



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1876/21

In the matter between:

SHANE VAN STRAATEN

Applicant

and

COMMISSIONER JULIES WEHNCKE

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

OUTA

(ORGANIZATION UNDOING TAX ABUSE)

Third Respondent

Heard: 9 January 2024

Delivered: 23 February 2024

Summary: Review proceedings – Application to review and set aside the arbitration award made by the First Respondent on 24 August 2021 pursuant to the arbitration in which the First Respondent found that the dismissal of the Applicant was both procedurally and substantively fair.

Held – Racism – the Applicant’s remark made on Facebook constituted racism. The Applicant’s defence that he exercised his right to freedom of expression was unsubstantiated. The dismissal of the Applicant was procedurally and

substantively fair. Costs ordered against the Applicant on an attorney-and-client scale.

JUDGMENT

SWANEPOEL, AJ

Introduction

[1] This is an application to:

- 1.1 Review and set aside the arbitration award issued by the First Respondent dated 24 August 2021 under case number GAJB 13256/20;
- 1.2 Should the Applicant be successful in regard to prayer 1, that the matter between the Applicant and Third Respondent not be remitted for a new hearing at the CCMA but that it be dealt with and decided by this Court;
- 1.3 The Respondent is to be ordered to pay the costs of the application should the Applicant be able to secure legal counsel to represent the case on a contingency fees agreement in terms of which they will receive no fee unless the application succeeds with costs, we accordingly ask for costs in our favour so that they may be compensated for their work;
- 1.4 Granting the applicant such further or alternative relief as the Court deems fit.

[2] The Applicant also filed an application to amend his Notice of Motion adding the following prayers:

- 2.1 Prayer 3 – The Third Respondent is to be ordered to reinstate the Applicant on terms not less favourable than those that applied prior to his dismissal and the Third Respondent is ordered to pay the Applicant whatever he was entitled to earn for his retrospective reinstatement from the period of 12 July 2020 to be confirmed and decided by this court;

- 2.2 Prayer 4 - That should this Court find that the actions of the Third Respondent are so vulgar and distasteful that attack the very foundation of the right to protection and the right to fair practices of vulnerable employees deem it necessary to award compensation for the suffering and hardship forced on the Applicant that the award be the maximum amount allowed by the Honourable Court bearing in mind that a single person within the Respondent's employ earns equivalent or more in one month than that what the Applicant earned in an entire year.
- [3] The Third Respondent opposed the relief sought and stated that the Applicant's claim was vexatious at best, had no merits and was a blatant abuse of the Honourable Court and its processes. Given the nature of the Applicant's conduct not only bringing these proceedings but also his conduct towards Mr Singh as well as the Third Respondent, it was fitting that a punitive cost order be made on an attorney and own-client scale.
- [4] During argument, Mr Londt stated that the Third Respondent did not take issue with the above-mentioned amendment as it did not add anything new to the original Notice filed.

The facts

Applicant's submissions

- [5] The matter related to the alleged unfair dismissal of the Applicant by the Third Respondent. The Applicant disputed both the procedural and substantive fairness of his dismissal.
- [6] I pause to record that the Applicant was a layperson and presented pleadings which seemed to at times deal with irrelevant assertions, averments, and comments. I do not intend to regurgitate all the allegations contained in his founding affidavit and will focus on those that the Third Respondent took issue with.
- [7] The Applicant denied the allegations against him, challenging the substantive and procedural fairness claiming that the chairperson of the hearing had been

biased, that the witnesses were not credible and that misconduct as well as criminal misconduct had taken place.

[8] During the arbitration proceedings, the First Respondent did not concede to recuse himself, the Applicant launched a Labour Court application, which was denied, and the matter was referred back to the CCMA.

[9] The grounds for review were stated as follows:

9.1 Altering/tampering with transcripts of the disciplinary hearing.

9.1.1 The First Respondent could not, once he became aware of it decide that it was irrelevant, or ignore or suppress it.

9.1.2 The First Respondent had a legal duty to ventilate the matter, deal with the matter and take the necessary steps and come to a finding.

9.1.3 The First Respondent remained silent.

9.1.4 The Third Respondent did not dispute or challenge it during cross-examination of the Applicant.

9.1.5 This indicated that the First and Third Respondents had been working together.

9.1.6 The First Respondent could have reopened the case and recalled witnesses but by his very silence was an active participant in the unlawful misconduct or made himself complicit or an accessory to the criminal misconduct.

9.2 That the First Respondent committed a gross irregularity by ignoring statutory requirements or legal principles and misconducted himself by not having wanton regard to decided cases of the Honourable Court in making the order by.

9.2.1 Conducting a hearing *de novo* by conducting the literal interpretation of the term *de novo* not supported by the Labour Court or the Constitutional Court.

9.2.2 Making reference inter alia of the First Respondent not being interested in whether the Applicant was found guilty at the disciplinary hearing since this was a new hearing.

9.3 That the First Respondent failed to determine the nature of the dispute/enquiry and arrived at an unreasonable result.

9.3.1 The First Respondent was asked when he was dismissed and when the Applicant stated that he believed it was on 12 June and added that he needed to know whether dismissal was in dispute, to which the Third Respondent responded. The First Commissioner then explained that if dismissal was in dispute the onus would be on the Applicant and that it would not serve him if he tried to be difficult.

9.3.2 The First Respondent explained the definition of gross insubordination and that he was not there to review the hearing or the chair (person), nor was it an appeal, but a hearing *de novo*, that the First Respondent then explained that he would look at the facts afresh and make a decision whether it was fair.

9.3.3 That the First Respondent then explained that Charge 2 could be lumped to Charge 1 and that it was not necessary to include the rest of the case to prove elements of Charge 2. When did this change and the Applicant suspected that the First Respondent played an active role or that the Third Respondent had presented their intended case had outside intervention or insurance that such course of action would be guaranteed and assurance that the First Respondent would shield them.

9.4 That the First Respondent was biased towards the Third Respondent and its witnesses in that he unduly assisted one or other party with his case and or interrupted/preventing the Applicant from cross-examining the Third Respondent's witnesses.

9.4.1 That the First Respondent knew by reading the transcripts and the Applicant's closing argument and the case of the disciplinary hearing in the Third Respondent's file how he would set about questioning the

witness and the First Respondent's actions and conduct could only be because he had decided to sabotage the Applicant's case and defence and the First Respondent improperly interrupted the Applicant's cross-examination of the witness Mr Singh by rushing the Applicant and cutting the Applicant short preventing the Applicant from questioning and putting forward a defence depriving the Applicant a fair hearing.

9.4.2 That the First Respondent interrupted the Applicant's questioning and blocked the Applicant on numerous occasions.

9.5 That the First Respondent improperly interrupted the evidence presented by the Applicant in advancing his case or defence which resulted in the Applicant not receiving a fair hearing.

9.5.1 The First Respondent asked that the Applicant re-do his bundle as in one PDF file, index and paginate it and email it. On 27 July 2021, the First Respondent went through the bundle and stated that the pre-disciplinary hearing, applications done after the hearing, and admissions such as warnings and written warnings testified to false the deletion and/or destruction of the disciplinary record the First Respondent stated were not relevant or issues before him, and that the crux of the matter was the comment (made) to Mr Singh as the only evidence to be dealt with.

9.5.2 The First Respondent stated that the disclosure record was important to the Applicant as it showed admissions as to the disciplinary hearing recordings and other facts and admissions which the First Respondent also stated were not relevant to the matter, and that if it did not exist, it did not exist.

9.5.3 The First Respondent refused to print all the documents as he could not waste CCMA resources and there were only a few relevant documents.

9.5.4 The Applicant was told to focus on the case presented, pointing out which documents could be printed, and upon the resumption of the matter the Applicant again raised his unhappiness with the fact that he

was forced to leave out documents and that he had to strip his defence bundle, to which the Applicant responded that he was not ready to continue. The First Respondent said that the Applicant had to state his case and if he was not ready to give evidence, he would have no other choice but to either dismiss the case or find in favour of the Third Respondent.

9.6 That the First Respondent failed to appreciate or attach any weight to the inconsistencies and improbable versions placed before him by the Third Respondent and its witnesses and failed to apply his mind, misconstrued, and ignored certain evidence led at the arbitration.

9.6.1 The Third Respondent totally disregarded and ignored the Applicant's testimony as well as his written submission of closing argument, which is shown in the award virtually reflecting nothing of the Applicant's closing submissions and undisputed testimony presented.

9.6.2 The case faced by the Applicant was two charges, one of racism and the second of gross insubordination using Facebook postings to sustain the second charge.

9.6.3 The Third Respondent abandoned and did not present evidence or testify as to the Applicant's Facebook postings used to bring charge 2, yet the First Respondent still found the Applicant guilty.

9.6.3.1 The First Respondent summarised the charge in his findings in paragraph 67 of the award: *"You are accused of racism for directing offensive remarks towards a member of the public on Facebook. You were previously cautioned about the dangers of social media and disregarded management's advice. In addition, you were bound by a clear social media Policy and Code of Conduct. Your actions brought the employer's name into disrepute"*.

9.6.3.2 Evidence led by the Applicant and in the testimony which went undisputed showed that the media policy introduced, replaced Section 6 of the Media Policy and Code of Conduct.

9.6.3.3 What also was not disputed was that the Third Respondent had no clear Social Media Policy, therefore the Third Respondent fabricated this story in making such a finding and the First Respondent had in all essence created a new single charge when the question called for a verdict on both charges.

9.6.3.3.1 The case presented was not the case originally faced and had to defend against the following will be established that the response/comment to Mr Singh was not the only violation or conduct used to charge and find the Applicant guilty of and reach a sanction which resulted in dismissal.

9.6.4 The First Respondent found the Chairperson to be a credible witness, and also found the second witness, Mrs Klazar was found an excellent witness contradictory where Mrs Klazar was caught out on various occasions with different versions and contradictions.

9.6.5 The First Respondent blocked, interrupted and sabotaged the Applicant's cross-examination of Mr Singh when the Applicant was attempting to bring it across.

9.7 That the First Respondent failed to appreciate that the Third Respondent had an improper motive for bringing the charges and committed an irregularity and misconduct of a gross nature by his further actions.

9.7.1 The Applicant had claimed that the Third Respondent had an improper motive for bringing the charges against him. Part of this contention was based on the belief that the Third Respondent fearing that they would be unable to prove the first charge, then sought to implicate the Applicant in another form of misconduct which they then fabricated and then cherry-picked postings from his social media accounts to sustain the second charge. The second charge was always going to be relied upon and the second charge had been decided before the addition of the first charge.

The arbitration award

- 9.8 That the Third Respondent interpreted the Applicant's testimony as unprofessional misconduct, sad and pathetic.
- 9.9 That at para 41, which stated that *"the Applicant denied that there was any policy regulating social media in the workplace. Even if there was one, it did not apply to him. He claimed that it can never be said that his own views on social media represent that of the Respondent because he has freedom of speech. He could not remember ever attending social media training but admitted that it was mandatory for everyone"*. This goes to the First Respondent's dishonesty and lack of integrity.
- 9.10 At paragraph 57, 58 and 59 as to the credibility and honesty of the witnesses was again unprofessional misconduct.
- 9.11 Paragraph 60 stated that *"Mr Singh also lodged a complaint with the SAHRC and reported the incident to the Respondent, this undoubtedly had the potential to bring the Respondent into disrepute"*. This again went to the First Respondent's dishonesty and lack of integrity when it was the First Respondent that prevented and blocked the Applicant during cross-examination of this very questioning.
- 9.12 At paragraph 61 it was stated that: *"it did not matter that the post made by the Applicant was done in his personal capacity. His utterances and online presence were clearly linked to his employment. Freedom of speech is not an absolute right. The Applicant failed in his duty to act in the interests of the Respondent"*. Such a finding and interpretation as to a policy being so interpreted is overbroad and results in overreach and is just sad and unreasonable and sets the bar very low for freedom of speech as one can be linked to their employment through clothing or cell phone account or a loan application or the attendance to school by the children of parents, a bank account or home loan and countless other methods some required by legislation.

9.13 The First Respondent quoted *Rustenburg Platinum Mine v SAEWA obo Bester and Others*¹ when the Applicant had quoted two most recent Constitutional Court (CC) cases; *Qwelane v South African Human Rights Commission and Another*² (*Qwelane*).

9.13.1 When looking at the Applicant's alleged racist posting one is required to look at all possible external factors.

9.14 At paragraph 65 – “*The Applicant correctly conceded that because the post emanated from his Facebook, he was most probably responsible for the contents. He further conceded that the Respondent's media and communications policy provided as follows and that he was aware thereof...*”.

9.14.1 Conceding was not an admission, furthermore it was not for the Applicant to admit to anything or to make out the Third Respondent's case, it is for the Third Respondent to prove its case which the First Respondent in his findings and assessment of evidence seemed to fail to such basic understanding of what the requirement was.

9.14.2 A media policy should be interpreted in its entire context, and it could never be said this media policy which dealt with interactions within the work environment and on work social media accounts and with official work-related interactions or engagements remotely represents or constitutes a social media policy in an employee's private life.

9.15 In paragraph 69, when the First Respondent referred to the *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others*³ (SARS) even then the guilty party got a compensation award. The utterances of the “K” word in the workplace against his team leader a senior manager, in that case, compared to the utterance of the Applicant of the words “*immigrant Paki*”. Paki was a word used every day and was not a slur but an internationally recognised

¹ [2018] ZACC 13; (2018) 39 ILJ 1503.

² [2021] ZACC 22; 2021 (6) SA 579 (CC).

³ 2017 (2) BCLR 241 (CC); [2016] ZACC 38.

abbreviation just like the word “*Aussie, Leb, Pora, Sim*” and countless others. It was recognised in three countries as a racist slur and hate speech because, in these three countries, the word in nearly all cases was followed by violence known as “*Paki Bashing*”.

9.16 That the Third Respondent cherry-picked postings or comments made by the Applicant on his social media (account) or in his personal life which resulted in disciplinary action and sanction that infringed upon his right to belief, conscience or political opinion or curtailed/suppressed his right to freedom of expression and that this would constitute an automatically unfair dismissal as contemplated in Section 187(1)(f) of the Labour Relations Act⁴ (LRA).

9.17 The Applicant also filed a supplementary affidavit, which I do not intend to repeat, safe to state that it had been perused and taken into account and that the averments made in closing would be the only aspects recorded herein.

9.17.1 Everything that the Applicant testified to or led evidence to was in the Third Respondent’s file presented to arbitration or other parts presented to the parties and as such must remain undisputed and the Third Respondent did not cross-examine or dispute or disprove the Applicant’s evidence.

9.17.2 The First Respondent on numerous occasions unsuccessfully instructed and attempted to force the Applicant to only deal with the first charge of the racist comment as that was the only relevant issue before this arbitration.

9.17.2.1 The fact that the Third Respondent used other charges and offences during the disciplinary hearing in order to find the Applicant guilty and dismiss him made a material difference to the case. It would go to substantive and procedural issues, furthermore, the fact that the Third Respondent chose to abandon that part of its case in order to conceal

⁴ Act 66 of 1995, as amended.

and prevent their own misconduct and illegal action from being ventilated and knowing that such a case of using a person's personal comments or postings regarding his constitutional right of political opinion, belief or conscience and freedom of expression would result in an automatically unfair dismissal finding before a statutory arbitration or before a Court did not detract from the fact that this was what the Third Respondent had done.

9.17.3 If the Applicant were to accept the First Respondent's view that he was to focus on what he considered the only relevant issue before him being the posting of Mr Singh as per A89 line 10: *"It's not gone Sir, it relates to the same issue so for present purposes, I look at the true nature of the dispute and the true reason for your dismissal and I have explained myself on record previously as to what the true allegation against you. A 128 line 38 SS; 'this is an OUTA project not in my name. Com:' But how does that relate to the posts because when they the Respondents are trying to dictate to me the way to think of speak, I say not in my name I don't allow abuse of government departments or state capture or anything of the sort of censorship or anything of the sort to happen in my name. I am not even going to allow my employer to do it. Not in my name and our employer has stayed away from controversial subjects because of makes no difference right or wrong they just don't want the controversy that goes with it whether it is BEE Affirmative Action they don't want the controversy no matter what I mean who was it the SAHRC a year ago they had already come and said Affirmative action is unconstitutional so my beliefs and my opinions remain my beliefs and my opinions they protected right I mean they are a protected right". (sic)*

9.17.4 The Respondent did not dispute that the posting to Mr Singh was not a response to an attack by Mr Singh on the Applicant, even in cross-examination of the Applicant.

9.17.5 Besides the First Respondent's best efforts to interfere, sabotage and interrupt the Applicant and his cross-examination of Mr Singh the Applicant proved four critical admissions from the witness.

9.17.5.1 Singh said "... *you attacked my basic honour and reputation ...*" it would be a very sad day when the bar for racism is set so low as so non-existent when two people are engaged in insulting one another when one can claim racism simply based on skin colour.

9.17.5.2 Singh stated "*Okay, I think being called a cake like Mr Du Preez called me a cake I think that is an insult but when you and yes I may have said that work immigrant Paki is not what really irks me, but it is the use of the words against a person of my colour that's what makes it racist*". Honour and reputation – which the Applicant stated he believed the most recent CC case dealt with these very issues.

9.17.5.3 That the witness omitted his own comments or postings that illicit insults or attacks upon himself and then came up with his narrative of what transpired,

9.17.5.4 Besides the various lies and changing stories proved against the witness during cross-examination; and

9.17.5.5 That the witness admitted to provoking/ attacking people to entrap them and take the matter further. This was the very definition and behaviour of an internet troll.

9.17.5.6 The Applicant stated that he transcribed the record of the arbitration himself and the further transcripts namely KDJ and NS and a video of Kerry Erin and swore to the fact that they were done with honesty and integrity.

The Third Respondent's contentions

[10] The Third Respondent filed its answering affidavit, and presented the following comments on the averments made by the Applicant:

10.1 The Third Respondent did not agree with the content regarding the altering/tampering with the disciplinary hearing records and the contentions made by the Applicant pertaining to the issues raised by the Applicant.

- 10.2 With regards to the issue raised that the First Respondent ignored the statutory or legal principles it did not comment other than to note the averments made by the Applicant.
- 10.3 It stated that the Applicant twisted the First Respondent's words with regard to transcripts and inconsistent statements made and contended that the First Respondent plainly stated that he was concerned with giving the Applicant a fresh hearing and considering all the evidence presented before him by the parties anew. He was not prepared to consider irrelevant evidence, and whether the Third Respondent was able to discharge its onus in consideration of evidence relevant to the question of whether or not the Applicant's dismissal was unfair and was prepared to consider transcripts of the disciplinary enquiry if the Applicant was able to demonstrate that statements made by witnesses during the disciplinary enquiry were inconsistent to the evidence presented during the arbitration process. It was added that the Applicant distorted the evidence in his statements. The First Respondent did nothing unfair, the Applicant was the one who refused to listen to the First Respondent's reasoned explanations and persisted with nonsensical explanations for his disagreement with the Chairperson, thus delaying the proceedings.
- 10.4 The contention by the Applicant that the First Respondent failed to determine the true nature of the dispute was incorrect, and that nothing that the First Respondent stated in regard to the question of whether or not the Applicant was dismissed could be construed as showing bias or creating a reasonable suspicion of bias. The First Respondent's words were a matter of fact to the extent that the onus rested on the Applicant to prove dismissal and if such onus was not met the Applicant's claim was to be dismissed.
- 10.5 The Respondent agreed with the First Respondent's words that the Applicant was to establish exactly the basis of his challenge against the (Third) Respondent in regard to procedural unfairness and that such a basis should be factually grounded in respect of actual elements of

procedural unfairness. This had to, in turn, be put to the (Third) Respondent's witnesses by the Applicant. The Applicant's statement was that the Chairperson was aggressive towards him, however, he was unable to demonstrate how the Chairperson acted aggressively towards him and what the Chairperson did against him that was aggressive. The explanation offered by the Applicant as to why he found the First Respondent's statement problematic was incoherent at best. This seemed to suggest that the Applicant be allowed to challenge inconsistent statements by witnesses. If this indeed was what the Applicant wished to express or convey, then there could be no further argument in this regard as the First Respondent had already afforded the Applicant the opportunity to utilise the transcripts for the purpose of proving previously inconsistent witness statements.

- 10.6 The Applicant had been given numerous opportunities to place before the First Respondent the ground upon which he relied insofar as his claim of procedural unfairness was concerned, and on numerous occasions, the First Respondent had to explain to the Applicant that the grounds he presented did not constitute elements of procedural fairness but rather concerns themselves with the substantive aspects of the matter.
- 10.7 There was nothing said by the First Respondent in regard to the question of whether or not the Applicant was dismissed that could be construed as showing bias on his part, let alone the probability of his words creating a reasonable suspicion of bias. The First Respondent's words were matter of fact to the extent that the onus was on the Applicant to prove dismissal and if such onus was not met, the First Respondent had to dismiss the claim.
- 10.8 The Third Respondent agreed with the First Respondent that an arbitration was a hearing *de novo* and that the commissioner had to narrow the issues down in order to deal with what was in fact in dispute. The First Respondent was thus able to make determinations of relevance in respect of the evidence to be considered. The Applicant had

not demonstrated that the First Respondent was in any way biased towards the Third Respondent. In fact, the First Respondent was extremely patient with the Applicant in that he repeated these aspects to the Applicant on multiple occasions so as to try and explain them to the Applicant and to help him understand. The First Respondent showed enduring patience towards the Applicant and was in no way hostile towards him.

- 10.9 The First Respondent at no time “lumped” the charges together. On page A3 of the Applicant’s transcriptions of the arbitration proceedings. In lines 41 to 53, the First Respondent made himself clear about how the charges were formulated and ought to be formulated. He indicated that the second charge might relate to the first charge, which it indeed was, and that an employer was entitled to charge an employee in the alternative or bring an additional charge. The First Respondent further spelt out the import of the second charge, being gross insubordination, being different from the charge of racism, discrimination, and conduct unbecoming of an OUTA member towards a member of the public.
- 10.10 The allegations of bias of the First Respondent related to the Applicant’s cross-examination of Mr Singh and that such bias happened in the form of interrupting his cross-examination of Mr Singh, blocking him from asking questions and rushing him. Since this related to a general approach, as the conduct of the Third Respondent that the Applicant complained about, the Third Respondent opted to comment accordingly without referring to the various examples raised. The First Respondent was well within his authority to prevent irrelevant lines of questioning by the Applicant in order not to waste time. The Applicant’s cross-examination of the witness was limited to the ambit of the witness’ testimony and versions given by him whilst testifying. The First Respondent had the authority to ask clarifying questions, whether to seek clarity for the purpose of his understanding or to ascertain whether or not the subject matter submitted was relevant.

10.11 The Applicant had not provided any grounds for his allegations that the First Respondent sabotaged his case and that the First and Third Respondents made common purpose with one another. The Applicant made allegations of tampering with the recordings of the proceedings but did not explain the specific portion of the record that had been tampered with and by whom. It seemed as though the Applicant was referring to conversations that were held off the record that he insisted were recorded to should have been recorded at the beginning and end of the proceedings. He suggested that all conversations should be recorded, this could not be further from the truth. Any recordings not forming part of the proceedings should rightly be deleted. No recordings of conversations that were not part of the proceedings should take place. These allegations were vague, embarrassing, and unsubstantiated. There was nothing untoward regarding the First Respondent engaging in conversation with the Third Respondent's representative regarding having to "summon" the Third Respondent's witnesses who refused to testify. The First Respondent's role was to oversee proceedings and ensure that parties were not treated unfairly. The Third Respondent was allowed to avail itself of the mechanisms in the Commission for Conciliation, Mediation and Arbitration (CCMA) rules that were provided for in the circumstances where a witness refused to willingly testify. The witness in question was Mr Singh and he was one of the key witnesses in the matter as he was the person to whom the Applicant directed his racist and discriminatory comment.

10.12 In his supplementary affidavit the Applicant referred to pages A79 to page A89, line 45 of the CCMA transcriptions in support of his various submissions in each of the paragraphs. He contended that the First Respondent deprived him of a fair hearing on account of disallowing his entire bundle which consisted of over 600 pages and instead reduced its contents. The contents of the bundle excluded by the First Respondent were so excluded solely on the basis that they were not relevant to the reason for his dismissal, this being the comment that he posted on Facebook directed at Mr Singh. The First Respondent was extremely

assistive to the Applicant in reconstructing his bundles and putting his papers in order and spent a considerable amount of time during the proceedings doing this for the Applicant. Despite their lack of relevance, the Applicant's allegation that the Third Respondent destroyed recordings from the disciplinary hearing was completely unfounded and scandalous.

- 10.13 The First Respondent on page A81 from lines 19 to 27 put the second charge into clear perspective. He clarified that no evidence was tendered in respect of the second charge and that the Third Respondent squarely focused on the first charge and that he was of the preliminary view that there could be a splitting of charges as the second charge related to the first charge, being his misconduct on social media. This was the First Respondent's finding in regard to the curtailment of issues for consideration in the hearing and thus the foundation laid by the First Respondent when deciding whether or not to admit evidence in the Applicant's bundle based on relevance.
- 10.14 In reply to the Applicant's averments that the First Respondent failed to appreciate or attach any weight to the inconsistencies, contradictions and wholly improbable versions placed before him by the Third Respondent and or its witnesses, and or applying his mind to and misconstruing, ignoring certain evidence and facts led, the Third Respondent contended that the Applicant was avoiding the real issues in dispute by adopting illogical reasoning and false statements to create confusion. The common cause facts were simple. On page A432, an email was presented which was sent by Klazar to the Applicant as far back as 2017. The content of this email was clear and self-explanatory. It informed the Applicant that he had to remove all defamatory, inappropriate, or insulting comments from his personal account. This was due to the fact that as an employee his comments represented the organization and any comments that brought the organization into disrepute would not be tolerated, and that he refrains from making any

further inflammatory remarks in order to avoid formal action. No in-depth interpretation of this was required.

10.15 The Third Respondent also had two policies that forbid the Applicant's misconduct. The first being the Code of Conduct and Business Ethics introduced in 2017, commencing on page A417 and the Media and Communications Policy, commencing on page A437, introduced in November 2019. It sufficed not to comment on the applicable clauses of the respective policies for the purpose of this affidavit, suffice was to say that the Third Respondent forbade comments made by employees on their personal interests and in their personal capacities that directly or indirectly brought the Third Respondent into disrepute, including those constituting racial and other forms of discrimination. The Applicant's denial of the existence of these policies could not be sustained, notwithstanding that he signed an attendance register in respect of training on acceptable social media practices.

10.16 It was never the Applicant's case that he did not publish the post, neither did he advance a case of it having been someone else who published the post. The Applicant's attacks on the character, integrity, conduct and partiality of the First Respondent were unwarranted to the extreme. For the Applicant to accuse the First Respondent of criminal conduct was extremely serious indeed and was in itself a demonstration of the Applicant's contempt for the CCMA and the dignity and high standing of this honourable Court.

10.17 The Applicant attempted to justify his deplorable and unacceptable racist comments towards Mr Singh referring to his right to freedom of speech. This right was not absolute and was limited to the extent that it violated the rights of others, Mr Singh in this case, and his right not to be unfairly discriminated against. The Applicant further attempted to justify his conduct by suggesting that Klazar was a liar in regard to the frequency of social media reports generated by her on an annual basis, which suggestion was clearly and blatantly untrue, as she was referring to two different types of reports, being a quarterly risk report excluding the

aspect of social media risk, and a social media risk report that she generated twice per year.

10.18 The Applicant further tried to justify his conduct in the most profoundly absurd and reprehensible manner by accusing Mr Singh of being dishonest, of provoking and insulting people. Altered his story in order to make him look like *"the victim or innocent party"*. This is when the evidence presented was crystal clear on the basis that Mr Singh was insulted and degraded. The Applicant called Mr Singh a "Paki". Mr Singh was an Indian male of Muslim faith. On page A401, a screen grab of Mr Singh's reply to the Applicant was included. In his reaction, he uses the words *"not all Asiatic persons of colour are Paki or immigrants... I seriously am baffled by your unprecedented attack on me"*. On page A407, a certain Riaan Swanepoel, unknown to the Applicant or the Third Respondent, responded: *"Shane van Straaten Seriously! Racism and xenophobia in one comment...?"* In his affidavit on page A411 at paragraph 7, Mr Singh stated, *inter alia* as follows: *"I took some time to compose myself as I was extremely overwhelmed by such an overtly racist and demeaning statement, especially in a public forum and without eliciting such a response from Mr Van Straaten, as I had no prior engagement with him"*. It could not be denied that Mr Singh felt extremely offended on the basis that the Applicant made a racist comment against him.

10.19 On the allegation by the Applicant that the First Respondent failed to appreciate that the Third Respondent had an improper motive for bringing the charges and committed an irregularity and misconduct himself of a gross nature, it submitted that the Applicant's claim of improper motive against the Third Respondent was completely outlandish, unfounded and without substantiation and corroboration. It was in the best interest of the Third Respondent, especially after receiving the complaint from Mr Singh, that a search be done on any other similar incidents that might have occurred and of which the Third Respondent had no prior knowledge. This was to mitigate against any

risk to the Third Respondent that might result should there be such posts and no action was taken in respect of them. It just so happened that further offending posts by the Applicant were discovered. The Third Respondent was well within its rights to charge the Applicant in respect of all offending posts by the Applicant after he recited the cautionary email in 2017.

10.20 The Applicant, in his averments regarding the arbitration award, continued to conjure up unfounded allegations of bias against the First Respondent and continued with his unrelenting vexatious attack on the First Respondent's conduct. The denial of the existence of the aforementioned policies and their application to him were completely baseless even though these policies existed and applied to the Applicant as an employee of the Third Respondent. The Applicant at no time presented conclusive evidence to prove that he did not post the offending comments. Instead, he tried to justify his posting thereof. He continues to do so in this application. The complaint to the SAHRC had absolutely no bearing on whether or not he was fairly dismissed. The First Respondent correctly found that freedom of speech was not an absolute right and the Applicant's submission that this amounted to the policy being given an overbroad interpretation on the reasons advanced by the Applicant was inconceivable.

10.21 The Applicant's interpretation of the case authorities he quoted was completely incorrect, nonsensical and did not advance the real issue of whether or not the comment posted on his Facebook account, directed at Mr Singh was racial or not. The *ratio decidendi* of the CC in the *Rustenburg Platinum Mines v SAEWA obo Bester*⁵ was not that each matter be decided on its merits. This was a universally observed tenet. The precedent set by this matter in summary was that a reasonable objective and informed person would, on the correct facts perceive the comment in question to be racist and derogatory. This was the very case

⁵ [2018] ZACC 13; (2018) 39 ILJ 1503.

that neutralised any justification for his comment that the Applicant offered to this Court.

10.22 The Third Respondent completely disagreed with the Applicant's submissions regarding the interpretation of the Media and Communications Policy. It was apposite to state that the Applicant, possibly selectively so, failed to deal with the Code of Conduct and Business Ethics, as these policies were submitted together and were read together to evidence the rules contravened by the Applicant through his conduct. The Applicant, by omitting to mention the Code of Conduct and Business Ethics relied on selected portions of the policy of which he could attempt to manufacture an interpretation to suit his weak arguments of bias against the First Respondent. The Applicant's submissions related to freedom of speech were futile and irrelevant.

10.23 The Applicant advanced an illogical argument regarding the interpretation of the 2017 email as well as the respective policies. These arguments were incorrect and an attempt by the Applicant to once again justify his deplorable conduct where he knew that there could be no exoneration for him in respect thereof. These stood to be dismissed.

10.24 The averments made by the Applicant that the First Respondent held him to more stringent conditions and that the Applicant had to prove the Third Respondent's case was preposterous. It was inconceivable as to how the Applicant drew the inference that the First Respondent's findings in respect of the Applicant's conduct as a witness suggested that the reverse onus provision did not apply to the Applicant, especially after repeated explanations to the Applicant by the First Respondent that the employer carried the onus in misconduct dismissal matters.

10.25 The First Respondent made a logical inference based on the facts of the matter and the Applicant's deplorable conduct, that the relationship between the Applicant and the Third Respondent had been damaged beyond repair and was completely correct in making the inference.

10.26 The SARS judgment that the Applicant interpreted was incorrect and cherry-picked to suit him. The facts in the matter when compared to this one were completely different and related to the employer altering a disciplinary enquiry outcome from a sanction short of dismissal to one of dismissal. This gave rise to the CC confirming the compensatory aspect of the Labour Court's judgment. Conversely, the Applicant in this matter was in fact dismissed at his disciplinary enquiry for making racist comments.

10.27 The same applied to the *Qwelane* judgement. The Applicant misconstrued it, and it was irrelevant to these proceedings. The matter related to the narrowing down to wording of certain sections of the Promotion of Equality and Prevention of Unfair Discrimination Act⁶ (Equality Act). Unlike the Applicant's submissions, it dealt with the publication of a document alleged to contain hate speech. It did not change the law in a manner that would exonerate the Applicant from liability for his actions. The Applicant posted the comment on his Facebook page and should thus accept the consequences arising therefrom.

10.28 With reference to the supplementary affidavit filed, the Third Respondent proffered the following responses:

10.28.1 The Third Respondent disputed that everything that the Applicant testified to or led evidence about or was not cross-examined on remained undisputed.

10.28.2 Mr Singh clearly testified that the Applicant's post was an unlawful and unprovoked attack on his basic honour and reputation and that the use of the words "*immigrant Paki*" against a person of his colour made it racist. He differentiated the insult from the Applicant from the insult from Du Preez in calling him a "cake" on this basis. The former was an attack on his race, the latter bore no reference to his race whatsoever. The Applicant

⁶ Act 4 of 2000.

tried to make light of this by saying that one should not be able to claim racism simply based on the colour of skin. The application of the “Bester” test would show that the Applicant’s comment amounted to racism. The Applicant then went as far as to insult Mr Singh again in his supplementary affidavit by calling him an “internet troll”, which he did not provide a definition for.

10.28.3 The transcripts were accepted by this Court in the judgment of Moshwana J on 12 September 2023. It was however added that the Applicant had in certain sections of the transcripts incorrectly identified speakers, and omitted sections of speech by him, which cast him in a negative light and altered verbal submissions per the recordings. For purposes of remaining concise and relevant, the Third Respondent opted to not burden the record with a complete list of these.

10.29 The Applicant’s claim was vexatious at best, had absolutely no merits and was a blatant abuse of this honourable Court and its processes. Given the nature of the Applicant’s conduct in bringing these proceedings, but also his conduct towards Mr Singh as well as the Third Respondent, it would be fitting to submit that a punitive costs order on an attorney and own-client scale be made.

[11] Mr Londt in his argument summarised the facts that led to the suspension and dismissal of the Applicant, aspects that I intend to deal with later on in this judgment.

[12] He reiterated that the Third Respondent did not share the view of the Applicant on any of the grounds raised by the Applicant.

Evaluation

[13] The review test by now is trite⁷. The question to be asked by the review Court is whether the decision reached by an arbitrator is one that no other reasonable

⁷ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

decision maker may reach. Differently put, the decision falls outside the bands of reasonableness. It is not about the correctness of the decision.

- [14] The Applicant, during his address on his Heads of Argument again commenced his address based on the events that took place during the disciplinary hearing. He was guided back to the matter at hand on numerous occasions, and at a stage, I even removed the arbitration award from the file, showed it to him and guided him to concentrate his rhetoric on addressing me on that which was recorded in the award. It was a near-futile exercise. Not even paging through his Heads of Argument and directing him to start at his heading on page 12 "CCMA Arbitration Hearing" helped. He bemoaned the fact that he needed to go back to the disciplinary hearing and that he was being restrained.
- [15] The Applicant remained adamant, remorseless and defiant. His unsubstantiated attacks on the reputation of the First Respondent ran like a golden thread throughout his lengthy and mostly unsubstantiated belligerent comments. His lack of appreciation or willingness to accept accountability and responsibility for what he had done is beyond apprehension. It should also be noted that he downplayed the severity and seriousness of his misconduct by being overly critical of the process followed when, as I will deal with underneath, there was nothing sinister taking place in the way that the First Respondent handled the arbitration.
- [16] It stands to be noted that the Applicant's prayer to be reinstated as if he had never been dismissed did not add up at all. It would not make sense that any diligent and conscientious honest employee who had been loyal to his employer and who wanted to be reinstated would want to be reinstated into an employment environment which, according to him was prone to criminal mischief and trampled on rights.
- [17] Nonetheless, regardless of the above, I am obligated to consider all the aspects raised by the Applicant in his grounds of review and apply the law to it.
- [18] It is further beyond belief that if the Third Respondent was such a devious employer who would deliberately and without reason target an innocent dutiful and diligent employee and dismiss him on trumped-up charges and alleged

criminal behaviour would want to be reinstated. The Applicant himself painted a picture which vividly demonstrated that the employment relationship had been destroyed.

[19] Mr Londt stands to be thanked for his immensely helpful Heads of Argument, and, given that he eloquently summarised the gist of the matter and the voluminous irrelevant aspects contained in the Applicant's pleadings, I was able to rely heavily on his summary of the facts, which, when compared to the award issued and the documentary evidence presented assisted me in establishing the gist of the matter placed before me.

[20] The incident that gave rise to the hearing and subsequent dismissal of the Applicant was eventuated by the comment made by the Applicant on or about 21 May 2020 when the Applicant responded in a comment thread to a post placed on the Tshwane SPCA Facebook page. The Applicant was not a party to the prior comments posted, but he directed a response at Mr Singh. The response was as follows:

'Navesh Singh Really, that's an immigrant Paki like you can come up with... oh wow so intelligent you fit right in – Welcome to my country but remember we do like to encourage people to bathe at least once a month...' (sic)

[21] Mr Singh in his affidavit stated that he took some time to compose himself as he was extremely overwhelmed by "... *such an overly racist and demeaning statement, especially in a public forum and without eliciting such response from Mr van Straaten as he [I] had no prior engagement with him*". (sic)

[22] Mr Singh was not the only one who took issue with the comment posted by the Applicant. A certain Mr Riaan Swanepoel also waged a comment and posted: "*Shane van Straaten Seriously! Racism and Xenophobia in one comment. That's how you chose to go about it? Pathetic really*".(sic).

[23] Mr Singh traced the Applicant via LinkedIn to being employed by the Third Respondent, sent an email to the SAHRC informing it of the incident and forwarded the same email to Mr Volmink of the Third Respondent. He

forwarded it to Mr Wayne Duvenhage the Chief Executive Officer of the Third Respondent.

- [24] The Applicant had, as far back as December 2017 been warned by Ms Klazar to review all his social media postings and to remove any defamatory, inappropriate, or insulting comments from his personal accounts. He was also informed that as a staff member, his comments represented the Third Respondent and that any comments that brought the organization into disrepute would not be tolerated and to refrain from publishing such posts in future to avoid formal action. The offending publications followed. Despite this warning, undergoing ethics training and his awareness of the Third Respondent's policies, being its Code of Conduct and Business Ethics, and the Media and Communications Policy, the Applicant nevertheless proceeded to insult Mr Singh in the manner in which he did.
- [25] In the watershed case on racism, *Rustenburg Platinum Mine v SAEWA obo Bester and Others*⁸, the Court stated as follows:

‘[43] ...The test that applies to the determination of whether the use of the word ‘swart man’ by Mr Bester was derogatory or abusive, and in contravention of the Rustenburg Platinum Mine’s disciplinary code, is an objective one. The employer, in this case, Rustenburg Platinum Mine, bore the evidentiary burden in the arbitration proceedings to prove that the language used by Mr Bester was objectively derogatory. The test is not based on how the employer understood the words nor the subjective feelings of the person/s to whom the remark was made, but rather whether a reasonable, objective and informed person would on the *correct facts* perceive it to be so. Once that is established on the evidence, the burden of proof shifts to the employee to prove the existence of a ground of justification and that the derogatory or racist remark was not made with the intent to demean.’

⁸ [2018] ZACC 13; (2018) 39 ILJ 1503.

[26] The factors that one would need to consider are whether:

26.1 The language or conduct complained of is abusive;

26.2 The language or conduct complained of impairs the dignity of the complainant;

26.3 The extent and degree of abuse or impairment to a person's dignity; and

26.4 The impact of the conduct.

[27] When applying the above to the utterances made by the Applicant, his comment fell squarely within the confines of the abovementioned factors.

[28] In the matter of *Dagane v SSSBC and Others*⁹, the Court held that making the following remark on Facebook: "*F#\$%¹⁰ this white racist s&^%!¹¹ We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA. When the Black Messiah (NM) dies, we'll teach whites some lesson. We'll commit a genocide on them. I hate whites*" constituted racist remarks which warranted the sanction of dismissal.

[29] When applying the above to the matter at hand, the fact that the Applicant made the comment in his personal capacity on his personal page did not safeguard him from facing the consequences at work.

[30] Given the scope and role that the Third Respondent played in society, the importance of not being associated with the kinds of comments made by the Applicant, the action taken against the Applicant based on the comments made by the Applicant was not inappropriate, a witch hunt, nor inappropriate or done in malice towards the Applicant.

The grounds for review

[31] The altering and/or tampering with transcripts of the disciplinary hearing and the averment that the fact that the First Respondent was not prepared to

⁹ [2018] ZALCJHB 114; (2018) 39 ILJ 1592 (LC).

¹⁰ I omitted the actual word used intentionally.

¹¹ Ibid.

entertain this did not indicate that the First Respondent and the Third Respondent must have been working together.

[32] In *Hillside Aluminium (Pty) Ltd v Mathuse and Others*¹², the Court considered the status of evidence and held that:

[56] In litigation parties would prepare bundles of documents and the documents included in the trial bundles, would be included as documentary evidence which the parties intend to rely on in support of their respective cases. It is a common practice for parties to agree on the status of the documents to be included in the trial bundle.

[57] In my view there are three possible scenarios.

[58] The first scenario is where there is no agreement on the authenticity or status of documents or where the authenticity is disputed. In such instances the party wishing to produce a document and wants to rely on the document as evidence, has to prove the authenticity of the document by leading evidence and if the authenticity is not proved or admitted, the document is inadmissible, may not be used in cross-examination and cannot be considered as evidence.

[59] The second scenario is where parties agree that documents are what they purport to be. This means that the party wishing to rely on the document, does not have to prove the authenticity of the document but may lead evidence and rely on the document on the basis that it is what it purports to be. In this instance documents must be introduced as evidence and cross-examination on such documents is permissible. The presiding officer can accept the document as evidence insofar as it was properly introduced by witnesses. Where a document is agreed to be what it purports to be, but no evidence is adduced on the document, the presiding officer cannot *mero motu* consider such document as evidence merely because it is included in a trial bundle.

[60] The third scenario is where the parties agree that the documents in the bundle should be regarded as evidence. In this instance the presiding officer is entitled to accept the contents of the documentary evidence

¹² [2016] ZALCD 12; (2016) 37 ILJ 2081 (LC).

as if it were evidence adduced before him or her and even if no witness testifies about it, it can be considered as relevant and admissible evidence.

[61] Where the document is a transcript or record of another proceeding, the same principles apply. Where the parties agreed that the transcript is what it purports to be and a true reflection of what purports to be recorded, it means that the record is authentic and correctly reflects that the proceedings indeed took place. In this scenario contradictions in testimony could be canvassed during cross-examination. The presiding officer is entitled to consider the portions of the transcribed record that were introduced by witnesses, either in evidence in chief or cross-examination, as evidence. The presiding officer cannot merely accept the entire record as evidence, but can accept as evidence those portions introduced by witnesses.

[62] Where the parties agreed that the entire transcript should be regarded as evidence before the presiding officer, the entire record could be considered and accepted as if it was evidence that was adduced before the tribunal where it was introduced, without the need for evidence to be adduced on it. In this scenario the evidence given at the disciplinary hearing is regarded as evidence at the arbitration. This is an extraordinary scenario and requires an explicit and clear agreement between the parties.'

[33] *In casu*, since the Third Respondent had not explicitly agreed to the content of the disciplinary hearing being regarded as evidence adduced, the First Respondent was not wrong not to accept it as evidence. The First Respondent was not wrong to explain that the purpose of introducing the transcript of testimony tendered during a disciplinary hearing would be to establish the credibility of a witness's evidence.

[34] Further to this, the First Respondent informed the Applicant that he would be allowed to use the disciplinary hearing records to identify previously inconsistent statements made by the witnesses. The Applicant did not use this opportunity or guidance given but opted to bring an application to this Court for the recusal of an urgent application, which was denied.

- [35] The fact that the First Respondent conducted the hearing *de novo* was not a gross irregularity.
- [36] In terms of the CCMA Guidelines on Misconduct Arbitrations¹³, Item 7, confirmed that the arbitrator must determine whether the dismissal is fair in the light of the evidence admitted at the arbitration. Therefore, when the First Respondent indicated to the Applicant that this was not a review but a hearing *de novo*, the First Respondent did not commit a gross irregularity.
- [37] There was no substantiated evidence that the First Respondent failed to determine the nature of the dispute.
- [38] The Applicant was the person who referred an unfair dismissal dispute to the Second Respondent in terms of Section 186(1)(a) of the LRA. The First Respondent correctly so established jurisdiction by enquiring whether the Applicant had been dismissed or not and based on the information supplied during the process of narrowing the issues in dispute and determining the common cause facts determined that the matter to determine related to whether the dismissal of the Applicant had been procedurally and substantively fair, and if found unfair, to determine the appropriate relief.
- [39] The First Respondent did not show bias towards the Third Respondent by unduly assisting one or the other party and or by interrupting/preventing the Applicant to cross-examine the Third Respondent's witnesses.
- [40] The allegations proffered by the Applicant in his founding affidavit consisted of his interpretation of technical aspects devoid of accuracy or the truth. The Applicant stated in paragraph 10.2.1.2 – “... *The arbitration hearing gets off to a bad start. Applicant is asked when he was dismissed Applicant responds I believe on the 12 June - Commissioner interrupts and says, ‘Don’t believe, tell me... Commissioner then asks if dismissal is in dispute... Employer intervenes, and states termination of employment came into effect on 12 June and Mr Van Straaten was called to notify him...’* (sic)

¹³ GN 602 1 September 2011: Commission for Conciliation, Mediation and Arbitration: Guidelines on misconduct arbitrations with effect from 1 January 2012.

- [41] This was not out of the ordinary nor was the First Respondent showing his disposition towards the Applicant.
- [42] The First Respondent did not improperly interrupt the evidence presented by the Applicant thereby preventing the Applicant in advancing his case or defence. The Applicant was given a fair hearing.
- [43] The Applicant, as a layperson, was guided on what was required and also assisted on numerous occasions to deal with the facts tendered. This Court had the same issue with the Applicant. He is not a person who takes kindly to guidance and assistance.
- [44] The Applicant did his level best to raise perceived technical concerns he had with the First Respondent but downplayed his comment posted on Facebook as “freedom of speech”.
- [45] The First Respondent did not fail to apportion weight to the evidence presented. He did not misconstrue or ignore certain facts and evidence presented at the arbitration hearing.
- [46] The crisp and clear facts that the First Respondent had to consider and rule on in terms of the Code of Good Practice: Dismissal (Schedule 8), Item 7 was as follows:
- 46.1 Whether or not the employee contravened a rule or standard regulating conduct in, or with relevance to the workplace, and
- 46.2 If a rule or standard was contravened whether or not –
- 46.2.1 The rule was a valid or reasonable rule or standard;
- 46.2.2 The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- 46.2.3 The rule or standard had been consistently applied by the employer; and

46.2.4 Dismissal was the appropriate sanction for the contravention of the rule or standard.

- [47] The Applicant deemed it fit to concentrate on ancillary misinterpreted assumptions on how he perceived the First Respondent's handling of the matter, instead of placing facts on record that demonstrated that the decision made by the Third Respondent fell short of the above-mentioned criteria did not do the Applicant any favours.
- [48] The First Respondent applied his mind to the evidence presented by both parties and correctly found that the dismissal of the Applicant had been based on substantiated and credible evidence adduced.
- [49] The award is not a conclusion that another decision-maker would not have arrived at.
- [50] This was not an automatically unfair dismissal in terms of S 187(1)(f) of the LRA.
- [51] The Applicant claimed that he was entitled to and only exercise his freedom of speech, which, he stated, was his Constitutional right. Section 16 of Chapter 2 of the Bill of Rights reads as follows:

'(1) Everyone has the right to freedom of expression, which includes-

- a) Freedom of the press and other media;
 - b) Freedom to receive or impart information and ideas;
 - c) Freedom of artistic creativity; and
 - d) Academic freedom and freedom of scientific research.
- 2) The right in subsection (1) does not extend to –
- a) Propaganda of war;
 - b) Incitement of imminent violence;

- c) Advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.’

[52] The *Sidumo* test was refined by the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴ where the Court formulated the following questions to determine whether an award made by a commissioner was reviewable as follows:

In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?

- 52.1 Did the arbitrator identify the dispute he was required to arbitrate (this may only become clear after both parties have led their evidence)?
- 52.2 Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?
- 52.3 Did he or she deal with the substantial merits of the dispute, and
- 52.4 Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence presented?

[53] The crisp question to be determined therefore is whether the First Respondent committed a gross irregularity when he determined that the dismissal of the Third Respondent was procedurally and substantively fair.

[54] Applying the abovementioned test to the facts at hand, I find that the First Respondent's award met all of the criteria required.

[55] I am unconvinced by the submission made by the Applicant and have no reason to interfere with the decision reached.

¹⁴ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at para 14.

- [56] The award rendered by the First Respondent and the conclusions he arrived at cannot be regarded as an award that a reasonable commissioner would not have arrived at.

Costs

- [57] The Court may order costs against a party or its representative according to the requirements of the law and fairness. In determining the Court may take into account the “conduct of the parties”, both in proceeding with or defending the matter. Put differently, consider the merits of their respective cases, and during the proceedings before Court.
- [58] The principle that the costs follow the suit accordingly does not apply to this Court, however, in terms of Section 162 of the LRA, an award of cost on an attorney-and-client scale when the application was devoid of any merit or rested on a perverse view of the law had not been precluded.
- [59] When considering the aspects raised by the Applicant and the fact that his application was devoid of merit and rested on the perverse view of the law that he had the right to make racial comments because of his right of freedom of expression (speech), seen in the backdrop of the decision in the *Rustenburg Platinum* case which makes mention of the need to consider comments against the backdrop of apartheid, I see no reasons not to award costs against the Applicant in this matter.
- [60] Accordingly, I make the following order:

Order

1. The application is dismissed with costs on an attorney-client scale.



H. Swanepoel

Acting Judge in the Labour Court of South Africa

Appearances:

For the Applicant:

In person

For the Third Respondent:

Mr Londt

Instructed by:

McCormick Londt Inc.

LABOUR COURT