

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Not Reportable
Case No: JR96/2022**

In the matter between:

CAPE TOWN CITY FOOTBALL CLUB

Applicant

And

MPHO MATSI

First Respondent

SOUTH AFRICAN FOOTBALL ASSOCIATION

Second Respondent

NATIONAL SOCCER LEAGUE

Third Respondent

**ADVOCATE W R MOKHARE SC N.O.
Respondent**

Fourth

Heard: 12 January 2024

Delivered: 13 March 2024

Summary: Review application — private arbitration - jurisdiction in terms of section 157(3).

JUDGMENT

VENTER, AJ

Introduction

- [1] This is a review of a private arbitration award where the Applicant calls for the setting aside of the arbitration award dated 7 December 2021 and reinstating the initial award of the Dispute Resolution Chamber on 27 July 2021, alternatively remitting the matter for a rehearing before a new arbitrator other than the Fourth Respondent.
- [2] The First Respondent has opposed the review on three bases: (1) the Labour Court does not have jurisdiction to review the private arbitration award; (2) the Labour Court does not have jurisdiction to review the arbitration award in terms of sections 145 and 158(1)(g) of the Labour Relations Act¹ (LRA); and (3) substantively, the review must fail.
- [3] Despite belatedly doing so, the Applicant has wisely abandoned the review in terms of sections 145 and 158(1)(g), conceding that the review of this award can only be considered in terms of section 33 of the Arbitration Act².
- [4] The First Respondent, in turn, has raised that the Applicant has not pleaded to a review in terms of section 33 of the Arbitration Act and, therefore, cannot introduce such a basis as a passing shot in its heads of argument.

Background

- [5] The facts of this case are mainly common cause.
- [6] The Applicant, the Cape Town City Football Club, is a professional football club competing in the National Soccer League.
- [7] The First Respondent, Mr Matsi, was a central midfielder football player during the dispute.

¹ Act 66 of 1995, as amended.

² Act 42 of 1965.

- [8] The Applicant and the First Respondent are members of the Third Respondent, the National Soccer League (NSL).
- [9] The Third Respondent, who trades as the Premier Soccer League (PSL), is a member of the Second Respondent, the South African Football Association (SAFA).
- [10] All professional clubs and professional footballers are subject to the PSL, the rules and regulations of SAFA, the Confederation of African Football (CAF), and the Federation Internationale de Football Association (FIFA).
- [11] All contracts, statutes, regulations, directives, and decisions in South African Football must be fully compliant with FIFA regulations, directives and decisions (which include the decisions of the FIFA Dispute Resolution Chamber), CAF decisions, including but not limited to the FIFA Circulars.
- [12] On 10 September 2018, the Applicant concluded a fixed-term contract of employment with the First Respondent. The effective date was 1 July 2018, and the termination date was 30 June 2022. The Employee Handbook, Constitution and Rules form part of the contract.
- [13] The First Respondent went on loan to Maritzburg Football Club from 1 January to 30 June 2019. On the First Respondent's return, he was sent out on loan to Stellenbosch Football Club from 1 July 2019 to 30 June 2020, which was extended to 31 August 2020 as the league was extended due to the COVID-19 pandemic. He didn't play for the Applicant while he was on loan.
- [14] On or about 25 May 2020, the First Respondent received a letter titled "*Notice of Salary Reduction / Retrenchment under section 189 of the Labour Relations Act 66 of 1995*".
- [15] In response to the letter, the First Respondent's agent addressed emails to the Applicant on 28 May 2020, submitting that no consultation process had occurred and requesting a list of documents and financial information. The Applicant responded on 29 May 2020 but failed to provide financial

information. On 29 May 2020, the Applicant declined to provide relevant information and documentation, and the Applicant could not give a signed handbook.

- [16] Consultations occurred on 1 June 2020, 24 June 2020, and 21 July 2020.
- [17] The Applicant terminated the First Respondent's contract on 24 July 2020, effective 31 August 2020, on the grounds of operational requirements in terms of section 189 of the LRA for financial reasons.
- [18] On 30 September 2020, the First Respondent referred a dispute to the Dispute Resolution Chamber at the National Soccer League (DRC) regarding the league's handbook. He claimed that:
- 18.1. the contract of employment was terminated unlawfully, and claimed the total damages for the sum of R3 630 000.00;
 - 18.2. the dismissal was substantively and procedurally unfair and claimed compensation equivalent to twelve months' salary for the sum of R1 440 000; and
 - 18.3. severance pay and leave pay due to the First Respondent.
- [19] The Applicant opposed the matter.
- [20] On 27 July 2021, the DRC handed down its decision dismissing the claim and concluded the dismissal was substantively and procedurally fair.
- [21] On 12 August 2021, the First Respondent submitted a notice of arbitration to SAFA to appeal the correctness of the DRC's decision. The appeal was opposed.
- [22] The Fourth Respondent, Mr Mokhare SC, was appointed to arbitrate the matter. The matter sat on 4 December 2021, and the award was rendered on 7 December 2021. The award set aside the decision of the DRC and replaced that decision with the following order:

- ‘64.2.1. the termination of employment contract of the appellant by the respondent on 24 July 2020, effective 1 August 2020 was without just cause;
- 62.2.2. the termination of the employment contract of the appellant by the respondent on 24 July 2020 effective 1 August 2020 is unlawful and in breach of the employment contract concluded between the appellant and the respondent;
- 62.2.3. the respondent is ordered to pay to the appellant the sum of R3 630 000 (three million six hundred and thirty thousand rands);
- 64.2.4. the aforesaid amount shall bear interest at the prescribed legal rate from the date of this award to the date of payment.
- 64.2.5. the respondent is ordered to pay the costs of the appellant incurred at the DRC as well as the costs of the appellant in this arbitration;
- 64.2.6. the costs of the arbitrator shall be borne by the National Soccer League, which shall recover same through its internal processes from the respondent.’

[23] It is this award that the Applicant seeks to review.

Jurisdiction of this Court

[24] The First Respondent submitted that an unlawful termination of an employment contract does not fall under section 157(3) of the LRA, and therefore this Court does not have jurisdiction.

[25] Section 157(3) of the LRA provides:

‘Any reference to the court in the Arbitration Act, 1965 (Act 42 Of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act.’

- [26] Section 157(3) accords jurisdiction to the Labour Court to entertain matters brought to it in terms of the Arbitration Act. That being the case, the court, in considering matters under this Act, acts in terms of its powers set out in section 33 of the Act. Section 158(1)(g) accords this Court's power to review. On that basis, it is competent for this Court to entertain a review application relating to a matter brought to it in terms of the Arbitration Act.
- [27] The essence of the First Respondent's submission is that the Arbitrator found that the dismissal was unlawful and not unfair. Because unlawfulness falls outside the ambit of the LRA, this ousts the jurisdiction of the CCMA and the Labour Court. Thus, this dispute cannot be referred to arbitration under the LRA. In other words, as the argument goes, the finding of an unlawful dismissal transforms the dispute from one that might be referred to arbitration in terms of the LRA into one that cannot be referred to and thus takes the dispute out of the ambit of s 157(3).
- [28] I do not concur with this approach. Jurisdiction does not flow from an award's outcome; jurisdiction flows from the pleadings in the arbitration. In *Gcaba v Minister for Safety and Security and Others*³, the court stated:
- ‘Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in *Chirwa*,⁴ and not the substantive merits of the case. If Mr Gcaba's case were heard by the High Court, he would have failed for not being able to make out a case for the relief he sought, namely review of an administrative decision. In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another

³ [2009] ZACC 26; 2010 (1) SA 238 (CC) at para 75.

⁴ *Chirwa v Transnet Limited and Others* [2007] ZACC 23; 2008 (3) BCLR 251 (CC) at paras 155 and 169, referred to in above; also see *Makhanya* above n 4 at paras 34 and 71.

claim, cognisable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a Claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would lack jurisdiction. An applicant like Mr Gcaba, who is unable to plead facts that sustain a cause of administrative action that is cognisable by the High Court, should thus approach the Labour Court.'

[29] In *Manaka and Others v Air Chefs (Pty) Ltd*⁵, the Labour Court, in finding that a private arbitration award may be made an order of court, had this to say:

'The crisp question, therefore, is whether it is necessary for the dispute to remain cognizable under the Act throughout its currency or whether it is enough for the purposes of s 157(3) that it be a dispute that at least at the outset is cognizable under the statute. In my view, the latter interpretation is the appropriate one. The section simply states that the dispute must be one that may be referred to arbitration in terms of this Act. It must, therefore, be a dispute that permissibly or legally can be referred to arbitration in that manner. It is such a dispute at its outset and that, in my opinion, is sufficient to bring it within the ambit of s 157(3).'

[30] Therefore, the jurisdiction lies in the initial referral and pleadings in the arbitration. In this case, the First Respondent's referral was to challenge the fairness and lawfulness of the operational requirements dismissal at the DRC and, when the DRC found the dismissal to be fair, sought to appeal the outcome at arbitration. The prayer of the First Respondent at arbitration was that the decision of the DRC be declared invalid and set aside and that it be replaced with a decision that the employment contract of the First Respondent was prematurely unlawfully terminated by the respondent and the dismissal of the Appellant was unfair and without just cause.

[31] The fairness of an operational requirements dismissal is arbitrable under the LRA, and a private arbitration award is rendered reviewable before this Court

⁵ [1998] ZALC 150; (1999) 20 ILJ 388 (LC) at 389I – 390A.

by section 157(3). Unlawfulness, on the other hand, is not arbitrable under the LRA. It is the Labour Court or a civil court that has jurisdiction to adjudicate such a matter. Section 77(3) of the Basic Conditions of Employment Act⁶ (BCEA) gives the Labour Court wide powers to hear disputes “*concerning a contract of employment*” and concurrent jurisdiction with the civil courts on whether the termination of that contract has been validly cancelled or breached.⁷ The Labour Court is a specialist court with overarching supervision over matters falling within labour legislation. This ensures the preservation of coherence in our labour jurisprudence overseen by judges with specialist knowledge and experience. Suppose a narrow interpretation of section 157(3) was taken that the Labour Court could not review an arbitration award determining the unlawfulness of the termination of a contract when it can decide this issue on a direct referral. Such an approach would diminish the specialist nature of this Court and render the court unable to review a matter that at its core is an employment matter and which it has jurisdiction to adjudicate. In this case, it would also result in an incongruous consequence that an arbitration award would need to go on review to two different forums: to the Labour Court and the High Court to attend to fairness and lawfulness, respectively. I therefore agree with the purposive approach taken in *Eskom v Hiemstra NO and others*⁸:

‘[S]ection 157(3) deserves a purposive interpretation. Clearly, it was intended that if arbitration is resorted to in a dispute which the Labour Court could adjudicate, then, if it is processed by private arbitration under the Arbitration Act 1965, the Labour Court would have jurisdiction over the arbitration proceedings. See the remarks in Landman & Van Niekerk Practice in the Labour Courts A13-A14 (revision service 2). I

⁶ Act 75 of 1997. Section 77(3) reads: “*The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.*”

⁷ See: *SA Municipal Workers Union on behalf of Morwe v Tswaing Local Municipality and others* [2022] ZALAC 107; (2022) 43 ILJ 2754 (LAC); *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA) at para 18; *Rand Water v Stoop and another* [2012] ZALAC 32; (2013) 34 ILJ 576 (LAC) at para 33; *City of Tshwane Metropolitan Municipality v Campanella NO and Others* (JA36/2002) [2003] ZALAC 19 (20 November 2003) at para 11.

⁸ (1999) 20 ILJ 2362 (LC) at para 14.

am satisfied that this Court has jurisdiction to hear the review application.'

[32] For these reasons, the review is correctly before this Court.

Whether the pleadings provide for a s33 review under the Arbitration Act

[33] The Applicant has, in its oral argument, abandoned its claim under section 145 and section 158(1)(g) of the LRA, as outlined in its pleadings and heads of argument. It is perplexing that, despite the First Respondent's specific objection in his pleadings to the Court's jurisdiction regarding sections 145 and 158(1)(g), the Applicant persisted with the review under these LRA sections. The Applicant did not plead any reliance in the main or the alternative on section 33 of the Arbitration Act in its replying affidavit.

[34] The first mention of the Applicant's reliance on section 33 of the Arbitration Act appears in paragraph 34 of the Applicant's heads of argument, which reads:

'To conclude this section, the applicant contends that this Honourable Court retains the jurisdiction to review the arbitrator's award and that the review can proceed in terms of section 158(1)(g) of the LRA, alternatively in terms of section 33 of the Arbitration Act. The latter section remains available to the Club because what is before this court is a review.'

[35] Argument is not evidence and is merely persuasive commentary concerning questions of fact and law. This cannot replace pleadings which provide the factual basis and evidence for its case. To allow this would deprive the respondent of the opportunity to reply and refute or comment to the allegations contained in the statements submitted through argument.

[36] The First Respondent argued that the Applicant's belated attempt to introduce reliance on section 33 of the Arbitration Act should not be condoned.

[37] The Applicant, in turn, argued before the Court that the notice of motion provides that this is a review.

- [38] *In Transnet (Ltd) v Hospersa and Another*,⁹ the Court deals with a case where there was a mischaracterisation of the nature of the review, concluding that it is the substance rather than the legal label that must prevail:

‘I turn now to the other preliminary issue. The applicant characterised its application as “Notice of application for a review section 158(1)(g) and 145”. Mr Jammy, for the applicant submitted, correctly, that it was clear that what was intended by the applicant was to reflect that it was an application in terms of section 33 of the Arbitration Act. He submitted further that if Hospersa considered the mis-characterisation in the applicant’s papers as fatally defective to the application, then a formal amendment of the heading was necessary. In my view mis-characterisation of the nature of the review is not fatal. This court has to look beyond the legal label and consider the substance of the application. To look no further than the heading would be unduly formalistic.’

- [39] I agree with this approach. The failure of the Applicant to rely on section 33 in its pleadings does not detract from its intention to review the award.
- [40] The Applicant did mischaracterise the nature of the review, but it intended to review the award, and the jurisdiction is embedded in section 157(3) of the LRA, read with section 158(g).

The Merits of the Review

- [41] Before this Court is whether the Arbitrator misconducted himself, exceeded his powers or committed a gross irregularity in finding that the dismissal of the First Respondent was unlawful. The basis of the Applicant’s complaint against the award seems to span between misconduct, exceeding his powers and a gross irregularity in section 33.

- [42] Section 33(1) of the Arbitration Act provides:

‘33. Setting aside of award

⁹ [1999] ZALC 18 (12 February 1999) at para 7.

(1) Where—

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.’

[43] The National Soccer League Handbook provides, in paragraph 24.1, that the “*Dispute Resolution Chamber may be the subject of an appeal or review to the SAFA Arbitration Tribunal*”. The Arbitrator’s power is derived from the SAFA Disciplinary Code, which provides for the Arbitration Tribunal. Mr Joseph argued that this provision did not apply. However, the pleadings confirm otherwise. In the answering affidavit in paragraph 34.12, the First Respondent submitted that “... *the Arbitrator’s powers are recorded in the SAFA Disciplinary Code, art 81...*” This is not disputed in the Applicant’s reply. In its reply, the Applicant in fact relies on the article, submitting that the proceedings will be heard *de novo*.

[44] The SAFA Disciplinary Code gives the Arbitrator a broad scope of procedural powers:

- ‘9. The arbitration shall be carried out informally and in a summary manner. It will not be necessary to observe strict rules of evidence or procedure.
- 10. The arbitrator shall not be confined to the record before the Appeals Board and shall have the right to call for any papers, records or other evidence as s/he may deem necessary to reach

his finding. The chairpersons of previous Disciplinary Committee or the Appeal Board may be called to explain their decisions at the sole discretion of the arbitrator.

11. Notwithstanding anything contained in these Rules, the powers of the arbitrator shall be wide and shall be determined by the arbitrator at his sole discretion.'

[45] The Arbitrator, in paragraph 10 of his award, confirms the issues to be determined as follows:

- '10. Whilst parties filed extensive heads of arguments with case law and submitted an extensive record with volumes of paper, the issue underpinning the dispute it's a simple and narrow one. The issue is whether the club's unilateral termination of the contract it concluded with the player before the expiry of the contract duration on 30 June 2022 is lawful. Whether or not the termination of the contract was lawful may encompass elements of fairness. This issue is determined with reference to the written contract itself, read together with the other instruments which it embodies.'

[46] The section 33 review test is distinguished from that provided in sections 145 and 158(1)(g) of the LRA in that it is referred to as a narrow test of review. In other words, the reasonableness standard does not apply, and a court will not interfere with a discretion exercised by an arbitrator merely because the finding is erroneous or unreasonable. Courts are, therefore, slow to interfere with private arbitration, distinguishing the considerations that apply to mandatory arbitration by the CCMA, bargaining council or private agency exercising public power and protecting a constitutional right.

[47] The Applicant accepts that the review is in terms of section 33 of the Arbitration Act and, therefore, the test developed by the courts of a reasonable decision maker for purposes of reviews in terms of sections 145 and 158 does not apply. The Applicant's pleadings, framed to provide for a review in terms of section 158(1)(g), read with section 145, refer to the

reasonable decision-maker test. The Applicant's heads of arguments to review on this basis fall away with its abandonment of a review under the LRA. The Applicant, however, pursued in its oral argument that the evidence before the Arbitrator could not reasonably result in him finding that the termination of the contract was unlawful. This misdirection and persistence to squeeze the reasonable decision-maker test into section 33 renders their substantive review an own goal.

[48] The Applicant argued that the Arbitrator misconceived the entire nature of the enquiry and, therefore, committed misconduct by assessing the Applicant's position and FIFA's position on the termination for just cause rather than applying South African law and deciding whether the dismissal was unfair as provided for by section 189 of the LRA. As I understood it, it was also submitted in oral argument that the Arbitrator misconstrued his powers by determining the lawfulness of the retrenchment rather than fairness and, by doing so, committed a latent gross irregularity and exceeded his powers. In other words, in adjudicating the matter as a contractual dispute instead of an employment-related dispute, the Arbitrator indicates that he "mis-appreciated" the facts before him and misunderstood the dispute to be determined.

[49] Both these bases for review fall far short of a reason for review.

[50] In *Stock Civils Engineering (Pty) Ltd v RIP NO and another*¹⁰, the Court, after articulating the test for review based on misconduct as this:

'In my view the following principles emerge: A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable. It is equally implicit in the

¹⁰ [2002] ZALAC 3; (2002) 23 ILJ 358 (LAC) at para 52.

agreement under which an arbitrator is appointed that he is fully cognizant with the extent of a limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result *per se* not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.'

[51] Nothing in the pleadings or arguments suggests that the Arbitrator engaged in improper conduct or acted with any malfeasance or dishonesty. There was no material malfunctioning. The Arbitrator functioned within the vast scope of his duties outlined in the Handbook.

[52] I now consider whether the Arbitrator's consideration of just cause resulted in misconduct.

[53] The basis for considering just cause comes from the Cape Town City Sporting Club (Pty) Ltd Employee Handbook, which has been contractually incorporated into the fixed-term contract between the parties. Rule 41 in this Handbook deals with professional players' contracts and states:

'41.2. A contract of employment of a player must be consistent with South African law, the NSL Handbook, the statutes of SAFA and FIFA, and may not exceed a period of 5 years, inclusive of any option to renew, from its effective date.'

[54] It was not in dispute before the Arbitrator that these instruments in this clause from the Handbook are binding on the parties. The provisions of article 14(1) of the FIFA statutes are explicit. It states that:

‘a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.’

[55] FIFA also states that financial reasons do not constitute just cause.

[56] The Arbitrator correctly frames just cause by stating that it depends on the facts and circumstances of each case. He evaluates the facts of the retrenchment to conclude that the common cause facts by the parties do not demonstrate the existence of just cause by the Applicant when it prematurely terminated the player’s contract. In doing so, he considers the requirements of section 189 and whether proper consideration was given to the items listed in section 189(3), therefore applying the prescripts of South African law, which he found to be applicable, against the contractual backdrop provided by the contract of employment, the NSL Handbook, which expressly provides that the procedure to be followed for operational requirements is set out in the LRA, and the SAFA and FIFA regulations.

[57] The Arbitrator found that the Applicant fell materially short of the procedural prescripts embodied in section 189(3) of the LRA. The Arbitrator concluded that no selection criteria were discussed with the player (and that he was selected as he does not fit into the plans of the coach is not a justifiable reason), they never offered the player any alternatives to termination of his contract, they failed to provide any documentation in support of the Applicant’s alleged financial reasons or to demonstrate their financial distress or any of the information requested by the First Respondent. The Arbitrator concluded that if this was the basis for the retrenchment, the Applicant was wrong in refusing to provide the player with financial information. The Arbitrator stated that the Applicant failed to place any evidence before the DRC to prove that the club was in financial distress, and the DRC was incorrect to rely sweepingly on COVID-19 to assert this. It further stated that reliance on one sponsor pulling funding was insufficient for the Applicant to rely on financial distress.

[58] The Arbitrator determined that:

[43] ... The club has therefore failed simply at the level of common cause facts, and on the requirement of section 189(2) read with section 189(3) to discharge its onus that it was entitled to prematurely terminate the fixed term contract that it concluded with the player. The club's handbook provides in paragraph 31 that termination of contract may be effected due to operational requirements in terms of section 189 of the LRA. This being a contractual terms (*sic*), a failure by the club to comply with clause 31 of the club's handbook and its failure to adhere to the requirements of section 189 of the LRA constitutes a material breach of the contract. The club simply failed to discharge the onus resting on it that it complied with section 189 of the LRA, and that retrenchment was justifiable in the circumstances. Accordingly, the club has failed to demonstrate just cause. This renders the termination of the contract unlawful. The club's premature termination of the player's fixed term contract is a breach of contract entitling the player to contractual damages.'

[59] The Arbitrator uses section 189(3) to determine whether the contractual requirement of good cause has been met against the backdrop of the contractual requirements between the parties. Therefore, the Applicant's contention that the Arbitrator failed to apply South African law is unsustainable.

[60] The Arbitrator went on to find that it was common cause that FIFA statutes provide that termination due to financial reasons does not constitute just cause. As this was the basis for the termination of the contract, this renders the termination unlawful and a breach.

[61] The Applicant argued that it could, under the LRA, terminate the First Respondent's contract for financial reasons in terms of the LRA because the South African legal position takes precedence over the FIFA position. The Arbitrator took the view that the FIFA position does not conflict with South African law and, therefore, should apply. The contention that the Arbitrator

“mistakenly concludes” this is also unsustainable, and even if this was the case, does not meet the test for review in terms of section 33.

[62] In *South African Football Association v Mangope*¹¹, it was held that:

‘The lawfulness of the termination of the contract therefore depends on the justifiability of the reasons for it. Where the employer terminates the contract without lawful reason, the employer will have repudiated the contract permitting the employee to sue for specific performance or damages.’

[63] The Arbitrator found that the Applicant fell short of the contractually entrenched procedure to invoke the operational requirement dismissal and consequently breached the contract. The Arbitrator’s conclusions fall within the realm of the evidence before him and with due regard for the legal principles.

[64] Turning to whether any of the Applicant’s complaints constitute a gross irregularity, *Telcordia Technologies Inc v Telkom SA Ltd*¹² establishes the principles that the courts have applied consistently. The review ground of gross irregularity is procedural and not substantive in that it relates to the conduct of the proceedings and not the decision on the merits. An arbitrator’s conduct will amount to a gross irregularity if it prevents a fair trial. Gross irregularities may be patent and occur during the trial as acts of procedural unfairness or latent and occur in the mind of the judicial officer.

[65] In *Goldfields Investments Ltd v City Council of Johannesburg and another*,¹³ the court stated:

‘These are only ascertainable from the reasons given by him. In neither case need there be intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether the irregularity prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not

¹¹ [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC) at para 38.

¹² [2006] ZASCA 112; [2007] 2 All SA 243 (SCA).

¹³ 1938 TPD 551,560.

been a fair trial. But if a mistake of law leads to a material misconception of the nature of the inquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial.'

[66] The Applicant argued in their pleadings that the Arbitrator materially erred on the facts, "misconstrued the test" and "mis-appreciated" the proceedings before him because the proceedings were *de novo*. This would be construed as a latent gross irregularity. Therefore, his reliance on and reference to the DRC proceedings, as a review, were wrong. This argument cannot be sustained considering the Arbitrator's wide discretion in the Disciplinary Code, including but not limited to, calling previous presiding officers to explain their decisions and determining his powers at his "sole discretion". It was apparent from the arbitration award that the Arbitrator determined the matter as an appeal of the decision of the DRC. It was well within his sole discretion to consider the DRC proceedings and the submissions before the DRC as well as any other submissions that he considered relevant to reaching his decision.

[67] Where an arbitrator's award is not in keeping with what was pleaded and with the common cause facts, it is a gross irregularity.¹⁴ The Applicant also submitted that the lawfulness of the termination of the contract was not before the Arbitrator; only the fairness was to be determined in terms of the LRA, making it reviewable. The overwhelming evidence before this Court, including in the record of the arbitration proceedings, reflects that not only was unlawfulness and unfairness before the DRC to determine but also central to what the Arbitrator was expected to determine. The statement of claim before the DRC claimed compensation equivalent to 12 months' salary for substantive and procedural unfair dismissal and severance pay, as well as a claim that the termination of his contract was unlawful, claiming damages in the sum of R3 630 000. The transcript of the arbitration proceedings reveals that Mr May, who represented the Applicant in the arbitration proceedings, in his opening address at the arbitration, stated the following as the issues to be determined:

¹⁴ See: *Steeledale Cladding (Pty) Ltd v Parsons NO and Another* 2001 (2) SA 663 (D).

‘... I will highlight what my learned colleague highlighted as well. And I do agree that the central issue to be determined is, one, whether there was an unlawful termination of a fixed term contract, and, alternatively, well, I understood it as being on the alternative, also whether there was an unfair termination of a fixed term contract...’

[68] The Arbitrator also engages the parties in the arbitration to confirm his understanding that lawfulness and unfairness are before him.

[69] It is, therefore, quite evident that what was before the Arbitrator was the lawfulness and unfairness of the termination of the First Respondent's contract of employment and that the First Respondent sought remedies that addressed these complaints. Therefore, this submission by the Applicant is quite simply factually incorrect.

[70] The Arbitrator's findings not only did not misconstrue the facts before him, but his findings seem eminently reasonable considering the submissions before him. Even if this was not the case, nothing points to the Arbitrator's conduct constituting misconduct or a gross irregularity, nor did he exceed his powers. The procedural way he conducted the proceedings was well within his mandate, which he executed honestly. The proceedings were fair, and his award considered the substantive evidence and the arguments before him.

[71] Therefore, based on all the reasons set out above, I conclude that the Arbitrator's award is not reviewable.

Costs

[72] The First Respondent sought that this Court deviate from the practice that employment case costs do not follow the result and issue punitive costs against the Applicant.

[73] The awarding of costs in the Labour Court is governed by s 162 of LRA, which provides that, in making orders for payment of costs, the Court must regard the requirements of law and fairness. In deciding whether to order payment of costs, the court may consider, among others, the parties' conduct in

proceeding with the matter before the court and during the proceedings. Therefore, this Court has wide discretion when it comes to the issue of costs.

[74] As held in *Booi v Amathole District Municipality and Others*¹⁵:

‘However, this is a labour matter and this court’s jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters. Rather, what emerges from the provisions of the LRA and the jurisprudence is that courts, when awarding costs in labour disputes, must consider what fairness demands and err on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes. Further, if costs are to be awarded in labour matters, there must be reasons that justify a court’s decision to depart from the position that a losing party should not be mulcted in costs in labour disputes...’

[75] In *Vermaak v MEC for Local Government and Traditional Affairs, North West Province and Others*,¹⁶ the court outlined the principles for awarding punitive costs:

‘... The scale of attorney and client is the highest scale possible that a litigant can be ordered to pay. It is an extraordinary one which should be reserved for cases where there is clearly and indubitably vexatious and reprehensible conduct on the part of a litigant. ... The learned authors of *Erasmus Superior Court Practice* list various circumstances in which the courts have, over the years, awarded costs on an attorney and own client scale. One of the instances is where a party’s conduct has been found to be “unconscionable, appalling and disgraceful”.’

[76] In the present case, the matter was poorly pleaded and didn’t have any chance of meeting the narrow test of review as prescribed in section 33. In my view, that can hardly be described as “unconscionable, appalling or disgraceful”.

¹⁵ [2021] ZACC 36; (2022) 43 ILJ 91 (CC) at para 60.

¹⁶ (JA15/2014) [2017] ZALAC 2 (10 January 2017) at para 13.

- [77] Although punitive costs are not warranted, this case justifies a departure from the ordinary principle that costs do not follow the result. Firstly, despite the First Respondent persisting in its pleadings that the review could not fall under the LRA, the Applicant sought to include reference to section 33 as an afterthought in its heads of argument and only in oral argument agreed to abandon its review under the LRA.
- [78] The Applicant's submission that the Arbitrator exceeded its powers and misconstrued the issues by considering the unlawful termination of the contract when this was plainly before him reflects a poorly considered attempt at reviewing an award, if not disingenuous.
- [79] The Arbitrator's conduct cannot possibly be described as misconduct, nor did he do anything that constituted something that remotely could be a gross irregularity.
- [80] The Applicant's case on the merits was also, truthfully described, hopeless.
- [81] I also consider that the First Respondent is an individual who has had to fund this litigation.
- [82] For these reasons, I exercise my discretion by deciding that a costs award against the Applicant is justified, and the Applicant should be ordered to pay the First Respondent's costs.

Order

1. The jurisdictional issues raised by the First Respondent are dismissed.
2. The review application is dismissed.
3. The Applicant is ordered to pay the costs of the First Respondent.

T Venter
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Brenton Joseph SC
Instructed by:	BDP Attorneys
For the First Respondent:	Adv C Goosen
Instructed by:	Van Gaalen Attorneys

LABOUR COURT