# JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the ……………had jurisdiction to hear this matter: the dispute falls within the ambit of s 186(1)(a) of the Labour Relations Act 66 of 1995 (the LRA). During the pre-arb process, the applicants indicated that they had been targeted for special treatment because they were active and vigorous members of their trade union ……….. I pointed out to Mr ………….(the applicants’ representative) that in such case the ……….would not have jurisdiction having regard to ss 5, 187 and 191(5)(b)(i) of the LRA all read together. A recess of 20 minutes was taken for the applicants to consider their position. On resumption, the applicants indicated that they would not raise this issue during the arbitration as part of their case. The matter proceeded on that basis.
2. The arbitration hearings were held on 6 May, 3 June, 1 July, 5 August, 2 September, 4 November and 2 December 2013, in the ……………boardrooms, Durban. The proceedings were recorded. The applicants were represented by Mr ………..a ……….union official of 28 years experience, while the respondent was represented by Capt …………up to 2 September and from 4 November by Capt………... Capt ……….indicated that he did not have any experience in representing parties at arbitrations but had experience in conducting disciplinary hearings. Having regard to the relative experience of the parties, the proceedings were conducted largely in an adversarial manner.
3. The respondent applied for the matter to be postponed on 7 October 2013 due to the resignation of Capt ………. It tendered the costs. The application was granted and a ruling to that effect was issued on 4 October 2013.
4. The interpreters were Ms C S Nkabinde (May) and Ms N Sibiya (June – December). Interpretation was not, at the applicants’ request, provided continuously. They indicated when they required interpretation. The interpreters however were in attendance at all times. The first applicant gave his evidence in isiZulu, but chose to be cross examined in English. The second applicant gave his evidence in isiZulu.
5. The respondent handed in a bundle of documents. The applicants were given 25 minutes to peruse the bundle. Thereafter they indicated that none of the documents were being disputed as regards their accuracy or authenticity. The applicants indicated that they may hand in a bundle at a later stage in the proceedings. In the event they did not.
6. The respondent handed in a further bundle of documents on 2 December 2013. The documents were admitted by the applicants.
7. With the consent of the parties a pre-arb was conducted on 6 May 2013. A typed minute thereof was prepared and distributed to both parties on 3 June 2013. After some minor amendments were effected, it was read into the record. The parties were asked to keep the minute handy and make regular reference to it to remind themselves of the agreed and disputed issues or facts.
8. On 3 June 2013 Mr …………put certain versions to one of the respondent’s witness that had not been previously mentioned in the pre-arb. He was asked to clarify whether these were additional versions or new versions. After a short recess he indicated that he would not pursue that line of questioning.
9. At the close of the hearing on 2 September 2013 the respondent was requested to produce at the next sitting the transcript of the applicants’ opening statement at the disciplinary hearing. This was to resolve an argument between the parties about whether a particular version had been a part of the applicants’ case during the disciplinary hearing. Be that as it may the transcript was not produced at the next hearing. The applicants accordingly asked me to draw an inference against the respondent due to that failure. It is not necessary for me to draw any inference as the applicants gave sufficient direct evidence during the arbitration on that issue for me to make the necessary findings.
10. At the commencement of the hearing on 2 December 2013 the “similar fact” rule of evidence was explained to the parties. Both parties – and the applicants especially – were asked to make submissions by the agreed time of 4.30pm on 4 December 3013 on whether certain evidence led by the applicants was hit by this rule and whether it should be admitted. The respondent made its submission in time while the applicants were 2 days late. Their submissions were however considered in the preparation of this award.

# ISSUE TO BE DECIDED

1. The issue to be decided is whether the applicants were unfairly dismissed. Both sought reinstatement together with back pay.

# BACKGROUND TO THE DISPUTE

1. The first applicant is ……………... He commenced employment with the respondent in August 2008.
2. The second applicant is ………………. He commenced employment with the respondent in January 2009.
3. Both applicants –
   1. Performed duties as police constables;
   2. Were dismissed on 17 January 2013;
   3. Earned R11 452.79 per month for working a 48 hour week;
   4. Remain unemployed despite making attempts at finding alternative employment; and
   5. Have not earned any money from any type of casual employment.
4. The respondent is ……………..a local government body. The applicants worked in its …………..(MP) unit. It employs 2899 persons, while the municipality as a whole employs approximately 20 000 persons.
5. The applicants were each given a notice to attend a disciplinary hearing on 10 August 2012. The first applicant’s notice contained the following charge: “*Count 1: For contravening clause 1.2.5 of annexure A “Conduct and Sanctions” of the ……………Disciplinary Procedure collective agreement, in that employees should conduct themselves with honesty and integrity. In that on 14 May 2012 you and your crew mate PC820 ………, extorted money from members of the public following a warrants roadblock that was conducted in the vicinity of Alice and Russell Streets in Durban in exchange for not detaining them for outstanding warrants of arrest that were issued against them for failure to pay for traffic fines*.” For purposes of the arbitration it was agreed that the second applicant’s notice had a similar charge.
6. Para 1.2.5 of the collective agreement provides that employees should conduct themselves with honesty and integrity. Para 2.7 thereof provides that an employee may be dismissed on the first occasion for any act of gross dishonesty (para 2.7.5), or any other act of misconduct which would constitute just cause for dismissal (para 2.7.10).
7. The respondent indicated that its case was that the dishonesty or lack of integrity on the part of the applicants essentially consisted of the applicants having received a bribe of R600 in return for releasing 3 persons (“the suspects”) who ought to have been lodged in the Durban Central Police Station cells. The applicants agreed that that is also how they had understood the charges against them.
8. The applicants were found guilty at the disciplinary hearing and dismissed. They lodged an appeal on 17 January 2013. It was dismissed on 11 February 2013. The applicants lodged an unfair dismissal dispute with the ………….on 12 February 2013. The matter was conciliated on 8 March 2013 and remained unresolved. Hence the arbitration.
9. With the consent of both parties a pre-arb was conducted. The following issues were raised by the applicants:
   1. Only one **procedural issue** was raised by the applicants: that the chairperson of the disciplinary hearing was biased. The bias allegedly consisted of him repeatedly interfering in or interrupting the cross examination of the respondent’s witnesses. The applicants submitted that they had suffered prejudice as a result. Had such bias not existed, they submitted that they would have been found not guilty of the charges. (*At the commencement of the hearing on 5 August 2013 this procedural issue was abandoned by the applicants. Hence no further reference need be made to it*.)
   2. Insofar as the **substantive issues** were concerned the applicants raised the following issues:
      1. Whether they had breached the rule relating to honesty and integrity. They submitted that the charges were fabricated against them because they were active and vigorous members of ………... (*This issue has already been disposed of in para 1 above*.); and
      2. Whether the rule relating to honesty and integrity was applied consistently in the past by the respondent. (*The applicants did not in their evidence give any evidence on this issue, hence no further reference need be made thereto.*)
   3. Having regard to the principles set out in Sidumo & Another v Rustenburg Platinum Mines Ltd (CC)and Edcon v Pillemer NO (SCA) the following was raised:
      1. *Whether the respondent had taken steps to make the applicants aware that they would be dismissed if they breached the rule relating to honesty and integrity*. As for themselves the applicants submitted that they were not reasonably aware that breaching the rule would lead to their dismissal;
      2. *Whether this was an appropriate case for the application of progressive or corrective discipline*. The respondent submitted that dismissal was the only fair and appropriate sanction. The applicants disagreed;
      3. Since it was the applicant’s case that they had not engaged in any irregular acts, the question of whether they had committed the alleged misconduct wilfully or in error did not arise;
      4. *Whether additional training would have assisted the applicants*. The applicants submitted that it would have assisted them, while the respondent disagreed;
      5. *The basis of the applicants’ defence.* The applicants’ defence was that they had released the 3 suspects on the instructions of acting Insp Romeo Khumalo (Khumalo). He had advised them in a call, allegedly received by them as they were on their way to the police station, that they should release the 3 suspects as no “physical warrants” (of arrest) existed for the suspects. Insofar as taking money from the suspects was concerned they disputed having taken any money. What they had done, so they alleged, was that at the request of the suspects, bought food for the suspects with money that the suspects had given them;
      6. *The importance of the rule that was allegedly breached.* Insofar as the importance of the rule was concerned, the respondent submitted that it was the duty of a policeman to uphold the law. Honesty and integrity was part and parcel of that duty. A policeman could not engage in conduct that went against those principles. The applicants agreed with this submission but stated that they were persons of honesty and integrity;
      7. *The applicants’ disciplinary record.* It was agreed that both applicants had a clean disciplinary record;
      8. *Whether the respondent had suffered any harm or prejudice.* The respondent submitted that it had an expectation that its employees will conduct themselves with honesty and integrity. In instances where the public become aware that certain policemen are acting dishonestly it causes harm to the image of the police service and members of the public may lose faith, trust and respect in them. The applicants disagreed with this submission and insisted that they had not engaged in any dishonest conduct. They had merely carried out an order. They submitted that if they had failed to carry out the order given to them by Khumalo then they would have been charged with insubordination. The applicants submitted that they assumed that Khumalo had the authority to give them the instruction to release the suspects;
      9. *Whether the employment relationship had broken down irretrievably.* The respondent submitted that the employment relationship had broken down irretrievably because the respondent could not repose any trust in the applicants, ie the respondent could not expect the applicants to deal with members of the public with honesty and integrity. The applicants disagreed and stated that no criminal charges had been brought against them. The respondent stated that a criminal case had been opened, but it was not clear what progress had been made in that regard;
      10. *Whether the rule has been applied consistently.* The respondent submitted that the applicants had to be dismissed as not dismissing them would set a bad precedent. It submitted that others in similar positions had been dismissed in the past. The applicants disagreed. (*The applicants did not lead any evidence on inconsistency. Hence no further reference will be made to this issue*)*;* and
      11. *Whether reinstatement or re-employment is a feasible option.* The respondent submitted that reinstatement or re-employment was out of the question as the applicants could simply not be trusted to perform their duties with honesty and integrity. The applicants disagreed.
10. The following facts were agreed to by the parties during the pre-arb:
    1. That the MP had on 14 May 2012 set up a roadblock near Alice and Russel streets. The applicants were on duty at that roadblock under the command of Capt ……….;
    2. The purpose of the roadblock was to apprehend motorists who had not paid outstanding fines or had warrants of arrest against their names. Computers with the relevant data were on hand to establish instantly details of any motorist caught in the roadblock;
    3. Warrants of arrest (WOAs) for errant motorists are filed at the offices of the MP in the Old Fort Road complex. These were referred to in the arbitration as the “physical WOAs”. When an errant motorist is caught in the roadblock the procedure is for the physical WOA in relation to that motorist to be fetched from the MP offices and brought to the site of the roadblock, thereby validating the arrest and detention of the motorist;
    4. Three motorists (“the suspects”) were arrested because they had WOAs recorded against their names. They were taken into custody;
    5. A message was sent to the MP office to have the physical WOAs in respect of the suspects brought to the site of the roadblock. They were brought;
    6. The usual procedure is for suspects to be taken to the central police station by a transport officer. The transport officer PC Chamane was unwell on that day. The applicants accordingly assisted with transport duties even though performing transport duties is not part of their regular function;
    7. The physical WOAs were handed to the applicants by Capt …………. (The respondent contended that these were proper WOAs while the applicants disagreed.);
    8. The applicants commenced their journey to the central police station using NDM………. (a marked police vehicle) together with the suspects. The vehicle did not reach the police station. It came to a standstill in or near Mansell Rd. The applicants then proceeded to Moore Rd where the suspects were freed.
    9. That a proper WOA is signed by a magistrate and is capable of being cancelled only by a magistrate.

# SURVEY AND ANALYSIS OF EVIDENCE AND ARGUMENTS

1. The following gave evidence at the arbitration for the respondent: ………… (instructor and inspector for 4 years and having served in the MP for 18 years), …………. (civilian supervisor of the warrants of arrest section for 8 years and having served in the MP for 25 years), …………. (inspector at the time of the events of this case and presently acting captain, and having served the MP for 15 years), …………. (detective in the SAPS for 20 years and based at the Durban Central Police Station) and ……………. (taxi driver from Chatsworth with 6 years of experience. He was one of the suspects arrested at the roadblock and subsequently released).
2. The following gave evidence for the applicants: …………… (a taxi driver at the relevant time and presently unemployed), the applicants themselves (they gave evidence alone and not in the presence of each other), ……………. (constable for approx 4 years in the MP) and ……………..(constable for approximately 3 years in the MP).
3. The name of Capt ……….featured prominently in the arbitration. She was on the list of witnesses to be called by the applicants and her name was “brandished” at regular intervals by the applicants’ representative. In the event she did not give evidence for the applicants.
4. Only the evidence that is relevant for resolving the disputed issues is surveyed.
5. The following evidence was *either agreed, common cause or undisputed* in cross examination:
   1. **Chetty:**
      1. That the applicants were taught ethics and the consequences of unethical conduct;
      2. That they had passed all the modules; and
      3. That the applicants had not made any request to undergo any refresher course on any subject.
   2. **Murphy:**
      1. That 3 sets of WOA were booked out on 14 May 2012 and sent to the roadblock;
      2. That these WOAs were not returned, nor executed nor found again;
      3. That the term “physical WOA” is a reference to the document that is prepared within 14 days after it has been authorised by the magistrate. It is then signed by the magistrate who authorised it and filed away by the warrants section in the MP;
      4. During the period of 14 days (ie before the WOA is actually printed and signed), it has the status of a warrant on the computer, but it cannot be acted upon because it has not yet been signed by the magistrate. In other words a motorist cannot be arrested before the WOA is signed by the magistrate;
      5. That the actual arrest occurs only after the WOA is produced at the roadblock in the presence of the relevant suspect;
      6. That an example of a proper WOA could be found at p 64 of the respondent’s bundle; and
      7. That one could not comply with an illegal instruction.
   3. **Khumalo:**
      1. That documents delivered to a roadblock from the warrants office were WOAs; and
      2. That he was not the applicants’ shift supervisor: it was Capt…………... If there were any problems or difficulties, they would have had to liaise with Capt………….. Releasing can be authorised only by the captain in charge of a roadblock in conjunction with the administration section of the warrants office.
   4. **Daniel:** That a criminal case had been investigated against the applicants under CAS14895/2012 and that the docket had been submitted to the senior public prosecutor for decision.
   5. **Lupondwana:**
      1. That he had been lawfully arrested because he had outstanding fines against his name;
      2. That he was aware that he had to pay his own fines but had not done so. As at the date of the arbitration his fines remained unpaid;
      3. That he was expecting to be detained at the central police station;
      4. That he did not know anything about monies being paid by the suspects to the applicants for their (ie the suspects’) release;
      5. He did not know why he had been released; and
      6. That he had been told by one of the other suspects that the suspects had to thank him for their (ie the suspects’) release.
   6. **Dlamini and Chamane:**
      1. That they had in the past received instructions to release persons who had warrants of arrest outstanding and who ought to be detained;
      2. That they had complied with the instructions only after checking with Capt ………….because they fell under her command. They were aware that releasing such persons was unlawful, but they took the precaution of checking with their own commander first; and
      3. That whenever Khumalo issued instructions, he did so in conjunction with Capt …………. because she was in charge of the roadblock.
6. **Bhengu’s** disputed evidence was as follows:
   1. That the applicants had suggested that the suspects give them R200 each to enable their release;
   2. That he had given R200 to one of the other suspects to hand over to the applicants;
   3. That he believed that he had been released because he had given the bribe. He conceded that this was a crime; and
   4. That he had advised his employer how he had been released and his employer advised him that he should go back to the MP and sort out the fines and WOAs. He had done so.
7. The **first applicant’s** evidence was as follows:
   1. That when they had stopped at Mansell Rd to buy food for the suspects, one of them handed to him his cellphone. He took the cellphone and recognised the voice as that of Khumalo. Khumalo advised him that there had been a mistake and that the suspects should be released because there were no physical WOAs for them;
   2. He then advised the second applicant, who had by then arrived with the food, about the call from Khumalo. They advised the suspects as well about their impending release and asked the suspects further where they wished to be dropped off. They suggested that they all be dropped off in Moore Rd;
   3. He did not know how the suspect had contacted Khumalo or vice versa. It is possible that the number was obtained from the computer by Khumalo. (The applicants’ representative indicated that he would lead evidence on this issue at a later date but never did.);
   4. That there had been a case in the past where city councillor, one Ms Young, had been released after the intervention of Khumalo;
   5. That neither he nor the second applicant had requested any money from the suspects and he did not know anything about R200 being handed to them by the suspects;
   6. That if they had failed to comply with the instruction of Khumalo they would have been charged with insubordination;
   7. That he had undergone training in WOAs. However that training had been provided on the job by his seniors and not at the police college. He was conversant with the procedures relating to WOAs. He confirmed that he had been taught police ethics at the college;
   8. That he had participated in many roadblocks and understood his functions well as a policeman;
   9. That they had received certain documents on 14 May 2013. He was aware that they were WOAs. But he did not know whether they were signed by a magistrate;
   10. That the suspects had been arrested by virtue of WOAs and that a person cannot be detained without a WOA. Insofar as he was concerned they were acting correctly because they were in possession of WOAs in respect of the suspects;
   11. That he conducted himself with honesty and integrity;
   12. That he had been informed by Capt …………..after being on sick leave that there was a problem with the release of the suspects. He had however informed her that they were released on the instructions of Khumalo. But she had advised him that the suspects ought not to have been released and asked that he submit a report to Snr Supt van Bargen. He had consulted with his trade union on this issue and that it had advised him not to submit a report. He had accordingly not informed management that he had been instructed to release the suspects by Khumalo;
   13. That he was aware that the second applicant had submitted a written report on the release of the suspects and he had seen it at the disciplinary hearing;
   14. That he had not informed his shop steward, who was defending him at the disciplinary hearing, that his version was different to that of the second applicant. He had also not informed his shop steward that he had received instructions from Khumalo and did not find it strange when the shop steward did not put relevant questions to respondent’s witnesses. He felt that a strategy was being followed. Be that as it may, he was satisfied with the quality of representation that he had received from the shop steward; and
   15. He could not say why the radio (channel 2) had not been used on 14 May 2012 to communicate. He agreed that radio was the standard mode of communication in the MP. However Khumalo had not contacted them on the radio.
8. The **second applicant’s** evidence was as follows:
   1. That he did not understand the meaning of the word “physical”. (This was explained to him by myself);
   2. That he had not taken any money from the suspects;
   3. That Khumalo had instructed them to release the suspects. He did not find this instruction strange because it was not something that was happening for the first time. The suspects had not been released voluntarily;
   4. That he had learnt about WOAs on the job and not at police college;
   5. He had been taught that one must take and carry out the instructions given by one’s seniors;
   6. That the paperwork in relation to WOAs is done in the warrants office;
   7. That at the roadblock it was his function to radio the warrants office with the ID of the relevant motorist. The warrants office will then inform him whether there is a WOA for such motorist;
   8. That he had given a false written report in his own handwriting on the incidents of 14 May 2012 to Snr Supt ……………. The report was dated 22 May 2012. He had done so after consulting with Khumalo. Khumalo had dictated to him what to write in the report. It read as follows: “*On the 14/05/2012 , we were on duty in the warrant roadblock at Russel and Alice Street. I PC820 and my crew 509 at about 12h30 we took suspects for detaining to Durban Central SAPS and Chatsworth. We took 3 male suspect from PC452 because they were female constable transporting 3 males. We took the 4 suspects and went to Durban Central SAPS for detaining.*

*We put three suspect to the cells, and were told to come back for the OB numbers as to the facts that the cells were still busy. When we returned to the police vehicle the 4th suspect was missing. We checked for him everywhere but could not find him. We kept his warrant in order to look for him and trace him, so we could arrest him.*

*On the 16/08/2012 we were called to the warrants office and informed that the suspect handed himself over the warrant office*.”

* 1. That the 4th suspect mentioned in his statement, who returned and handed himself over was Bhengu and that he had returned with the intention of paying his outstanding fines. His boss had instructed him to sort things out;
  2. That he and the first applicant had been instructed to return the WOAs that they had left in the cubby-hole of the car. But they could not be found because that vehicle had been taken for a service;
  3. That he had successfully passed his training at police college and was aware of the difference between lawful and unlawful conduct;
  4. That he had received a document at the roadblock that he now agreed was a WOA. He came across warrants daily and could recognise one when he saw one. It is a printed document similar the one at p 64 of the respondent’s bundle;
  5. That he had been instructed by Khumalo to release the suspects;
  6. That even if Khumalo’s conduct was unlawful he could do nothing about it because senior policemen, such as Khumalo, talk amongst themselves and they could make things difficult for him;
  7. That he could not agree that it is unlawful for a policeman to fail to report wrongdoing on the part of another policeman. He could not say whether he would ignore wrongdoing on the part of a policeman. It was not easy decision;
  8. That he had advised his representative that Khumalo had drafted the report but it had for some or other reason not been put to Khumalo;
  9. He could not say why the warrants were not returned to Capt ……………later on 14 May 2012 even though she was still on duty. He also could not say why they were not handed in at the charge office which was open 24 hours a day;
  10. That he had not taken any money from the suspects;
  11. He could not comment on whether he could be trusted or not; and
  12. That he had not tried to use the radio on the day. He agreed that it was the standard mode of communication in the MP.

1. The respondent argued that the applicants were clearly guilty of the alleged misconduct and that dismissal was a fair and appropriate sanction. It also argued that the similar fact evidence should be excluded as being inadmissible.
2. The applicants argued that they were not guilty and that they should be reinstated. They submitted that they were bound to follow the instruction even though it was unlawful failing which they would have faced a charge of insubordination. They also argued, even though there was no evidence on this issue, that Khumalo had the power to instruct Capt …………….. In other words that if he had the power to instruct her then they (ie the applicants) were also duty bound to carry out his instructions. The applicants did not cite any authority – from the textbooks or any decided case – for the proposition that the similar fact evidence should be admitted.

# ANALYSIS OF EVIDENCE AND ARGUMENT

1. Before dealing with the disputed issues, I find for the following reasons that the applicants’ evidence was not credible, reliable or probable:
   1. They painted a picture of being victims but they did not offer a motive for the respondent to victimise them in that manner;
   2. The second applicant damaged his credibility by putting up a false report on the events of 14 May 2012. He blamed Khumalo for drawing up the report. But that version was not put to Khumalo in cross examination;
   3. If it was indeed the case that Khumalo had instructed him to release the suspects, why did the second applicant simply not state that in his report of his own accord? I find it strange that he would feel the need to consult Khumalo on events of which he had full knowledge;
   4. The first applicant damaged his credibility by declining to give a report on the events of 14 May 2012 after consulting with his trade union. It is not clear why his trade union would give such advice because no one from the trade union gave evidence. I find accordingly that if he had nothing to hide, the first applicant would have given a report. After all on his version, he was merely carrying out orders;
   5. The first applicant had read the second applicant’s report at the disciplinary hearing. That report would have alerted him to the fact that his version was not in conformity with that of the second applicant. Yet, there is no evidence that he confronted the second applicant about why he put up a report in that manner. He did not say during the arbitration that the report was false and that he distanced himself from that report;
   6. The first applicant furthermore failed to advise his shop steward representative at the disciplinary hearing that his version was different to that of the second applicant. He had also not informed the shop steward that Khumalo had instructed them to release the suspects;
   7. The applicants accepted during the pre-arb that they were handed WOAs by Capt …………. It was agreed that they would have been handed these to validate the further detention of the suspects in the police station. There is no evidence that they inspected the WOA at the roadblock and pointed out any defect to Capt ………….. Despite this, they attempted to create confusion during the arbitration about physical and non-physical WOAs. This attempt at confusion unravelled when it was necessary for me to explain to the second applicant the meaning of the word “physical”;
   8. If there was any doubt in the minds of the applicants, they ought to have driven straight to the MP offices. I take judicial notice of the fact that Mansell Rd is a mere 5 minutes on foot from the MP offices; and
   9. The second applicant stated that he could not agree that it is unlawful for a policeman to fail to report wrongdoing on the part of another policeman. This calls into question the fitness of the second applicant to be a policeman.
2. The evidence will now be analysed having regard to the issues that were identified in the pre-arb as being disputed. These were as follows:
   1. *Whether the respondent had taken steps to make the applicants aware that they would be dismissed for breaching the rule*. I find that the applicants were aware that they would be dismissed because they had attended police college and passed the course in ethics. They were also aware of the consequences of unethical conduct. I find it incredible that the applicants – who are trained policemen – submitted in the pre-arb that they were not reasonably aware that dishonest conduct may lead to their dismissal. I find that any employee in any sphere of work and industry ought to be reasonably aware that dishonest conduct may lead to dismissal. This applies with more force to policemen who are enforcers of the law.
   2. *Whether additional training would have assisted the applicants.* I find that further training would probably not have assisted the applicants for the following reasons:
      1. The applicants stated that they had not been taught about WOAs at police college. Chetty’s evidence consisted mainly of having taught the applicants ethical conduct. While I find it surprising that they were not taught anything about WOAs at police college, that does not necessarily mean that the applicants did not have knowledge of WOAs. Their evidence was that they had learned about WOAs on the job and were familiar with WOAs;
      2. Chetty stated further that the applicants did not ask for refresher courses on any subject. In any event there is no evidence that they advised any of their superiors that they considered their knowledge of WOAs to be inadequate and wanted to be given further training on this subject;
      3. This was not the first time that they were encountering a WOA. Dealing with WOAs was a routine matter for the applicants. The second applicant stated that he was familiar with WOAs and that he came across such on a daily basis and could recognise one when he saw one. He confirmed that it was a printed document similar to the example in the respondent’s bundle;
      4. Murphy referred to an example of a WOA in the bundle of documents. The applicants did not cross examine her to point out any defects in the WOAs that they had received at the roadblock; and
      5. The first applicant stated that he had participated in many roadblocks and understood his functions as a policeman.
   3. *Whether the documents handed to the applicants were proper WOAs*. I find that the documents handed to the applicants at the roadblock were on the probabilities proper WOAs and that the applicants were aware of that fact at all times for the following reasons:
      1. The first applicant agreed that the documents handed to them by Capt ………..had the appearance of the WOA that appeared in the respondent’s bundle of documents. It was undisputed that is an example of a proper WOA;
      2. The second applicant conceded that the documents given to them at the roadblock were WOAs;
      3. The applicants agreed that proper WOAs are signed by a magistrate. They did not dispute that the WOAs in question were signed by a magistrate;
      4. The applicants did not give evidence of any other defect in the WOAs that would have rendered them invalid;
      5. Murphy stated that 3 sets of WOA were booked out on 14 May 2013. That they have never been executed nor returned;
      6. The applicants did not challenge the evidence of Murphy about the characteristics of a valid WOA. She pointed out an example of a valid WOA in the bundle. At no stage did the applicants dispute that the documents handed to them by Capt ………….departed in any way from the characteristics of a valid WOA; and
      7. Khumalo stated that that the documents given to the applicants by Capt …………….were proper WOAs.
   4. *What occurred when the vehicle came to a standstill in or near Mansell Rd.* I find that the following probably occurred at Mansell Rd:
      1. The applicants bought food for the suspects; and
      2. They received the monies in exchange for the liberty of the suspects. (The reasons for this finding appear below.)
   5. *Whether the applicants received money from the suspects in return for their liberty*. I find that the applicants did on the probabilities receive money for the following reasons:
      1. The applicants denied having received any money from the suspects. I reject that version;
      2. Bhengu, Lupondwana and the applicants gave evidence about what occurred at Mansell Rd. Bhengu was an impressive witness because he had after being released handed himself over to the MP on the instructions of his employer. His evidence was that he had given R200 to another suspect to hand to the applicants in exchange for his liberty. He admitted candidly that this action on his part constituted a crime. There was no evidence that he was promised immunity from prosecution in exchange for incriminating himself. I find accordingly that he was probably being honest as he was exposing himself to serious criminal consequences by stating on oath that he had engaged in criminal conduct;
      3. Lupondwana evidence was that he did not know whether monies were paid. He further stated that he had been lawfully arrested because there were outstanding fines against his name and he was fully expecting to be detained at the police station. *But when he was released he did not know why he had been released*. He did not appear to be surprised even though he was not aware of any apparent reason why he should be released. He himself could not give any. Another suspect advised him that he (Lupondwana) should thank him for his release. I find that the only reasonable explanation for Lupondwana’s release was that an irregularity took place and that irregularity was probably the payment of monies to the applicants. It is important to note that Lupondwana did not expressly state that no money changed hands; and
      4. The amount that was received by the applicants was probably R200.
   6. *Whether the WOAs were returned to the MP*. I find on the probabilities that the WOAs were not returned to the MP for the following reasons:
      1. The applicants’ version was that they had left the documents in the cubby hole and they had gone missing because the vehicle in question had thereafter been sent for a service; and
      2. The applicants could not give any reasonable explanation why the WOAs were not returned to Capt …………..who was in her office in the afternoon of 14 May 2012, or left at the MP charge office which is open 24 hours.
   7. *Whether the applicants received a call from Khumalo to say that they should ignore the documents in their possession as no WOA existed in respect of the 3 suspects*. I find that the applicants probably did not receive a call from Khumalo for the following reasons:
      1. It was agreed that the standard mode of communication in the warrants section of the MP is the radio. Neither applicant could say why that mode of communication was not used on that day to verify the instruction with Khumalo;
      2. It is not clear to me how Khumalo would have had possession of a suspect’s phone number. I cannot find that Khumalo would have called a suspect’s phone when he had the radio available to communicate with the applicants; and
      3. Even if the applicants had received a call from Khumalo, there is no explanation as to why they did not consult with their own commander Capt …………before releasing the suspects.
   8. *Whether Khumalo ordered the applicants to release the suspects*. I find that Khumalo did not on the probabilities order the release of the suspects for the following reasons:
      1. Khumalo denied having ordered their release having regard to the fact that there were valid WOAs in existence for the suspects. I accept his evidence;
      2. The instruction to release would have been an unlawful instruction. The applicants stated that they were aware of the difference between a lawful and unlawful instruction. But they stated that their difficulty was that if they had failed to carry out Khumalo’s instruction, they would have been charged with insubordination. I cannot accept that one can be charged with insubordination when an order is unlawful. If the respondent was foolish enough to charge them, then that hearing would have been stillborn because it would have been impossible for the respondent to prove lawfulness of the instruction. The applicants would also have had the benefit of the trade union assisting them in their endeavours to repel any such ill-founded insubordination charge;
      3. Even if Khumalo had ordered the release, the applicants ought to have, consulted with their commander Capt ……………before releasing the suspects. The applicants’ junior colleagues and witnesses, Dlamini and Chamane, appeared to be more competent and knowledgeable about their duties than themselves. They were aware of how a chain of command works. Hence they stated that if they received an instruction that they had doubts about, they would first consult with their commander, Capt …………., before carrying out such instruction. I find that the applicants ought to have done the same when they supposedly received a call from Khumalo; and
      4. Besides stating expressly that Khumalo had instructed them to release the suspects, the applicants spent a significant amount of time stating repeatedly that it was a habit or propensity of Khumalo to interfere in the work of others. I asked their representative whether he wanted me to draw an inference having regard to this alleged habit or propensity that Khumalo had indeed interfered in this case as well. He answered in the affirmative. I cannot draw that inference because it constitutes evidence of similar facts. As such it is irrelevant and inadmissible. The applicants furthermore did not argue that such evidence could be admitted under any of the exceptions to similar facts rule.
   9. *Whether the respondent had suffered any harm or prejudice.* I agree with the submission of the respondent that conduct of the type displayed by the applicants can cause harm to the image of the MP and cause members of the public to lose trust, faith and confidence in law enforcement authorities.
   10. *The importance of the rule relating to honesty and integrity.* It was agreed that it was the duty of a policeman to uphold the law. Honesty and integrity was part and parcel of that duty. A policeman could not engage in conduct that went against those principles. I agree and find accordingly.
   11. *Whether the employment relationship had broken down irretrievably between the parties having regard to the contention of the respondent that it could not repose trust in the applicants*. I find that the employment relationship has probably broken irretrievably for the following reasons:
       1. The applicants were dishonest during the arbitration and on 14 May 2012;
       2. The applicants created a self-serving smokescreen about physical WOAs and non-physical WOAs;
       3. They implicated Khumalo when he had no part in their wrongdoings;
       4. Criminal proceedings are pending against the applicants;
       5. They refused to accept responsibility for their actions and expressed no remorse; and
       6. Astonishingly, they did not know that a policeman that is dishonest can be dismissed from his employment.
   12. *Whether the applicants breached the rule relating to honesty and integrity*. A finding has already been made that the applicants received R200 as a bribe. Whether they received R600 (as alleged) or R200 is neither here nor there as the quantum of the bribe is not relevant. I find accordingly that the applicants did breach the rule contained in para 1.2.5 of the collective agreement. They were also dishonest during the arbitration. The reasons are adequately set out above.
   13. *Whether this was an appropriate case for the application of progressive or corrective discipline.* I find that this is not such a case for the reasons contained in this award. The applicants engaged in gross dishonesty and persisted with their dishonesty during the arbitration.
3. It follows that the applicants committed gross dishonesty as contemplated in para 2.7.5 of the collective agreement. The prescribed sanction is dismissal. I find that it was correctly applied.
4. For all the above reasons I find that the dismissal of the applicants to be both substantively and procedurally fair. I propose to dismiss the application.
5. I would have been disposed to award arbitration fees to the respondent in terms of para 2.41 (3) of the ………….main collective agreement had it asked for such. An “innocent party” as contemplated in ………….. circular number 7/2012 must actively promote and protect its own interests. It is not the function of an arbitrator to come to the rescue of a party that does not seek relief.

# AWARD

1. The application is dismissed.

Dated at DURBAN on this the 10th day of DECEMBER 2013.

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R J PURSHOTAM

*Arbitrator*