



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other Judges

Case no: JR 2811/2010 and J 2215/10

In the matter between:

THE ONLY PROFFESIONAL MODERN AUTOBODY CC

t/a MODERN COLLISION CENTRE

Applicant

and

MISSA OBO PJ GOUWS

First Respondent

E RICHTER *N.O*

Second Respondent

THE DISPUTE RESOLUTION CENTRE FOR

THE MOTOR INDUSTRY BARGAINING COUNCIL

Third Respondent

Heard: 26 January 2012

Delivered: 14 June 2012

Summary: Review application- failure to file the full record and to substantiate the legal grounds upon which review based.

JUDGMENT

Molahlehi, J

Introduction

- 1] This is an application to review and set aside the arbitration award of the second respondent (the arbitrator) made under case number MINT 23883F, dated 29 September 2010. In terms of that arbitration award, the arbitrator found that the dismissal of Mr Gouws (hereinafter for ease of reference referred to as “the employee”) to have been both substantively and procedurally unfair.
- 2] The employee who was, prior to his dismissal, employed as a general worker was assisted by his union, MISA during the arbitration hearing. MISA is a trade union registered in terms of the Labour Relations Act of 1995 (the LRA). The third respondent is the Dispute Resolution Centre for the Motor Industry Bargaining Council, referred hereinafter as “the DRC.”
- 3] The employee has, on the other hand, applied to have the arbitration award made an order court in terms of section 158 (1) (c) of the LRA.

Background facts

- 4] The employee was prior to his dismissal charged with the following offences:
 1. Failure to report for duty on 20 and 21 April 2010, without obtaining the necessary permission from management.

2.Failure to comply with the company rules and regulations when being absent.'

- 5] It is recorded in the minutes of the disciplinary hearing that the employee pleaded guilty to charges against him.
- 6] In support of its case that the dismissal was for a fair reason, the applicant presented during the arbitration hearing the testimony of two witnesses. The first witness was Mr Higgs who testified that he was approached by one of the employees, named Douglas, who informed him that the employee's fiancée who was pregnant was bleeding.
- 7] Mr Higgs advised Douglas to arrange transport to take the employee to Bethal which would appear to be the home of the employee. That arrangement was accordingly made.
- 8] Mr Higgs further testified that the following day when he enquired about the whereabouts of the employee, he was told that an sms was received indicating that the employee's fiancée who was seven months pregnant was to undergo an operation. He then approached Douglas and enquired as to whether he was aware as to what was happening to the employee. Douglas indicated that he was not aware of anything except that the employee had sent an sms indicating that he would not be coming to work.
- 9] During cross examination, Mr Higgs testified that the employee knew about the procedure which was to be followed if he was to be absent from work. In response to the question during cross examination Mr Higgs indicated that the procedure was not in writing.
- 10] The second witness of the applicant was Mr Boucher, assistant manager, who testified that the employee informed him that his

fiancée started bleeding from 19 April 2010. He testified that he received a telephone call from one of the employee's family members who indicated that the fiancée was in hospital and that the employee was not able to contact him (Mr Boucher).

- 11] The employee testified on his own behalf and stated that his fiancé was admitted for medical treatment at the hospital on 20 April 2010 and had to go for a further check up on 21 April 2010. He further testified that he sent an sms to the applicant indicating his situation.
- 12] The employee denied having pleaded guilty to the charges but did admit to having been absent on those days in question.

The grounds for review

- 13] The applicant contends that the arbitrator committed, a misconduct in relation to the duties as an arbitrator; gross irregularity; exceeded his powers alternatively failed to apply his mind to the relevant issues in the policy and the provisions of the LRA. The applicant contended that there was no rational connection between the evidence before the arbitrator and the conclusion that he reached and therefore the decision reached was unreasonable. In what appears to be the substantiation of the above grounds, the applicant states the following:

‘8.1 The Second Respondent failed to allow the Applicant to be represented by a legal representative during the arbitration proceedings;

8.2 The Second Respond refused to grant the Applicant a postponement after the Applicant's legal representative was disallowed to present the Applicant during the arbitration proceedings;

8.3 The Second Respondent refused the Applicant's request to allow

the Applicant's representative to sit on the proceedings as an observer;

- 8.4 The Second Respondent determined that: 'The Applicant was absent within the knowledge of his employer on 20 and 21 April';
 - 8.5 The Second Respondent ruled that the chairperson of the disciplinary enquiry was biased and in doing so confused the test/requirements of a recusal application with their of establishing whether or not the chairperson was biased in favour of the Applicant;
 - 8.6 The Second Respondent, in finding that the dismissal of the first of was procedurally unfair, failed to consider the disciplinary proceedings in its totality when determining that they Disney's of the First Respondent was procedurally unfair;
 - 8.7 The Second Respondent awards the First Respondent compensation equivalent to 9 month's salary under circumstances where the First Respondent had only been employed with the Respondent for approximately a month.'
- 14] The union, on behalf of the employee, has raised a number of preliminary points against the applicant's application. Before dealing with those points, I am of the view that it is apposite to deal first with the issue of the refusal to allow legal representation and postponement.
 - 15] It is common cause that at the beginning of the arbitration hearing the applicant applied for permission to be legally represented; and when it was refused, it applied for the postponement of the matter in order to afford it the opportunity to prepare.
 - 16] In applying for the representation during the arbitration hearing, the applicant's attorney contended that the applicant was

entitled to be legally represented because its representative Mr Higgs would not be in a position to cross examine the employee; and also because the employee had added advantage, referring to the fact that the employee was represented by a union official who had a legal background.

17] The application for the legal representation was made in terms of Rule 43 of the Rules of the DRC which are similar to Rule 25 of the CCMA Rules.¹

18] The arbitrator in refusing to allow legal representation reasoned that the matter was not complex to warrant legal representation. The arbitrator further found that in as far comparable ability between the applicant's representative and the employee was concerned, the applicant being a member of an employers' organisation could have sought assistance from RMI, the

¹ Rule 25 of the Rules of the CCMA provides:

'(1) (a) In conciliation proceedings a party to the dispute may appear in person or be represented only by-

- (1) a *director* or *employee* of that party and if a close corporation also a member thereof; or
- (2) any *member*, *office bearer* or *official* of that party's registered *trade union* or registered employer's organisation.

(b) In any arbitration proceedings, a party to the *dispute* may appear in person or be represented only by:

- (1) a *legal practitioner* ;
- (2) a *director* or *employee* of the party and if a close corporation also a member thereof; or
- (3) any *member*, *office-bearer* or *official* of that party's registered trade union or a registered *employers'* organisation.

(c) If the *dispute* being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the *dismissal* relates to the employee's conduct or capacity, the parties, despite subrule (1) (b), are not entitled to be represented by a *legal practitioner* in the proceedings unless-

- (1) the commissioner and all the other parties consent;
- (2) the commissioner concludes that it is unreasonable to expect a party to deal with the *dispute* without legal representation, after considering-

- (a) the nature of the questions of law raised by the *dispute* ;
- (b) the complexity of the *dispute* ;
- (c) the public interest; and
- (d) the comparative ability of the opposing parties or their representatives to deal with the *dispute* .

(2) If the party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this rule, the commissioner must determine the issue.

(3) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule.

(4) A representative must tender any documents requested by the commissioner in terms of subrule (2), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employers' organisation.'

employers' organisation.

19] After legal representation was refused, the applicant applied for postponement of the matter on the basis that it needed to prepare for the case. The employee opposed the application on the basis that the applicant was aware long before the set down of the hearing that application for legal representation would be opposed and should have come prepared in case its application was refused.

20] The arbitrator refused to grant a postponement on the basis that the applicant ought to have come prepared to the hearing. The arbitrator also noted that the previous time the matter was postponed it was indicated to the parties that a further postponement would not be allowed.

21] In terms of 43 of the Rules of the DRC, the arbitrator has discretion whether to allow legal representation during the arbitration hearing. The factors which the arbitrator takes into account when considering whether or not to allow legal representation are the following:

22.1 the nature of the question of law raised by the dispute;

22.2 the complexity of the dispute;

22.3 The comparative ability of the opposing parties or their representatives to deal with the dispute.

22] It would appear that the reason for wanting legal representative by the applicant was because of the comparative ability between its representative and that of the employee. The applicant contended that its representative did not have the same comparable ability to those of the representative of the employee because the representative of the employee had an

advantage because he is legally qualified and was assisted by a labour clerk.

23] In substantiating for legal representation, the attorney who represented the applicant at the beginning of the arbitration hearing relied on the following grounds in respect of that application:

23.1 The representative of the applicant would not be in a position to make opening remarks and closing statements.

23.2 The employee's representative was far more experienced than the representative of the applicant.

23.3 The representative of the applicant was not trained in conducting arbitration proceedings.

23.4 The comparative ability to deal with the dispute favoured the employee.

23.5 The applicant was not a member of the employer's organisation.²

23.6 The representative of the applicant would not be able to cross-examine the employee.

23.7 The applicant would suffer prejudice as the employee had a clear advantage.

24] The issue of legal representation received attention in *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO and Others*,³ where the court held that there was no right to legal representation in the arbitration proceedings involving dismissal for misconduct or incapacity. This was confirmed in

² However when applying for the postponement of the proceedings the applicant stated as of the reasons as needing the opportunity to consult with the employers organisation.

³ (2009) 30 ILJ 269 (LAC) at para 10.

Sidumo v Rustenburg the Platinum Mines and Ltd and Others,⁴ where the court held that ‘there is no blanket right to legal representation.’

- 25] In *Afrox v Laka and Others*,⁵ a case decided in terms of the then section 140(1) (b) of the LRA before the 2002 amendments, the court held that:

‘. . . A party who applies for legal representation in terms of s 140 (1) (b) of the Act must seek to persuade the commissioner to conclude that it would be unreasonable for the commissioner to expect such a party to deal with the dispute without legal representation. Such a party must seek to do this with reference to matters set out in s 140 (1) (b) (i)-(iv).’

- 26] It is trite that the arbitrator in dismissal dispute involving misconduct or incapacity has discretion whether or not to allow legal representation. The discretion is exercised properly by having regard to the factors listed in Rule 43 of the Rules. The issue of comparable ability by the parties or their representatives has to be weighed in the context of the complexity of the dispute.

- 27] The other complaint of the applicant is that the arbitrator refused the attorney of the applicant to sit in the arbitration as an observer. This has not been disputed. The point does not however take the case of the applicant any further because there is no indication if this was to be regarded as irregular to what extent did it affect the fairness of the proceedings. The applicant has not set out what prejudice did it suffer as a result of the approach adopted by the arbitrator.⁶

- 28] In my view, the reasoning of the arbitrator in refusing to allow

4 (2007) 28 ILJ 2405 (CC) at para 85.

5 (1999) 20 ILJ 1732 (LC) at para 20.

6 See *County Fair v CCMA and Others* (1998) 19 ILJ 815 (LC) and *Weltevrede Kwekery (Pty) Ltd v CCMA and Others* (2006) 27 ILJ 182 (LC).

legal representation cannot be faulted for unreasonableness or irregularity. The arbitrator reasoned that the applicant could have approached the employers' organisation if it needed assistance in the conduct of its case prior to the hearing. In other words, according to the arbitrator, this is not a case that required legal assistance at best the applicant could have, if assistance was necessary, done with assistance from a representative from the employers' organisation.

29] The facts which were before the arbitrator were simple and straight forward. The employee was dismissed for being absent without authorisation according to the applicant. Those facts could be presented by any person irrespective of whether that person has ever conducted arbitration or not. The background facts are also, in general, very straight forward and most of it undisputed. It is common cause that the employee was absent from work on the days in question. The only question which was to be determined was whether he had authority to do so or not. The other simple issue was whether the employee informed the applicant of his absence in accordance with the rules of the applicant.

30] Turning to the issue of refusal to grant the postponement to afford the applicant an opportunity to prepare after legal representation was refused, the issue is whether the arbitrator acted reasonably in refusing the postponement.

31] The reasons for seeking a postponement by the applicant during the arbitration hearing are the following:

31.1 To have an opportunity to prepare for the case.

31.2 To have an opportunity to approach the employers' organisation for assistance with a person to represent the applicant during the arbitration proceedings.

31.3 That the applicant would be prejudiced if postponement was not granted.

31.4 The applicant had limited experience with arbitration proceedings.

31.5 The postponement on the previous occasions was at the instance of the employee.

31.6 The prejudice that the applicant would suffer if postponement was not granted outweighs that of the employee.

31.7 It would be unreasonable to expect the applicant's representative to lead in evidence the chairperson of the disciplinary hearing who is a qualified attorney.

32] The discretion to grant or refuse a postponement rest with the arbitrator. The duty is on the applicant to make out a case and persuade the arbitrator that there exists a basis upon which a postponement should be granted. The issue of postponement in the DRC is governed by rule 24 which provides for the procedure to follow in applying for a postponement of a hearing.⁷

33] The basic principle governing postponement in the DRC and the CCMA is that a party seeking a postponement in arbitration hearing is seeking an indulgence from the arbitrator and can only obtain that by convincing the arbitrator that indeed a postponement is deserved. In other words there is no right to a

⁷ Rule 24 of the Rules of the DRC provides as follows:

- '1) An arbitration may be postponed-
 - a. by agreement the parties in terms of sub-rule (2); or
 - b. by application and on notice to the other parties in terms of sub-rule (3)
- 2) The DRC must postpone an arbitration without the parties appearing if-
 - a. all the parties to the dispute agree in writing to the postponement; and
 - b. the written agreement for the postponement is received by the DRC morethan seven days prior to the scheduled date of arbitration.
- 3) If the condition in sub-rule (2) are not met, any of the parties may apply in terms of rule 32 (application on affidavit) to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the DRC before the scheduled date of the arbitration.'

postponement and as has been stated in a number of authorities, postponement in arbitration hearings are not to be readily granted.⁸ The approach for dealing with application for postponement in arbitration hearings is different to those in the court of law. The reason why the approach in dealing with postponement in arbitration hearings are slightly different to those in the courts was stated in *Carephone (Pty) Ltd v Marcus NO and Others*⁹ as follows:

‘There are at least three reasons why the approach for application for postponement in arbitration proceedings under the auspices of the commission (including the bargaining councils) under the LRA is not necessarily on a par with that in the courts of law. The first is that arbitration proceedings must be structured to deal with dispute fairly and quickly. Secondly, it must be done with ‘the minimum of legal formalities. And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted.’

34] In the courts of law, postponement is generally granted where the prejudice occasioned by the postponement can be cured by a costs order. In arbitration proceedings there is recognition that costs orders would not necessarily address the prejudice that may be occasioned by a postponement. This is largely so because of the limitation on the compensation that may be awarded in dismissal cases by section 194 of the LRA. The problem of addressing the prejudice that may be occasioned by a postponement through an order of costs was identified in *Coin Security Group (Pty) Ltd v Mshengu and Others*¹⁰ as follows:

‘The submission that there would be no prejudice to the first respondent is without merit. The compensation payable in terms of s 194 (2) of the Act is limited to 12 months’ pay. . . . The first respondent has a material interest in having the matter finalised.’

⁸ See *Voster v CCMA and Others* (2002) 23 ILJ 1899 (LC) at 1904 A-B.

⁹ 1999 (3) SA 304 (LAC) at para 55.

¹⁰ 2001 (22) ILJ 910 (LC) at para 18.

35] Another important principle governing applications for postponements is stated in *Coin Security Group*,¹¹ where the court held that a party applying for a postponement should never assume that a postponement will be granted and therefore should always prepare for the continuation of the hearing in case the postponement is refused. An important observation made in that case which is apposite to the present case is that :

‘It is also noteworthy that the applicant had not made any arrangement to continue with the arbitration in the event that a postponement was refused. Implicit in this is the assumption by the applicant that it has as of right entitled to a postponement and that it arranged its affairs on the basis of the correctness of that assumption.’

36] The important aspect of that observation which needs to be emphasised which serves as an important principle is the following:

‘The applicant was not entitled to assume that a postponement would be granted and only has itself to blame for its failure to make appropriate arrangements for the continuation of the arbitration on the scheduled date.’

37] In line with the views expressed above, the Labour Court sitting in review has adopted a stringent and restricted approach to interfering with the refusal to grant postponements by arbitrators. It is only when a compelling case has been made for interfering with the exercise of the discretion of the arbitrator will the court interfere with the refusal to grant a postponement. In *Real Estate Services (Pty) Ltd v Smith*,¹² the court held that postponement in arbitrations should be granted on ‘less generous basis.’ This approach is informed by the recognition that the LRA requires that labour disputes need to be resolved

¹¹ Id at para 19

¹² (1999) 20 ILJ 196 (LC) at para 12.

expeditiously and thus arbitrators have a wide discretion in granting or refusing to grant a postponement.¹³

38] The arbitrator, in the present matter, rejected, correctly so, as not being good reason for a postponement the fact that the applicant needed time to prepare after the application for legal representation was refused. The applicant ought to have come prepared to continue with the arbitration in case application for legal representation was refused. The reason for the need for the postponement is made even weaker by the fact that the applicant knew that the application for legal representation would be opposed and was made aware of this fact sometime before the set down of the arbitration hearing.

39] I now turn to deal with the preliminary points raised by the employee.

The review application is defective

40] It is contended on behalf of the employee that the review application is defective for want of compliance with the provisions of rule 7A (2) (c) of the Rules of the Labour Court. In terms of Rule 7A (2) (c) an applicant is required to state the grounds of review in his or her founding affidavit. The founding affidavit has to set out the factual and the legal grounds upon which the applicant relies on to have the arbitration award reviewed and or set aside. Those facts and the circumstances surrounding the review may be further augmented in the supplementary affidavit is filed once the record of the proceedings which are challenged have been filed.

41] In *Telcordia Technologies Inc v Telkom SA Ltd*,¹⁴ the Court held that:

¹³ See *Northern Province Development Corporation v CCMA and Others* (2001) 22 ILJ 2697 (LC) at para 20 and *Fraser International Removals v CCMA and Others* 1999 (7) BLLR 689 (LC).
¹⁴ 2007 (3) SA 266 (SCA) at para 32.

[32] The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on opinion information which has become available.¹⁵

42] In the present instance, except for the application for legal representation, the postponement and the awarding of compensation, the applicant has set out very broad and general legal grounds upon which it relies on for its review application. The legal grounds are however not supported by factual grounds or allegations as to why the arbitration award of the arbitrator is susceptible to review. This means that the applicant has failed to place before the court all the material facts upon which it relies on to have the arbitration award reviewed and set aside. In fact the applicant states in its founding affidavit that it does not have to set out all the material facts concerning its review application. This makes the applicant's review application fatally defective. In *MIT Tissue v Theron and Others*,¹⁶ the court held:

'Rule 7A (2) (c) requires that an application for review should set out 'the factual and legal grounds upon which the applicant relies. . . Such failure would normally be fatal.'

43] In *Terblanche v Wiese en Andere*,¹⁷ the then Transvaal Provincial Division dismissed the review application on the ground that applicant's affidavit did not contain sufficient grounds, facts or circumstances as required by Rule 53 (2) of the Rules of the Court. That decision was upheld on appeal. The provisions of rule 7A (2) of the Rules of the Labour Court are similar to those of Rule 53 of the Rules of the High Court.¹⁸

15 See *Lefuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 at para 15.

16 2000 (8) BLLR 947 (LC) at para 23.

17 1973 (4) SA 497 (A).

18 Rule 53(2) of the Rules of the High Court provides that: 'The notice of motion shall set out

In complete records of the arbitration proceedings

- 44] It is common cause that the applicant has filed an incomplete record of the arbitration proceedings in particular in relation specifically to the testimony of the second witness, Mr Boucher. The applicant has also according to the employee failed to file the bundle of all the documents that were presented at the arbitration proceedings.
- 45] The applicant contends that it was not necessary to file the record in the present proceedings “as the grounds for review may be decided by the . . . the Court without . . . having to have regard to the record.” The applicant further relies on the directive of the Judge President which provides as follows:

‘7.3 Applications to review and set aside arbitration awards

Parties are reminded that Rule 7A requires an applicant in a review application to copy, serve and file only those portions of a record that are necessary for the purposes of the review. The filing of unnecessary portions of a record is a factor that may be taken into account for the purposes of any order of costs.’ (my emphasis).

- 46] In *Boale v National Prosecuting and Others*,¹⁹ the Labour Court held that where the applicant fails to produce a full transcript of the record of arbitration proceedings which he or she wishes to review the application should be dismissed, unless it can be shown that the tape cassettes went missing and that it is impossible to reconstruct the record.
- 47] In *Fidelity Cash Management Services (Pty) Ltd v Muvhango*,²⁰ the court held that:

the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected.’

19 [2003] 10 BLLR 988 (LC) para 5.

20 [2005] 8 BLLR 783 (LC) at 785H-I.

‘This court should be placed in a position to assess the different versions as they were placed before before the first respondent via a full transcription of the record or a satisfactory reconstruction thereof.’

- 48] The guidelines to adopt when parties are faced with an incomplete record was set out in *Life Care Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA and Others*,²¹ where the Labour Appeal Court held:

‘[14] This is not to say that much purpose was served by placing the un-transcribed notes before the Court a quo. It is properly to be expected that Court, as in this Court that hand written documents will be accompanied by typed written transcription or copies. The commissioner's hand writing affords ample reason for the settled practise.’

- 49] The court held further that:

‘[17] The reconstruction of the record (or part thereof) is usually undertaken in the following way, the tribunal (in this case the commissioner) and the representatives in this case is ready for the employee and Mr Mvelengwa for the employer to come together, bring in their extent notes and such other documentation as may be relevant. He then endeavoured to the best of their ability and recollection to reconstruct as full and accurate a record of the proceedings as the circumstances allow. This is then placed before the relevant court with such reservations as the participants may wish to note. Whether the product of their endeavours is adequate for the purposes of appeal or review is for the court hearing same to decide, after listening to argument in the event of a dispute as to the accuracy or completeness.’²²

- 50] In *Papane v Van Aarde NO and Others*, the Court held that:²³

‘In the ordinary course the appellant should first have endeavoured to

21 [2003] 5 BLLR 416 (LAC) at para14.

22 Id at para 17.

23 (2007) 28 ILJ 2561 (LAC) at para 27.

establish, by way of further investigation and affidavits, whether or not the missing part was irretrievably lost. If not, then it could have been transcribed. If irretrievably lost, then the parties and the commissioner should have endeavoured to reconstruct the missing part. The appellant has not initiated any of these steps. In the ordinary course, therefore, the Labour Court should have declined to hear the matter on its merits, and should either have dismissed the application or struck it from the roll (with a view to obtaining a full record).'

- 51] There are of course instances where the appropriate and exceptional circumstances may warrant the court considering a review application on the bases of an incomplete record. In that case the review application may be determined on the basis of the arbitration award and any other material that may be before the court. In this respect the court in *Papane* held that:

'I do not understand the decided cases, cited earlier, to preclude this Court from determining an appeal on less than a complete record in an appropriate and exceptional case, provided the Court feels able to do so on the material before it. I consider that this is such a case. In addition to all the factors that I have mentioned, we have a full and detailed summary (in the award) of the evidence of all three witnesses at the arbitration. While less than ideal, I think that summary plus the appellant's cross-examination, which was transcribed in full, is adequate for our purposes. As will appear, the appellant's admissions under cross-examination were not without material significance. Furthermore, the central issues before us fall within a relatively narrow compass. Those issues, together with such subsidiary issues as arise, can in my view be justly resolved on the material before us. I am satisfied that it is the course we should follow in this matter.'

- 52] In the present matter, the contention of the applicant is less than satisfactory as to why the full record was not placed before the court. The suggested approach by the applicant that the matter should be decided on the basis of the arbitration award is unsatisfactory. It would appear that the approach arose as an

24 *Id* at para 30.

afterthought when the applicant was confronted with the problem of the delay in the prosecution of its review. Whilst the arbitrator has summarised the evidence of the witnesses in his arbitration award, it is not easy to evaluate the reasonableness of the arbitration award on the broad and general grounds upon which the applicant is seeking to have the arbitration award reviewed. This is so in particular in relation to the contention of the applicant that there was no rational connection between the evidence before the arbitrator and the conclusion he reached. In this regard, the full testimony of Mr Boucher which the applicant has failed to place before the court was necessary and critical. There is no evidence that the applicant attempted at reconstructing the record in light of the missing portions of the record.

- 53] It is therefore my view that the applicant's review stands to fail on the ground of failure to place before the court a complete record of the arbitration proceedings.

The delay in the prosecution of the review

- 54] It would seem to me for the above reasons and those that follow hereafter that it is not necessary to deal with the issue of the delay in the prosecution of the review application. I will proceed to deal with issue of compensation raised by the applicant and very briefly with the merits of the review.

The compensation awarded to the employee

- 55] The applicant contends that because the employee had been in its employment for a very short period the arbitrator was not justified in awarding the employee compensation equivalent to nine months' pay. The other reason for the complaint about the compensation awarded to the employee is that the arbitrator did not take into account the fact employee another employment

soon thereafter.

56] It is trite that in awarding compensation an arbitrator exercise a judicial discretion. In terms of section 194 of the LRA, compensation to be awarded to an employee in a case of unfair dismissal either because the dismissal is substantively or procedurally unfair or both, must be just and equitable in all circumstances. The test to apply in determining whether compensation should be awarded to an unfairly dismissed employee is fairness. The degree of non-compliance with the principles of fairness would generally determine the amount of compensation to awarded to an employee.²⁵

57] In the present instance, the arbitrator in awarding the compensation to the employee reasoned that:

‘In determining the appropriate relief I take into consideration all the evidence before me specifically the conduct of the respondent and the prejudice suffered by the applicant.’

58] The test to apply in considering whether the arbitrator applied his mind to the appropriateness of the relief he or she made is not whether the arbitrator was correct in arriving at the decision as to what compensation should be made but rather whether his or her decision is one which a reasonable decision maker could not have reached.

59] The arbitrator in the present instance arrived at the conclusion that the appropriate compensation for the employee was nine months because of the unfairness perpetuated on the employee by the applicant. In other words the unfairness with which the applicant treated the employee warranted a compensation

²⁵ See *FAWU and Others v SA Breweries* [2004] 11 BLLR 1093, where the court in dealing with compensation for procedural unfairness held that the degree of deviation from a fair procedure would serve as a guide as to the compensation. In *Smith v CCMA* [2004] 6 BLLR 585, the court held that where the dismissal was procedurally unfair but substantively fair was entitled to nominal compensation.

equivalent to nine months' compensation. In considering the facts and the circumstances of this case, I am of the view that there is no basis to criticise the conclusion reached by the arbitrator for unreasonableness. The applicant was the one who arranged transport to the employee back home because he had an emergency relating to the health of his fiancée. The employee was absent for few days. The reason for being away was that his fiancée who was hospitalised had to undergo an operation. Even if the employee did not contact the applicant himself, on the version of the applicant, the information regarding the reason for not attending work on those days did in way reach the applicant. The applicant was aware at least, that the reason for the applicant not reporting for work was because of the very reason why it (the applicant) had arranged for transport to rush him home. Further, even assuming that no information reached the applicant as to the reason for not attending work, the explanation proffered by the employee was so reasonable that a dismissal in those circumstances was so unfair that could only be addressed by means of a fair compensation that would address the unfair dismissal. This is a case where ordinarily reinstatement could have been ordered but for the employee choosing compensation. It is important to note that the arbitrator found the dismissal of the employee to be both substantively and procedurally unfair.

- 60] The fact that the employee found another job also bears very little relevance to the determination of what compensation should be made where the dismissal has been found to be substantively and procedurally unfair in particular in the light of the decision in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*,²⁶ where the Constitutional Court held that there was no obligation on the employee to mitigate his or her loss after the dismissal.

26 2010 (31) ILJ 273 (CC) at at para 40.

- 61] In my view, for the reasons set out above, there is no basis for interfering with the compensation award made by the arbitrator. The contention of the applicant that the compensation awarded by the arbitrator to the employee was irregular or unreasonable stands to be dismissed.

The merits

- 62] It is also my view that the applicant's application stands to fail even on the merits of the case. In determining whether an arbitrator committed a reviewable irregularity where the challenge is based on the reasoning of the arbitrator the court has to scrutinise the evidence which was presented during the arbitration.²⁷ The applicant says there is no need for the record of the arbitration proceedings as the matter can be determined on the basis of the arbitration award. The arbitration award properly read shows no defect in the reasoning and the conclusion reached by the arbitrator. It is clear from the reading of the arbitration award why the arbitrator made the findings that the dismissal was both substantively and procedurally unfair. The limited record which the applicant has placed before the court also reveals very clearly that the decision of the arbitrator was fair and reasonable in the circumstances of this case.

The costs

- 63] The applicant argued that the review should be dismissed with costs including costs of reading the heads of applicant and drafting the heads of the employee. The applicant on the other hand argued that the employee should not be entitled to costs if he succeeds because the filing of section 158(1) of the LRA was not necessary.

²⁷ See *Fidelity Cash Management Services v CCMA and Others* 2008 (29) ILJ 964 at para 103.

64] It is trite that in the Labour Court costs are granted on the basis of the law and fairness.²⁸ It was argued on behalf of the employee during hearing of this matter that the costs should follow the results and should include the preparation of the heads of argument and the perusal of the applicant's heads of argument. I am not persuaded that costs should apply in as far as heads of arguments are concerned. The same applies in relation to the application in terms of section 158 (1) (c) of the LRA. It would however be unfair not to allow costs to follow the results in as far as the review application is concerned.

65] In the premises, the following order is made:

65.1 The applicant's review application is dismissed with costs.

65.2 The arbitration award of the second respondent is made an order of the court.

Molahlehi J

Judge of the Labour Court of South Africa

²⁸ See section 162 of the LRA which reads as follows:

- '(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.
- (2) When deciding whether or not to order the payment of costs, the Labour Court may take into account-
 - a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and
 - (b) the conduct of the parties-
 - (i) in proceeding with or defending the matter before the Court; and
 - (ii) during the proceedings before the Court.
- (3) The Labour Court may order costs against a party to the dispute or against any person who represented that party in those proceedings before the Court.'

Appearances:

For the Applicant: ADV R.B Wade SC Instructed by Wilson McWilliams Inc.

For the Respondent: Minnaar Niehause instructed by Minnaar Niehaus