



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 812 / 2012

In the matter between:

STEELCOR (PTY) LTD

Applicant

and

SEELE MOKWENA N.O.

First Respondent

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

Second Respondent

LAWRENCE RADEBE

Third Respondent

Heard: 15 January 2014

Delivered: 17 January 2014

Summary: Bargaining Council arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA 1995 – Whether outcome arrived at by the arbitrator reasonable – determinations of arbitrator compared with evidence on record – arbitrator’s award or unfair

dismissal sustainable and upheld

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

Misconduct – nature of misconduct – sanction of dismissal not appropriate – determination of arbitrator upheld

Insubordination – splitting of charges – dismissal not justified for actual offence – employer contributed to altercation – award of arbitrator 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 applicant to review and set aside an arbitration award of the first respondent in his capacity as arbitrator of the Metal and Engineering Industry Bargaining Council (the second 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”).

[2] The third respondent was dismissed by the applicant on 18 April 2011, based on a complaint by the applicant that the third respondent was grossly insubordinate and conducted himself in a manner detrimental to the employment relationship, which issues will be dealt with hereunder. In an award dated 13 March 2012, the first respondent determined that the dismissal of the third respondent by the applicant was substantively unfair, and directed that the applicant had to fully

¹ 66 of 1995.

retrospectively reinstate the third respondent. The first respondent further directed that the back pay payable to the third respondent in terms of the reinstatement award to be some ten months' salary in the sum of R148 682.24. It is these determinations by the first respondent that forms the subject matter of the review application brought by the applicant.

Background facts

- [3] The third respondent was employed by the applicant as a winding shop supervisor. The third respondent was also a shop steward of NUMSA. The third respondent had some five years' service with the applicant at the time of his dismissal.
- [4] The production director for the department in which the third respondent worked was one John Farren ("Farren"). It was clear from the record that the working relationship between Farren and the third respondent was strained to say the least, and had consistently deteriorated over the period of the third respondent's employment at the applicant. I am also convinced, in considering the evidence on record as a whole, that Farren was in any event not an easy person to work with.
- [5] The incident giving rise to this matter took place on 15 February 2011. The third respondent was on duty and attending to the winding of a transformer and experienced a shortage of copper shim, and sought assistance to complete his work. There was some dispute of fact between the third respondent and Farren about what exactly happened once the third respondent came into contact with Farren on the day, but in my view nothing turns on this, in the end. I will however set out the contentions of both parties.
- [6] Farren contended that the third respondent had called him (Farren) to ask how the third respondent had to deal with the shortage of shim. According to Farren, he then called Nicholas Grobler ("Grobler"), an electrician employed by the

applicant, to assist in resolving the issue. Farren then said that in response to this, the third respondent then said to him that that he (Farren) never has solutions to problems and that he always calls Grobler to resolve problems. Farren said that he considered this statement to be disrespectful, provocative and insubordinate. Farren then informed the third respondent that he should be careful in making these kind of statements as he could get himself into trouble. The third respondent answered that if Farren wanted to fire him, then he must do so. There was then an exchange of words between the parties.

- [7] What further appears to be undisputed is that at some time during this exchange between the third respondent and Farren, Farren in fact called the third respondent an arrogant little man, and in fact said that he could take the third respondent up on the issue of firing him. It was also clear that the third respondent was upset as a result of the altercation.
- [8] According to the third respondent, on the other hand, he asked Farren for assistance in the form of getting another employee to help him with the work he was carrying out. Farren assessed the work and then called Grobler, and the third respondent asked why Grobler was being called, as all the third respondent needed was a person to help him. Farren then informed the third respondent that he must watch his big mouth as it would land him in trouble and he will dismiss the third respondent.
- [9] It was common cause that in the end, and a short while later, the third respondent actually completed the work he was required to complete. He actually joined the shims without further incident or protest.
- [10] Following the above incident, and finally on 5 April 2011, the third respondent was charged with two charges. These charges were:

‘i) Gross insubordination in that when Mr Farren called Mr N Grobler to instruct him (Mr Grobler) what to do to join two pieces of shim for Lawrence. Lawrence

said that Mr Farren has no solutions and always asks for Mr Grobler to solve the problems.

ii) Conduct affecting the employer/employee relationship detrimentally.' (sic)

- [11] The chairperson of the disciplinary hearing, which was a labour consultant from SEESA, had some difficulty in resolving the above factual dispute. The chairperson concluded in his reasoning that it was not clear what was said, but the chairperson accepted that the conduct of the third respondent in saying to Farren that he always asked Grobler for help was indeed insubordinate, but found that it was not grossly insubordinate as the charge read. The chairperson further concluded that the conduct detrimental to the employer resulted from this same event.
- [12] In recommending an appropriate sanction, the chairperson then recommended that the third respondent be given a final written warning valid for six months on the first charge, but be summarily dismissed on the second charge. The applicant accepted this recommendation and implemented the same in writing on 18 April 2011.
- [13] It must also be mentioned that at the time of his dismissal, the third respondent was subject to a final written warning issued on 8 February 2011 which appears to have related to an incident where the third respondent with other employees attended a NUMSA conference at the end of October 2010 for a total of three days, when the said employees were specifically told by management that they were only entitled to attend the conference for one day.
- [14] The third respondent then pursued his dismissal to the second respondent as an unfair dismissal and this dispute ultimately came before the first respondent, who made the finding in favour of the third respondent referred to above.
- [15] This matter will be determined against the above background.

The relevant test for review

[16] The proper review test to be applied is known in the general labour law colloquial tongue as the ‘Sidumo test’. This test comes from the judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² where Navsa, AJ held that in 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, and that ‘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?’³ Following on, and in *CUSA v Tao Ying Metal Industries and Others*,⁴ 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.’

[17] What the Constitutional Court meant in *Sidumo* and *Tao Ying Metal Industries* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.

[18] The first occasion the Labour Appeal Court authoritatively considered the *Sidumo* review test, and with respect correctly, was in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*,⁵ where the Court said the following:

² (2007) 28 ILJ 2405 (CC).

³ Ibid at para 110.

⁴ (2008) 29 ILJ 2461 (CC) at para 134.

⁵ (2008) 29 ILJ 964 (LAC) at para 96.

'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:⁶

'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach....'

The Court in *Fidelity Cash Management Service* then went further and formulated what can be described as an outcome based review test which the Court held the *Sidumo* review test envisaged, where the Court said:⁷

'It seems to me that, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such

⁶ Id at para 97.

⁷ Id at para 102.

decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.’

The Court in *Fidelity Cash Management Service* concluded:⁸

‘.... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.’

[19] Following a number of different interpretations and applications of the *Sidumo* test after the judgment in *Fidelity Cash Management*, matters came full circle, so to speak, in the judgment of the SCA in *Herholdt v Nedbank Ltd and Another*⁹ where the Court again specifically considered the *Sidumo* test, and concluded as follows:¹⁰

‘In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an

⁸ Id at para 103.

⁹ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) Cachalia and Wallis JJA.

¹⁰ Id at para 25.

unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

What this judgment means is simply that if the arbitrator ignored material evidence, and the review court in considering this material evidence so ignored together with the case as a whole, believes that the arbitration award outcome cannot still be reasonably sustained on any basis, then the award would be reviewable.

[20] Following the judgment of the SCA in *Herholdt*, the Labour Appeal Court has most recently in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹¹ again authoritatively interpreted and applied the *Sidumo* test and held as follows:¹²

‘*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator... In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material’

With respect, this clearly postulates that the *Sidumo* test is limited to an outcome based review test. The Court further said:¹³

¹¹ (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.

¹² *Id* at para 14.

¹³ *Id* at para 15.

‘.... What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test....’

And concluded:¹⁴

‘In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.’

- [21] In my view, and with the view to encapsulate a practical application of the review test in line with the principles set out above, the first step in a review enquiry is to consider or determine if an irregularity indeed exists where it comes to the arbitration award or the arbitration proceedings. A review court determines whether such an irregularity exists by considering the evidence before the arbitrator as a whole, as gathered from the review record, and comparing this to the award and reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law in order to determine what indeed constituted the proper evidence that the arbitrator, as a whole, would have had to consider. Once an irregularity is identified, the materiality of the irregularity then becomes relevant and must be considered. This means that the irregularity committed by the arbitrator must be a material departure from the acceptable norm or a material deviation from the actual evidence before him or a material departure from the proper principles of law or a material failure to consider and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy this first step in the enquiry. This approach of also requiring materiality of the irregularity takes care of the imperative that not every possible individual irregularity that may exist,

¹⁴ Id at para 16.

would be contemplated by the review test, as the review test requires the irregularity in the first place to be 'gross'.¹⁵ If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations needs to be made, and the review must fail.

[22] Should the review court however conclude that an irregularity indeed exists, then the second step in the review test follows, which is simply a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome. In conducting this second step of the review enquiry, the review court need not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity exists in the first place. The review court, in essence, takes the proper evidence as a whole, as ascertained from the review record, considers the relevant legal principles and decides whether the outcome that the arbitrator arrived at could nonetheless be arrived at by another reasonable decision-maker, even if it is for different reasons. If, and pursuant to this second step in the review enquiry, the review court is satisfied that the same outcome could not reasonably follow even for any other reasons, then the review must succeed, because, simply put, the irregularity would have affected the outcome. The end result always has to be an unreasonable outcome for a review to succeed.

[23] I will now proceed to determine the applicant's review application on the basis of the above principles and the two step enquiry in the application of the *Sidumo* test as I have set out above.

¹⁵ See Section 145(2)(ii).

Merits of the review: substantive fairness

- [24] From the outset, I must state that I have found the arbitration award of the first respondent to be a properly reasoned and motivated award. The first respondent dealt with all the pertinent evidence in a manner that is fully in line with the relevant principles of law relating to the determination of evidence. The first respondent for example excluded evidence not put to the witnesses for the applicant by the third respondent and made proper credibility findings on pertinent issues. I have no hesitation in saying that the award of the first respondent on the merits of this matter is a good example of what an arbitration award should look like. As a general proposition, I can find no irregularity in the arbitration award of the first respondent on the merits of the matter.
- [25] In applying the *Sidumo* test, I am of the view that the ultimate outcome arrived at by the first respondent that dismissal was inappropriate is unassailable, and must be upheld. One only needs to consider two pertinent issues in coming to such a conclusion, both of which issues the first respondent was very much alive to, and were pertinently addressed in the arbitration award.
- [26] The first issue can be found in the conduct of the applicant itself in deciding to dismiss the third respondent. The primary duty of an arbitrator is not to determine if an employee is guilty or not guilty of a charge. The arbitrator's duty is determine whether the dismissal of an employee is fair or not. In deciding this issue, the point of departure is to consider precisely what the employer in fact dismissed the employee for. In *Fidelity Cash Management Service*¹⁶ the Labour Appeal Court specifically held as follows:

‘It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.’ (emphasis added)

¹⁶ (supra) footnote 5 at para 32

- [27] The above being said, the applicant never dismissed the third respondent for what he had said to Farren per se. The chairperson of the disciplinary hearing recorded, and this was accepted by the applicant, that this misconduct was not gross, and justified a final written warning valid for six months. Therefore, the fact that the third respondent actually made the statement that he did to Farren, even on the applicant's own version, was not the reason for his dismissal.
- [28] What the third respondent was actually dismissed for was the second charge, being conduct affecting the employer / employee relationship detrimentally. How this can be a change in itself in any event escapes me. The fact is that the factual basis for this charge is exactly the same as that of the first charge. The two charges are inextricably linked. What the applicant clearly did was to elevate an issue which really must be considered when an appropriate sanction is determined to a charge in itself. This is a fundamentally wrong approach and in fact is nothing more than the irregular splitting of charges to bolster the case against the third respondent. To describe it simply – the misconduct is found in what the third respondent said to Farren. Whether this conduct detrimentally affected the employment relationship is a consideration in deciding what to do about the misconduct in the form of a sanction. The fact is that the applicant's own case was that what was actually said by the third respondent did not justify dismissal. It is then simply wrong and unfair to use the exact same statement made, then call it conduct detrimentally affecting the employment relationship, and dismissing the third respondent for what is actually the same thing not dismissable in the first instance. The first respondent was very much alive to this, and specifically so found in her award, where the first respondent concluded that based on this reasoning the third respondent should have 'escaped' with a final written warning. There is simply no irregularity in this reasoning of the first respondent, and therefore, in respect of the first part of the review test referred to above, no irregularity can be found to exist.
- [29] This matter is in fact comparative to what the Court deal with in *Volkswagen SA*

*(Pty) Ltd v Koorts NO and Others*¹⁷. The following extract from the judgment is pertinent, and in my view supports what has been set out above:¹⁸

‘.... Thirdly, I must point out that there appears to be a splitting of charges. The employees are charged with making false explanations to Rautenbach about their absence from their workstation and activities in the locker room although there appears to be no explicit provision in the code for this offence. This or the evidence relating to this in turn, according to the appellant, to be used to demonstrate that the employees were dishonest in the sense that they stole company time to spend on their own private interests while being paid for this time.’

[30] Of further relevance is the judgment in *Ntshangane v Speciality Metals CC*¹⁹ where Mlambo J, as he then was, said the following:

‘.... Respondent's contention is that applicant's false explanation for his lateness and absenteeism presented a clear breach of the trust the respondent had placed on him. Respondent therefore contends that with the trust breached it was entitled to formulate a separate charge following therefrom and dismiss him.

If applicant had a good and acceptable explanation for his lateness and absenteeism it would have been unfair to dismiss him under those circumstances. The fact that applicant had no good or acceptable reason for being late and absent made it proper for him to be charged. In charging him on account of lateness and absenteeism respondent made an election. Having made this election respondent went further and used applicant's unacceptable and false explanation to formulate a third charge.

In my view this was unfair. It is clear that the basis for finding applicant guilty on the first two charges was applicant's unacceptable explanation. Using the

¹⁷ (2011) 32 ILJ 1892 (LAC)

¹⁸ Id at para 33

¹⁹ (1998) 19 ILJ 584 (LC) at para 15 – 17

explanation to formulate a third charge took the issue beyond the realms of fairness.'

In casu, the third respondent was found by the applicant itself not to be subject to dismissal for the actual conduct. To now formulate a separate charge based on breach of trust for the same issue is simply not fair. That is the point.

- [31] The second issue is what can basically be described as the contributory conduct of Farren. The first respondent found that whilst two wrongs did not make a right, the conduct of Farren himself and what he actually said to the third respondent must mitigate against the sanction dismissal being imposed on the third respondent. This conclusion of the first respondent is in my view not only a reasonable conclusion, but actually correct and fully supported by the evidence. There is simply no irregularity in this reasoning and conclusion. The fact is that Farren called the third respondent an arrogant little man, when there was no reason for doing so. On his own version, he in fact implied that he would dismiss the third respondent. These issues cannot be ignored. The first respondent's conclusion that these events justified a mitigation of the sanction of dismissal must be sustained.
- [32] Having found as set out above, there is no need for me to consider any further issues raised by the applicant in its review application. The fact is that there exists no irregularity in the reasoning and conclusions of the first respondent in respect of the above two pertinent issues. Because there exists no irregularity in the first place, there is simply no reason to enquire whether or not the outcome is reasonable. In the circumstances, I uphold the determination of the first respondent that the dismissal of the third respondent was substantively unfair.

The issue of the relief

- [33] It is clear from the award of the first respondent that the first respondent simply opted for awarding reinstatement to the third respondent. The first respondent

gave no reason for this determination, referred to no evidence in this regard and exercised no judicial discretion as required. This the first respondent did despite the issue of reinstatement is being an inappropriate remedy being specifically raised by the applicant. In applying the review test referred to above, this conduct of the first respondent would constitute a material irregularity which would justify an enquiry into whether the outcome of the relief of reinstatement would nonetheless be reasonable. Now 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*²⁰ said:

‘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

²⁰ (2008) 29 ILJ 2507 (CC) at para 44.

of s 193(1)(c) may be ordered, the amount of which depends on the nature of the dismissal.'

- [34] 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, in *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others*,²¹ 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 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."

²¹ (2012) 33 ILJ 160 (LAC) at para 28.

The Court in *Mediterranean Textile Mills (Pty) Ltd* concluded that:²²

‘... 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.’

- [35] In applying a judicial discretion in order to determine whether the “non-reinstatable” conditions exist in the current matter, so as to determine the issue of a reasonable outcome, 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 as a reasonable outcome 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 it appears clearly from the record that there was no prospect of establishing any sound working relationship between the third respondent and Farren into the future, and there was simply no way in which it could be avoided that they would come into contact with one another on a day to day basis in the workplace. The fact that the third respondent was also a shop steward exacerbates this conflict and this would certainly persist. There is documentary evidence on record that meetings between the third respondent and other shop stewards, and Farren, would deteriorate in accusations and the trading of insults by both of them to one another. The third respondent accused Farren that it was his “number one” task to dismiss the third respondent. Farren on the other hand contended that the third respondent never wanted to listen and whenever he gave the third respondent work to do there would be shouting. In

²² Id at para 30.

the recent past, the third respondent had been subjected to several disciplinary processes, all relating to insubordination / insolence issues. I am satisfied that a proper and reasonable consideration of the entire record of evidence in this matter can leave little doubt that the employment relationship between Farren and the third respondent had been irretrievably destroyed and if the third respondent went back to work for Farren, which is what reinstatement would compel to happen, it would not be long before the parties are back in a dispute again.

- [36] The third respondent never showed any remorse for any of his conduct, even in the arbitration. The fact is that the third respondent did not behave in an acceptable manner as well. The third respondent never said that he would try and mend the relationship with Farren or testified that a continued working relationship may be possible. Farren specifically testified that any continued working relationship with the third respondent was not possible, which testimony was uncontradicted. Without the third respondent at least showing some remorse for what he did and exhibited a willingness to rehabilitate, no working relationship with can be restored. As the Court said in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*:²³

‘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.’

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

- [37] 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*

²³ (2000) 21 ILJ 1051 (LAC) at para 25.

Others.²⁴ The Court held that:²⁵ '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.²⁶

[38] I also find guidance in the judgment of *National Union of Metalworkers of SA on behalf of Maifo and Others v Ulrich Seats (Pty) Ltd*,²⁷ 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 reinstatement.'

After analysing the case law on this issue, the Court concluded as follows, which I respectfully agree with:²⁸

'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;

²⁴ (2012) 33 ILJ 1081 (LAC).

²⁵ Id at para 30.

²⁶ Id at paras 31 – 34.

²⁷ (2012) 33 ILJ 2918 (LC) at para 40.

²⁸ Id at para 48.

- (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.'

[39] I also refer to *Boxer Superstores (Pty) Ltd v Zuma and Others*,²⁹ where 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 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

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

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:³⁰

'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 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.'

- [40] In the end, what is clear from the award of the first respondent is that the first respondent simply plumbs for reinstatement, and does not properly determine the issue, and does not exercise any discretion at all. This is a material irregularity. Then having regard to the events before her in the arbitration as evidenced by the record of the arbitration proceedings, the first respondent would be compelled to have, had he exercised his 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 first 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 what would be a reasonable outcome expected of an

³⁰ Id at para 11.

arbitrator such as the first respondent. I, accordingly, review and set aside the award of reinstatement made by the first respondent in favour of the third respondent.

[41] In this matter, the appropriate relief to have been afforded to the third respondent was one of compensation.³¹ Since this was not the determination of the first respondent in his award, I intend to substitute the award of the first 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 second respondent for determination by the first 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.³² 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*:³³

‘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 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

³¹ See Section 193(1)(c)

³² 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

³³ (2011) 32 ILJ 2154 (LC) at paras 47 – 48

respect.'

- [42] As to the exercise of the discretion in making a determination of the quantum of compensation, reference is made to the well known considerations as set out in *Ferodo (Pty) Ltd v De Ruiter*.³⁴ In *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*,³⁵ 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.'

- [43] 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 (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).

- [44] 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

³⁴ (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.'

³⁵ (2007) 28 ILJ 2238 (LAC).

the following: (1) The applicant did have a proper cause of complaint against the third respondent, but in essence overreacted and split the charges; (2) the third respondent was still unemployed as at the date of the arbitration; (3) the third respondent had a length of service of five years at the time of his dismissal; (4) the third respondent presented no evidence as to his attempts to mitigate damages; (5) the third respondent showed no remorse; and finally (6) the fact that the conduct of Farren contributed to the problem. 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 that the third respondent earned R13 904.84 per month, giving a total compensation award of R125 143.56.

[45] Accordingly, in the light of all of the above, I conclude that the award of the first respondent on the issue that the third respondent's dismissal was substantively unfair is upheld. I further conclude that the award of the first respondent as regards the issue of relief be reviewed and set aside, and I shall substitute such award with an award of compensation on the basis as set out above.

[46] The applicant did not 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.

Order

[47] In the premises, I make the following order:

47.1 The arbitration award of the first respondent, being arbitrator Seele Mokwena, dated 13 March 2012 in the arbitration proceedings between the applicant and the third respondent, under case number MEGA 32858, to the effect that the dismissal of the third respondent by the applicant was

substantively unfair, is upheld and confirmed;

- 47.2 The arbitration award of the first respondent, being arbitrator Seele Mokwena, dated 13 March 2012 in the arbitration proceedings between the applicant and the third respondent, under case number MEGA 32858, as to the relief of reinstatement and back pay afforded to the third respondent, is reviewed and set aside;
- 47.3 The award of the first respondent with regard to the issue of relief as contained in the arbitration award dated 13 March 2012 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 R125 143.56;
- 47.4 The applicant is ordered to make payment to the third respondent in the amount of R125 143.56 within 10(ten) days of date of this judgment;
- 47.5 There is no order as to costs.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Advocate Connie Prinsloo

Instructed by: De Villiers Du Plessis Attorneys

For the third Respondent: None