IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: DA08/16

In the matter between:

THE WORKFORCE GROUP **Appellant**

and

DAMIEN KENETH MCLINTOCK **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND CONCILIATION **Second Respondent**

COMMISSIONER N MATHE *N.O* **Third Respondent**

Heard: **21 February 2017**

Delivered: **01 August 2017**

Summary: Dismissal of an employee on account of perpetration of fraudulent activities. The CCMA – finding that the employee was not coerced into committing fraud and concluding that his dismissal was substantively fair.

On review to the Labour Court - The Court finding that the CCMA misconstrued the nature of the enquiry it was enjoined to undertake. Finding - that the employee had acted under economic duress when committing the acts of misconduct. The Court - reviewing and setting aside the award.

On Appeal to the Labour Appeal Court- finding no evidence to support a conclusion that the employee had acted under economic duress – further finding no merit in the contention that the employer was not consistent in the application of discipline- The award of the CCMA fell within the purview of

reasonable decision makers- The Labour Court materially misdirected itself in upsetting the award on review.

The appeal upheld with no order as to costs. The Judgment of the Labour Court substituted with an order dismissing the review application.

Coram: Tlaletsi AJP, Landman JA and Phatshoane AJA

JUDGMENT

Phatshoane AJA

[1] This is an appeal against the whole of the judgment and the order of the Labour Court (per Cele J) dated 28 January 2016 reviewing and setting aside the arbitration award dated 17 September 2013 issued under Case No: KNDB8371-13 by commissioner N Mathe under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) and substituting same with an order that the dismissal of Mr Damien Kenneth McLintock, the first respondent, was substantively unfair. The appeal is with leave of this Court.

[2] Workforce Group (Pty) Ltd (Workforce Group), the appellant, is a temporary employment services provider as defined in s 198(1) of the Labour Relations Act, 66 of 1995 (LRA). It conducts business nationally with branches in a number of the major cities throughout South Africa.

[3] Mr McLintock, a former operations director for Programme Construction, a division of Workforce Group, was dismissed on 13 June 2013 pursuant to a disciplinary enquiry where he was found guilty on four counts. For purposes of this appeal the following two charges are relevant:

'1. It is alleged that you are guilty of instructing an employee to commit an unlawful act, in that on or about 08 March 2013, you instructed Rinesh Ramessar to obtain a signature from Anesh Dookie which would incorrectly confirm an outstanding balance from Plessy South Africa (Pty) Ltd to the Workforce Group of approximately R4,503,792,90.

2. It is alleged that you are guilty of fraud in that on or about 08 March 2013 you ticked the "*Yes*" box on a document dated 08/03/2013 addressed to Plessy

South Africa (Pty) Ltd and with the subject: Confirmation of Balance- East London Project.'

[4] Early in 2012 Workforce Group received purchase orders for work to be carried out in East London by Programme Construction. The sum of R4.5 Million was raised for work to be executed. Put differently, this amount was borrowed but the work was not performed. The amount was reflected as outstanding on Workforce Group's debtors' books.

[5] In early March 2013 Mr Lawrence Diamond (Mr Diamond), the Chief Executive Officer of Workforce Group, requested Mr Avishkar Maharaj (Mr Maharaj), Workforce Group's financial director, to provide him with the names and contact details of all Programme Construction clients so as to verify the amounts owed to Programme Construction. In that same period Mr Maharaj informed Mr McLintock that an amount of approximately R4.5 million was incorrectly reflected in the company's debtors' book as a debt owed by a client, Plessy South Africa (Pty) Ltd (Plessy SA), to Workforce Group when in fact the liability was non-existent. According to Mr Maharaj, Mr McLintock informed him that he would make arrangements with one Mr Anesh Dookie (Mr Dookie) of Plessy SA to "*verify the amount*"[1] as the latter owed him a favour. Two days later, Mr Maharaj says, Mr McLintock informed him that he had approached Mr Rinesh Ramessar (Mr Ramessar), an employee of Workforce Group, to make arrangements for Mr Dookie to confirm that the debt was owed. Coincidentally, not long thereafter Mr Diamond requested Mr Maharaj to provide him with a written acknowledgement of Debt from Plessy SA. Mr Maharaj says he was under immense pressure at the time because the debt was not due and owing. Around 08 March 2013 Mr Maharaj drafted a letter which acknowledged Plessey SA's indebtedness to Workforce Group. However, he did not send the acknowledgment of debt to Plessy SA for signature.

[6] Mr McLintock informed Ms Nolene Fuhri (Ms Fuhri), the regional managing director of Workforce Group, KwaZulu-Natal, who is also his common law wife, about the fictitious debt. On 11 March 2013 Ms Fuhri and Mr McLintock drove to Workforce Group head office in Johannesburg to meet Messrs Diamond and

[1] In other words to falsely confirm that Plessy SA owed Workforce Group an amount of R4.5 million.

Ronnie Katz, the founder and chairperson of the Workforce Group, to explain to them that the money the company sought from Plessy SA would not be forthcoming because no debt existed. When Mr Diamond enquired where the money was McLintock referred him to Mr Maharaj. Mr Diamond instructed him to "*sit down with Avi (Maharaj) and put every purchase order and invoice together and I want you to go through each single one of them on every single Job*".

[7] Mr Maharaj says on 12 March 2013 Ms Fuhri telephonically informed him that she had been to head office on 11 March 2013 where she informed Messrs Diamond and Katz that there were amounts that were borrowed from the purchase orders while work had not been performed to justify the lending; and that she took full responsibility for this financial quagmire. Ms Fuhri further told him that Mr McLintock would visit him that morning and together they needed to work out how much of the outstanding debt of R4.5 million could be recouped from the additional work that had been performed.

[8] Mr Maharaj testified that on that same day, 12 March 2013, he called Ms Fuhri and enquired: *"Since everything is out in the open do we still need the letter for East London signed?*" Ms Fuhri at a later stage informed Mr Maharaj that the acknowledgement of debt had to be signed. According to Mr Maharaj he and Mr McLintock handed over the acknowledgement of debt to Mr Ramessar in his (Mr Maharaj's) office for transmission to Mr Dookie of Plessy SA. Mr McLintock informed Mr Ramessar to tell Mr Dookie that "*they will sort it out*". Mr McLintock's version, on the conversation of 12 March 2013 they had with Mr Ramessar, is slightly different. He says Mr Ramessar called Mr Dookie but was a bit reluctant to speak to him. He consequently took away the phone from Mr Ramessar and told Mr Dookie: *"Listen, I'll look after you. Meaning I will try and keep you out of any trouble…because* ***we all know that's fraud and try and keep him out of trouble****."* (My emphasis)

[9] The acknowledgement of debt was sent to East London where it was signed by Mr Dookie. Later on that morning of 12 March 2013, says Mr Maharaj, they received a copy of a signed written acknowledgement of debt, which reads in part:

'We are currently undergoing an internal audit and would like you to confirm the outstanding balance due as at 31 December 2012 for the East London Project.

Your prompt attention to this request will be appreciated. If you could please confirm the below mentioned balance.'

The letter has a box which requires Plessy SA to confirm the amount of debt by ticking the applicable box marked "*Yes*" or "*No*".

[10] Mr Maharaj forwarded the acknowledgement of debt document to Ms Fuhri. He says that few minutes later Mr McLintock received a call from Ms Fuhri to the effect that the "*Yes*" box appearing on the acknowledgement of debt was not ticked. He says that Mr McLintock responded: "*It's not ticked- I will tick it*." Mr McLintock ticked the "*Yes*" box. He further testified that McLintock did not appear pressured when he ticked the box and neither was he hesitant in doing so. Mr Maharaj further intimated that Mr McLintock never informed him that he was pressured to tick the said box, nor was any duress brought to bear upon him in his presence. Mr McLintock admitted that he ticked-off the "*Yes*" box and took full responsibility and acknowledged that by ticking-off the "*Yes*" box he committed fraud. Under cross-examination he said he did so because he was under "*extreme pressure*" which was exerted by the CEO, Mr Diamond, as communicated through Ms Fuhri. It was put to him that he made no mention of having been under any duress when he ticked the box during his disciplinary enquiry. He conceded but attempted to exculpate himself that it was his first disciplinary hearing that he had attended and was not asked how he felt. By his own admission, Mr Diamond did not ask him to tick the "*Yes*" box; he also did not ask him to commit any fraud.

[11] Having ticked "*Yes*" the acknowledgement of the debt instrument in the amount of approximately R4.5 million was forwarded to Ms Fuhri. Later in the course of that day, 12 March 2013, Mr Maharaj received an e-mail from Ms Fuhri stating that Mr Diamond wanted him to sign the letter. He reluctantly signed the letter.

[12] Mr McLintock explanation of the events of 12 May 2013 was that Mr Maharaj appeared confused after Ms Fuhri had telephonically informed him that she told Messrs Diamond and Katz about the fabricated R4.5 million debt. Mr Maharaj reported to him that Mr Diamond was looking for the acknowledgement of debt.

He was puzzled by Mr Diamond's request because, at that stage, Mr Diamond knew that the debt was non-existent. He then called Ms Fuhri to enquire why the acknowledgement of debt was still needed. Ms Fuhri called Mr Diamond and enquired why he needed the letter. Mr Diamond responded: *"Noels, if you don't get that letter for us we're all losing our jobs, don't worry I will look after you*". Mr McLintock says Ms Fuhri insisted: "*Please we need that letter. Do what you have to do to get it*." Mr McLintock says he was uncomfortable but felt obliged to comply with the instruction as it came from those vested with authority. Hence his request to Mr Ramessar: "*We need this letter, you need to get hold of Mr Anesh Dookie, please can you organise it*".

[13] A claim was made by Workforce Group that Mr McLintock handed over an amount of R2000 to Mr Ramessar as a bribe to Mr Dookie for "*arranging*" the signed written acknowledgement of debt, a claim Mr McLintock vehemently deny. What is astonishing is that during his disciplinary enquiry Mr McLintock admitted having effected such payment which he said he regretted. When confronted on this piece of evidence his response was that he thought about it and retracts it because it never happened. Mr Maharaj did not deny having authorized that R2000 be taken out of the petty cash to compensate Mr Ramessar for travelling to East London to have the acknowledgement of debt signed by Mr Dookie. He denied that Mr Ramessar went to East London but he did learn that, on Mr McLintock's instructions, R2000 was paid to Mr Dookie.

[14] Mr McLintock's further complaint is that no disciplinary action was taken against Messrs Diamond and Ramessar whereas they were complicit in the perpetration of fraud. It was contended, for Mr McLintock, that the disciplinary action taken against Mr Maharaj was conveniently instituted on the eve of the arbitration proceedings allowing Mr Maharaj to carry on with his work as the financial director of Workforce Group despite the damning allegation of fraud against him.

[15] The reason provided by Ms Faith Kristen Newat, Workforce Group's Human Resource and Industrial Relations Manager, for the belated charges against Mr Maharaj, was that he cooperated with Workforce Group and gave all the information that was required, even to his own detriment. He had been furnished with a notice to attend his disciplinary hearing on the eve of the arbitration

because the audit process that he was assisting Workforce Group with was drawing to a close. Mr Maharaj says Mr Diamond warned him that what he did was wrong and was likely to face disciplinary action. In any event, Workforce Group curtailed his powers. For instance, Workforce Group withdrew his power to approve transactions.

The Arbitration Award.

[16] The commissioner found that the evidence established that Mr McLintock instructed his subordinate, Mr Ramessar, to obtain Mr Dookie's signature on the acknowledgment of debt for fraudulent purposes because the debt purportedly owed by Plessey SA to Programme Construction did not exist. The commissioner concluded that Mr McLintock's conduct, in obtaining the fraudulent acknowledgment of debt, was dishonest in nature.

[17] The commissioner held that no one had exerted any pressure or forced Mr McLintock to fraudulently obtain the signature of Mr Dookie on the fake document and that he did so out of his own free will or volition. He concluded that Mr McLintock was correctly found guilty of misconduct and that this transgression alone merited the sanction of dismissal.

[18] The commissioner noted that Mr McLintock conceded that he ticked off the "*Yes*" box depicted on the written acknowledgement of debt confirming that the amount of R4.5 Million was owed, when he knew it was not and took full responsibility for having done so. The commissioner was of the view that Mr McLintock's argument that he was acting under duress was *'a gross exaggeration'.* In any event, Mr McLintock's claim of duress was contrary to the evidence presented by Ms Fuhri. He also found that Mr McLintock stood to benefit from obtaining the acknowledgment of debt.

[19] The commissioner concluded that Mr McLintock committed serious offences that breach the relationship of trust and severed the employment ties. Resultantly, he

found that Workforce Group succeeded in proving that Mr McLintock's dismissal was for a fair reason and upheld the sanction of dismissal.

The proceedings before the Labour Court:

[20] The Court *a quo* noted that Messrs Diamond and Katz were not called to testify at the disciplinary hearing and at the arbitration. It further noted that, if the alleged evidence of their complicity and Mr Diamond's instruction to Ms Fuhri were disputed by Mr McLintock, they ought to have been called as the truth thereof depended on their evidence.

[21] The Court found that Mr McLintock correctly contended that there were two factual findings in respect of which the commissioner misdirected himself. Firstly, he misconstrued Mr McLintock's defence by examining whether or not Mr Maharaj exerted undue pressure on him because that was never his case. Mr McLintock's defence was that the pressure came from Mr Diamond through Ms Fuhri. The Court *a quo* was of the view that the commissioner must have confused the evidence relating to the initial pressure which Mr Maharaj exerted on Mr Ramessar to get Mr Dookie to sign the letter with the pressure experienced by Mr McLintock at the hands of Mr Diamond. Secondly, the Court *a quo* could not find anything on the evidence supportive of the commissioner's finding that Mr McLintock was motivated by some benefit from which he stood to gain if he secured the fraudulent acknowledgment of debt. On the contrary, the Court found, it was Workforce Group that stood to benefit from its financier's overdraft facilities on the basis of the potential injection of R4.5 million into its account.

[22] The Court *a quo* further held that, on the assessment of the evidence, there were facts presented by Mr McLintock which were not seriously challenged through cross-examination. For example: McLintock had been opposed to the initial arrangement by Mr Maharaj for Mr Ramessar to travel to East London to have the acknowledgement of debt signed; Mr McLintock and Ms Fuhri reported the fraudulent activities to Messrs Diamond and Katz; Mr Diamond instructed the duo to collate the invoices for work done and determine the extent of workforce

Group's liability; Mr McLintock reported to Ms Fuhri pertaining to the re-emergence of the demand by Mr Diamond of the acknowledgement of debt which they had hoped had been kept in abeyance until the books were reconciled; Mr McLintock was informed by Ms Fuhri that the letter had to be obtained failing which he would lose his employment; he procured the letter on Ms Fuhri's instruction. The Court *a quo* found that this evidence, when properly assessed, demonstrated that Mr McLintock acted on instructions of his superiors "*failing which he would have to face the wrath of the company*".

[23] The Court *a quo* further held that Mr McLintock was acting under economic duress (reasonable fear of losing his job) because he was made to act against what he believed was correct. The Court was further of the view that Mr McLintock's defence was that the exigency demanded that he follow the superior's orders which were unlawful.

[24] The Court *a quo* reasoned that, in respect of the two acts of misconduct said to have been committed by Mr McLintock, the commissioner did not consider the key issues arising for consideration; had failed to properly evaluate the facts presented at the arbitration; and had not attached proper weight to such facts. Consequently, he came to a conclusion which no reasonable commissioner could reach.

[25] The Court concluded that Mr Maharaj was the main architect of the misconduct in that he initiated "*the whole false accounting of work done by feeding the head office with false information*". The Judge reasoned that when Mr McLintock commenced acting the fraudulent activities were already afoot. Mr Diamond had issued a firm instruction that the acknowledgement of debt be procured while he knew that the debt did not exist.

[26] The Court *a quo* found that three employees (Mr Maharaj, Mr Diamond and Mr Ramessar) were never effectively disciplined by Workforce. The belated charging of Mr Maharaj and the curbing of his powers "*were cold comfort when it is considered that he was the main protagonist*". Premised on the aforesaid findings the Court *a quo* concluded that *'When all [the] facts of this matter are*

considered and weighing up the interests of [Mr McLintock] *this outweigh those of [Workforce Group].*

[27] The Court reviewed and set aside the arbitration award. It concluded that Mr McLintock's dismissal was substantively unfair and determined that he was entitled to the fullest of the redress permissible in terms of s 194 of the LRA. Therefore, it ordered that Workforce Group pay him an amount equivalent to his twelve (12) months' salary; and the costs of the application.

The grounds of appeal:

[28] The grounds of appeal boiled down to this. The Court *a quo* erred:

28.1 In finding that the commissioner misconstrued Mr McLintock's defence by finding in effect that Mr Maharaj exerted pressure on him when in fact the pressure came from Mr Diamond through Ms Fuhri. It was contended that any pressure which may have existed was directed at Mr Maharaj and Ms Fuhri and not at Mr McLintock. In any event, it was Ms Fuhri who requested Mr McLintock to assist in 'sorting out' the issue of Plessy SA indebtedness. During the meeting of 11 March 2013 Mr McLintock was merely requested to attend to a reconciliation of Plessy SA's account by collating the invoices in respect of the work done.

28.2 Insofar as it concluded that *ex facie* the record of the arbitration there is no reference to any benefit which Mr McLintock derived from securing the fraudulent acknowledgement of debt. It was also contended*, inter alia*, that by obtaining the fraudulent acknowledgement of debt Mr McLintock and Ms Fuhri would benefit from concealing their fraudulent conduct.

28.3 In finding that neither Mr Katz nor Mr Diamond were called to testify at the arbitration. It was contended that the Court erred in placing undue weight on the alleged knowledge of the fraudulent action by Messrs Diamond and Katz. Mr McLintock's version was that he did not receive

instructions from Mr Diamond to attend to any unlawful activities. In any event, it was not put to any of Workforce Group's witnesses that Mr Diamond perpetrated the fraud. Therefore, there can be no suggestion that Mr Diamond was required to give evidence at arbitration, the grounds continued.

28.4 In finding that Mr McLintock was under duress and was coerced to commit fraud and further that he followed the instructions of his superior. It was contended that Mr McLintock did not provide sufficient evidence for a realistic fear and that such fear was so material as to override his misconduct.

28.5 In finding that the three employees were never effectively disciplined and that the disciplinary action taken against Mr Maharaj was "*cold comfort*" when he was the key player in the commission of fraud.

Analysis

[29] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae*[2] the Supreme Court of Appeal summarized the position regarding the review of CCMA awards as this:

> 'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[2] (2013) 34 *ILJ* 2795 (SCA) at 2806 para 25

[30] As I see it, to determine whether the decision reached by the commissioner fell within the purview of reasonable decision makers, there are three issues emerging for consideration in this appeal. First, whether Mr Diamond exerted any undue pressure on Mr McLintock to commit fraud. Second, whether Mr McLintock stood to derive any benefit in securing the fraudulent acknowledgement of debt. Third, whether Workforce was consistent in the application of discipline.

The question of duress

[31] Programme Construction, Kwazulu-Natal, under the control of Ms Fuhri, was run into the ground. The unchallenged evidence by Ms Newat was that approximately R15 to R20 million had been lost through fraud and financial mismanagement. At the time of the arbitration the company was closing down. The three remaining employees were busy selling off its assets. Regard being had to this state of affairs I am not persuaded that on 11 March 2013 Ms Fuhri and Mr McLintock met Messrs Diamond and Katz solely for purposes of disclosing R4.5 million fraud case. Ms Fuhri says, in a nutshell, they disclosed "*the fact that the invoicing that we had found was overstated with some of the contracts and that clients in actual fact did not owe us that money*."

[32] The discussion of 11 March 2013 could not only have been about the Plessy SA's transaction. There was more. It is not surprising that Mr Diamond instructed Ms Fuhri and Mr McLintock to return to Durban and alert Mr Maharaj that Ms Fuhri met Messrs Diamond and Katz and that Ms Fuhri and her colleagues had to "*sit with all the invoices and all the work, jobs that had been done, and correspond the invoices to the outstanding work or work in progress so that we could see what the overruns actually were because at that point we weren't sure what the amount was*". What is remarkable about the ultimate instruction given by Mr Diamond to Ms Fuhri and Mr McLintock is that Diamond said nothing to them about obtaining the acknowledgement of debt of the debt purportedly owed by Plessy SA to Workforce Group.

[32] As already alluded to, the evidence was that at the beginning of March 2013 Mr Diamonds started making enquiries at the Durban branch regarding the names and contact details of the clients. It was in this time-frame that Mr Maharaj informed Mr McLintock of the amount of approximately R4.5 million which was incorrectly recorded in the company's debtors' book as a debt owed by Plessy SA. On the probabilities, Mr McLintock and Ms Fuhri met Messrs Diamond and Katz in an attempt to exculpate themselves from the financial mismanagement that was at play in their Durban branch.

[33] Mr McLintock was alive to the fact that he was committing fraud when he facilitated the procurement of the acknowledgement of debt. This is apparent from what he told Mr Dookie: "*Listen, I'll look after you meaning 'I will try and keep you out of any trouble'…because* ***we all know that's fraud and try and keep him out of trouble****."*

[34] The acknowledgement of debt could not have been a product of duress. Mr Maharaj testified that Mr McLintock was not forced to *"tick the box*". Mr McLintock himself conceded during his disciplinary hearing that Mr Diamond did not instruct him to commit fraud or to tick the "*Yes*" box on the acknowledgment of debt. These concessions are irreconcilable with his version at arbitration which was to the effect that Messrs Diamond and Katz exerted pressure on him through Ms Fuhri to tick the "*Yes*" box. This must be seen in the context that it was Mr McLintock who proposed that another employee, Mr Ramessar, arrange that the document be signed. When Ramessar appeared hesitant Mr McLintock took over and spoke to Mr Dookie. There appears to be no reason to doubt the testimony of Mr Maharaj. He had nothing to lose or gain by telling the truth. He gave his cooperation to Workforce despite the fact that he was told that he would be disciplined for taking part in the fraudulent schemes.

[35] Mr Maharaj prepared the acknowledgement of debt several days prior to the meeting of 11 March 2013 between Ms Fuhri, Mr McLintock, Mr Diamond and Mr Katz. Mr McLintock says Mr Maharaj made him aware of this letter. It is clear that there was some planning involved in the execution of this fraudulent scheme prior to the alleged 'pressure' which McLintock intimated was exerted on him.

Apart from his self-contradictory say so, there is no evidence that Mr McLintock was initially opposed to the perpetration of fraud or the dishonest conduct.

[36] The fact that Mr Diamond had requested that the acknowledgement of debt be signed by Mr Maharaj or had enquired about Mr Dookie, whose name appeared *ex facie* the acknowledgment of debt, does not mean that he knew or was aware of the fraudulent activities. To hold otherwise would be to venture into impermissible spectrum of conjecture. Even assuming that he was aware, that does not exonerate Mr McLintock and Mr Maharaj from their own fraudulent activities.

[37] The conclusion reached by the Court *a quo* that Mr McLintock initially resisted the scheme of things initiated by Mr Maharaj; that he was coerced into compliance; he was made to act against what he believed was correct; and was acting under economic duress, is simply not supported by the evidence. It is clear that Mr McLintock and Mr Maharaj acted in cahoots to perpetrate the fraud.

<u>The question of whether Mr McLintock stood to derive some benefit in securing the fraudulent acknowledgement of debt</u>

[38] As adumbrated earlier, the acknowledgment of debt was prepared by Mr Maharaj and both Mr McLintock and he took steps to have it signed by Plessey SA. The benefit that Mr McLintock stood to gain was the concealment of their fraudulent activities. The fact that Mr McLintock and Ms Fuhri had decided to disclose the financial mismanagement to Messrs Diamond and Katz does not detract from Mr McLintock's fraudulent conduct. A motive is the underlying reason why an employee would commit a particular offence. It is irrelevant, particularly in the circumstances of this case, in establishing the employee's guilt. It may well play a role in determining the appropriate sanction.

[39] The Court *a quo* incorrectly found that there was no evidence in support of the commissioner's conclusion that Mr McLintock was motivated by some benefit from which he stood to gain if he secured the fraudulent acknowledgement of debt. It also erred insofar as it concluded that it was Workforce Group that stood

to benefit from the fraudulent activity on the basis of the fabricated R4.5 million revenue. There could never have been anything peculiar in Workforce Group having sought to reconcile its financial information so as to establish its true exposure in respect of one of its debtors and presenting that information to its financier for purposes of maintaining its overdraft facilities.

The question of inconstancy in the application of discipline

[40] Our law requires that employees who have committed similar misconduct should not be treated differentially[3]**.** However, the parity principle may not be applied willy-nilly without any measure of caution. In *Absa Bank Ltd v Naidu & others* this Court pronounced:[4]

> '(T)he element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer in the belief that they will not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances.

[41] The undisputed evidence before the CCMA was that disciplinary proceedings had been instituted against the other employees of Workforce Group. For example, Ms Fuhri had already been disciplined and dismissed. Mr Maharaj had received notice to attend his disciplinary hearing on the eve of the arbitration. It was also shown that his disciplinary hearing was delayed because he was assisting with

[3] *Chemical Energy Paper Printing Wood & Allied Workers Union & others v Metrofile* (Pty) Ltd (2004) 25 ILJ 231 (LAC)
[4] (2015) 36 ILJ 602 (LAC) at 618 para 42

the investigation. With regard to Messrs Diamond and Katz, there is no evidence which support the conclusion that they gave any unlawful instructions to Mr McLintock, Ms Fuhri or Mr Maharaj or that they were complicit in the fraudulent activities.

[42] As found by the Court *a quo*, Mr Maharaj may have *"initiated the whole false accounting of work done by feeding the head office with false information and was accordingly the main architect of the misconduct"*. However, what bears scrutiny in this case is the role Mr McLintock played after *'the wheel was set in motion'.* The fact the Mr McLintock may or may not have participated in the fraudulent activities from the outset does not excuse or mitigate his later involvement. There is simply no merit in the argument that Workforce Group was inconsistent in the application of discipline.

Conclusion

[43] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[5] this Court quoted with approval the earlier *dictum* of the Labour Court in *Standard Bank of SA Ltd v CCMA and Others*[6] to the effect that:

> 'It is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it.'

[44] Mr McLintock occupied a very senior position at Workforce Group which demanded a lot of integrity and trust. He breached that trust. I am satisfied that the commissioner did not misconceive the nature of the enquiry he was enjoined to undertake and neither was the outcome of the arbitration unreasonable on the available evidential material. The commissioner correctly concluded that the dismissal of Mr McLintock was an appropriate sanction. His award falls within the band of reasonable decision makers. Insofar as the Court *a quo* concluded

[5] (2008) 29 ILJ 2581 (LAC); See also *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (3) SA 493 (SCA); (2009) 30 ILJ 829 (SCA); *Absa Bank Ltd v Naidu & others* (2015) 36 ILJ 602 (LAC); *Miyambo v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 2031 (LAC)

[6] (1998) 19 ILJ 903 (LC) at 913 para 38.

otherwise it erred. The arbitration award ought not to have been upset on review. The material misdirection by the Court *a quo* justifies the setting aside of its order. The Corollary of this is that the appeal should succeed.

[45] In respect of costs, I am of the view that it will not be in accordance with the requirement of law and fairness that they should follow the result of both the proceedings before the Labour Court and in this Court. I make the following order.

Order

1. The appeal is upheld with no order as to costs.
2. The order of the Court *a quo* is set aside and substituted with the following:

"1. The application for the review and setting aside of the arbitration award dated 17 September 2013 issued under Case No: KNDB8371-13 by the Commission for Conciliation Mediation and Arbitration is dismissed.

2. No order is made as to costs."

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MV Phatshoane

Acting Judge of the Labour Appeal Court

Tlaletsi AJP and Landman JA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANTS:	Adv LM Malan & S Jackson Instructed by Hunts Attorneys
FOR THE FIRST RESPONDENT:	Adv RG Ungerer Instructed by Weber Attorneys