevant to the determination of the fairness of the dismissal of the appellants by the SAPS. The court *a quo* can thus not be faulted for finding that the decision of the Commissioner did not fall outside the ambit of reasonableness.

[84] As indicated earlier the other complaint by the appellants is that the dismissal is unfair because they had offered to repay the money in terms of the policy of the SAPS. The policy does not assist the appellants case because it applies only in circumstances where the payment was erroneously made and not where theft or fraud is involved.

[85] In light of the above, I find that the court *a quo* cannot be faulted in its finding that the award of the Commissioner was one which a reasonable decision maker could reach and accordingly dismissing the appellants review application.

[86] In the result, the following order is made:

Order

1. The appeal is dismissed with no order as to costs.

Molahlehi ADJP

Musi JA *et* Malindi AJA concur

APPEARANCES:

For the Appellant:	Adv. B Ford
Instructed by:	Rabia Sayed Attorneys
For the Respondent:	Adv. LC Abrahams
Instructed by:	The State Attorney