



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2326 / 2006

In the matter between:

MINISTER OF HOME AFFAIRS

First Applicant

DEPARTMENT OF HOME AFFAIRS

Second Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL

First Respondent

Z MDLADLA N.O.

Second Respondent

K R MALATJI

Third Respondent

Heard: 26 February 2013

Delivered: ...March 2013

Summary: Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA 1995 – Requires the arbitrator rationally and reasonably consider the evidence as a whole – determinations of arbitrator compared with evidence on record – arbitrator's award only party upheld

Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – assessment of evidence by arbitrator – requires determinations of credibility and balance of probabilities – principles stated – award party upheld

Disciplinary proceedings – Employee leaving disciplinary proceedings at the outset – consequences of such conduct in respect of fairness and relief – principles stated

Disciplinary proceedings – procedural fairness – requirements for procedural fairness – requirements that hearing overall fair – arbitrator's finding of procedural unfairness unjustified and unreasonable – determination of procedural unfairness reviewed and set aside

Misconduct – nature of position of the employee – effect thereof on the charges against the employee – progressive discipline however still required

Dismissal for misconduct / poor performance – difference between the concepts of misconduct and poor performance – principles stated – considering the nature of position of the employee the distinction is not important – corrective action still required – award partly upheld

Unfair dismissal – issue of relief – finding of reinstatement inappropriate – award of

reinstatement set aside – compensation ordered

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This matter concerns an application by the applicants to review and set aside an arbitration award of the second respondent in his capacity as arbitration of the General Public Service Sectoral Bargaining Council (the first respondent). This application has been brought in terms of Section 145 as read with Section 158(1)(g) of the Labour Relations Act¹ ("the LRA"). Also before the Court is an application in terms of Section 158(1)(c) of the LRA under case number J 1710/06 to make the same arbitration award an Order of Court, and both parties were ad idem that the outcome of the review application would determine the outcome of the Section 158(1)(c) application. The Section 158(1)(c) application will therefore not be dealt with separately.
- [2] The third respondent was dismissed by the second applicant on 28 April 2005, on a variety of charges, which will be dealt with hereunder. In an award dated 14 August 2006, the second respondent determined that the dismissal of the third respondent by the second applicant was substantively and procedurally unfair, and directed that the second applicant had to fully retrospectively reinstate the third respondent. In a variation award dated 30 August 2006, the second respondent directed that the back pay payable to the third respondent in terms of the reinstatement award be limited to twelve months' salary in the sum of R533 000,00. It is these determinations by the second respondent that forms the subject matter of the review application brought by the applicants.

¹ 66 of 1995.

Background facts

- [3] The third respondent was employed by the second applicant as the Chief Director: Legal Resources, commencing his appointment in this position on 1 April 1998.
- [4] It was clear from the record that the position of the third respondent was a senior and critical position. In considering and determining the actual role of Chief Director: Legal Services, this position can perhaps be best described using a performance agreement the third respondent himself drew up and signed on 15 September 2003, but which was in the end not signed by the Director General (“DG”). These duties are (1) to ensure the efficient management and administration of the Chief Directorate; (2) to evaluate, train and develop personnel in the Chief Directorate; (3) to ensure the proper utilisation of personnel in the Chief Directorate; (4) to strive towards the Vision and Mission of the Department; (5) to ensure the proper management of Government property; (6) to uphold discipline in the Chief Directorate; (7) to strive towards meeting goals and objectives set out in the business plan for the Chief Directorate; (8) to ensure duties allocated to the third respondent as Programme manager are properly fulfilled; (9) to ensure strict adherence to the code of conduct; (10) to ensure the correct application of department policies, legislation, regulations and manuals through support and monitoring; (11) to practice participative management so as to enhance a healthy working environment ; and (12) to maintain and improve the procedures and processes to ensure efficient workflow. I will accept that in a nutshell, these are the core functions of the position of Chief Directorate: Legal Services, as occupied by the third respondent at all relevant times.
- [5] There was some dispute in the arbitration proceedings as to what the actual duties and responsibilities of the third respondent were. I however consider this dispute to be of no importance, as this matter can be properly determined simply on the basis of what the third respondent says his duties and responsibilities were, as set out

above, and I intend to deal with this matter on that basis.

- [6] In my view, and considering the evidence on record as a whole, there can be little doubt that the position of the third respondent carries with it significant strategic leadership duties. Since the department at stake in this instance is that of legal services, it would actually be appropriate to compare the position of the third respondent to that of the senior/managing partner in a law firm. The position is a very specialised one, and one of the fundamentals of the position is to provide direction and effectively manage staff and resources. The senior partner must be seen as a leader of the team and set an example to all subordinates. The senior partner brings all the necessary skills and experience and expertise to the party, and must effectively impart this on the whole team in such a manner so as to maintain cohesion in the team and enhance service delivery. Finally, the senior partner has to ensure effective communication to the clients (in this case the Department of Home Affairs) of all matters attended to by the team. All these “senior partner” duties and responsibilities must squarely rest on the third respondent.
- [7] There is however a complication in this matter. What the record shows is that in 2003, a new DG was appointed for the second applicant, being Barry Gilder (“Gilder”). The evidence showed that one Dikeledi Thlagale (“Thlagale”) had worked for Gilder before in his previous appointment elsewhere in public service as an advisor of sorts. Upon becoming the DG of the second applicant, Gilder then brought Thlagale into the second applicant. The role of Thlagale was not supposed be a functional position, and it appears she did not report to the third respondent, but reported directly to Gilder. The problem however was that the functions actually fulfilled by Thlagale was principally that of “legal adviser” to the DG, and this meant that she would fulfill most of her functions within the realm of the third respondent, which would, and in the end did, cause tension in Legal Services.
- [8] I have little hesitation in concluding that Thlagale was, to use the well known term,

the “trouble shooter” for Gilder in Legal Services. This is apparent from an address given to all senior management in the second applicant at a team building session on 25 September 2003. With specific reference to Legal Services, Gilder stated that:

‘At the risk of hurting some feelings here, I have to say that the Department’s legal services is not highly regarded in the Department, in the Ministry, with the Portfolio Committee or the legal fraternity out there. It is another area of internal service delivery that needs attention. There are concerns that we do not drive our legislation forcefully and proactively enough, that we do not act decisively and effectively enough in relation to litigation against us, that we are slow to meet deadlines, and that we often submit legislation that has not been thoroughly checked and edited. I have not had enough opportunity to personally pay attention to what the problems may be, but it is an area of our work that needs critical and decisive intervention.’²

There can be little doubt that this is aimed at the third respondent and set the tone of what was to come. It also gives some indication of the role of Thlagale. To put it simply, Thlagale was the eyes and ears of the DG in Legal Services.

- [9] The true role of Thlagale brought her into direct conflict with the third respondent. There can be no doubt that the relationship between them was not cordial to say the least, and at times deteriorated into open hostility. What Thlagale also did in several instances was to assume direct and functional responsibility for particular individual matters, when that should never have been her role and duty. The upshot of all of this was that the third respondent took issue with what he perceived to be interference in his department, but instead of actively engaging the DG in this respect, it appears from the record that he became surly and withdrawn where it came to the active management and control of Legal Services, and viewed most that Thlagale did as being part of an orchestrated plan to get him to resign.

² See Record page 383.

- [10] The evidence on record in the arbitration and the documents on record show a dysfunctional Legal Services department during the course of 2004. In my view, there was little management and control of the department. There was little or no leadership from the third respondent, and there was undue interference from Thlagale. There was no business plan in place, and no proper system to manage what was clearly a substantial volume of litigation. There were instances of Court orders not being complied with, resulting in contempt proceedings against various functionaries. It was a sorry state of affairs which in my view destroyed the credibility of Legal Services. The evidence in this matter actually shows how a Legal Services department should not be managed.
- [11] The end result of the above situation is that the second applicant clearly placed the blame for the state of Legal Services directly on the third respondent, and decided to “throw the book”, so to speak, at the third respondent. The third respondent after all was in charge of Legal Services. On 13 January 2005, the third respondent was presented with a six page charge sheet containing five principal charges each with several categories of sub charges (save for charge 5 which was one charge). Several of these charges simply had no merit, and I deal with all these charges hereunder. Some charges, however, indeed had merit, which I shall also deal with. The disciplinary hearing was initially scheduled for 24 and 25 January 2005.
- [12] The third respondent consulted his attorneys, which attorneys on 17 January 2005 presented the second applicant with a lengthy request for further particulars. The end result of all of this is that the disciplinary hearing could not continue as scheduled and on 26 January 2005, the second applicant then answered the request for further particulars. On 28 January 2005, the third respondent was also presented with all the documents the second applicant intended to use in the disciplinary proceedings.
- [13] The disciplinary hearing then convened on 1 March 2005 before an external

chairperson, Lavery Modise ("Modise"). Modise is an experienced and skilled employment law practitioner. From the outset of the disciplinary proceedings, the third respondent, as represented by his attorney Viljoen, raised preliminary issues about the charges and documents and the like, and requested a postponement. Modise was not inclined to allow unreasonable postponements. He then proceeded, with the agreement of both parties, to analyse the request for further particulars and the response thereto so as to determine whether there was cause in the preliminary complaints of the third respondent. Modise in fact canvassed each and every individual charge and its content with both representatives, with reference to the further particulars and discovered documents, which process, as recorded in Modise's judgment, took most of the day on 1 March 2005. I believe it is important to highlight some of the conclusions Modise came to in this respect. Modise recorded that as part of the documents in fact discovered by the applicant was an "investigative report" about the alleged misconduct of the third respondent giving rise to the charges, which, if the third respondent and his representative had just taken the trouble of reading, would have removed the need to ask for most of the further particulars. As a result of the exercise embarked on by Modise, clarity was achieved on all of the charges and in fact, some of the wording on some charges was changed and four charges were withdrawn. The matter was then postponed for hearing on the merits so both parties could go and prepare.

- [14] The hearing reconvened on 3 March 2005. At the commencement of the hearing, the third respondent objected to the manner in which he had been treated by the employee relations director, Mr Oppert, and in essence contended that Oppert caused that he was deprived of access to documents and that he was removed from the premises. The third respondent again sought a postponement. Modise was however having none of this. Modise instructed that Oppert be called to answer these allegations, and Oppert then indeed came to the disciplinary hearing. Oppert denied the allegations. Modise then asked the third respondent's attorney Viljoen if he was, in the light of what Oppert had said, ready to proceed with the disciplinary

hearing, and Viljoen replied that he was. What the third respondent and Viljoen however then did when the hearing commenced was to simply leave the hearing, alleging that Modise was biased. The hearing then proceeded in the absence of the third respondent.

- [15] Modise then delivered a comprehensive finding, dealing with each charge individually, and in fact even acquitted the third respondent on some charges despite the fact that he was not even there. A useful summary of the ultimate findings on each of the charges and the consequent sanction imposed by Modise can be found at page 279 of the record. Modise recommended in his written finding that the third respondent be dismissed on some charges and receive a final written warning on others.
- [16] It must also be pointed out that instead of participating in the disciplinary hearing, the third respondent approach the High Court in what was simply an ill advised attempt, without any merit, to interdict the disciplinary proceedings. This created further conflict, and the end result was that these High Court proceedings brought by the third respondent were dismissed.
- [17] As stated above, Modise made his findings on the merits of this matter without the participation of the third respondent. The second respondent in the arbitration proceedings conducted at the first respondent however did have the benefit of the third respondent's version and explanation. I intend to determine this matter only on the basis of the charges against the third respondent which in my view had merit. Insofar as I make no reference to other specific charges in this judgment, it can be accepted that I did not consider these charges to have merit and that I uphold the determinations of the second respondent in this respect.
- [18] Also of relevance in the determination of this matter is also what transpired at the arbitration proceedings in respect of the actual conduct of such proceedings. Both

parties gave an opening address, and a pretrial minute was filed. The case of the third respondent was that he was not guilty of any acts of misconduct, and he further contended that in any event all the charges, save for one charge relating to speaking with a newspaper, were actually issues of incompetence/poor performance and were not dealt with as such as prescribed by the SMS handbook relating to poor performance. The third respondent also contended that his dismissal was procedurally unfair on four grounds, which, significantly, did not include an allegation of bias against Modise.³ The third respondent also recorded that the reason why he left the disciplinary hearing was that he was actively prevented from accessing documents he needed for his defense and that he was denied access to his laptop, and when he raised this with the chairperson, it was brushed aside.

[19] In respect of the issue of substantive fairness, the second respondent, if proper regard is had to her award as a whole, found that the third respondent was not guilty of most of the charges, but on other charges she seemed to accept that the third respondent was “guilty”, for the want of a better phrase, but the issue was actually a performance issue. The second respondent in the end found no substance to exist in any of the issues raised against the third respondent, and concluded that the dismissal of the third respondent was consequently substantively unfair. On the issue of procedural fairness, the second respondent rejected all the procedural challenges of the third respondent save for one, being that he was actively prevented from accessing documents in order to prepare his defense, and the second respondent then found the third respondent’s dismissal to be procedurally unfair as a result.

[20] This matter will be determined against the above background.

The relevant test for review

³ See record page 105 – 106.

[21] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁴ Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?' In *CUSA v Tao Ying Metal Industries and Others*,⁵ O'Regan J held: 'It is clear... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[22] The Labour Appeal Court had the occasion to fully ventilate the issue again in *Herholdt v Nedbank Ltd*.⁶ In this judgment, the Court concluded:⁷

'...Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable...

.... Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the

⁴ (2007) 28 ILJ 2405 (CC) at para 106.

⁵ (2008) 29 ILJ 2461 (CC) at para 84.

⁶ (2012) 33 ILJ 1789 (LAC).

⁷ Id at paras 36 and 39.

commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

- [23] The judgment in *Herholdt v Nedbank Ltd* is in any event in line with what Labour Appeal Court had earlier said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*⁸ when specifically interpreting the *Sidumo* test. The Court held that: '[t]o this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'
- [24] As the Labour Appeal Court in *Herholdt v Nedbank Ltd* referred with approval to the judgment in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,⁹ reference is made to the following extract from such judgment, where it was held as follows:

'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the

⁸ (2008) 29 ILJ 964 (LAC) at para 92.

proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[25] In *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others*,¹⁰ the Court held:

'Even where the reasoning of the arbitrator may be criticized, this in itself does not render the award reviewable particularly where the ultimate result arrived at by the arbitrator is sustainable in the light of the record. I must, however, qualify this statement by pointing out that there may be cases where, although the ultimate conclusion reached by the commissioner or arbitrator is reasonable, the reasoning adopted by the arbitrator or commissioner is so flawed (even if the ultimate result is reasonable), that it cannot be concluded that the arbitrator duly exercised his or her functions as an arbitrator by taking due consideration of matters that are vital to the dispute. In such circumstances the reviewing court may well be inclined to review and set aside the award.'

[26] Against the above principles and test, the award of the second respondent in this instance must be determined.

Merits of the review: procedural fairness

[27] The second respondent, as stated above, concluded that the dismissal of the third respondent was procedurally unfair because he had been "actively" denied access to documents he needed for his case. In my view, there are a number of material difficulties with this conclusion. Firstly, and immediately, nowhere on the record is it even indicated what these documents were and in what manner these documents could in fact contribute to the third respondent's defense. This is in essence an issue in the air, so to speak. It was incumbent on the third respondent to at least identify the documents concerned, allude to their contents, and explain why such

⁹ (2010) 31 ILJ 452 (LC) at para 17.

documents were needed. This issue must also be evaluated against the judgment of Modise, which was indeed in evidence before the second respondent, and which recorded that he went through each and every charge at the commencement of the disciplinary hearing with the both parties present and participating, as against the request for further particulars, the response given thereto, and the documents that were discovered, with the end result that all issues were fully clarified so that the hearing could proceed. The second respondent considered none of the above, and thus clearly ignored material evidence where it came to the determination of procedural fairness. Had the second respondent properly, reasonably and rationally considered this issue, she could not have come to the conclusion that she did. In *Pam Golding Properties (Pty) Ltd v Erasmus and Others*,¹¹ the Court said:

‘In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness. The court is also empowered to scrutinize the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including, for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.’

[28] There is however a further important issue in this regard. This is the issue of the third respondent simply leaving the disciplinary hearing. This being the case, the simple point is that the third respondent cannot be seen to complain about procedural fairness, and his refusal to participate in the disciplinary proceedings must entirely negate any contention of procedural unfairness. I am strengthened in my views in this regard by the fact that the third respondent actually had no

¹⁰ (2010) 31 ILJ 1425 (LC) at para 18.

¹¹ (2010) 31 ILJ 1460 (LC) at para 8.

justification at all for leaving the disciplinary hearing. This complete lack of justification is based on three important factors. The first is that Viljoen stated that he was ready to proceed with the hearing, and when the hearing then started, Viljoen and the third respondent walk out. This smacks of mala fides. The second factor is the entirely contradictory explanations by the third respondent himself in the arbitration as to why he left the hearing. At the commencement of the arbitration, the third respondent records that he left because he was denied access to documents, and when he raised this concern, it was brushed aside. In giving evidence, however, the third respondent then stated he left because Modise was biased and had an “attitude” and was “harassing” him. It may be stated that the second respondent herself found no merit in any contention of bias on the part of Modise, and I in any event immediately conclude that there can be no merit in this contention, based on the evidence on record. The third factor is that even if there was merit in the third respondent’s contention that he did not have access to some documents, this did not justify him leaving the hearing, and what he should have done in the hearing was to remain and participate, and then in the hearing record and illustrate what these documents were, why he needed it, and how he was being prejudiced by not having it in the hearing.

[29] The principle at stake in this respect was enunciated thus in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Metrofile (Pty) Ltd*,¹² where the Court said:

‘The right to be afforded a fair hearing before one’s dismissal is indeed an integral part of our law. This right is explicitly recognized by the Act and has been restated in numerous decisions of this court. However once an employer institutes disciplinary action and gives the affected employee notice thereof, it is open to the employee to attend or refuse to attend the enquiry. Should the employee refuse to attend the enquiry such employee must be prepared to accept the consequences thereof, one

¹² (2004) 25 ILJ 231 (LAC) at para 55.

of which is that the enquiry will proceed in his absence and adverse findings may be made.'

[30] Also in *Fidelity Cash Management Service*,¹³ it was held at follows:

'The reason why, generally speaking, an employee is not obliged to attend his disciplinary hearing is that a disciplinary hearing is there to comply with the audi alteram partem rule before the employer may take a decision that may affect the employee or his rights or interests adversely. An employee can make use of that right if he so chooses but he can also decide not to exercise it. However, if he decides not to exercise that right after he has been afforded an opportunity to exercise it and a decision is subsequently taken by the employer that affects him in an adverse manner, he cannot be heard to complain that he was not afforded an opportunity to be heard.

The fear that the employer may take an adverse decision against the employee without the employee stating his side of the story is the reason why employees normally attend their disciplinary hearings. All an employer can do, if an employee fails to attend his disciplinary enquiry, is to proceed with the disciplinary enquiry in the employee's absence and make such decision as he considers to be right in the light of all the evidence before him.'

[31] The conduct of the third respondent in the current matter is in my view comparative to what happened in the case of *Dipaleseng Municipality v SA Local Government Bargaining Council and Others*.¹⁴ The Court held as follows, which in my view can equally be applied to the current matter so as to illustrate the true reason why the third respondent left the disciplinary and the consequences of such conduct:

'The third respondent overplayed her hand when she terminated her attorney's mandate on realizing that her advocate was barred from representing her at the

¹³ *Fidelity Cash Management Service* at para 40 – 41.

¹⁴ (2008) 29 ILJ 2933 (LC) at para 25.

hearing because of his intransigent behaviour. This was a ploy, no doubt, to influence the chairperson to reverse his decision regarding Advocate Mathee's participation at the disciplinary hearing. When this failed, she walked out of the disciplinary hearing in the hope that the matter would once again be postponed. In doing so, she took a gamble and must bear the consequences of the fact that it boomeranged on her.'

In my view, the third respondent wanted yet another postponement when the hearing reconvened on 3 March 2005. When it was clear that Modise was not going to allow this, the third respondent actually gambled on leaving the hearing, and assumed that if he did so, the hearing would rather be postponed. This tactic backfired on him when Modise decided to proceed with the disciplinary hearing. The third respondent now simply has to live with the consequences of this tactic.

- [32] The judgment in *Old Mutual Life Assurance Co SA Ltd v Gumbi*¹⁵ can also be equally applied to the current matter, and I refer to the following pertinent extract from the judgment:

'All these facts ineluctably lead to the conclusion that the employee wanted to have the hearing aborted so as to prevent the fulfillment of the condition - a fair disciplinary hearing - upon which dismissal by the employer was contractually dependent. In our law a contractual condition is deemed to have been fulfilled where a party deliberately frustrates its fulfilment. By analogy this may also be the position in a statutory setting. In *Scott and Another v Poupard and Another* 1971 (2) SA 373 (A) Holmes JA said at 378G-H:

"I come now to the issue of fictional fulfilment of the condition upon the occurrence of which the money was to be paid and the shares to be transferred to Poupard and Lobel, ie to say, the grant of mining rights

In essence it is an equitable doctrine, based on the rule that a party cannot

take advantage of his own default, to the loss or injury of another. The principle may be stated thus: Where a party to a contract, in breach of his duty, prevents the fulfilment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."

See also *SA Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) in paras 33-36.' (emphasis added)

- [33] Finally, in this regard, I wish to refer to what the Court held in *Foschini Group v Maidi and Others*¹⁶ which I respectfully agree with and conclude can be applied directly to the current matter:

'On the evidence accepted by the arbitrator, the respondents' refusal to attend the disciplinary hearing was unreasonable. Assuming the objection to a material witness, being the enquiry initiator, to be a valid one, the respondents should nonetheless have participated in the hearing and placed their objections on record. It is a trite principle in our law that a party who chooses not to attend a hearing, does so at his or her own peril, and is precluded from later complaining about the outcome of the hearing.'

- [34] In the end, and surely, the failure of an employee to attend the disciplinary hearing and participate in the same has to have consequences for the employee. Otherwise, what is the point of the disciplinary process? At the very least, this consequence has to be that the employee cannot contend that the dismissal of the employee was procedurally unfair. The fact of the matter is that in this case, the employee was afforded more than sufficient time to prepare for the disciplinary hearing, and was properly notified of the same. In addition, and with the assistance of the presiding officer in the disciplinary hearing, clarity was obtained on all of the charges and the

¹⁵ (2007) 28 ILJ 1499 (SCA) at para 16.

¹⁶ (2010) 31 ILJ 1787 (LAC) at para 58.

hearing was postponed for two days for the parties to then prepare to proceed on the merits. The third respondent was further at all relevant times legally represented in the disciplinary hearing. Even if there was merit in what the third respondent said was wrong in the disciplinary proceedings, this simply did not justify him leaving the disciplinary hearing. All of these critical issues were entirely ignored by the second respondent in coming to her conclusion that the third respondent's dismissal was procedurally unfair. As a result, the second respondent's award on the issue of procedural unfairness is unsustainable, and consequently reviewable.

- [35] I wish to conclude on this issue by saying something about the nature of the issues raised by the third respondent as procedural irregularities. In my view, these kind of procedural objections can frequently be found in disciplinary proceedings in the public service, and this would more often than not lead to material delays in the conclusion of such disciplinary proceedings. Normally, these delays are also on full remuneration of the employee being subjected to discipline, at great expense to the taxpayer. This is not in line with the objectives of the LRA, and should be discouraged. I fully align myself with what the Court said in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*,¹⁷ where it was held as follows, and which in my view should equally be applied to disciplinary proceedings in the public service:

'It follows that the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision.

This approach represents a significant and fundamental departure from what might be termed the 'criminal justice' model that was developed by the Industrial Court and applied under the unfair labour practice jurisdiction that evolved under the 1956

Labour Relations Act. That model likened a workplace disciplinary enquiry to a criminal trial, and developed rules and procedures, including rules relating to bias and any apprehension of bias, that were appropriate in that context.

The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognize that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions is found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgment that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.

The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.

....

¹⁷ (2006) 27 ILJ 1644 (LC) 1651-1652.

On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge-sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like'

- [36] I, therefore, conclude that the second respondent's finding of procedural unfairness in respect of the dismissal of the third respondent falls to be reviewed and set aside.

Merits of the review: substantive fairness

- [37] As stated above, I intend to limit the issues of substantive fairness I will deal with in this judgment to only those charges which I believe have merit. I reiterate that where I do not specifically deal with and determine the merits of a particular individual charge, it must be accepted that the charge had no merit and that the second respondent's conclusion of the third respondent being not guilty of that charge must be considered to be properly and rationally arrived at, and must thus be considered to have been sustained.
- [38] The first issue I wish to deal with is the charge against the third respondent with regard to his failure to provide strategic leadership in Legal Services. The second respondent found that the third respondent was not guilty of this charge. I, however, do have a number of difficulties in respect of this conclusion of the second respondent. The reason for my difficulties is found in the simple issue of how the second respondent came to her determination. The second respondent in essence concluded that she found the third respondent not guilty of this charge simply and only because the best persons to testify about this charge was the DG or the third respondent's subordinates, and not Thlagale who testified on this aspect. This in my view is simply not a proper determination of the charge, or the evidence. The second respondent in essence completely shirks the evidence of Thlagale, and does not determine or deal with her evidence at all. This is a material failure. The fact is that Thlagale was the eyes and ears of the DG, as stated. She functioned in

Legal Services on a daily basis, and was in a proper and informed position to give evidence on the charge. The third respondent, in presenting his case in evidence, often directly disputed and contradicted what Thlagale was saying. As a result of the aforesaid, the second respondent was compelled to determine if the evidence on the issues Thlagale testified about was credible or not, whether the third respondent's evidence on these versions was credible or not, and whether Thlagale's versions or that of the third respondent was to be preferred. The second respondent completely failed to do so. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni No and Others*:¹⁸ 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.' If the second respondent at least made some or other credibility finding or preferred the evidence of one witness over another, there would be little basis to interfere,¹⁹ but unfortunately she made no such finding. I refer to the following extract from *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,²⁰ where the Court, in dealing with issues of determining evidence by arbitrators held as follows, which in my view can equally be applied to the current matter:

'To resolve the factual controversy between Carstens and Nkunzi, the commissioner had to embark upon a balanced assessment of the credibility, reliability and probabilities associated with their respective versions. But the commissioner did nothing of the sort - and instead simply plumbed for Nkunzi's version. In the result, the award is bereft of any reason whatsoever for why Nkunzi "was able to establish" her version on this score.'

¹⁸ (2011) 32 ILJ 723 (LC) at para 9.

¹⁹ see *Rex v Dhlumayo* 1948 (2) SA 677 (A); *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others* (2005) 26 ILJ 876 (LC); *Scopeful 21 (Pty) Ltd t/a Maluti Bus Services v SA Transport and Allied Workers Union on behalf of Mosia and Others* (2005) 26 ILJ 2033 (LC); *Custance v SA Local Government Bargaining Council and Others* (2003) 24 ILJ 1387 (LC)). In this regard, I further refer to *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 485 (LC) at para 18.

²⁰ Id at para 20 ; see also *Network Field Marketing (Pty) Ltd v Mnghezana NO and Others* (2011) 32 ILJ 1705 (LC) at para 18 – 19.

[39] I conclude in this respect with the following reference from *Sasol Mining (Pty) Ltd v Ngqeleni No and Others*,²¹ which in my view is principally the problem with the award of the second respondent in this instance:

‘... Some commissioners appear wholly incapable of dealing with disputes of fact - their awards comprise an often detailed summary of the evidence, followed by an ‘analysis’ that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner.’

[40] As the second respondent made no such credibility finding, this now compels me to do so, in order to determine whether the second respondent’s finding on this charge is fully and properly supported by the evidence on record. A proper consideration of the evidence on the record compels me to conclude that the second respondent’s finding on this charge cannot be sustained, for the reasons set out hereunder.

[41] The evidence of Thlagale was consistent on this issue of the third respondent’s failure to provide strategic leadership. Her evidence, even under rigorous cross examination, remained unwaivering. It is also crucial to point out that under cross examination, the case put to Thlagale to answer was in essence that the second respondent had no obligation to provide strategic leadership, with very little emphasis on the fact that the allegation that he did not provide it was untrue. When the turn of the third respondent came to testify, he placed no reliance at all on the issue that he had no obligation to provide strategic leadership, and considering his own view of the nature of his position, rightly so. The third respondent was adamant

²¹ Id at para 7.

that at all times he indeed provided proper strategic leadership, which Thlagale was never really confronted with under cross examination. There is thus a clear contradiction between the defense presented under cross examination of Thlagale, and the actual case then presented by the third respondent in evidence. This must have a material negative impact on the assessment of the evidence of the third respondent. Reference is made to *ABSA Brokers (Pty) Ltd v G N Moshoana N.O. and Others*,²² where it was held as follows:

‘It is an essential part of the administration of justice that a cross-examiner must put as much of his case to a witness as concerns that witness (see *van Tonder v Killian NO en Ander* 1992 (1) SA 67 (T) at 721). He has not a right to cross-examination but, indeed, also a responsibility to cross examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness’ attention must first be drawn to a particular point on the basis of which it is alleged that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation (see *Zwart and Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19(A)). A failure to cross-examine may, in general, imply an acceptance of the witness’ testimony...’

- [42] In considering the evidence of the third respondent as a whole, and as it appears from the arbitration record, I am compelled to conclude that it left much to be desired. He was argumentative and on occasion quite insulting and contemptuous towards his cross examiner. He would often not answer questions directly and there were numerous instances of versions he testified to not having been put to Thlagale under cross examination, and when this was pointed out to him, his answer was that this did not have to be put to Thlagale under cross examination because he (the third respondent) was testifying about it now. In my view, and where it came to whether the evidence of Thlagale should be preferred or that of the third respondent, the only proper and reasonable conclusion could have been that the

²² (2005) 26 ILJ 1652 (LAC) at para 39; See also *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (*supra*) footnote 13; *Masilela v Leonard Dingler*

evidence of Thlagale had to be preferred, and this must mean that indeed the third respondent provided no strategic leadership as Thlagale indeed testified to be the case.

- [43] However, any case is not just determined on the basis of credibility. As was said in *SFW Group Ltd and Another v Martell et Cie and Others*.²³

‘The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.’

- [44] Dealing then with the issue as to whether the third respondent actually provided strategic leadership as an issue of probability, I have little hesitation in answering this question in the negative. Having regard to the evidence as a whole, and even the third respondent's own evidence, the most natural and plausible inference to be drawn from the evidence is that the third respondent did not provide strategic leadership. I say this firstly because the state of Legal Services in itself must prove this. The third respondent was where the buck stopped in Legal Services, and there is simply no way in which this department could deteriorate to where it was if the third respondent had provided strategic leadership. The fact is that some of the individual charges against the third respondent were symptoms of this very failure. These are issues such as the lack of proper support to subordinates, the lack of a proper case management system, the contempt of Court issues referred to, the fact that there was no business plan, and the fact that subordinates appeared to function without any proper control. The third respondent was also clearly aggravated by Thlagale in his domain who he viewed as being earmarked to take over his position, and this negatively affected his behaviour in not providing such leadership as well. In the end, Legal Services simply could not have been as dysfunctional as it was if

(Pty) Ltd (2004) 25 ILJ 544 (LC).

²³ 2003 (1) SA 11 (SCA) at para 5.

the third respondent was fully engaged in the department providing strategic leadership.

- [45] In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport*,²⁴ it was held that the inference drawn from the evidence just has to be “the most natural or acceptable inference”, and not the only inference. In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*²⁵ it was held as follows:

‘The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).’ (emphasis added)

- [46] In *Govan v Skidmore*,²⁶ where the Court held that it was trite law that: ‘.... in general, in finding facts and making inferences in a civil case, the court may go upon a mere preponderance of probability, even though in so doing does not exclude every reasonable doubt, so that one may, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one’. The judgment in *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*²⁷ adds a further dimension to the enquiry, where it was held as follows:

‘The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603

²⁴ (2000) 21 ILJ 2585 (SCA) at para 9.

²⁵ 1985 (3) SA 916 (A) at 939I-J.

²⁶ 1952 (1) SA 732 (N) at 734A-C.

²⁷ (1994) 15 ILJ 1057 (LAC) at 1064C-E.

(A)). In the present case however no alternative inferences have been advanced which have a foundation in the evidence.'

- [47] What alternative inference does the third respondent then actually advance? The third respondent's alternative inference is somewhat perplexing. He contends he did provide proper strategic leadership at all times, in the face of the state of Legal Services. He then goes further and contends that what is happening to him was firstly because the DG wanted him to resign so Thlagale could take over his position, secondly because he was a Christian and "they" did not like Christians, and lastly because he was not willing to live with corruption. Most of the details raised by the third respondent when giving evidence in respect of these allegations were never put to Thlagale under cross examination, and these allegations were in any event entirely unfounded. In effect, and to put it simply, what the third respondent is actually suggesting is that the DG of Home Affairs is deliberately allowing the Legal Services department to deteriorate into a state of disarray with contempt applications being brought inter alia against the Minister just because the DG dislikes Christians and wants his crony (Thlagale) to get the third respondent's job. I consider this proposition to be ludicrous. The ultimate contradiction of these contentions of the third respondent however lies in the fact that on the undisputed evidence, Thlagale did not even apply for the third respondent's position after he was dismissed, despite the fact that she did act in the position after he left. In effect, therefore, the third respondent had no proper explanation for the state of his own department for which he was ultimately responsible.
- [48] In the circumstances, I conclude that the conclusion of the second respondent in respect of charge 1.1, being the charge relating to the third respondent's failure to provide strategic leadership, is simply not a conclusion a reasonable decision maker could come to, having regard to the evidence if properly and rationally considered as a whole. The conclusion of the second respondent that the third respondent is not guilty of this charge cannot be upheld, and falls to be reviewed and set aside. In

my view, the proper conclusion is that the third respondent is indeed guilty of this charge.

- [49] The next charge I wish to deal with relates to the charge that the third respondent failed to adopt and implement a business plan. There was much debate about this issue in the arbitration. There were conflicting versions as to what happened in the business plan meeting, and about the fact that Thlagale was present in such proceedings when she according to the third respondent should not have been there. The third respondent in his evidence also made it clear that he was unwilling to work with the facilitators appointed to facilitate the business plan, and he took strong exception with the manner in which the business plan was being arrived at. The upshot of all of the above is that there was no business plan. The third respondent's own version about his position, as set out above, is that he had to manage his department in terms of a business plan. It simply does not matter who else the third respondent sought to blame for this failure, which was what he was consistently doing, as the simple fact is that the direct duty rested on the third respondent to formulate and implement a business plan and so give guidance to all his subordinates in terms thereof. The third respondent also contended he was told by the DDG to hold the business plan in abeyance until HR had concluded their business plan. This explanation is entirely unacceptable, as I have difficulty in understanding how HR can formulate any business plan relating to employment resources if the third respondent did not first determine what he wanted for his department in his own business plan. Furthermore, even if there is truth in this contention of the third respondent, he simply could not leave it there, and had to put pressure on HR to finalise their plan so he could do his, and pursue the matter further if HR did not act timeously. Legal Services was the third respondent's department and he had to take all reasonable steps to ensure it was managed properly. In the end, and to simply plod along for a year without a business plan because of the above reasons is entirely unacceptable. I would have expected someone with the acumen and experience of the third respondent, who was fully in

charge of legal services, to have done a lot more to pursue the issue with the DG or even the Minister where he believed he was hindered in, or obstacles were placed in his way, in respect of the formulating and implementing of a proper business plan.

[50] The second respondent completely failed to properly determine this charge. The second respondent in essence ignored virtually all the evidence on record in this regard and failed to consider any probabilities. In fact, the only reasoning by the second respondent in finding the third respondent not guilty of this charge is contained in one paragraph²⁸ which, with respect to the second respondent, makes little sense. Of concern to me is that the second respondent finds that the second applicant was seeking to rely on hearsay evidence and should have called the DDG to testify, but then in the same breath concludes that where the third respondent was similarly relying on hearsay evidence to substantiate his version, and the second applicant similarly refuted this evidence, the duty was on the second applicant to call a witness to rebut this. This is clearly not an even handed and fair determination of the evidence, and this approach as far as I am concerned is simply unacceptable. Once again also, the second respondent makes no credibility findings. Therefore, and applying the same principles of probability and credibility as referred to above, it is my conclusion that the only rational and reasonable conclusion that can be drawn from the evidence as a whole is that the third respondent indeed failed to formulate and implement a business plan, when he was obliged to do so.

[51] In the circumstances, and in respect of charge 1.2, being the issue of the business plan, it is my view that the second respondent's finding that the third respondent was not guilty of this charge is also not a conclusion a reasonable decision maker could come to, having regard to the evidence if properly and rationally considered as a whole, and this conclusion equally falls to be reviewed and set aside. I find that

²⁸ Para 6.16 of her award at record page 71.

the proper conclusion is that the third respondent was indeed guilty of this charge as well.

[52] The next issue to be addressed related to the third respondent's failure to implement a case management system (charge 2.1). In this regard, it was common cause that there was no case management system. There was a Q & A process being used, but even the third respondent conceded it was not a case management system. Thlagale stated that the Q & A system was not effective and could be manipulated. The third respondent disputed this, but conceded the Q & A system was far from ideal, and a case management system was needed. The third respondent's further evidence on the case management is however disturbing. The third respondent stated that he does not know what case management system to implement as he was not given one to implement. The third respondent thus contended that he could not be blamed for the absence of a case management system as he was not given one. The third respondent also, in what would be somewhat contradictory to that which the first contended as set out above, stated that he asked for a budget for a case management system but this was not entertained. Once again, I am compelled to point out that the third respondent simply did not discharge his core functions in this respect. As has been set out above, the third respondent himself described one of his core duties to be the implementation and maintenance of a case management system. Considering that he was the head of the department, he had the duty to either find or project manage the design of such a system, and if a budget was needed, to drive the process of getting the necessary funds. A proper case management system was critical to the effective and proper functioning and control of Legal Services. I am left with the distinct impression from the evidence on record that the third respondent treated this issue with what can only be described as indifference.

[53] In dealing with this charge, the second respondent accepted the contention that the third respondent was given no case management system to implement. In my view,

this clearly indicates that the second respondent did not understand or appreciate the actual issue. The actual issue was it was the very duty of the third respondent to find or design a case management system, and not that he be given one to implement. The second respondent clearly also failed to comprehend the importance of a proper case management system, and the fact that this was actually one of the third respondent's core strategic functions. The second respondent also had no regard to what was really the third respondent's indifference to this issue. Once again therefore, the second respondent entirely negates what is crucial evidence and simply does not consider or determine such evidence. The second respondent also fails to comprehend and determine the actual issue before her. In this respect, I refer to what was said in *F N Marketing Distribution Services v Commissioner Matee and Others*²⁹ where it was held as follows, in finding that an arbitration award was indeed reviewable:

'In my view the statement by the arbitrator that there is 'no evidence to suggest' the employee's guilt, taken together with his failure to refer to and to analyse key portions of the evidence referred to above, demonstrates a failure on the part of the arbitrator to direct his mind to material, and largely common cause, evidence...'

- [54] The second respondent goes further and concludes that this issue of the case management system and all the charges relating to the control of and management of cases was in any event really a performance based issue and not an issue of misconduct. The second respondent held that the poor performance process in the SMS handbook was not followed. For this reason, the second respondent concluded the third respondent was not guilty of these charges. In assessing this conclusion, the question must firstly be what is then the difference then between misconduct and poor work performance? The distinction can be found in the concept of wilfulness or deliberateness. In the case of misconduct, it must be present, whilst in the case of poor performance, it must be absent. In *Robinson v*

²⁹ (2002) 23 ILJ 1413 (LC) at para 14.

Sun Couriers (Pty) Ltd,³⁰ it was held in a CCMA arbitration award that the distinction lies in the fact that poor performance does not require an investigation into culpability, but in the case of misconduct, it does. I agree with this reasoning. The CCMA in *Robinson v Sun Couriers* also referred to the preceding judgment of the Labour Court between the same parties, being that of *Sun Couriers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,³¹ where it was held that

‘Referring to commentaries on the concept in two articles, Grogan *Cracking the Code - The Code of Good Practice: Dismissal* (1997) 13(6) Employment Law 118 and Le Roux and Van Niekerk *The SA Law of Unfair Dismissal*, the applicant emphasizes the distinction between misconduct, described by Grogan as ‘improper behaviour over which the employee has control’ and incapacity, which Le Roux and Van Niekerk define as ‘behavioural conduct which is not intentional or which is not negligent.’

As a general proposition therefore, poor performance would not include a failure to comply with company rules and policies, where the employee is able to comply with such rules but does not. Pursuant to the above reasoning, and where the employee has failed, which would be the case in both misconduct and poor performance proceedings, the crisp question thus is what would be the reason for the failure, and it is this issue that needs to be determined to make the distinction. The following was said in *Robinson v Sun Couriers (Pty) Ltd (supra)*³², which I agree with:

‘The fact that there is such a positive obligation on the employer to establish the reasons for the failure to perform is also important for purposes of distinguishing between misconduct type of failures and incapacity type of failures. This distinction is no doubt a difficulty employees are often faced with and having regard to the rather rigid approach laid down by the Labour Court, an incorrect categorization of the

³⁰ (2003) 24 ILJ 655 (CCMA).

³¹ (2002) 23 ILJ 189 (LC) at para 11.

action against an employee will almost inevitably be fatal from an employer's perspective.'

[55] I accept that it may not be easy to make this distinction. The commissioner in the CCMA arbitration award in *Thompson v Samaki Beach Lodge*³³ was alive to this, and I fully agree with the following extract from such arbitration award:

'... There is an extremely fine line between misconduct and incapacity (or operational requirements) in some instances and that line is not easily drawn in many instances. As proper categorization of a dispute will determine what course of action will be taken against an employee, there is no doubt that proper categorization is extremely important. A proper distinction should be made between a misconduct enquiry and a poor work performance: incapacity enquiry as the latter does not require any investigation into the issue of culpability. See in this regard *Sun Couriers (Pty) Ltd v CCMA and Others* (2002) 23 ILJ 189 (LC). But, often, the same conduct may give rise to more than one categorization and employers may (not unreasonably) make mistakes in their attempt to categorize the matter as being of misconduct or poor performance. However, the employer's failure to correctly categorize the matter does not change the fundamental questions: was there a substantively fair reason for the dismissal and whether an appropriate and fair procedure had been followed before the dismissal. In this regard see *SABC v CCMA and Others* [2006] 6 BLLR 587 (LC).

On thorough consideration of the evidence it is clear to me that the issue in dispute is that of misconduct. It has never been the case of the respondent that the applicant is believed to be incapable of performing her duties, nor was it raised by the applicant at the disciplinary enquiry that she believes the matter to be one of her not being able to do her job.'

[56] Recently, the Court in the judgment of *Transnet Freight Rail v Transnet Bargaining*

³² Id at 670F-H

³³ (2009) 30 ILJ 1396 (CCMA) at 1417D-J.

*Council and Others*³⁴ also had occasion to deal with this issue as well, and held as follows:

‘Negligence can be defined as ‘a failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person.

As is obvious from that definition, there is sometimes an overlap between poor work performance and negligence. Negligence can be treated as either incapacity or as misconduct, depending on the circumstances. The basis for culpability in negligence cases is the lack of care and/or diligence accompanying the act or omission. The test for negligence is an objective one, namely whether the harm (or potential harm) was foreseeable and whether a reasonable person would have guarded against its occurring. *Grogan Workplace Law* at 122-3; *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 28 ILJ 307 (SCA); *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-H.’

The Court concluded as follows, which dictum in my view can be applied directly to the current matter:³⁵

‘Had the arbitrator applied the relevant legal principles distinguishing between misconduct and incapacity, he would have concluded that fourth respondent was guilty of misconduct and that the EAP was not, on the facts, an appropriate avenue for dealing with the matter. Accordingly, there was no obligation or basis for the employer to have referred fourth respondent to the EAP or to address the matter by means of counselling.

In addressing the factual dispute before him on the incorrect application of the relevant legal principles, second respondent committed a gross irregularity of a material nature in the conduct of the arbitration proceedings, thereby resulting in applicant not being afforded a fair hearing at arbitration. For the same reasons,

³⁴ (2011) 32 ILJ 1766 (LC) at para 44 – 45.

³⁵ *Id* at para 56 – 57.

second respondent's arbitration award amounts to a decision that a reasonable decision maker could not make.'

- [57] In my view, the distinction between poor performance and misconduct can be established by the asking of two simple questions when it has been established that an employee indeed failed. The first question is "[d]id the employee try but could not?" and the second question is "[c]ould the employee do it, but did not?" If the first question is answered in the affirmative, then it has to be poor performance, because an employee that honestly (for the want of a better word) seeks to achieve what is expected of him or her but is unable to do so is incapacitated and would not behave wilful or indifferent or fail to apply the necessary care. If the second question is answered in the affirmative, then it has to be misconduct, as this would be a situation where the employee is fully able to do what is required not to fail, and such failure could therefore only be because of indifference or wilfulness or a failure to take care. The problem in this matter is that the second respondent did not apply any of the above legal principles. The second respondent provided no reasoning or motivation at all for coming to her conclusion that the issues were actually that of poor performance. She simply "agrees" with the third respondent's contentions in this regard but does not say why.
- [58] Whilst giving evidence in the arbitration, Thlagale was indeed confronted with the issue of the charges against the third respondent being principally based on issues of poor performance and not misconduct. Thlagale appeared to be alive to the distinction between these two issues and actually testified to the effect that this was not a case what the third respondent could not fulfil the duties, but this was a case where he did not want to do the duties. Thlagale stated that the third respondent did not want to play with the team, so to speak. Her evidence in this regard remained consistent, and there was no reason not to have accepted it. In giving his evidence, the third respondent did not suggest there were any failures on his part resulting from his inability to fulfil his duties. To put it simply, the case of the third respondent

when giving his evidence was not that he tried and could not. Quite the opposite, his case in giving evidence was that he properly did all he could and no failure was his fault – it was all the fault of other persons such as the DG and Thlagale, the fault of the employer's attitude towards him, and the result of him being victimised. In my view, the core issues in this case are not issues of poor performance, but actually issues of misconduct, even on the third respondent's own version. In finding that such issues were poor performance issues, the second respondent committed a reviewable irregularity.

- [59] The above being said, and even if the second respondent view that the case against the third respondent was in essence one of poor performance and not misconduct was proper and justified, then she still had to determine whether, on the facts and evidence in this matter, there was actual substance in the issue of poor performance, even if the second applicant may have incorrectly labelled it to be misconduct. What the second respondent however in essence does, in a nutshell, is to find that the second applicant called the issues against the third respondent misconduct, but such issues were actually poor performance, and therefore as a result of this per se, it is unfair. That simply cannot be the proper approach. As I have set out above, the issue of the possible existence of poor performance as a basis for the issues raised against the third respondent was specifically placed before the second respondent as an issue at the commencement of the arbitration. The issue was indeed canvassed in the arbitration itself. Once "all the evidence was then in", so to speak, the second respondent had the duty to determine the true nature of the case before her, and then determine the merits of such case. In *National Union of Metalworkers of SA and Others v Bader Bop (Pty) Ltd and Another*,³⁶ it was held as follows:

‘It is the duty of a court to ascertain the true nature of the dispute between the parties. In ascertaining the real dispute a court must look at the substance of the

³⁶ (2003) 24 ILJ 305 (CC).

dispute and not at the form in which it is presented. The label given to a dispute by a party is not necessarily conclusive. The true nature of the dispute must be distilled from the history of the dispute, as reflected in the communications between the parties and between the parties and the Commission for Conciliation, Mediation and Arbitration (CCMA), before and after referral of such dispute. These would include referral documents, the certificate of outcome and all relevant communications. It is also important to bear in mind that parties may modify their demands in the course of discussing the dispute or during the conciliation process. All of this must be taken into consideration in ascertaining the true nature of the dispute.'

[60] Also in *CUSA v Tao Ying Metal Industries and Others*,³⁷ the Court said that:

'In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that the parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration... The dispute between the parties only emerges once all the evidence is in.'

In this respect reference is also made to *Coin Security Group (Pty) Ltd v Adams and Others* (2000) 21 ILJ 925 (LAC) at para 16; *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union and Others (1)* (1998) 19 ILJ 260 (LAC) at 269G-H; *Viney v Barnard Jacobs Mellet Securities (Pty) Ltd* (2008) 29 ILJ 1564 (LC) at para 37; *Kroukam v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) at 2162F; *SA Chemical Workers Union and Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC) at 1726; *Van der Velde v Business and Design Software (Pty) Ltd and Another* (2006) 27 ILJ 1738 (LC) at 1745I, where the same sentiment is echoed.

[61] As stated, the second respondent however did not determine the merits of the poor

³⁷ Id at para 66

performance issue. If this issue is considered on the merits thereof, it would be my conclusion that the second applicant's case in fact had substance. The reason for this is based on the nature of the position of the third respondent, and what his core duties and functions were, even on his own version. The third respondent was at the helm of Legal Services. At the time when these issues arose, he had been at the helm of Legal Services for some five years. He was fully responsible for all aspects of the management of such department. In fact, and as I have set out above, his own assessment of his own core functions clearly showed what was expected of him, and that he precisely knew what was expected of him. Added to all of the above is actual specialised nature of the position, relating to the field of legal services. It is the very reason for the engagement of the third respondent as Chief Director that he will be required to bring the requisite skills, knowledge and expertise to the party. In the end, and on the evidence, the third respondent clearly failed in his core duties considering that which was expected of him.

[62] This matter draws many similarities to the arbitration award in *A-B v SA Breweries Ltd.*³⁸ If regard is has to the factual matrix and evidence as recorded in such award, most of the issues raised in that matter and the contentions raised by both parties therein are directly comparable to the current matter³⁹. I intend to refer to a number of extracts from this award, which in my view can be directly applied to the current matter, and with which I entirely agree with. In the first instance, the arbitrator determined as follows:⁴⁰

³⁸ (2001) 22 ILJ 495 (CCMA)

³⁹ See page 517C-F of the award where it was held: 'As I see the dispute, rather than looking at each specific charge and the factual disputes within those charges, one question needs to be asked: Did the employee's work performance justify her position on the top rung of middle management, namely as manager of the planning and administration department? The employee's challenge has been in the form of a piecemeal attack on various factual (and grammatical) discrepancies within the charges as stated. Whilst I understand that it is necessary to highlight specific occurrences in an attempt to assess the employee's overall performance, the question to be decided remains whether the employer justifiably demoted the employee on the basis that she was not satisfactorily discharging her duties as the manager of the P&A department. The employer's case is that the employee was incompetent at her job, and therefore this dispute is essentially a dispute over alleged incapacity and whether, as a *whole*, the employer has proven its case on a balance of probabilities.'

⁴⁰ Id at 519F-H.

‘In addition, when one looks at the goals set for the employee by herself (A260) it is clear that the employee was aware of what was expected of her. Phrases like ‘maximize production’ and ‘maximize opportunity’ abound, and rightly so, as the evidence of the employer’s witnesses was that this was what the employer expected of the employee. She was supposed to be a planner, in effect a visionary, able to provide the way forward. Similarly, if one looks at the matter objectively, the employee was employed on a senior managerial level at a handsome salary. Clearly such a position and the payment of such a salary presuppose a function beyond that of the ordinary foot soldier and more in keeping with that of a field commander.’

There can be very little doubt that the above reasoning can be directly applied to the current matter, especially considering the third respondent’s own description of his position, referred to above. The third respondent was supposed to be the planner, the visionary and the strategic leader in the department. He was the most senior manager in Legal Services, earning a handsome salary. He was certainly the “field commander”.

[63] The arbitrator in *A-B v SA Breweries Ltd* also held as follows:⁴¹

‘Whether the employee’s efforts would have been sufficient to swing matters around and bring back production to accepted levels is a matter of conjecture. If the employee had attempted to do so, as was expected of her, and failed, the question before me would be different and may have yielded a different answer. However, the employee did not attempt to be proactive, creative, problem solving or solution seeking. She could only manage to record what was wrong, without attempting to cure that wrong. The defence of the employee to the charge of failing to implement full production earlier is indicative of her attitude in this regard. She essentially argued that nobody told her to do it. The employer’s response was that ‘it was your job to tell us to do it’. The employee was content to be reactive, the employer employed her, and paid her, to be proactive.’

⁴¹ Id at page 519I – 520B.

Once again, I fully agree with the above reasoning, and in applying the same to the current matter, it is clear that the same criticism can be directly leveled at the third respondent. He made no attempt to be pro-active, to conduct problem solving or being creative. He simply played the blame game. In fact, and in respect of the case management system, his contention precisely was that he had to be told how to do his job in this regard, when it was his very duty to be innovative and proactive.

- [64] Part of the defense raised by the third respondent in the arbitration was he never received a formal job profile or job description or the like, specifying exactly what his duties were. Once again, the award in *A-B v SA Breweries Ltd* is most apposite and I refer to the following extract from the award, which I fully agree with:⁴²

‘For a senior managerial employee to ask for a job description is a clear indication that the employee was not senior managerial material. The concepts of managerial prerogative, managerial discretion and managerial responsibility do not sit well within the restrictive confines of a job description, which belong to more mechanistic and delineated occupations.’

- [65] As enunciated in *New Forest Farming CC v Cachalia and Others*⁴³:- ‘... the second respondent (referring to the employee in that instance), holding the managerial position that he did, ought to have been able to judge for himself whether or not he was meeting the standard set by his employer.’ This surely must have been the case with the third respondent.

- [66] In respect of the failure to apply a proper poor performance process to the third respondent, which the second respondent also took issue with in her award, one can do little better than to refer to what the Court said in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon*.⁴⁴ In writing the minority judgment,⁴⁵ in this matter,

⁴² Id at page 519E-F.

⁴³ (2003) 24 ILJ 1995 (LC).

⁴⁴ (2000) 21 ILJ 501 (LAC).

⁴⁵ In respect of the quotation referred to in this judgment, Conradie JA however did concur in the majority

Conradie JA held as follows, which I respectfully agree with:⁴⁶

‘As for procedural unfairness, it is unfair to expect an employer to apply to a senior executive those guidelines regarding counselling which have been worked out by the courts in relation to workers who wear blue collars and those who wear no collars at all (*Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC) at 324D-E). An experienced executive who needs to be counselled on fundamental job skills is probably not fit to be an executive. He is there to oversee others. He cannot do that if he cannot even oversee himself. Prof M P Olivier some years ago wrote an interesting article in the Industrial Law Journal entitled 'The Dismissal of Executive Employees'. It is to be found at (1988) 9 ILJ 519. I agree with him that the courts have in the case of senior employees (I would say correctly) taken a more flexible attitude in the application of the unfair dismissal guidelines.’

[67] Also, in *Somyo v Ross Poultry Breeders (Pty) Ltd*⁴⁷ the Court held that:

‘An employer who is concerned about the poor performance of an employee is normally required to appraise the employee's work performance; to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance; *Craig v Rubtec (Pty) Ltd t/a Guys and Girls* (1992) 1 LCD 29 (IC); *James v Waltham Holy Cross UDC* [1973] IRLR 202. Those requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer; *Stevenson v Sterns Jewellers (Pty) Limited* (1986) 7 ILJ 318 (IC) at 324F-G; *Blue Circle Materials Limited v Haskins* (1992) 1 ICD 6 (LAC). The second is where "... the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal '. *Taylor v Alidair Limited* [1978] IRLR

judgment written by Zondo AJP (as he then was).

⁴⁶ Id at para 76.

⁴⁷ (1997) 7 BLLR 862 (LAC).

82.’

[68] In my view, the actual seniority of the applicant, the very reason for his employment, his actual duties and objectives as defined by the third respondent himself, and his particular specialised position of skill and expertise that he brings to the party, falls squarely within the ambit of what is set out and envisaged above. The third respondent did not achieve his particular objectives. The third respondent did not properly manage and control Legal Services. The third respondent did not provide leadership and did play as a member of the team. The dysfunctional state of Legal Services surely proves how the third respondent failed. I conclude with the following final reference from the judgment in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon*.⁴⁸

‘I would think that where an employer on reasonable grounds comes to the conclusion that a senior management employee is unsuited to the position which he holds, the scope for having such a conclusion overturned in a court of law is small. It is in the highest degree desirable that an employer should, in the interests of efficiency, be entitled to choose with as much freedom as is compatible with the honest exercise of a discretion, who it wants at or near the helm of its enterprise. Qualities like leadership, resolve, business acumen, judgment and effective administration are not readily provable in a court. A deficiency in such qualities is not readily provable either.’

It is my view that these sentiments must find application in this instance.

[69] I therefore conclude that insofar as the second respondent found that the issues raised against the third respondent were poor performance issues, the second respondent was required to determine the merits of the same. Had the second respondent properly, rationally and reasonably determined the merits of the poor performance complaint against the third respondent, she could only have concluded

⁴⁸ Id at para 73.

that there was indeed substance in the same, and the issues raised by the second applicant was entirely justified. To put it simply – the second applicant had proper cause to complain about the third respondent's work performance, if that was indeed the issue. In this regard, I align myself to the following extract from the judgment in *Boss Logistics v Phopi and Others*⁴⁹ which can equally be applied to the current matter:

‘The evidence of Mr Van Rensburg as regards the seniority of the position was clear and unequivocal. The first respondent's job title was that of customer relationship manager. He was obviously not appointed to a menial position and his salary was commensurate with a management position. The first respondent's bald denial that he had a senior or management position, rings hollow in the face of these facts.

When regard is had to the first respondent's CV, it appears that he clearly knew what a management position was. Not only does his CV stipulate that he had been employed as a major accounts manager at TNT, but it spells out in considerable detail the responsibilities he supposedly carried in such a position. These responsibilities are clearly consistent with being part of management as opposed to being merely a sales representative or clerk. If the first respondent had in fact been a manager at TNT, he must clearly have been able to rate his own performance once he started work at the applicant company. If he encountered any difficulties, he ought to have made this known and ought to have asked for assistance. In addition, according to the evidence, applicant had a number of customer relationship managers in its employ and it would presumably have been a relatively simple exercise for the first respondent to measure his performance against theirs. Given the aforesaid facts and circumstances which appear from the record of the proceedings, it appears to me that no reasonable commissioner would have come to the conclusion that the first respondent's dismissal was substantively unfair.’

⁴⁹ (2010) 31 ILJ 1644 (LC) at 1653A-E.

- [70] It is my view that the above really sums up the case against the third respondent. He did not provide leadership, did not implement a business plan and case management system, and simply did not proactively manage his department with the necessary diligence, vision and creativity. The third respondent did not build and manage a cohesive legal team, which was essential. Instead, the third respondent was consistently obstructive and confrontational because of what he perceived to be undue interference in his terrain and ulterior purposes of the DG to have him resign. Most of the individual charges brought against the third respondent, although not being per se attributable to him, are but the symptoms of this greater and core problem.
- [71] I wish to refer to one final incident which I believe succinctly illustrates my views with regard to the above. On the common cause evidence, submissions were made in the name of Legal Services to the Department of Justice in respect of Discussion Paper 104 on Domestic Partnerships, in January 2004. It was also undisputed that the views reflected in such submissions did not accord with the views of the Department of Home Affairs, and some of the views were in fact in nature unacceptable. The submissions were actually made in the name of the third respondent, and on face value purported to come from him. It was then established in the arbitration that the submissions came from one of the subordinates in Legal Services, being Henry Madalane ("Madalane"). Madalane contended that the third respondent instructed him to make these submissions, and that the third respondent in fact checked the content before it being. The third respondent disputed this, and stated that he had no knowledge of submission and never authorised it. It was however common cause that Madalane put the third respondent's name on the submissions. If the third respondent's contentions are correct, then Madalane not only acted on his own bat and without authority but actually misrepresented that he was doing so in the name of the third respondent as Chief Director. The crisp question then was – why did the third respondent not take action against Madalane, and he was confronted with this in cross examination. The answer of the third

respondent was that because Madalane did not report directly to him but to one of his subordinates, he could not take action. Despite this explanation of course being entirely unacceptable, it illustrates the core problem in the management of Legal Services.

[72] I thus conclude that based on all of the above, whether it be considered to be misconduct or poor performance, there can be little doubt that the third respondent failed. I also conclude that such failure was of significant scope and extent so as to have principally justified his dismissal on a substantive basis. The third respondent, in my view, was clearly “guilty” (and I use the term very loosely) of either the principal charges of misconduct against him or of poor performance or both. If this was where the enquiry stopped, I would have had little hesitation in concluding that the dismissal of the third respondent by the applicants was substantively fair. However, what also needs to be considered is the issue of sanction, and this I will consider hereunder.

[73] I will now turn to where I believe the second applicant did fail in this matter, and this is in respect of the issue of sanction. As the second respondent determined that the third respondent was not guilty of any of the issues against him, she did not determine the issue of sanction. I have however concluded, as set out above, that the second respondent’s conclusion that the third respondent is not guilty of anything is not sustainable and thus reviewable. Since I have concluded that a proper determination of the evidence reveals that the third respondent is indeed “guilty” of the principal causes of complaint against him, the issue of sanction must now be considered, which I will now do. In general terms, the failure of the second applicant lies in its failure to afford the third respondent an opportunity to remedy his failures. In my view, if the issues were that of misconduct, progressive discipline needed to be applied, and if the issues were that of poor performance, the deficiencies the second applicant perceived with his performance should have been highlighted to him and he should have been given the opportunity to remove such

causes of complaint. The fact of the matter is that what the evidence shows is that by the end of 2004, the second applicant had had enough of the third respondent. It was then decided to throw the book at him on each and every failure for the preceding year that the second applicant could think of. The problem with this approach of the second applicant is that whether one calls it progressive discipline or an opportunity to remedy poor performance, what the second applicant should have done is to consistently address each of these issues during the course of the year with the third respondent, give him an opportunity to remedy these causes of complaint, and specifically warn him that if he failed to do so, his continued employment was being placed at risk.

- [74] Based on the principles I have discussed above relating to senior managers, I do not say that the full poor performance process must be applied. I do not say that the third respondent required training, guidance, counseling and assistance. I also do not say that the third respondent was in any way unable to properly fulfill his functions. In my view, it is clear that the third respondent knew exactly what he required to do in order to properly discharge his duties, that he was the expert in his field and did not require any assistance or guidance or training. In my view, it was also not necessary to apply the "full" poor performance process as envisaged by the SMS handbook and/or Schedule 8 of the LRA to the third respondent. All I say, in simple terms, is that the third respondent in the circumstances of this particular matter should have been forewarned of his failures and forewarned that if he does not fix the failures in a specified time period, he would face dismissal.
- [75] I have referred above to the address by the DG on 25 September 2003 to senior management in the second applicant. In this address, and in specifically addressing Legal Services, the DG recorded that "critical and decisive" intervention was required and it was certainly intimated that the DG himself would be involved in the intervention. Even if it was not the intimation of the DG to become involved in the intervention referred to, it still remains my view that he should have done so. The

DG should have engaged the third respondent to make it clear to the third respondent what in the view of the DG was wrong and where intervention was required, and then give the third respondent the opportunity, against the risk of dismissal if this did not happen, to give the DG what the DG required. There is no evidence that this ever happened. It must also be considered that that Gilder was at the time the newly appointed DG, which made such a kind of intervention even more important. Finally, and as I have said before, the fact that the situation was in essence allowed to perpetuate for more than a year with no real intervention could reasonably have lulled the third respondent into a false sense of security under the new DG, for want of a better description, which had to be dispelled first.

[76] If the appointment of Thlagale could be considered to be an attempted intervention in Legal Services, this was wholly insufficient and inadequate. It must have been clear relatively early in the relationship that there was no working relationship between Thlagale and the third respondent. Also, Thlagale was not really the appropriate person to make it clear to the third respondent what was required of him and what the consequences would be if this did not happen. The evidence also showed that instead of giving guidance on how to resolve problems, where the same existed, Thlagale instead took on individual functional duties and responsibilities – in other words she did the work herself. This does not assist in identifying problems for resolution with the involvement of the third respondent.

[77] I specifically refer to what the Court said in *Somyo v Ross Poultry Breeders*,⁵⁰ as referred to above, to the effect that '[a]n employer who is concerned about the poor performance of an employee is normally required to... to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance'. It is in these two respects where the second applicant in my view thus failed. If the situation is one of misconduct, I refer to *Chibi v MEC: Department of Co-operative Governance and*

⁵⁰ Supra, footnote 45 above.

*Traditional Affairs (Mpumalanga Provincial Government) and Another*⁵¹ where the Court held, with specific reference to the SMS handbook:

‘Further the SMS Handbook incorporates the Labour Relations Act’s Code of Good Practice on dismissal. This means that the respondents intended that progressive discipline be applied to acts of misconduct rather than employees being dismissed in the first instance.’

In *Department of Labour v General Public Service Sectoral Bargaining Council and Others*,⁵² the Court said:

‘It is to be noted that the director-general, when offering the respondents to consider an alternative sanction short of dismissal, was in effect complying with the provision relating to the purpose and object of discipline. By giving the respondents an option of accepting a sanction other than dismissal, the director-general was offering them an opportunity to correct their behaviour and to rehabilitate themselves.’

Therefore, and in the event of the issues being that of misconduct, this was first instance misconduct, which in the circumstances required an opportunity to be given to the third respondent to correct his behaviour. It is therefore on the principles of law as set out in this paragraph that the second respondent, in my view, could have concluded that the dismissal of the third respondent was substantively unfair, had she considered the issue. I, accordingly, intend to determine that the dismissal of the third respondent was substantively unfair on this basis.

[78] In the circumstances, I would uphold the determination of the second respondent that the dismissal of the third respondent was substantively unfair. I, however, cannot sustain the reasoning of the second respondent in coming to this conclusion,

⁵¹ (2012) 33 ILJ 855 (LC) at para 27.

⁵² (2010) 31 ILJ 1313 (LAC) at para 32.

being in essence that the third respondent is guilty of nothing. There can be no doubt that the third respondent indeed failed, and this must still have a material impact on the relief that should have been afforded to the third respondent for the finding of unfair dismissal in this matter, as will be addressed hereunder.

The issue of the relief

[79] It is clear from the award of the second respondent that she simply opted for awarding reinstatement to the third respondent. She gave no reason for this determination, referred to no evidence in this regard and exercised no judicial discretion as required. This the second respondent did despite the issue of reinstatement is being an inappropriate remedy being specifically raised by the second applicant. It is true that reinstatement is the primary remedy in the case of a dismissal of an employee that is found to be substantively unfair. Section 193(1) provides that:

‘If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may - (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal ... ‘Section 193(2) then provides that ‘The Labour Court or the arbitrator must require the employer to re-instate or re-employ the employee unless - (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure.’

In applying the above provisions, the Court in *Equity Aviation Services Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁵³ said:

⁵³ (2008) 29 ILJ 2507 (CC) at para 44.

‘The legislative structure for the resolution of unfair dismissal disputes is clear and coherently crafted. The LRA allows for any of the three remedies set out in s 193(1) to be granted to an unfairly dismissed employee. Reinstatement or re-employment remains the legislatively preferred remedy so as to restore the employee to the employment relationship. They safeguard the employee's security of employment. Either of the two remedies may be granted except in the specified circumstances set out in s 193(2) in which case compensation in terms of s 193(1)(c) may be ordered, the amount of which depends on the nature of the dismissal.’

- [80] What the above means is that, despite the fact that reinstatement is indeed the primary remedy for a substantively unfair dismissal, it is not a compulsory remedy. In this regard, and in the recent judgment of *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others*,⁵⁴ the Court said:

‘By its use of the word ‘must’ in s 193(1)(a) of the LRA, the legislature clearly intended that upon the finding in a given case that the employee concerned was substantively unfairly dismissed, such employee must be reinstated, if the employee so wished, unless either or both of the conditions referred to in paras (b) and (c) of subsection (2) of the said section (hereinafter, for the present purpose, referred to as ‘the non-reinstatable conditions’) are present. It was common cause that the appellant sought to rely only on the second-mentioned condition, namely, that it was ‘not reasonably practicable’ for the appellant to reinstate the employees. It is notable that in terms of the earlier decisions, s 193(2) was construed as placing an onus on the employer to establish the existence of any of the non-reinstatable conditions, but since *Equity Aviation* there has been a constitutional paradigm shift in this regard. Rather than departing from the premise of a legal onus, the focal point and overriding consideration in this enquiry should be the underlying notion of fairness between the parties and that “[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment”. In further amplification, the Constitutional Court, in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*, stated: “The remedies awarded

⁵⁴ (2012) 33 ILJ 160 (LAC) at para 28.

in terms of s 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation*. That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an enquiry into fairness with notions of a legal onus.”

The Court in *Mediterranean Textile Mills (Pty) Ltd* concluded that:⁵⁵

‘... at the conclusion of each case it remains the responsibility of the court or the arbitrator to determine whether or not, on the evidentiary material properly presented and in the light of the *Equity Aviation* principle, it can be said that the reinstatement order is justified. In other words, even in a situation such as the present, where no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant in the determination of whether or not such conditions exist.’

- [81] In applying a judicial discretion in order to determine whether the “non-reinstatable” conditions exist in the current matter, as would be required in terms of the above principles, it is my view that this is clearly an instance where reinstatement would simply not be appropriate because of the fact that Section 193(2)(b) would certainly find application. I say this for a number of reasons. The first and immediate issue is that the third respondent, no matter how one looks at it, failed in his position as Chief Director of Legal Services. This is evident from the dysfunctional state of Legal Services and the complete lack of credibility of such department. The consequences of this state of affairs have been disastrous, not only in monetary terms but also in terms of reputation, considering the contempt issues and compliance with Court Orders referred to in the evidence. There can be no doubt that the second applicant saw the third respondent as the cause of this situation, and it is highly likely that this view of the second applicant will remain. In my view,

⁵⁵ Id at para 30.

the same problems would simply be perpetuated by placing the third respondent back into such position, as the situation would simply deteriorate back into the third respondent defending himself rather than proactively, progressively and innovatively managing the department, which is what is really needed.

[82] The next important issue to consider is what in fact happened in the arbitration itself, which cannot be ignored. The attitude exhibited by the third respondent in the arbitration was manifestly unacceptable. His conduct towards his employer in the arbitration was confrontational, aggressive and insulting. There are several examples of this on the record, but I wish to refer to one in particular. As at the date of arbitration, the third respondent was still in possession of the lap top belonging to the applicants, and never returned it, despite being dismissed. The third respondent was confronted with this under cross examination, and he stated that he was entitled to keep it because he felt he was owed money and was challenging his dismissal, and for as long as this was the case, he would keep it.⁵⁶ This is clearly not the conduct of an employee that wishes to restore an employment relationship with an employer. The conduct of the third respondent in the arbitration also mitigated against any reasonable prospect of the restoration of the employment relationship.

[83] The third respondent further contended, as I have already touched on above, that he was dismissed for being a Christian and because he did not to ascribe to the corrupt practices of his employer. The third respondent also stated that there was a campaign to get him to resign so that Thlagale could take over his position, despite the fact that even after he left Thlagale did not apply for his position despite acting in the same on an interim basis upon the third respondent leaving. The third respondent accused the disciplinary hearing chairperson of being biased, without there being any substance in this contention. When the third respondent was confronted under cross examination about not calling particular witnesses, the third

⁵⁶ See record page 1147 – 1148

respondent answered that he could not call such witnesses because they would be corrupted by the persons remaining behind after he left, and that in any event all witnesses are harassed and intimidated by the second applicant. The third respondent maintained this contention despite conceding that he had no evidence of this. The point I wish to make that this is not the conduct of an employee which could be conducive to the restoration of any workable employment relationship, and actually mitigated against the restoration of such employment relationship.

- [84] I will also consider what Modise, the disciplinary hearing chairperson, found in his judgment.⁵⁷ This judgment was properly in evidence before the second respondent as well. Modise in fact considers the issue of progressive discipline, but unfortunately was confronted with the absence of the third respondent in the disciplinary proceedings which prevented him from properly determining the issue. Modise recorded that the third respondent made unreasonable demands in respect of participating in the disciplinary hearing and consistently shifted the goal posts. Modise recorded that 'I expected the employee to welcome the hearing as an opportunity to clear his name. He did the opposite'. Modise stated that he was shocked by some of the allegations made by the third respondent in his abortive High Court application. Modise concluded that it was in the best interest of the department and pursuant to considerations of good governance that the third respondent be dismissed. I agree with what Modise said in this matter, and this in turn must also mitigate against any award of reinstatement. I add that the conduct of the third respondent in simply refusing to participate in the disciplinary proceedings where he could have sought to convince his employer to continue with the employment relationship strongly counts against any award of reinstatement. The third respondent in effect deprived the second applicant though his own conduct from properly applying corrective discipline, and this must count against him where it comes to the consideration of the restoration of the employment relationship.

⁵⁷ See record page 108 – 110.

- [85] The third respondent never showed any remorse for any of his conduct, even in the arbitration. The third respondent continued to maintain that he had no responsibility at all for the state Legal Services was actually in. The third respondent continued to contend that all that had gone wrong was the fault of everyone else, and in particular Thlagale and the DG. It is so that it was raised in the arbitration that Gilder and Thlagale had since left the second applicant, but in my view this simply does not matter. Without the third respondent at least showing some remorse for what he did and exhibited a willingness to rehabilitate, no working relationship with anyone in the second applicant can be restored. As the Court said in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:⁵⁸

‘This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer’s workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk to continue to employ the offender is unacceptably great.’

In my view, the above directly applies to the current matter.

- [86] In *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*,⁵⁹ it was held as follows:

‘The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. See *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at

⁵⁸ (2000) 21 ILJ 1051 (LAC) at para 25.

26E-G... It is to be underlined that Mr Henn's course of conduct leaves no space at all for one to distil a spirit of remorse or an allied desire to repair any damage to the employment relationship which had resulted from his unlawful retention of the amounts paid to him. In regard to the latter aspect, a striking feature of the case presented for Mr Henn was the submission that the root cause of the problems which have arisen lies in the municipality's administrative incompetence in making the payments in the first place. That is a fundamentally unsound approach... His attempt to transpose the culpability on to his employer does no more than to accentuate his lack of remorse.'

- [87] The Labour Appeal Court specifically dealt with the issue of appropriate relief in the case of a finding of unfair dismissal in the matter of *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others*.⁶⁰ The Court held that:⁶¹ 'I have noted that the relief sought by the employee was that of reinstatement, alternatively compensation. It is trite that the primary remedy is that of reinstatement, except where same is inappropriate, in which event compensation should be ordered.' The Court considered the conduct of the employee party, and the fact that the employee had not worked for the employer for a considerable period of time as relevant factors in coming to the conclusion that reinstatement was not appropriate.⁶²
- [88] I also find guidance in the recent judgment of *National Union of Metalworkers of SA on behalf of Maifo and Others v Ulrich Seats (Pty) Ltd*,⁶³ where the Court dealt with the same issue. It was held as follows:

'In the present matter, the applicants prayed for reinstatement. The issue that then arises is whether any of the factors listed in of the LRA exists, which may in terms of the principles of fairness require the court to make an order that is less than

⁵⁹ (2010) 31 ILJ 2475 (LC) at para 23.

⁶⁰ (2012) 33 ILJ 1081 (LAC).

⁶¹ Id at para 30.

⁶² Id at paras 31 – 34.

reinstatement.'

After analysing the case law on this issue, the Court concluded as follows, which I respectfully agree with:⁶⁴

'It would seem to me that in considering whether the remedy of reinstatement is just and equitable, account should be taken of the following:

- (a) the outcome of the enquiry into the fairness or otherwise of the dismissal;
- (b) the core value of the LRA being security of employment;
- (c) the period between the dismissal and trial or the arbitration hearing;
- (d) the impact that the delays between the date of the dismissal and the date of the hearing may have on the fairness of the relief to be made;
- (e) that the employees were without income during the period of dismissal.'

[89] I also refer to *Boxer Superstores (Pty) Ltd v Zuma and Others*,⁶⁵ the Court held as follows:

'Secondly, in attacking the conclusion reached by the court a quo that 'the only appropriate remedy was to reinstate the employee fully', Mr *Smithers* correctly referred to the architecture of the Labour Relations Act 66 of 1995 (the Act) and particularly to s 193(2) thereof. In a case, as in the present dispute, where it is found that an employer has not discharged the onus of proving that a dismissal was fair, the competent remedy is that of reinstatement. Reinstatement is in effect, the default

⁶³ (2012) 33 ILJ 2918 (LC) at para 40.

⁶⁴ Id at para 48.

⁶⁵ (2008) 29 ILJ 2680 (LAC) at para –11.

position. Section 193(2) sets out alternative remedies that the Labour Court or an arbitrator may utilize other than reinstatement. These include re-employment or compensation.

In *Volkswagen SA (Pty) Ltd v Brand NO and Others* (2001) 22 ILJ 993 (LC); [2001] 5 BLLR 558 (LC) at 582, Landman J found that it was not open to an arbitrator, if the circumstances surrounding the dismissal were that a continued employment relationship would be intolerable, nevertheless to order reinstatement. In these circumstances, an arbitrator would have no discretion, she could only award compensation and not reinstatement. In short, s 193(2) mandates the arbitrator or the court, where applicable, to examine the factors set out in the section, in order to craft the remedy. If the evidence indicates, for example, that a continued employment relationship is intolerable, the arbitrator cannot reinstate but must employ an alternative remedy, in this case compensation. Mr *Smithers* correctly noted that Pillay J had not engaged with the requirements of s 193(2) but simply concluded that the only appropriate remedy was to reinstate. The only appropriate remedy may well have been to reinstate but that could not simply be concluded without more. The enquiry required an engagement with the requirements of s 193(2) and the evidence before the court as to the nature of the relationship between the parties.'

The Court concluded as follows:⁶⁶

'The third respondent's award was manifestly irrational and to that extent the judgment of Pillay J is correct. It is irrational because the third respondent gave no reasons for awarding compensation after having found that the appellant had failed to discharge the onus in relation to substantive dismissal. What third respondent should have done was to have said in effect: I have examined the evidence. It appears to me that, given the grave nature of the charges levelled against first respondent, that is of dishonesty, it is clear that the relationship between the two parties is at the level where they can no longer work together. Reinstatement would

⁶⁶ Id at para 11.

therefore be inappropriate, re-employment would be inappropriate because of the conclusions reached by the appellant as set out in my award. Accordingly in terms of the powers that I have under s 193(2), I make a small award of compensation.'

- [90] The dismissal of the third respondent dates back to 2005, the principal cause of which seems to be systemic delays. In the judgment of *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*,⁶⁷ the Court said:

'I now return to the argument at hand. It is that "systemic delays" justify the development of a constitutional duty for the Labour Appeal Court to initiate an enquiry of its own into post-judgment facts, even when the original order was justified on the facts at the time it was made and where no application to lead further evidence on appeal was made by any of the parties either. The answer to that contention must, in each instance where it is aired, be determined by an examination of the facts of the particular case. A similar kind of argument was raised, but rejected, in *Equity Aviation [Equity Aviation Services (Pty) Ltd v Commission of Conciliation, Mediation and Arbitration and Others* 2009 (2) BCLR 111; 2009 (1) SA 390 (CC); (2008) 29 ILJ 2507 (CC)]. It needs to be rejected in the present case as well.'

In the light of this judgment, and as can be seen from what is set out above, I limited the basis of the determination of the issue of reinstatement as an appropriate remedy to the circumstances and events as they existed at the time of the arbitration in 2006. I shall have no regard to any events between this date, and when the matter finally came before me in 2013.

- [91] The third respondent was dismissed at the end of April 2005. The arbitration was only concluded at the end of August 2006, being some 16 months later. In this period of time, matters at the second applicant had moved on and there was even a new DG appointed. The third respondent however clearly did not work in Legal

⁶⁷ (2010) 31 ILJ 273 (CC) at para 48.

Services in this period, and considering the nature of the functions that Legal Services fulfill, in particular that of dealing with continuing legal proceedings, this long period of absence is significant. The period of delay in this regard must therefore be considered in determining whether reinstatement is appropriate, and in my view, clearly mitigates against it. In *Republican Press (Pty) Ltd v CEPPWAWU and Others*,⁶⁸ the Court said:

'... While the Act requires an order for reinstatement or re-employment generally to be made a court or an arbitrator may decline to make such an order where it is "not reasonably practicable" for the employer to take the worker back in employment. Whether that will be so will naturally depend on the particular circumstances, but in many cases the impracticability of resuming the relationship of employment will increase with the passage of time. In my view the present case illustrates the point.'

That is not to suggest that an order for reinstatement or re-employment may not be made whenever there has been delay... It means only that the remedies were probably provided for in the Act in the belief that they would be applied soon after the dismissals had occurred, and that it is a material fact to be borne in mind in assessing whether any alleged impracticability of implementing such an order is reasonable or not. In the present case the passage of six years from the time the workers were dismissed, all of which followed consequentially upon the failure of the union to pursue the claim expeditiously, was sufficient in itself to find that it was not reasonably practicable to reinstate re-employ the workers. In my view it was entirely inappropriate for such an order to be granted.'

- [92] In the end, and if there is ever a case where the evidence clearly indicates that any award of reinstatement would be inappropriate on the basis that a continued employment relationship would be intolerable as contemplated by Section 193(2)(b), then this case must be it. What is clear from the award of the second respondent is that she simply plumbs for reinstatement. She does not properly determine the

⁶⁸ (2007) 28 ILJ 2503 (SCA) at para 20 and 22.

issue, and does not exercise any discretion at all. Having regard to the events before her in the arbitration as evidenced by the record of the arbitration proceedings, the second respondent would be compelled to have, had she exercised her discretion on the issue of relief in a judicial manner, determined that any award of reinstatement simply could not have been made due to the existence of the non-reinstatable factor as contemplated by Section 193(2)(b). The second respondent's conduct in simply making an award of reinstatement in this instance thus constituted a reviewable irregularity in terms of the principles as set out above, and such conduct does not fall within the bands of reasonableness expected of an arbitrator such as the second respondent. I, accordingly, review and set aside the award of reinstatement made by the second respondent in favour of the third respondent.

[93] In this matter, the appropriate relief to have been afforded to the third respondent was one of compensation.⁶⁹ Since this was not the determination of the second respondent in her award, I intend to substitute the award of the second respondent on the issue of relief by making a determination of compensation. I see no need to refer the issue of compensation back to the first respondent for determination by the second respondent, and will determine appropriate quantum of compensation having regard to the evidence on record, which is sufficient to properly and reasonably do so in this instance.⁷⁰ Similarly, this requires the exercise of a judicial discretion, and I refer to what the Court said in *Matjhabeng Municipality v Mothupi No and Others*:⁷¹

‘The commissioner then decided that R250,000 was a just and equitable amount without giving reasons why he came to that conclusion. In my opinion he should have gone further and given reasons why he accepted that the said amount was just and equitable, and perhaps also taken into account whether the third respondent was

⁶⁹ See Section 193(1)(c)

⁷⁰ As the Court did in *Plasticwrap - A Division of CTP Ltd v Statutory Council for the Printing, Newspaper and Packaging Industry and Others* (2012) 33 ILJ 2668 (LC) at para 22

working, how much he was paid, etc. Even if he came to the same conclusion at least one would know why he came to that conclusion. On that basis, it is my conclusion that the failure on the part of the commissioner to justify the compensation amounts to a reviewable irregularity.

Commissioners should be vigilant at all times, especially where they decide not to grant compensation or they grant one or two months or so compensation, or where the maximum compensation is granted, to make sure that they give reasons therefor. Therefore, commissioners should be careful not [to burden] the courts with the task of making inferences from the body of evidence for the reasons for the compensation, although the courts will not fail in their duty in that respect.'

- [94] As to the exercise of the discretion in making an determination of the quantum of compensation, reference is made to the well known considerations as set out in *Ferodo (Pty) Ltd v De Ruiter*.⁷² In *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*,⁷³ the Court held:

'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

- [95] Reference is also made, with regard to how this discretion has been exercised in the past, to the judgments in *Mohlakoane v CCMA and Others* (2010) 31 ILJ 2688

⁷¹ (2011) 32 ILJ 2154 (LC) at paras 47 – 48

⁷² (1993) 14 ILJ 974 (LAC). The Court held that '(a) [T]here must be evidence of actual financial loss suffered by the person claiming compensation; (b) There must be proof that the loss was caused by the unfair labour practice; (c) The loss must be foreseeable, ie not too remote or speculative ; (d) The award must endeavour to place the applicant in monetary terms in that position which he would have been had the unfair labour practice not been committed ; (e) In making the award the court must be guided by what is reasonable and fair in the circumstances ; (f) There is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment.'

⁷³ (2007) 28 ILJ 2238 (LAC).

(LC); *SA Post Office Ltd v Jansen Van Vuuren NO and Others* (2008) 29 ILJ 2793 (LC); *Metalogik Engineering and Manufacturing CC v Fernandes and Others* (2002) 23 ILJ 1592 (LC); *Rope Constructions Co (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2002) 23 ILJ 157 (LC); *H M Liebowitz (Pty) Ltd t/a the Auto Industrial Centre Group of Companies v Fernandes* (2002) 23 ILJ 278 (LAC); *Ensign Brickford SA (Pty) Ltd v Shongwe NO and Others* (2001) 22 ILJ 146 (LC).

- [96] In applying the above principles, and in order to come to a fair and equitable determination on the issue of the appropriate amount in compensation, I consider the following: (1) The second applicant did have a proper cause of complaint against the third respondent, but needed to give him an opportunity to remedy the causes of complaint so as to avoid his dismissal; (2) the third respondent was still unemployed as at the date of the arbitration; (3) the third respondent had a length of service approaching seven years at the time of his dismissal and was a senior employee; (4) the third respondent presented no evidence as to his attempts to mitigate damages; (5) the third respondent refused to participate in the disciplinary hearing where he could have cleared his name, if he believed he was wrongly treated; (6) I also consider the conduct of the third respondent in the arbitration; and finally (7) the fact that the DG and Thlagale contributed to the problem by not actively engaging the third respondent in an intervention in the department, as was envisaged would be the case. Applying these considerations, and applying a general sense of fairness, it is my view that an award of 9(nine) months' salary in compensation in favour of the third respondent is appropriate. It was common cause on the pre-trial minute that the applicant earned R533 000,00 per annum, giving a total compensation award of R399 750,00.
- [97] Accordingly, in the light of all of the above, I conclude that the award of the second respondent on the issue that the third respondent's dismissal was substantively unfair is upheld, but that the award of the second respondent that the third

respondent's dismissal was procedurally unfair is reviewed and set aside. I further review and set aside the award of the second respondent as regards the issue of relief, and shall substitute such award with an award of compensation on the basis as set out above.

- [98] This then only leaves the issue of the third respondent's Section 158(1)(c) application and the issue of costs. Considering the determination I have come to as set out above, I shall make that part of the award of the second respondent that has been upheld an Order of Court. In respect of the issue of costs, it is clear that both parties enjoyed success in this matter. It is also clear that both parties contributed to the delays in this matter, and both parties had to be directed to file heads of argument. Mr Beaton, who represented the third respondent, pressed for costs if I should find as I did in this instance, and Mr Pio, who represented the applicants, did not really press the issue of costs and in essence left the matter in the hands of the Court. In terms of the provisions of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I exercise this discretion in favour of making no order as to costs, as I am of the view that this would be fair and appropriate in this instance. This, however, does not affect the wasted costs order I have already made against the applicants in paragraph 7 of my Order issued on 15 January 2013.

Order

- [99] In the premises, I make the following order:

99.1 The arbitration award of the second respondent, being arbitrator Z Mdladla, dated 14 August 2006 in the arbitration proceedings between the second applicant and the third respondent, under case number PSGA 126/05/06, to the effect that the dismissal of the third respondent by the second applicant was substantively unfair, is upheld and confirmed;

- 99.2 The arbitration award of the second respondent, being arbitrator Z Mdladla, dated 14 August 2006 in the arbitration proceedings between the second applicant and the third respondent, under case number PSGA 126/05/06, to the effect that the dismissal of the third respondent by the second applicant was procedurally unfair, is reviewed and set aside and replaced with a determination that the dismissal of the third respondent by the second applicant was procedurally fair;
- 99.3 The arbitration award and the variation award of the second respondent, being arbitrator Z Mdladla, dated 14 August 2006 and 30 August 2006 respectively, in the arbitration proceedings between the second applicant and the third respondent, under case number PSGA 126/05/06, as to the relief of reinstatement and back pay afforded to the third respondent, is reviewed and set aside;
- 99.4 The award of the second respondent with regard to the issue of relief as contained in the arbitration award dated 16 August 2006 and the variation award dated 30 August 2006 is substituted *in toto* by an award that the third respondent is entitled to compensation in an amount equivalent to 9(nine) months' salary, being an amount of R399 750.00;
- 99.5 The arbitration award of the second respondent in favour of the third respondent as amended by this Order to the effect that the dismissal of the third respondent by the second applicant was substantively unfair and procedurally fair and that the third respondent be awarded compensation in an amount of R399 750.00 is hereby made an Order of Court in terms of Section 158(1)(c) of the LRA;
- 99.6 There is no order as to costs in both the proceedings under case number JR 2326/06 and J 1710/06, save for the award of wasted costs made against

the applicants in paragraph 7 of the Order dated 15 January 2013 which shall continue to apply.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Advocate P. Pio

Instructed by: The State Attorney

For the third Respondent: Adv R Beaton SC

Instructed by: Rooth & Wessels Attorneys