THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 144/2012
Reportable

In the matter between:

COLLEEN MZINGISI DUMANI Appellant

and

DESMOND NAIR First Respondent
THE MAGISTRATES COMMISSION Second Respondent

Neutral citation: *Collen Mzingisi Dumani v Desmond Nair & another* (144/2012) [2012] ZASCA 196 (30 November 2012)

Coram: MPATI P, CLOETE, HEHER, CACHALIA and THERON JJA

Heard: 23 November 2012

Delivered 30 November 2012

Summary: **Review – Grounds for - Promotion of Administrative Justice Act 3 of 2000 - decision of presiding officer in disciplinary enquiry.**

Material mistake of fact – misdirection of the presiding officer in evaluating the evidence does not render the decision reviewable on ground of material error of fact.

Decision so unreasonable that no reasonable person could have reached it – this ground not established on the evidence.

ORDER

On appeal from: Eastern Cape High Court, Grahamstown (Pickering and Chetty JJ sitting as court of appeal):

The appeal is dismissed with costs.

JUDGMENT

THERON JA (MPATI P, CLOETE, HEHER and CACHALIA JJA concurring):

[1] This appeal is against the dismissal of an application, in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), for the review and setting aside of the appellant's conviction, at a disciplinary hearing, on three counts of misconduct.

[2] The appellant is Mr Collen Mzingisi Dumani (Dumani), a magistrate, currently on suspension, who was appointed as acting head of the Graaff-Reinet Magistrate's Court, with effect from 1 November 2008. The first respondent, Mr Desmond Nair (the presiding officer), is the chief magistrate of Pretoria, who presided over an inquiry into misconduct charges brought against Dumani by the second respondent, the Magistrates Commission.

[3] On 5 March 2009, the Magistrates Commission charged Dumani with four counts of misconduct in terms of regulation 26(4)(*a*) of the Regulations for Judicial Officers in the Lower Courts issued under the Magistrates Act 90 of

1993. All the complainants were employed in various capacities at the Graaff-Reinet Magistrates' Court where Dumani had been stationed. The first charge related to an incident that occurred during December 2008, when Dumani allegedly stroked the cheek of Ms Salome Hartney (Hartney), who was employed as an administrative clerk at the court. The second charge related to Dumani allegedly stroking the cheek of a security officer, Ms Marilyn Slavers (Slavers), with the back of his hand. In respect of the third charge, it was alleged that Dumani had touched the back of the neck of Ms Regina Karolus (Karolus), a cleaner at the court. The complainant in the final charge was Ms Edwina Ele (Ele), a senior administrative clerk, and it was alleged that Dumani had put his hand between her breasts.

[4] During March 2009, the Magistrates Commission appointed the presiding officer to hold a disciplinary enquiry into the misconduct charges. On 19 March 2010, and after hearing evidence, the presiding officer found Dumani guilty of three counts of misconduct and acquitted him on count two relating to the complaint by Slavers. On 24 May 2010, the presiding officer recommended to the Magistrates Commission, in terms of sub-regulation 26(17)(*b*) of the Regulations, that Dumani be removed from office as a magistrate as contemplated in s 13 of the Magistrates Act. On 14 June 2010, Dumani made written representations to the Magistrates Commission, requesting it to overturn the convictions, not to recommend to Parliament that he be removed from office and not to impose any sanction on him. By letter dated 1 September 2010, Dumani was advised that the Magistrates Commission had resolved to accept the recommendation that he be removed from office on grounds of misconduct in terms of s 13(4)(*a*)(i) of the Magistrates Act. The Commission informed Dumani that its recommendation had been forwarded to the Minister of Justice and Constitutional Development.

[5] Dumani instituted proceedings in the Eastern Cape High Court (Grahamstown) to review and set aside the findings of the presiding officer. The high court (Chetty J, Pickering J concurring) dismissed the application. Dumani now appeals with the leave of this court. The grounds of review relied upon are that: (a) the presiding officer committed a material error of fact (this is dealt with in the judgment of Cloete JA in which I concur); (b) the presiding officer acted arbitrarily; and (c) the presiding officer's decision is so unreasonable that no reasonable person could have reached it.

[6] The enquiry into the misconduct charges was held in Graaff-Reinet. The complainants and Mrs Rene Viljoen (Viljoen), the court manager, testified on behalf of the Magistrates Commission. Dumani testified in his own defence. The presiding officer called Mr Mzimkulu Walter Claassen (Claassen), a senior clerk at the court, as a witness.

[7] Hartney testified that she had, during the first week of December 2008, been requested to go to Dumani's office to assist him with his computer. While they were alone and she was sitting in front of the computer, Dumani, who was standing next to her, stroked her cheek with his hand. It was her testimony that she, in response, then requested him not to touch her. According to her, Dumani then apologised. When she had completed her task at the computer, she stood up and he once again touched her cheek. She voiced her displeasure and he again apologised and requested that she not disclose the details of the incident to anyone. The following day she reported the incident to Viljoen, but asked Viljoen not to take the matter further and said that she, Hartney, would only take the matter further if it happened again.

[8] Slavers, a security officer at the court, testified that she had, on 16 January 2009, been sitting at the security scanner at the entrance to the court.

Dumani, upon returning from lunch, greeted her by name, touched her cheek, proceeded past the security scanner and entered the building. She mentioned it to her colleague but the latter had not observed the incident. Karolus, a cleaner, testified that she had been emptying the waste-paper basket in Dumani's office on 29 January 2009, when he inappropriately touched the back of her head, in 'soft motions'.

[9] Ele, a senior administrative clerk, testified that she usually worked in the regional court, but when the court was not in session, she assisted in the cash hall or with administration. On a Friday, 30 January 2009, she received a telephone call from Dumani requesting that she come to his office. She asked if she could see him after two o'clock as it was close to lunch time and he agreed. Thereafter, and shortly before lunch time (one o'clock) Dumani approached her in the cash hall. After attending to his query, she went towards the door as it was already lunch time, with Dumani following closely behind her. She turned back to fetch her cellular telephone which she had left on her desk, and as she turned Dumani put his hand between her breasts. She entered the cash hall and asked Hartney whether Dumani was 'sexually hyperactive' and reported to Hartney that he had touched her breasts. Ele then went outside where she met Karolus and Slavers and told them about the incident. It was then that the complainants shared amongst themselves their respective experiences with Dumani. It was also then that the complainants decided to take the matter further. Reports were subsequently made to Viljoen. The complainants were referred to Ms Diane Bertram, a social worker in the Department of Social Services, for counselling, which they underwent.

[10] Viljoen, the court manager, confirmed that Hartney had, during December 2008, reported the incident with Dumani to her. Viljoen said that in January 2009, she was advised of the incidents of inappropriate conduct

involving Dumani and the other three complainants. She testified in cross-examination that most of the court's business was conducted in Afrikaans and certain members of the court staff (who did not include her) had not been in favour of Dumani's appointment because he could not speak Afrikaans.

[11] Dumani testified in his own defence. He was 58 years old at the time and had, prior to his appointment as magistrate, been in practice as an attorney. He took up his post as acting head of the court in Graaff-Reinet with effect from 1 December 2008 and was to have been on probation for a period of about six months. He denied having inappropriately touched the complainants and said he believed they had concocted these charges against him as they were dissatisfied because a black man had been appointed as head of office over Afrikaans-speaking people and he could not speak Afrikaans. He added it was his strong belief that the motive of the complainants was to undermine transformation.

[12] Dumani testified that Hartney had been disrespectful towards him. He said that she had on two occasions reprimanded him for being late for work. On another occasion she had come into his office while he had been dealing with a member of the public sitting there, and demanded that he immediately attend to a particular file that she was carrying. When he refused to do so immediately, she pushed the file against his chest and the contents thereof fell onto the floor. It was his evidence that Karolus only cleaned his office in December and not again, so that he subsequently had to arrange with persons doing community service at the court to clean his office. Dumani denied that he had gone to the cash hall on 30 January 2009. He said he left the court at 12h45 that day.

[13] Claassen was called as a witness by the presiding officer. In his evidence-in-chief he said that Dumani had given him certain documents at about 9h00 that morning that needed to be transmitted by telefax. He said that Dumani

telephoned him shortly before one o' clock on 30 January 2009, and requested that Claassen deliver the documents to Dumani. At the time, Dumani was in his vehicle, parked in the vicinity of the court. Claassen arranged for the newspaper vendor to take the documents to where Dumani was waiting in his vehicle.

[14] I turn now to deal with the analysis of the evidence necessitated by the two review grounds with which this judgment is concerned. It was initially contended by Mr Daubermann, who represented Dumani at the enquiry and has since continued to do so, that Claassen was a satisfactory witness and that there were no material inconsistencies or improbabilities in his version. It was further argued that his evidence supported Dumani's version. As I have said, in his evidence-in-chief Claassen testified that Dumani had given him the documents to send by telefax at about 9h00 on that morning and he had taken the documents to Dumani shortly before 13h00. During cross-examination the following was put to Claassen:

'Now this happened a long time ago, so I want you just to think carefully, because Mr Dumani says that the way it happened was that at about quarter-to-one he called you to come and fetch the documents to fax for him and that he then left his office and met you downstairs and handed the documents to you to fax. In other words he says on his way out he in fact handed the documents to you. Could it have happened that way?'

Claassen's response to this was:

'It can happen like that because it is quite a long time ago, but what I can clearly remember is that when he phoned me and requested [me] to bring the documents he was outside, that is when I went out to go and give him the documents'.

This was a dramatic change in Claassen's evidence. Whereas he had earlier testified that he had received the documents at 09h00 he was prepared to concede that this could have occurred shortly before 13h00. This raises questions about Claassen's recollection of the events and his reliability as a witness.

[15] It was also initially contended on behalf of Dumani that Claassen supported Dumani's version that the latter was not in the cash hall shortly before 13h00 on 30 January 2009 as alleged by Ele. Claassen's evidence in this regard was as follows:

'MR DAUBERMANN Did Mr Dumani come into the cash hall at any stage after half-past-twelve that afternoon?

MR CLAASSEN As I am saying that I was dealing with clients, but if he came in I did not see him.

MR DAUBERMANN Would you have seen him if he had come in?

MR CLAASSEN That is correct, because *I usually saw him when he comes in*.' (Emphasis added.)

Claassen's evidence does not assist either party. It does not establish that Dumani was not in the cash hall shortly before 13h00 and nor does it rule out the possibility that Dumani could have been in the cash hall at that time. It was ultimately submitted on behalf of Dumani that Claassen's evidence contained contradictions that made him an unreliable witness; and that accordingly, whilst his evidence did not support Dumani, at best for the Magistrates Commission it did not support its case either. I agree with this approach. Counsel for Dumani conceded, and rightly so, that Claassen's evidence on this aspect was neutral.

[16] It was argued by counsel for Dumani that the complainants were unreliable witnesses who had contradicted themselves in material respects. The following attacks were directed at their evidence. Hartney was criticised for not reporting the incident to her mother that same night. It was argued that there were a number of contradictions between Karolus' evidence and the statement she made to the police, namely, on whether (a) Dumani had been seated or standing when she entered his office, (b) he had touched the back of her head or her neck, and (c) she was bending or standing when he touched her. Karolus was also criticised for not telling her husband about the incident and it was

contended that her explanation that she did not tell her husband because he would have said she was responsible for what happened to her, was not credible. It was also contended that there were contradictions between Ele's testimony and her statement to the police. The first was in respect of the time of the incident (whether it had occurred before or after one o' clock) and secondly, whether Dumani had inserted his hand or only a few fingers between her breasts.

[17] I will deal with these criticisms in turn. The fact that Hartney did not tell her mother about the incident on the evening it occurred and only told her mother that the new magistrate was making her feel uncomfortable does not, to my mind, detract from her evidence. Karolus and Ele may have contradicted themselves on the actual incident (back of the head or neck, a few fingers or whole hand) but each incident still relates to inappropriate touching and the differences, in my view, are not material. The discrepancies between the police statements and the oral evidence of the complainants are trifling.

[18] The presiding officer, in his judgment, noted that the complainants had been subjected to thorough cross-examination. That observation is amply borne out by the record. He stated that Hartney and Karolus had testified in a 'convincing manner' while Ele and Hartney had made a good impression on him. He later referred to Ele as an 'outstanding witness'. He concluded that the contradictions, such as there were, were minor and did not adversely affect the complainants' credibility. There is no reason to doubt these findings.

[19] Counsel for Dumani urged the court to find that it was highly improbable that Dumani would act in the manner suggested by the complainants and face the risk of losing his new-found employment. Counsel suggested that it was improbable that Dumani would have engaged in such bizarre behaviour as

alleged by the complainants almost immediately after taking up his position at the court. It was argued that the complainants had conspired to bring false charges against the appellant because they were displeased with his appointment. Viljoen was asked in cross-examination about the reaction of the court staff when they discovered that a black magistrate who could not speak Afrikaans had been appointed as head of the office. She said that the staff were concerned as the majority of people in the Graaff-Reinet area were Afrikaans-speaking. She explained that reports that needed to be compiled in the Children's Court and the Domestic Violence section were compiled in Afrikaans and this was within the area of Dumani's work.

[20] There is no evidence to support the conspiracy theory. Viljoen would have had to have been part of that conspiracy. If she was part of the conspiracy, it is unlikely she would have conceded a motive for it, namely that people were unhappy because Dumani did not speak Afrikaans. Karolus and Slavers, a cleaner and security guard at the court respectively, would not have had much contact with Dumani in the performance of their duties. The fact that he did not speak Afrikaans would not have affected their work environment in any significant manner and could not therefore serve as a credible explanation for their being part of a conspiracy to get rid of him. If the complainants had conspired to bring these charges against Dumani, they would surely have complained of more serious conduct than the stroking of a cheek or touching of the back of the head. Furthermore, it is difficult to imagine that they would receive counselling from a social worker and thereby risk being exposed as liars. It is much more probable that they needed counselling. The common element in the evidence of the three complainants is that Dumani touched them inappropriately. In the absence of a conspiracy, the cumulative effect of their evidence is to render the denial by Dumani less probable.

[21] The fact that the conspiracy theory has not been proved does not entitle this court to draw an adverse inference against Dumani. There is, however, one aspect of Dumani's evidence that I find improbable. This is that Hartney would have treated him in the manner suggested by him. It is improbable that she, an administrative clerk, would have had the effrontery to treat Dumani, the acting head of the office, with such disrespect and that he would have allowed her to get away with this conduct as he said he did.

[22] The enquiry before the presiding officer was whether, on a balance of probabilities, Dumani was guilty of misconduct, bearing in mind that because such conduct amounted to a criminal offence, it is inherently unlikely that anyone, particularly a magistrate, would have indulged in it. The enquiry before this court is not whether the presiding officer was correct in his conclusion that Dumani was guilty on three of the charges. The main enquiry before this court is whether the presiding officer's decision is so unreasonable that no reasonable person could have reached it. The further ground of review relied upon by Dumani, namely that the presiding officer acted arbitrarily, is linked to the main enquiry in that the presiding officer would have acted arbitrarily if it were to be found that his finding of guilt on the part of Dumani could not be justified on the acceptable evidence. I am not persuaded that the review grounds relied upon have been established. I am satisfied that a reasonable person in the position of the presiding officer on the evidence disclosed in the record and applying the correct test in law could have reached the conclusion that Dumani was guilty of the three counts of misconduct of which he was convicted.

[23] At the hearing of this matter, it was argued on behalf of the Magistrates Commission that the findings and recommendations made by the presiding officer to the Magistrates Commission were only part of a multi-stage decision, and that no attempt had been made to review the decision and recommendation

of the Magistrates Commission itself. In view of my finding in para 23 above it is not necessary to deal with this argument that was raised for the first time on appeal. In any event, it is stated in the notice of appeal that Dumani would, on appeal, seek an order, inter alia, reviewing and setting aside the Magistrates Commission's decision to support the recommendation that he, Dumani, be removed from office and indeed, such relief was foreshadowed in Dumani's founding affidavit (albeit not in the notice of motion).

[24] Costs of two counsel were sought on appeal. Counsel for the respondents was unable to advance any convincing reason why such an order should be made.

[25] The appeal is dismissed with costs.

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L V THERON
JUDGE OF APPEAL

CLOETE JA (MPATI P, HEHER, CACHALIA AND THERON JJA CONCURRING)

[26] The appellant's attorney submitted that the presiding officer at the inquiry into the appellant's misconduct committed a material misdirection of fact that entitled the high court and entitles this court to 'review the convictions and consider the matter afresh' in terms of the decision in *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA). The argument requires a consideration of the parameters of material error of fact as a ground of review. I

shall deal first with the facts relied on for this part of the argument and then the law.

[27] So far as the facts are concerned, the submission was based on the presiding officer's reliance on the evidence of Mr Mzimkulu Walter Claassen, a clerk in the employ of the Department of Justice at the Graaff-Reinet Magistrate's Court. Claassen's evidence related to the fourth count of misconduct but it is evident from the following passage in the presiding officer's judgment that he accorded it wider significance:

'[W]hat is potent in my assessment is the variance between [the appellant] and Mr Claassen, in their testimonies and in the answers given . . . But Mr Claassen differs to a large extent from [the appellant]. In fact to my mind it made a very big impression on me, the variance between Mr Claassen and [the appellant's] testimony . . . It is a weakness in [the appellant's] case.'

The appellant's attorney argued that Claassen had conceded under cross-examination that the appellant's version, which was put to him, could be correct and that this removed any basis for the findings made by the presiding officer which I have quoted, thus leading to a material error of fact.

[28] The high court reasoned:

'[Counsel on behalf of the appellant] laid great emphasis on the [presiding officer's] treatment of the evidence of Claassen. Seizing upon the use of the word "potent" in the judgment, counsel sought to persuade us that the [appellant's] version was rejected on that score alone. There is no merit in this submission. The [presiding officer's] use of the word was imprecise and unfortunate but it is obvious from the judgment that upon an appraisal of the totality of the evidence, whatever conflict existed between the [appellant's] evidence and that of Claassen, played no meaningful role in the decision arrived at by him.'

This reasoning cannot be supported. The passage I have quoted from the presiding officer's judgment shows that he was considerably influenced by the contradictions found by him to exist between the evidence of Claassen and that of the appellant.

[29] I turn to consider the law. Material error of fact was first recognised as a ground of review by this court in *Pepcor* where the following was said in para 47:

'In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should . . . be reviewable at the suit of, *inter alios*, the functionary who made it ─ even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*[1], *Sarfu*[2] and *Pharmaceutical Manufacturers*[3] requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.'

But the court went on in the immediately succeeding paragraph, paragraph 48, to say:

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[1] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458).

[2] *President of the Republic of South African Rugby Football Union 2000* (1) SA 1 (CC) (1999 (10) BCLR 1059).

[3] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241).

'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'

The importance of the qualification contained in the paragraph just quoted was emphasized in the subsequent decision of this court in *Government Employees Pension Fund v Buitendag* 2007 (4) SA 2 (SCA) para 12.

[30] In *Chairperson's Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) Farlam JA said (in para 48):

'In my opinion the legal position as set out in the *Pepcor* case based as it is on the principle of legality still applies under PAJA, s 6(2)(*e*)(iii) of which provides that administrative action taken because "irrelevant considerations were taken into account or relevant considerations were not considered" can be set aside on review.'

Most recently, in *Chairman State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman State Tender Board v Sneller Digital (Pty) Ltd* 2012 (2) SA 16 (SCA), Plasket AJA said in para 34:

'It is now well established in South Africa (and in some other common-law jurisdictions) that a material error of fact is a ground of review',

and went on to point out that this ground could just as easily be accommodated in s 6(2)(*i*) of PAJA,[4] the catch-all provision that allows for the development of new grounds of review by providing that administrative action may be reviewed and set aside on the basis of it being 'otherwise unconstitutional or unlawful'.

[31] In the judgment I have just mentioned Plasket AJA referred to the chapter by Christopher Forsyth and Emma Dring entitled '*The Final Frontier: The Emergence of Material Error of Fact as a Ground for Judicial Review*' in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden and Anne Scully-Hill (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 245. In that chapter the learned authors deal with the orthodox approach to errors of fact in English law, which was similar to our law prior to *Pepcor*, and go on to consider the extent to which that approach has been developed to permit clear errors of fact to be reviewed. The developments in England and in several common law jurisdictions (Australia, South Africa, New Zealand and Hong Kong) are then briefly examined. For present purposes, it is the view expressed by the authors at p 258 that requires consideration:

'It is submitted that, ultimately, the suggestion that the recognition of this new ground for review destroys the distinction between review and appeal rests on a misunderstanding of the nature of an administrative decision. An administrative decision-maker may need to make various findings of law (which he must get right) and he may also need to make findings of fact (which it is submitted he must also get right), but then the decision-maker has to exercise his judgment. This is his realm of autonomy in which he is free to decide as his judgment ordains without any judicial intervention. For so long as the power to review on the ground of error of fact does not intrude into that area of judgment, the distinction between merits and review remains. It needs to be recognised though that the loss of the power to make errors of fact necessarily narrows the area of

[4] Promotion of Administrative Justice Act, 3 of 2000.

the [sic] in which the decision-maker may decide without any judicial intervention. But this is of course true of every extension of judicial review. In any event, it is submitted that the test laid down in *E* [*v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB1044] largely preserves the decision-maker's area of judgement, by requiring that a factual error must be "existing" and "established" (objectively verifiable) before the court will intervene.'

[32] In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been ─ ie an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary ─ an 'administrator' as defined in PAJA ─ the material error of fact ground of review does not entitle a reviewing court to reconsider the matter afresh. This appears, in the context of the particular ground of review being considered, from para 48 of *Pepcor*, quoted in para 29 above; and in the context of review generally, from the following passage in the judgment of O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 45:

'Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

The ground must be confined to the situation, as in the English law as set out in *E* para 66, to a fact that is established in the sense that it is uncontentious and

objectively verifiable. Examples appear from the cases decided in this court to which I have already referred:

(a) In *Pepcor* the Registrar of the Financial Services Board had granted statutory approvals, to effect the 'unbundling' of the appellant fund, relying on actuarial calculations that the high court categorised as 'arbitrary and indefensible' and in respect of which no justification was attempted on appeal (paras 4 to 6). The challenge by the appellants that the Registrar's decision would have been no different had the correct information been furnished, was rejected by the high court and this finding was confirmed on appeal (para 29).

(b) In the *Chairperson's Association* case the Minister of Arts and Culture took a decision to approve the change of name of the town Louis Trichardt to Makhado. The Minister was influenced (see para 47) by a memorandum from the Director General that contained an assurance from the Names Council that proper consultation about the name change had occurred, when it plainly had not (para 46).

(c) In the *Chairman, State Tender Board* case the State Tender Board resolved to restrict a company, Sneller Digital (Pty) Ltd, and its directors from doing business with all three spheres of government institutions for a period of ten years. It did so because it concluded that the directors had been appointed after a tender had been submitted by the company, and that the company had accordingly made a fraudulent misrepresentation to it and been guilty of 'fronting' so as to claim equity ownership points, to which it was not entitled, in order to obtain a tender (para 12). As a matter of objective fact, the directors had been appointed before the tender was submitted. This court concluded (para 36) that had the State Tender Board taken its decision based on the proper facts it could not have concluded that the company and directors had made fraudulent misrepresentations to it; and that this factual error was material because it was the direct cause of the decision to blacklist the company and directors.

[33] For these reasons, even if there was a misdirection by the presiding officer in regard to the evidence of Claassen, the convictions would not be reviewable on the ground of material error of fact, nor under the guise of the provisions of s 6(2)(*e*)(iii) of PAJA viz 'because irrelevant considerations were taken into account or relevant considerations were not considered'. That leaves the following grounds of review relied upon by the appellant, namely that the presiding officer acted arbitrarily (based on s 6(2)(*e*)(vi) of PAJA) and that the presiding officer's decision was so unreasonable that no reasonable person could have reached it (based on ss 6(2)(*f*)(ii)(*cc*) and (*h*) of PAJA). (The alleged misdirection to which I have referred would be relevant, if established, to the latter ground in considering whether, on the facts before the presiding officer as disclosed in the record, no reasonable person could have found the appellant guilty.) These grounds are dealt with in the judgment of my colleague Theron JA in whose judgment I concur.

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T D CLOETE

JUDGE OF APPEAL

Appearances

For the Appellant:	P Daubermann Instructed by: P Daubermann Attorneys, Grahamstown Symington & De Kok: Bloemfontein
For the Second Respondent:	SK Hassim SC (with N Gaisa) Instructed by: Netteltons Attorneys, Grahamstown State Attorney: Bloemfontein