IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG.

Case No. JA 48/04

In the matter between

EDWIN MAEPE	**Appellant**
And	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
RICHARD LYSTER N.O	**Second Respondent**

JUDGMENT

ZONDO JP

Introduction

[1] I have had the benefit of reading the judgment prepared by Jappie JA in this matter. I agree with the order which he proposes as well as the reasons he gives for it. However, in this judgment I wish to expand on certain matters and, possibly, add to the reasons relied upon by Jappie JA.

Basic facts and background

[2] The facts of this case and the evidence upon which it must be decided have been dealt with adequately by the commissioner of the CCMA in his arbitration award and by Jappie JA in his judgment. For that reason I do not propose to set the facts out in this judgment nor to deal with the evidence in any great detail. However, it is necessary to state some basic facts. They are that:

(a) the first respondent is the Commission for Conciliation Mediation and Arbitration, legal entity created by sec 112 of the Labour Relations Act, 1995 (Act 66 of 1995) ("**the Act**").

(b) in terms of sec 113 of the Act the first respondent is independent of the State, any political party, trade union, employer, employers' organisation, federation of trade unions or federation of employers' organisations.

(c) in terms of sec 114(1) of the Act the first respondent has jurisdiction in all provinces of the Republic and in terms of sec 114(3) it has to maintain at least one office in every province.

(d) in terms of sec 115 of the Act the first respondent has many functions the most important of which is the resolution of certain labour disputes through conciliation and arbitration; indeed, the bulk of labour disputes which are required to be referred to conciliation – other than those that fall under the jurisdiction of bargaining councils – get referred to the first respondent for conciliation;

(e) to perform its dispute resolution functions, the first respondent employs commissioners (sec 117(1) of the Act); in terms of sec 117(2)(a)(i) of the Act some commissioners are employed on a part-time basis whereas others are employed on a full-time basis.

(f) in terms of sec 117(2)(a)(ii) of the Act there are two categories of commissioners, namely, commissioners and senior commissioners;

(g) there is no provision in the Act for the office or position of convening senior commissioner but it would seem that, this notwithstanding, certain senior commissioners are designated by the first respondent as convening senior commissioners;

(h) in terms of sec 118(4) of the Act, the director of the first respondent, appointed in terms of sec 118(1) of the Act, automatically holds the office of senior commissioner.

(i) it would seem that those senior commissioners whom the first respondent has designated as convening senior commissioners are in charge of groups of commissioners; I don't know whether always, but it seems that, at least in some cases, convening senior commissioners are effectively provincial leaders of the first respondent in the provinces in which they operate and that they are not simply leaders of commissioners but are also senior managers responsible for all the staff of the first respondent in those provinces.

(j) the appellant was employed by the first respondent as a

"**convening senior commissioner**" in the Eastern Cape Province and, as such, was the most senior official of the first respondent in that province.

(k) part of the duties of a commissioner is to sit as an arbitrator in arbitrations conducted under the Act, administer the prescribed oath to witnesses who are about to give evidence in an arbitration in which the commissioner is the arbitrator, hear evidence and argument, weigh up evidence led at arbitrations, make, where necessary, credibility findings against or in favour of witnesses, make findings of fact and make value judgments about the fairness of dismissals, issue arbitration awards and make orders for reinstatement or re-employment or for the payment of compensation; this is not intended as an exhaustive list of the functions of commissioners.

(l) following upon a disciplinary inquiry, the appellant was found guilty of, and dismissed for,

(i) sexual harassment, and,

(ii) improper or disgraceful conduct.

In respect of the charge of sexual harassment, the allegation was that during or about October 2000 the appellant had **"sexually harassed receptionist V. Nunwana in that you-**

(a) made unwelcome comments that you loved her and/or that you wanted to kiss her and or you wanted to keep her photograph to put on your chest when you sleep at night.

(b) made unwelcome gestures of kisses and love towards her."

In respect of the second charge, namely, that of "**improper or disgraceful conduct",** it seems that the charge against the

appellant was that on the 13th November 2000 "**you conducted yourself in an improper and/or disgraceful manner unbecoming of a convening senior commissioner, in that you undermined the authority and integrity of the registrar, T. Fikizolo, by telling the said Nunwana that;**

(a) **you had not complained to Fikizolo about Nunwana in the manner in which [Ms Nunwana] was reported … to Fikizolo.**

(b) Fikizolo is a liar;

(c) She should not disclose to Fikizolo your visit to her and the nature of your conversation with her."

(m) in his disciplinary inquiry the appellant put up a false version of the events in respect of the allegations of misconduct levelled against him in the disciplinary inquiry;

(n) the appellant's version of events was rejected by the chairman of the disciplinary inquiry and he was found guilty of both charges. In respect of the sexual harassment charge the sanction of dismissal was imposed. In respect of the second charge a final written warning was imposed.

(o) in a subsequent arbitration conducted under the auspices of the first respondent under the Act in respect of a dispute about the fairness or otherwise of his dismissal, the appellant, under oath, also gave false evidence about the events for which he had been dismissed and the second respondent herein, being the commissioner who was the arbitrator in that case, rejected his version in such terms that, although he did not say so in so many words in his award, it is clear that he could not but have regarded the appellant as having been dishonest in giving the evidence that he gave; indeed, a reading of the record reveals that, if the version that the appellant put up in the arbitration was not true, the appellant must have deliberately given false evidence; it is not a case in which it could be said that the appellant could have been genuinely mistaken about what had happened between himself and Ms Nunwana.

(p) despite his finding that the appellant had given false evidence under oath in the arbitration, the commissioner, after finding that dismissal was unfair, ordered the first respondent to reinstate him but to

give him a final written warning on condition that, if the appellant was found guilty of similar misconduct within a period of 12 months, he would be dismissed.

(q) the first respondent subsequently brought a review application in the Labour Court to have the commissioner's arbitration award reviewed and set aside on the basis that, when he was considering whether the dismissal of the appellant had been fair or not or, if he found that it was unfair, when he considered what relief, if any, should be granted to the appellant, he had failed to take into account the fact that the appellant had given false evidence both in his disciplinary inquiry and in the arbitration proceedings and that this constituted a gross irregularity; in this regard the first respondent drew attention to the position in which the appellant had been employed by the first respondent and the special position of the first respondent as a dispute resolution institution.

(r) the Labour Court granted the review application, set the award aside, and declared that the appellant's dismissal had been fair.

(s) the appellant applied to the Labour Court for leave to appeal but the application was refused; he then petitioned this Court for leave to appeal. This Court granted him leave to appeal. Hence, this appeal.

Consideration of certain aspects of the appeal

[3] The main ground of review upon which the first respondent relied in support of its application for the review and setting aside of the commissioner's award was contained in par 6.1 of the first respondent's founding affidavit. That was that, although the commissioner had found that the appellant had given false evidence under oath in the arbitration proceedings, he had failed to take that fact into account in determining either the fairness of the dismissal or in determining whether or not the appellant should be granted any relief and that this constituted a gross irregularity justifying the reviewing and setting aside of either the entire award or at least the reinstatement order in the award. The appellant's response to this, as given in his answering affidavit, was that the finding that he had given false evidence was not relevant to a determination of whether the misconduct with which he had been

charged was serious or not. That response deals only with part of the point. That is the point about the fairness of the dismissal. It does not deal with the point that the fact that he was found to have given false evidence under oath is relevant to the issue of relief and that the commissioner ought to have taken it into account in deciding what relief, if any, the appellant should have been granted and that his failure to do so constituted a gross irregularity.

[4] The appellant has added another answer in the alternative to par 6.1 of the first respondent's founding affidavit. His answer in the alternative was that he disputed the contents of par 6.1. Disputing the contents of par 6.1 means that the appellant was contending that the commissioner did take into account the fact that he had given false evidence. The appellant specifically said that this was the case even though the commissioner did not in his award say expressly that he had taken this fact into account. The appellant stated that it was improbable that the commissioner would have made such a finding "**and then remove it from his later deliberations (sic**)." This statement is based on the assumption that the commissioner regarded the fact that the appellant had given false evidence as relevant to the question of what relief, if any, the appellant had to be granted. If he regarded it as irrelevant to that issue, he would not have taken it into account. If he regarded it as relevant, he may or may not have taken it into account. He did not expressly indicate that he took it into account nor did he indicate whether he considered it relevant to the determination of relief.

[5] The appellant did not in his affidavit challenge the finding made by

the commissioner that he had given false evidence. His Counsel submitted that, although the commissioner did not state in terms that the appellant had been a dishonest witness, "**it can hardly be contended that the commissioner proceeded to assess the matter as if Maepe had been entirely honest."** Counsel for the appellant argued the matter on the basis of an acceptance of the conclusion that the appellant had given false evidence under oath. Although the first respondent's case in the review application in the Labour Court and at the hearing before this Court was based on the appellant having given false evidence under oath both in the disciplinary inquiry and in the arbitration, in the view I take of the matter, I propose to base this judgment only on the appellant having given false evidence under oath in the arbitration.

[6] I have pointed out above that the first respondent contended first and foremost that the fact that the appellant had given false evidence under oath was relevant to the question whether or not his dismissal was fair and that the commissioner's failure to take it into account in determining the fairness or otherwise of the dismissal constituted a gross irregularity. I am unable to uphold this contention. The commissioner's failure in this regard could not constitute a gross irregularity because the appellant's conduct in giving false evidence under oath was not relevant to whether his dismissal was fair. It was only relevant to the issue of relief. The order that was made by the Labour Court suggests that that Court took the view that the appellant's conduct in giving false evidence under oath was relevant to the question whether the dismissal was fair and yet in the body of its judgment that Court did express agreement with the submission that that factor was only relevant to the issue of relief. As already stated, this factor is only relevant to the issue of relief.

[7] With regard to the question whether or not the commissioner failed to take into account the fact that the appellant had given false evidence when he considered the issue of relief, Counsel for the appellant submitted that simply because the commissioner did not

specifically refer to this fact in his award when considering relief and whether to order reinstatement does not necessarily mean that he did not take it into account. In support of this submission Counsel for the appellant referred to Conradie JA's judgment in **County Fair Foods (Pty) Ltd v CCMA & others (1999) 20 ILJ 1701 (LAC) at 1717 C-E** where it was, inter alia, said:

> "**Awards are expected to be brief. It seems to me to be destructive of the whole concept of CCMA arbitrations over individual dismissals that a commissioner should be held not to have applied his mind to a particular fact because it is not explicitly dealt with in his award**."

[8] I agree, at a general level, with what Conradie JA said in this passage. Indeed, I have probably said the same thing myself in some or other judgment in the past. Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account. In the present matter the appellant's conduct in giving false evidence under oath was so critical to the issue of relief that, in my view, the only explanation

for the commissioner ‘s failure to mention it in his reasons as one of the factors that he took into account is that he did not take it into account. If the commissioner had considered such a critical factor, he definitely would have mentioned this in his award. In my view the fact that the commissioner did not mention this very critical factor in his award justifies the drawing of the inference that he did not take it into account. Furthermore, his award is very comprehensive and cannot be said to have been intended to be brief. Accordingly, the matter must be decided on the basis that the commissioner did not take this fact into account in considering what relief, if any, should be granted to the appellant. In the light of the conclusion I have reached above that the commissioner did not take into account the fact that the appellant had given false evidence under oath in the arbitration proceedings in dealing with the matter, the next question to consider is whether or not the commissioner’s failure to take this fact into account constituted a gross irregularity.

[9] In its judgment the Labour Court did not expressly make any finding that the commissioner had committed a gross irregularity in any way in failing to take into account the appellant’s conduct in giving false evidence under oath. Nor did it state what ground of review it found to have been established in the matter. It indicated in its judgment that the fact that it was not manifest from the award whether or not the commissioner had applied his mind to the fact that the appellant had given false evidence under oath in the arbitration did not itself “**render the award reviewable**”.

[10] The first respondent contended that the commissioner’s failure to

take the appellant's conduct of giving false evidence into account constituted a gross irregularity. I have said above that the appellant's answer to this in the answering affidavit was that his giving false evidence under oath was irrelevant. However, before us his Counsel did not persist with this contention in so far as relief is concerned. Counsel for the appellant disputed the first respondent's contention that the commissioner's aforesaid omission constituted a gross irregularity justifying the setting aside of the order of reinstatement granted by the commissioner. In support of his contention in this regard, Counsel for the appellant pointed out that the first respondent did not as part of its argument invite the commissioner to take the appellant's conduct in giving false evidence under oath into account in determining what relief, if any, should be granted to the appellant if he was found to have given false evidence under oath and if his dismissal was found to have been unfair. The argument advanced by the appellant's Counsel was that the commissioner's failure to take the fact of the giving of false evidence under oath into account could not constitute a gross irregularity because in effect it was not raised in the arbitration and the commissioner could not be criticised for not doing what he was never asked to do.

[11] The answer to this argument is that where the law is that a commissioner must take into account a certain factor in deciding a certain question, he is obliged to take that factor into account even if none of the parties asks him to take it into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account. If the factor was a critical one and he did not take it into account, he may well have committed a gross irregularity justifying the reviewing and setting aside of his award. Accordingly, the commissioner's omission under discussion is capable of constituting a gross irregularity even if the first respondent did not ask the commissioner to take into account the appellant's conduct in giving false evidence under oath. Accordingly, I am unable to uphold the submission advanced by Counsel for the appellant in this regard.

[12] Another argument advanced by Counsel for the appellant was that the commissioner's omission could not constitute a gross irregularity because the commissioner was not entitled to take into account the appellant's conduct in giving false evidence because the first respondent had failed to put it to the appellant during cross-examination that the fact that he had given false evidence under oath or was giving false evidence under oath disqualified him from being granted reinstatement or any relief at all if the commissioner found that his dismissal was unfair. It is common cause that the first respondent did not put this to the appellant

when the latter was under cross-examination. I consider Counsel's contention in this regard below.

[13] In considering Counsel's submission on the issue at hand, it is important to have regard to the provisions of sec 193(1) and (2) of the Act in so far as they relate to reinstatement and the powers of the CCMA (in arbitrations) and the Labour Court (in adjudications). Secs 193(1) and (2) read as follows:

"(1) **If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-**

(a) order the employer to re-instate the employee from any date not earlier than the date of dismissal;

(b) order the employer to re-employ the employee, either in the work in which the employee wad employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or

(c) order the employer to pay compensation to the employee.

(2) The Labour Court or the arbitrator must require the employer to re-employ the employee unless –

(a) the employee does not wish to be re-instated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or

(d) the dismissal is unfair only because the employer did not follow a fair procedure"

Sec 193(2) of the Act obliges - it uses the word "**must**" – the Labour Court or an arbitrator to order the employer to reinstate or re-employ an employee whose dismissal it or he has found to be unfair for lack of a fair reason or whose dismissal it or he has found to be automatically unfair unless one or more of the

situations set out in sec 193(2)(a) – (d) applies.

[14] The situation envisaged in par (a) is where the employee does not wish to be reinstated or re-employed and it does not apply in this case. The situation envisaged in par (b) is where "**the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable**." It is possible that in so far as the giving of false evidence under oath may have occurred in the disciplinary inquiry before the dismissal, it could be said that it is one of the circumstances surrounding the dismissal, particularly where it was one of the factors that were taken into account in making the decision to dismiss. However, it does not appear to me that the same can be said of a situation where the giving of false evidence only occurs in the arbitration or at the trial subsequent to the dismissal. Paragraph (c) envisages a situation where "**it is not reasonably practicable for the employer to reinstate or re-employ the employee.**" Paragraph (d) is a situation where "**the dismissal is unfair only because the employer did not follow a fair procedure**." Paragraph (d) does not apply in this case.

[15] The effect of sec 193(1) and (2) is that in those cases in which the arbitrator or the Labour Court has found the dismissal to be either automatically unfair or unfair for lack of a fair reason and none of the situations contained in sec 193(2)(a) – (c) is present, the arbitrator or the Labour Court has no discretion to order the employer to reinstate the employee but is obliged to do so. I am here not referring to a case where the Court or arbitrator must decide whether to grant the relief of reinstatement or that of

re-employment. I am referring to a situation where the issue is whether to order the employer to reinstate the employee or to order the employer to pay compensation to the employee. In those cases where the Court or the arbitrator has found that the dismissal is automatically unfair or is unfair for lack of a fair reason and one or more of the situations set out in sec 193 (2)(a) – (c) is present, the Labour Court or the arbitrator has no power to order the employer to reinstate the employee. The same applies where the dismissal is unfair only because the employer did not follow a fair procedure.

[16] What I have just said in the preceding paragraph means that, if a case falls under one or other of the situations listed in sec 193 (2)(a) – (d), it is not competent for the Labour Court or an arbitrator to order reinstatement or re-employment. This is because sec 193(2) makes provision as to when reinstatement or re-employment must be ordered and when it must not be ordered. In effect it says that reinstatement or re-employment must be ordered in all cases except those listed in sec 193(2)(a)-(d). This is mainly because of the use of the words "**must require the employer to reinstate or re-employ the employee …**." which appear at the beginning of sec 193(2) of the Act. The Act uses the word "**must**" in many areas and it is clear from an analysis of most parts where "**must**" is used that it is used to impose an obligation. In the cases which fall under sec 193(2)(a) – (d) the Labour Court or arbitrator may order relief other than reinstatement or re-employment such as the payment of compensation to the employee as envisaged in sec 193(1)(c) of the Act. I now return to the submission advanced by Counsel for the appellant the commissioner's failure to take into account the appellant's conduct

in giving false evidence under oath could not constitute a gross irregularity because the first respondent had failed to put it to the appellant during cross-examination that the fact that he had given false evidence under oath disqualified him from being granted an order of reinstatement so that he could deal with that proposition.

[17] This submission must be considered against the background of the effect of sec 193(2) on reinstatement. That effect is that, if, as a matter of fact, the evidence that was placed before the arbitrator was such that it would not be "**reasonably practicable for the employer to reinstate**" the appellant as envisaged in sec 193(2)(c), then an order of reinstatement would have been incompetent and the first respondent's failure to put that to the appellant under cross-examination would not and could not have rendered it competent for the arbitrator to order reinstatement where it was otherwise incompetent for him to make such an order. The arbitrator could not suddenly be competent to make a reinstatement order in a sec 193 (2)(c) situation just because one party failed to put that to the other party under cross-examination. In those circumstances it seems to me that, while the proposition that Counsel for the appellant advanced with regard to a cross-examiner's obligation to put certain matters to a witness may on the face of it seem good, it cannot be accepted in the context of this case because this is about what the arbitrator or the Court was competent or not competent to do.

[18] Let me illustrate the point made above by way of an example. If the evidence before an arbitrator or the Labour Court in an unfair

> dismissal dispute between A, and B where A who had been employed by B as a driver, established that his driver's licence was withdrawn after his dismissal with the result that he could no longer drive lawfully, it would definitely be "**reasonably impracticable**" within the meaning of that phrase in sec 193(2)(c) for the employer to reinstate such employee because in such a case the employer would not be able to require the employee to perform his duties without requiring the employee to commit a criminal offence. If in such a case the employer did not put this to the employee under cross-examination would not change the fact that it would be reasonably impracticable for the employer to reinstate such employee. It could not be argued in such a case that, because the employer did not put it to the employee under cross-examination that, as he had lost his driver's licence, he could no longer be reinstated, the Court could order the employer to reinstate him in his position as a driver.

[19] In my view, the same principle applies to this case. The appellant gave false evidence under oath. Reinstatement was going to mean that he was reinstated to a position in which he had to expect others to respect an oath when he himself had been found to have shown no respect for the same oath. In my view, it was going to be reasonably impracticable for the first respondent to reinstate the appellant to such a position. On what basis could he expect parties and witnesses giving evidence before him to show respect for the oath they would take before giving evidence when he had shown no respect for such oath himself? In my view that state of affairs would be such that the appellant could not perform his duties effectively and when an employee cannot perform his duties effectively, it seems to me that it is reasonably impracticable within the meaning of that phrase in sec 193(2)(c) of the Act to order the employer to reinstate the employee. And when it is reasonably impracticable to order the employer to reinstate an employee, an order of reinstatement is incompetent. Once the commissioner had become satisfied, as he obviously became at some stage, that the appellant had given false

evidence under oath, he ought to have considered what the effect thereof, if any, was in regard to relief in the light of the type of institution that the first respondent is, the position which the appellant held in the first respondent and the appellant's functions or duties in the position in which he was employed.

[20] The fact that the appellant gave false evidence under oath in the arbitration means that he showed no respect for the oath to speak the truth which he took in the arbitration. His breach of that oath and the implied finding of the commissioner that he gave false evidence under oath would have left him without any integrity in the eyes of the public who know his position as a convening senior commissioner in the first respondent. How would he, for example, administer an oath to a party to a dispute or to a witness and expect such party or witness to respect that oath when he himself has been found not to have respected that oath? The party to the dispute or the witness to whom the appellant would be administering the oath may well be aware that the appellant was previously found to have given false evidence under oath in an arbitration. In a particular case his position as a commissioner may well require him to show his disapproval of the conduct of a witness who may give false evidence before him under oath. How would he deal with that situation when he himself has been found wanting in that regard? If he refrained from dealing with it, he could be failing in his duties. If he showed his disapproval, his disapproval would carry no weight with those who use the services of the first respondent.

[21] The first respondent is a very important statutory institution specially established to resolve certain labour disputes in the country. For it to function effectively, it requires to have integrity and enjoy the confidence of the users of its services. That is workers, trade unions, employers and employers' organisations. Its contact with those who use its services is, I have no doubt, often, through its commissioners who, throughout the length and breath of this country, conciliate and arbitrate disputes every working day. By and large commissioners are the face of the institution. If commissioners do not have integrity and do not enjoy the confidence of society and the users of the first respondent's services, the first respondent, as a dispute resolution institution, will fail. Everything possible must be done to avoid that eventuality.

[22] Without integrity the appellant simply could not carry out his functions or perform his duties as a convening senior commissioner or even as an ordinary commissioner effectively. He could not lead the rest of the commissioners in the Eastern Cape Province whom he was

required to lead in his position as a convening senior commissioner before his dismissal. The integrity of the first respondent as an institution would be intolerably compromised. In those circumstances I am of the view that this is a case which falls under sec 193(2)(c) of the Act and that, consequently, it was not competent for the commissioner to order the first respondent to reinstate the appellant. In my view the commissioner's failure to take into account the appellant's conduct in giving false evidence under oath in the arbitration when he considered the issue of relief constituted a gross irregularity which justified the setting aside of the order of reinstatement which the commissioner had made.

[23] I am not unmindful of the submission advanced by Counsel for the appellant that the first respondent failed to lead evidence that the appellant's conduct in having given false evidence under oath rendered a continued employment relationship intolerable and that, for that reason, the first respondent could not rely on the intolerability of a continued employment relationship to argue that the commissioner committed a gross irregularity in ordering the appellant's reinstatement. In the light of the conclusion I have reached above that the appellant's case fell under sec 193(2)(c) of the Act, it is unnecessary to deal with the appellant's Counsel's contention in this regard. That is because I am basing my decision on another argument and not on the intolerability of a continued employment relationship.

[24] Counsel for the appellant also urged this Court to adopt the same approach in this case as it adopted in **Flex-o-thene Plastices (Pty) Ltd v CWIU [1999] 2 BLLR 99 (LAC)** at paras 11 and 12. There this Court, through Froneman DJP, said:

> "**The effect of this approach is that the employees were deprived of reinstatement because of misconduct for which they were never charged nor disciplined by the appellant. The appellant never raised the fact of this misconduct in its statement of defence. It led no evidence of any breakdown of trust, let alone a break down caused by the alleged misconduct at the disciplinary enquiry. It was never suggested in cross-examination of the employees that their misconduct during the inquiry was**

> **the cause of any breakdown in the employment relationship.**
>
> **The misconduct at the disciplinary hearing was thus not responsible for a breakdown in the employment relationship. The presiding officer should not have refuse reinstatement because of it."**

[25] In my view the Flex-0-theme case is distinguishable from the present case. In that case the alleged misconduct with which Froneman DJP was dealing, if established, would not have meant that it was incompetent to order reinstatement whereas in the present case the fact that the appellant gave false evidence under oath meant that, if he were reinstated, he would not have been able to do his job effectively and that an order for his reinstatement was not competent. I have said earlier that that renders it reasonably impracticable for the first respondent to reinstate him and the order of reinstatement that the commissioner made in those circumstances was not competent.

[26] Counsel for the appellant further submitted that, even if the commissioner could not or ought not to have ordered the appellant's reinstatement, this did not necessarily mean that the appellant ought not to have been granted any relief. He submitted that, if the appellant was not granted an order of reinstatement, he ought to have been granted compensation because his dismissal remained substantively unfair. In this regard my view is different from that of the Court a quo and I agree with Counsel for the appellant. In my view the appellant deserved to be awarded compensation. His dismissal was correctly found to have been substantively unfair even though his conduct was not appropriate. He had made some sexual advances to the receptionist which he should never have made. However, his conduct in that regard did not constitute sexual harassment because the receptionist had no objection to it and, indeed, seems by her conduct to have encouraged the appellant's advances until the issue of her performance appraisal arose and she found out that the

appellant had said something negative to the Registrar of the first respondent in the Eastern Cape about her work performance. If the appellant had not given false evidence under oath in the arbitration but had been found to have done the things that the commissioner found him to have done, I may not have found any acceptable basis to interfere with the commissioner's order reinstating him.

[27] Before I conclude I wish to point out that the circumstances of this case are very unusual because of the nature and function of the first respondent as an institution, the position that the appellant held in the first respondent and the duties or functions that went with that position. The fact that in this case we have concluded that the appellant's conduct in giving false evidence under oath in the arbitration rendered it "**reasonably impracticable for the employer**" to reinstate him does not mean that this will be the conclusion in each case in which an employee is found to have given false evidence under oath in an unfair dismissal matter. Each case will have to be decided on its own merits. Indeed, in my view in many cases which come before the CCMA, bargaining councils and the Labour Court, that would not often be the result because it will not follow in many such cases that it is reasonably impracticable for the employer to reinstate such employee. I think cases where the giving of false evidence under oath will lead to it being reasonably impracticable for the employer to reinstate an employee will be relatively rare.

[28] In conclusion I am of the view that an amount of compensation equal to 12 months remuneration calculated at the appellant's rate of pay at the time of his dismissal would be appropriate relief for him. I accordingly agree with the order proposed by Jappie JA in his judgment.

Zondo JP

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA48/04

In the matter between

EDWIN MAEPE **APPELLANT**
(Second Respondent in the Court a quo)

And

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **FIRST RESPONDENT**
(Applicant in the Court a quo)

RICHARD LYSTER N.O **SECOND RESPONDENT**
(First Respondent in the Court a quo)

JUDGMENT

JAPPIE JA

[1] This appeal, with leave of this Court, is against a judgment of Pillay J sitting in the Labour Court. The *Court a quo* reviewed

and set aside an arbitration award issued by the second respondent, Richard Lyster, N.O ("the commissioner") in which award it was held that the dismissal of Edwin Maepe, the appellant, by the first respondent, the Commission for Conciliation Mediation and Arbitration ("the CCMA") for misconduct was too harsh and directed that the appellant be reinstated with a final written warning valid for twelve months, with the forfeiture of all back pay.

Background

[2] The appellant was employed by the first respondent as a convening senior commissioner for the Eastern Cape in February 2003. On the 10th January 2001 the appellant was charged with sexual harassment and, in addition, improper or disgraceful conduct. The charges arose out of various incidents which occurred during October and November 2000. The incidents of sexual harassment involved Ms Vuyiswa Nunwana ("the Complainant"). The charge of improper of disgraceful conduct was in regard to a conversation that the appellant had had with Ms Nunwana about the registrar of the CCMA, in the Eastern Cape, Mr Fikizolo.

[3] At the time of being charged, the appellant was not suspended and he continued with his duties as a convening senior commissioner up until the time of his dismissal following a disciplinary enquiry under the chairmanship of a fellow commissioner, Mr Kenny Mosime. At the disciplinary enquiry the appellant was found guilty of both charges of sexual harassment and of improper or disgraceful conduct, and the chairman, Mosime, recommended that

he be dismissed.

[4] In April 2001 the first respondent adopted this recommendation and the appellant was dismissed from his employment. Although the appellant was found guilty of both charges, it was only the finding in relation to the charge of sexual harassment which carried the sanction of dismissal. On the second charge of improper or disgraceful conduct the appellant received a final written warning. The appellant disputed the fairness of his dismissal and this dispute was referred to the CCMA for conciliation. The conciliation process failed and the dispute proceeded to arbitration.

The Arbitration Proceedings

[5] The arbitration proceedings commenced on the 26th September 2001 before the second respondent, also a commissioner of the CCMA.

[6] It was agreed by the parties that the evidence that was tendered at the disciplinary hearing before Mr Kenny Mosime would form part of the record of the arbitration. Nevertheless both the complainant and the appellant were called as witnesses as well as Mr Fikizolo and were subjected to cross-examination before the commissioner.

Complainant's Evidence

[7] The complainant, Vuyiswa Nunwana, was employed as a receptionist at the offices of the CCMA in Port Elizabeth. She

commenced employment in 1996 and fell under the supervision of the registrar, Mr T. Fikizolo. She testified that on the 24th October 2002 whilst at home she received a telephone call from the appellant. She received the call at approximately 17h24 and it lasted for 12 minutes and 22 seconds. During her conversation with the appellant he told her "*I love you*" and asked what she was doing. She informed him that she was in the bath. He repeated his statement that he loved her and told her "*I wish I can come and wash your back*." She attempted to divert the conversation and ignored the appellant's remarks. She thought to herself that she "*could solve it*." She testified that she had hoped that by ignoring the appellant he might stop this "*nonsense*" on his own.

[8] On the 30th October 2000 the appellant called Ms Nunwana again on her cellphone. The time of the call was 18h18, and it lasted for 6 minutes and 24 seconds. During this call the appellant once again told her that he loved her. She testified that she asked herself what it is that he wanted from her. She again attempted to change the discussion by asking the appellant where he was calling from. After this call, she became worried and upset and decided that she was going to inform Mr Xolile Mani, a senior member of the staff association. After the second call she informed Mani and was told to speak to Mr Dyakala as to what the appellant had said to her on the telephone.

[9] The next incident occurred at the offices of the CCMA on a date she could not recall. The appellant was on his way from the toilets, which are situated outside the main entrance to the reception area, where she used to sit. He approached her desk and told her that he wanted to confess how he loved her. He said that he wished that he could come around the desk to hug and kiss her. As the switchboard was busy she

ignored the appellant and continued with her duties. He then left her and went into his office.

[10] On another day, the date of which she could not recall, the appellant arrived at the reception area in the morning and instead of greeting her, gesticulated kisses in the air with his lips in her direction. Again she just ignored him and continued answering the phone.

[11] On Friday, the 25 October 2000, it was after working hours when Ms Nunwana found the appellant and other people in a lift. Ms Nunwana was showing photographs of her choir to a friend of hers, Ms Sulette Bonthyus, when the appellant saw these and asked whether he could take a better look at them. The complainant obliged. Since, according to the appellant, it was awkward to look at the photographs in the lift, he asked whether he could take them home to look at them. The complainant agreed on the understanding that he would return the photographs on the next Monday. On that Monday the appellant did not have the photographs with him, but returned them on the Tuesday. When the complainant went to fetch the photographs from the appellant, the latter told her "*you know, I wish I could keep these photos. I use[d] to put them here on my chest at night before I slept*." Ms Nunwana stated that, although she felt upset, she did not show this to the appellant.

[12] Under cross-examination Ms Nunwana conceded that she had not objected to the appellant's advances nor did she tell him how she felt about his behaviour. Her only response was that the

statements made by the appellant when he had phoned her and said that he loved her and wished that he could wash her back was to change the subject to something else. When asked how the appellant would have known how she felt about his amorous advances, her response was "*I don't know*". She did not inform anyone else at work other than Mr Mani and then on the 13th November Mr Dyakala. She stated that her intention in speaking to Mr Mani was to get advice from him as she was upset by what was going on. She further stated that her understanding of sexual harassment was exactly what the appellant was doing to her**.**

The Appellant's Evidence

[13] Appellant's response to the five incidents was that he conceded making the phone calls but denied that he uttered any words of a sexual nature. He testified that he had been invited by the complainant to watch her sing with her choir. In regard to both telephone calls to the complainant the appellant admitted having made them but stated that he made them in order to compensate for his earlier failure to attend to watch the choir singing. In regard to the other three incidents, he denied that these ever took place and said that the complainant had fabricated these incidents as well as the accusation of sexual harassment by telephone as she was angry because of what he had said concerning her work performance to the registrar, Mr Fikizolo.

The Evidence of Mr Fikizolo

[14] Mr Fikizolo was the registrar of the CCMA in Port Elizabeth. Part

of his job was to conduct performance appraisals of employees, including the complainant. Fikizolo said that he conducted an appraisal of the complainant on the 8th November 2000 and in his view the area in which the complainant was not performing well was in not responding promptly to incoming calls. During the course of his appraisal of her, he had mentioned to her that he had asked the appellant's view of her ability and the appellant had said that he was aware that she sometimes put the receiver on the table and did not answer the telephone. He said that the appellant had told him that he had at times seen a red light flickering indicating an incoming call that was going unanswered. When he had asked the complainant about this, the complainant had responded by saying that she had placed the receiver off the cradle because of the loudness of the ring when it was on the cradle as opposed to when it was off the cradle. According to Fikizolo, because of this particular complaint and other complaints he had received about the complainant's poor response time he had marked her 1 out of 5 in this area of her work. His overall assessment of her work was to mark her 3 out of 5. This was as far as Mr Fikizolo's evidence went.

[15] After the appraisal of the complainant's work performance by Mr Fikizolo, the appellant telephoned the complainant at her home. He said that he wanted to talk to her concerning her appraisal. The appellant came to the complainant's flat and they met in the parking lot. Thereafter, they drove to the beachfront where the appellant parked the car. Whilst they sat in his motor vehicle, the appellant spoke to the complainant about her performance

appraisal. The complainant informed him of what Fikizolo had told her concerning what the appellant had said about her performance to Fikizolo. The appellant denied having said this to Fikizolo and asked the complainant not to mention to Fikizolo that they had a discussion about her appraisal.

[16] It was after this incident that the complainant decided to lodge a grievance against both Mr Fikizolo and the appellant. Having lodged her grievance the appellant was charged with misconduct which led to the disciplinary enquiry against the appellant.

The Arbitration Award

[17] In arriving at his award, the commissioner was guided by the provisions of the Code of Good Practice (on the handling of Sexual Harassment) which envisages both an informal and formal procedure for addressing sexual harassment. The commissioner further relied on the decision in *Reddy vs University of Natal 1998 1 BLLR 20 LAC.* He cited, *inter alia*, the following passage:-

> "Sexual harassment as a form of misconduct was considered by the Industrial Court in J v M Ltd (1989) 10 ILJ 755 (IC). The court said at 757 I – 758 A: 'Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the workplace. Victims of harassment find it embarrassing and humiliating. It creates an intimidating, hostile and offensive work environment.' I may add that in terms of the Constitution, sexual harassment infringes the right to human dignity contained in section 6,

which provides: - 'Everyone has inherent dignity and the right to have their dignity respected and protected' and the right to privacy enshrined in section 14.

It is obviously not every act of sexual harassment which will lead to dismissal. Dismissal was, nevertheless, the appropriate remedy in this case, where the harassment was of an aggravated kind."

[18] After an analysis of all the facts and evidence placed before him, the commissioner came to the conclusion that the appellant's conduct did not amount to sexual harassment as defined in the Code of Good Practice. He stated his conclusion as follows:-

"Did the applicant's behaviour constitute sexual harassment, as we understand it? If one is guided solely by the definition of sexual harassment in the Code of Good Practise on the handling of sexual harassment cases, then it was not. Item 3.2 of the Code provides that sexual attention becomes sexual harassment if:

"

a) the behaviour is persisted in
b) the recipient has made it clear that the behaviour is considered offensive and/or
c) the perpetrator should have known that the behaviour is regarded as unacceptable."

[19] In his appraisal of the complainant's evidence the commissioner expressed the view:-

"…complainant can be said to have encouraged Applicant in his belief that complainant was enjoying his overtures. There are various examples of complainant's behaviour which are entirely contrary to what one would expect of a woman who is shocked by her boss's unwelcome sexual advances."

This conclusion by the commissioner means that the elements of the definition of sexual harassment mentioned in (b) and (c) thereof

in the preceding paragraph were not met and that, therefore, the appellant's conduct, unacceptable as it may be for a person in his position doing it to someone in the position of the complainant, did not constitute sexual harassment.

[20] Having concluded that the appellant was not guilty of sexual harassment, the commissioner turned his attention to the conduct of the appellant. In this regard he came to the following conclusion:-

> "Be that as it may, I believe that there is still enough evidence to show that the applicant did make inappropriate sexual advances to the Complainant, which he himself should have known were unacceptable. (see clause 3.2 of the Code of Good Practice on the handling of sexual harassment). It goes without saying that I reject applicant's version of the incidents. It seems highly probable that the applicant did make the comments that complainant say that he made."

[21] In the context of the award, the sexual advances to which the commissioner refers in this passage constitute conduct which the appellant ought to have known was inappropriate for a person in his position. That is to say, the appellant ought not to have made any advances to the complainant irrespective of whether he knew his conduct was acceptable or unacceptable to the complainant. In this passage the commissioner is stating that he disbelieved the appellant when the latter denied that he had behaved towards the complainant in the manner testified to by the complainant. The effect of this is that by implication he found the appellant to be a dishonest witness.

[22] The commissioner then considered what would be an appropriate

sanction. He stated that, if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable, then dismissal is an appropriate sanction. He said that the question was whether in any particular case the misconduct had made a continued employment relationship intolerable. This must be judged objectively and is a judgment which the arbitrator must make. The commissioner found that dismissal was not an appropriate sanction in this case and concluded that the appellant's dismissal was substantively unfair for this reason. The commissioner took into account the following in concluding that dismissal was not an appropriate sanction:

"(a) there was no evidence led at the arbitration by witnesses of the first respondent that there was material damage to the employment relationship or that the employer regarded a continued employment relationship intolerable;

(b) further there was evidence of the applicant's trouble free five month service after the matter had been reported, which indicated that a continued relationship was possible;

(c) the commissioner further pointed out that nothing had been placed before him to warrant a finding that it was not reasonably practicable to re-instate the appellant."

He, accordingly, made an award reinstating the appellant in the CCMA's employ subject to a final written warning on condition that, if the appellant was found guilty of any misconduct which amounted to sexual harassment or disgraceful or improper conduct within a 12 month period from the date of the award, he would be

dismissed. The commissioner further held that the appellant was not entitled to any arrear salary which might otherwise have been due to him from the date of his dismissal.

Proceedings in the Labour Court

[23] The first respondent brought an application in the Labour Court in terms of section 145 of the Labour Relations Act No. 66 of 1995 ("the LRA") for the review and the setting aside of the commissioner's award. The order which it sought was in the following terms:-

1. "**Reviewing and setting aside the award of the [Second Respondent] under case number H02-01, dated 12 December 2001.**
2.
    2.1 Declaring that the dismissal of the [appellant] was fair, and accordingly dismissing his unfair dismissal claim against the [first respondent];

    Or alternatively

    2.2 Determining the dispute in a manner the above Honourable Court considers appropriate.
3. **Granting further or alternative relief.**
4. **Ordering the [appellant] to pay the costs hereof".**

[24] The grounds upon which the first respondent challenged the award of the commissioner on review were twofold. Firstly, it was that the commissioner had committed a gross irregularity in

failing to apply the *reasonable employer test* in assessing the sanction of dismissal. With regard to the first respondent's second ground of attack, it was argued that, in determining *"whether the dismissal was fair, and if not, whether [Maepe] should be entitled to any relief and whether he should be reinstated,"* the commissioner had committed a gross irregularity in that he had failed to consider and attribute weight to the fact that the appellant had given false evidence both in the disciplinary inquiry and in the arbitration proceedings. The first respondent submitted that, if the commissioner had done so, he would not have found the appellant's dismissal unfair, alternatively, he would not have granted the appellant any relief.

[25] The *Court a quo* dismissed the first ground of attack on the award. Citing the case of *Toyota South Africa Motors Limited v Radebe 2000 (21) ILJ 340 (LAC)* the *Court a quo* concluded that on the decided cases the "*reasonable employer test"* had been rejected and came to the conclusion that the commissioner did not apply an incorrect test in assessing the fairness of the dismissal.

[26] Dealing with the question whether or not the appellant had given false evidence at the disciplinary hearing and before the commissioner, the *Court a quo* was not prepared to interfere with either Mosime's or the commissioner's rejection of the appellant's evidence and stated that they were better placed to determine his credibility having observed his demeanour. However, proceeding on the premise that the appellant had given false evidence the *Court a quo* concluded that this in itself could not render the appellant's dismissal fair. The *Court a quo* stated the position as follows:-

> "I accept for the purpose of this case that the giving of false evidence should go to determining the appropriate relief. It cannot render an invalid reason for dismissal valid."

[27] The *Court a quo* then dealt with the factual findings made by the commissioner which had led him to conclude that dismissal was inappropriate. The *Court a quo* observed that whether the commissioner "applied his mind to the false evidence given by [the Appellant], is not manifest from the award. This in itself does not render the award reviewable." Nevertheless, the *Court a quo* went on and stated the following:-

> "In the circumstances of this case, the dishonesty of the employee was a highly relevant issue. If it had been pertinently considered by the Commissioner, he would have come to a different conclusion."

Immediately after saying this, the Court a quo said:

> "In the circumstances, I grant an order in terms of paragraph 1,2.1 and 4 of the notice of motion."

[28] The effect of this finding by the *Court a quo* is that, if the commissioner had applied his mind to the fact that the appellant had given false evidence, the commissioner would not have granted the appellant any relief whatsoever or he would have granted him compensation rather than reinstatement. The *Court a quo* gave the following as its reasons as to why it regarded the giving of false evidence under oath as pertinent:-

> "1. The employee is not just any person employed in industry. He is a Commissioner, a person who is bound by the Code of Conduct for Commissioners which requires him to 'act with honesty' and maintain 'the good repute of the mediation and arbitration processes and in particular the office of the CCMA.'
>
> 2. He is entrusted by law to, amongst other things, administer the oath and encourage those appearing before him to be honest.

> He cannot demand that of others if he himself has scant regard for the truth.

3. His dishonesty must impair his integrity and standing as a leader of the CCMA in the Eastern Cape. It would be indicative of a lax morality which, must be discouraged. The fact that he was greeted enthusiastically when he arrived at the arbitration does not necessarily imply that he commands the respect of his subordinate or peers.

> 4. His dishonesty would be a barrier to reconciliation and corrective action which is one of the reasons the Commissioner advanced for reinstating him. The CCMA cannot begin to correct his conduct if he does not admit the wrongfulness of it.

5. Similarly the fact that the CCMA did not have in place a policy on sexual harassment or apply the sexual harassment code and counsel the applicant, ought not to have been weighed against it because counselling was not an appropriate process when the employee persisted in his denial of the misconduct.

6. Furthermore, as a convening senior commissioner the employee ought to have been aware of what conduct is prohibited in terms of the sexual harassment code. That also should have militated against his reinstatement.''

[29] The *Court a quo* granted the first respondent the order sought in the review application which had the effect of upholding the appellant's dismissal.

[30] The appellant applied for leave to appeal against the judgment of the Labour Court. The application was refused. Thereafter, the appellant petitioned this Court for leave to appeal which petition was granted.

THE APPEAL

[31] Counsel for the appellant argued that the first respondent was not entitled to insist that the *Court a quo* have regard to the commissioner's alleged failure to apply his mind to the fact that the appellant gave false evidence. He pointed out that the first

respondent had failed at the outset of the arbitration proceedings to inform both the appellant and the commissioner that it intended to contend that, quite regardless of the sanction to be imposed for misconduct, the appellant's dishonesty and lack of remorse had the effect that dismissal was either the only appropriate sanction or that reinstatement was no longer appropriate. He submitted that, that being so, the commissioner could not be faulted for having failed to consider an issue which had not been raised before him. Counsel submitted that, having omitted to pertinently raise the issue as aforesaid, the first respondent could not now rely upon it as a gross irregularity within the contemplation of section 145 of the LRA.

[32] It was further argued on behalf of the appellant that the *Court a quo* had correctly held that the appellant's conduct in giving false testimony under oath was relevant only in relation to the determination of what relief the appellant was to be granted. Counsel for the appellant submitted that the giving of false evidence could not convert an otherwise unfair dismissal into a fair dismissal. That being so, submitted Counsel, there was no basis in law for the *Court a quo's* decision to deprive the appellant of all relief, which was the effect of the judgment of the *Court a quo*.

[33] The next argument was based on sec 193(2)(b) of the LRA . Section 193(2)(b) reads:-

> " (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless;
>
> (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable "

It was submitted that, if the first respondent wanted to avoid the reinstatement of the appellant by relying on section 193(2)(b) of the LRA it ought to have led evidence to establish that a continued employment relationship would be intolerable. Counsel submitted that the first respondent failed to do this. It was argued that the mere reliance by an employer on the fact that an employee had given false evidence at a disciplinary enquiry or during the course of arbitration proceedings as a ground to establish that a continued employment relationship would be intolerable does not absolve an employer from the obligation to lead such evidence. Counsel submitted that in addition to leading such evidence, the accusation must be plainly put to the employee so that the latter can have an opportunity of defending himself in relation thereto. It was argued that the first respondent had failed to do so and that such failure meant that for the Court to deprive the appellant of reinstatement on this score alone would be both unjust and unfair.

[34] Counsel for the appellant also argued that this Court should follow the approach adopted in the case of *Flex-o-thene Plastics (Pty) Limited v CWIU [1999] 2 BLLR 1999 LAC*. Counsel cited the following passage which appears at paras [11] and [12]:-

> "The effect of this approach is that the employees were deprived of reinstatement because of misconduct for which they were never charged nor disciplined by the appellant. The appellant never raised the fact of this misconduct in its statement of defence. It led no evidence of breakdown of trust, let alone a breakdown caused by the alleged misconduct at the disciplinary enquiry. It was never suggested in cross-examination of the employees that their misconduct during the enquiry was the cause of any breakdown in the employment

relationship.

The misconduct at the disciplinary hearing was thus not responsible for a breakdown in the employment relationship. The presiding officer should not have refused reinstatement because of it."

[35] In its response to the appellant's argument, the first respondent argued that the *Court a quo* was correct in concluding that "in the circumstances of this case, the dishonesty of the employee was a highly relevant issue. If it had been pertinently considered by the commissioner, he would have come to a different conclusion." That seems to suggest that the commissioner had omitted to pertinently consider the dishonesty of the appellant and had thus committed a reviewable irregularity. Counsel for the first respondent submitted that the *Court a quo* was thus correct in setting aside the commissioner's award.

[36] It was further argued that the appellant's dishonest denials and the passion with which he pursued those denials demonstrated overwhelmingly:-

"1. That the first respondent could not reasonably have had confidence that the appellant would not commit further similar offence.

2. That the first respondent could not reasonably have retained confidence in the integrity of the appellant in the light of his dishonesty.

3. That the first respondent could not reasonably have continued to entrust to the appellant the and responsibilities of a convening senior commissioner to preside over arbitration proceedings and to lead the first respondent in the Province. The first respondent is a Public body.

It must carry out functions and entrusted on it by the Constitution. These functions include the enforcement of constitutional rights, including the right to fair labour practices, statutory rights provided for in the LRA.

4. That the first respondent could not have continued to have enjoyed public confidence as an institution if it retains the appellant in its employ. Significantly, even in this appeal, the appellant still fails to grasp the seriousness of his misconduct and the fact that he lied under oath. This is a further indication that he is simply unsuitable to hold the office of a commissioner of the CCMA."

[37] It was further submitted that the commissioner had failed in his duties and committed a gross irregularity by failing to take into account the following:-

1. the seniority of the position that was occupied by the appellant.
2. the significance of the second respondent as an institution and its role within the statutory framework for resolving labour disputes and
3. that the appellant's misconduct was sufficiently serious in all of the circumstances to warrant an order that deprived him of remuneration for a period of some 8 months and which imposed the final written warning of 12 months on terms that, if he was found guilty of any behaviour amounting to sexual harassment or disgraceful or improper conduct during the 12 month period from the date of his award, he would be dismissed.

Discussion

[38] In terms of section 138 of the LRA, it is for the commissioner to determine whether a disputed dismissal was fair and he must do so fairly and quickly. In *Z. Sidumo and Another v Rustenburg Platinum Mines Limited and Others 2008 (2) BCLR 158 t*he Constitutional Court at paragraph 61 of the judgment stated the following : -

> "There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that a commissioner is to determine the dismissal dispute as an impartial adjudicator."

[39] Once the Labour Court or an arbitrator has come to the conclusion that a dismissal is unfair, the Labour Court or the arbitrator must now determine what relief or remedy, if any, should be granted to the employee. The determination of what relief ought to be awarded to an employee is governed by the provisions of s 193 of the LRA. Once an award has been made, the award may be reviewed under limited grounds as set out in section 145 of the LRA.

[40] In addition to what is stated above, in *Z. Sidumo and Another v Rustenburg Platinum Mines Limited and Others 2008 BCLR 158* (cc) the Constitutional Court concluded that a commissioner

conducting CCMA arbitration is performing an administrative function. This notwithstanding, the Constitutional Court has rejected the justifiability of an arbitration award in relation to reasons given for it as a ground of review of CCMA awards. It held that CCMA awards can be reviewed on the ground of unreasonableness. It held that the test is whether the decision reached by the commissioner is one that a reasonable decision maker could not have reached. If it is one that a reasonable decision maker could have reached, such decision is reasonable. If it is not a decision that a reasonable decision maker could have reached, it is unreasonable and can be set aside on review on that ground. The Constitutional Court concluded that applying this standard would give effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair.

[41] The *Court a quo* interfered and set aside the commissioner's award on the basis that the commissioner had omitted to pertinently consider the dishonesty of the appellant when he gave false testimony. The *Court a quo* had concluded: -

"…. the dishonesty of the employee was a highly relevant issue. If it had patently considered by the Commissioner, he would have come to a different conclusion."

[42] It was argued on behalf of the first respondent that the commissioner did not consider the issue of the appellant having been found to have given false testimony before him. It was argued on behalf of the appellant that the commissioner was not obliged to do so as this issue had not been raised before him.

[43] In par 6.1 of its founding affidavit the first respondent (applicant in the *Court a quo*) stated the following:-

> "6.1 The commissioner failed to take into consideration, and consequently failed to attach any weight to the fact that the Second Respondent (appellant) gave false evidence, both in the disciplinary proceedings and in the arbitration, in an attempt to defend himself against the charges of misconduct brought against him. The commissioner should have taken this fact into consideration and should have attached weight to it in determining whether the dismissal was fair, and if not, whether the Second Respondent should be entitled to any relief, and whether he should be re-instated. The commissioner's failure to do so constituted a gross irregularity. Had he taken this fact into account, he would not have found the Second Respondent's dismissal to be unfair, alternatively would not have granted relief to the Second Respondent."

[44] In the opposing affidavit, the appellant contented himself with the following response: -

> " 8.1 A finding that I gave false evidence is not relevant a (sic) determination of whether the misconduct with which I was actually charged is serious or not.
>
> Alternatively
>
> 8.2 I dispute the contents of this paragraph. The commissioner must have taken this finding into consideration, even if he did not expressly indicate this in his Award. It's improbable that he would make such a finding and then remove it from later deliberations.

> 8.3 In any event, a finding that I gave false evidence cannot, in fairness and logic, outweigh all the material consideration set out above in paragraph 4. Accordingly it is denied that the commissioner would have come to a different conclusion."

[45] The appellant's response and the argument advanced do not meet the point that the appellant's dishonest conduct was a relevant and material consideration in determining what relief he ought to have been afforded.

[46] I have set out above arguments which were advanced on the appellant's behalf in an attempt to meet the first respondent's contention that the commissioner was obliged to have considered the effect of the appellant's conduct in giving false evidence under oath in the arbitration, that his failure to do so constituted a gross irregularity and that he should not have awarded the appellant any relief. That is that the first respondent did not lead any evidence to say that a continued employment relationship had become intolerable between the parties, that the first respondent had failed to put the effect of the appellant's conduct in giving false evidence under oath to the appellant under cross-examination so that he could have defended himself and that the first respondent did not raise the issue before the commissioner to enable him to deal with it. In a concurring judgment in this matter Zondo JP deals with these issues. I agree with his judgment and am of the view that it is unnecessary for me to deal with the same issues herein save what I say below.

[47] The appellant was employed in a position of trust. He was a convening senior commissioner for the Eastern Cape. He was required to act with honesty and integrity in order to maintain and preserve the trust and confidence the public must have in the CCMA as an institution. He was entrusted by virtue of his position to administer the oath to parties appearing before him and he would legitimately expect those parties to abide by the oath. He cannot demand this of others if he himself has been shown not to have any respect for the oath. That is to say that a person who holds the

> position of a commissioner, not to speak of a convening senior commissioner, must be a person of integrity in order to be considered a fit and proper person to hold such a position. When circumstances are present which cast serious doubt on the integrity of a person holding a position such as that previously held by the appellant, then, in my view, such a person is not a fit and proper person to be entrusted with such a position.

[48] In determining what sanction to impose, it would appear that the commissioner focused only on the issue whether a continued employment relationship between the appellant and the first respondent had become intolerable and did not consider whether or not it would be "reasonably impracticable" within the meaning of that term as used in sec 193(2)(c) of the LRA for the first respondent to reinstate the appellant. This issue is also dealt with in more detail in the concurring judgment of Zondo JP in this matter.

[49] The commissioner had concluded that the appellant had given false evidence. The commissioner was aware of the position the appellant held with the first respondent. Accordingly, the commissioner ought to have appreciated the importance of the appellant being a fit and proper person to occupy the position of a convening senior commissioner if he was to be reinstated in his position. The *Court a quo* was, therefore, correct in concluding that, had the commissioner applied his mind to the effect on his job of the appellant's conduct in giving false evidence, he would not have ordered reinstatement. This appears to be supported by what the commissioner said in reinstating the appellant, namely: -

> "Let me say at the outset, that although the Applicant comes away from this arbitration with his job intact, he can count himself extremely fortunate that I am not confirming his dismissal."

This suggests to me that, if the commissioner had taken into account the fact that the appellant had given false evidence under oath, he would not have ordered the appellant's reinstatement.

[50] I have said above that the Court a quo made an order the effect of which was to uphold the appellant's dismissal. Accordingly, the Court a quo set the commissioner's award aside and declared that the appellant's dismissal was fair. It is not clear from the judgment of the Labour Court why it concluded that the dismissal was fair. It cannot be that the Court a quo concluded that the dismissal was fair because the appellant gave false evidence because he had not been dismissed for giving false evidence. The Court a quo's conclusion to the effect that the dismissal was fair is particularly strange because that court did say that the giving of false evidence could not render valid an otherwise invalid reason for dismissal. Indeed, the Court a quo said that the giving of false evidence was relevant to relief. However, when the Court a quo was supposed to consider the weight to be attached thereto in relation to relief, it did not do so but simply upheld the dismissal as having been fair despite the fact that it expressed no difficulty with the commissioner's finding that the dismissal was unfair.

[51] Despite his dishonesty, the appellant's dismissal for sexual harassment remains unfair. Although the appellant's conduct was unacceptable, it seems to me that it is unfair that he should be denied not only reinstatement but all relief. His reinstatement as a convening senior commissioner is impracticable for the reasons stated earlier and as stated in Zondo JP's concurring judgment. In my view it is just and equitable that he be granted some relief. I consider it to be just and equitable that the appellant be awarded compensation equivalent to 12 months remuneration calculated at the appellant's rate of remuneration at the date of his dismissal.

[52] With regard to costs it must be borne in mind that, while, on the one hand, the appellant succeeded in having the order of the Labour Court altered, he did not succeed in getting an order of reinstatement which he wanted. In this regard the first respondent has successfully resisted the restoration of the order of reinstatement which the commissioner had made. However, it must also be borne in mind that, while on the one hand, the first respondent sought an order to the effect that the dismissal was fair so that the appellant would receive no relief, it has failed in this

regard and the appellant will be granted compensation equivalent to 12 months' remuneration. In these circumstances I am of the view that the requirements of the law and fairness dictate that there should be no order as to costs both in this Court and in the Labour Court.

[53] In the premises the order that I make is the following:

1. The appeal succeeds in part and fails in part.
2. There is to be no order as to costs on appeal.
3. The order of the Labour Court is set aside and replaced with the following order:.

" (a) That part of the arbitration award issued by the commissioner in this case which ordered the reinstatement of the second respondent is hereby reviewed and set aside.

(b) The part of the arbitration award referred to in (a) above is replaced with the following order:-

'(i) the respondent (i.e the CCMA) is ordered to pay the applicant within 14 calendar days compensation that is equivalent to 12 months remuneration calculated at the applicant's rate of pay at the time of his dismissal'

(b) There is to be no order as to costs."

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Jappie JA

I agree.

_____
Zondo JP

I agree.

_____
Patel JA

On behalf of the appellant:	Mr AT Myburgh Instructed by Allardyce &Partners Parktown
On behalf of the respondent:	Mr T Ngcukitobi Instructed by Bowman Gilfillan Sandton

Date of Judgment: 18 April 2008