REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1767 / 2012

In the matter between:

WINDSCREEN DISTRIBUTORS (PTY) LTD	**Applicant**
and	
MOTOR INDUSTRY BARGAINING COUNCIL	
(DISPUTE RESOLUTION CENTRE)	**First Respondent**
THANDIWE TSHAYANA N.O.	**Second Respondent**
PETRO EKERMANS	**Third Respondent**

Heard: **16 August 2013**

Delivered: **04 March 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 – plea of guilty – consequence of guilty plea – employer to prove existence of guilty plea – employer failed to prove such plea

Misconduct – defence to misconduct of provocation – requirements of provocation – provocation shown to exist – determination of arbitrator upheld

Insubordination – splitting of charges – dismissal not justified – employer principal cause of altercation – award of arbitrator upheld

Unfair dismissal – issue of relief – award of compensation justified – compensation award upheld

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in her capacity as arbitrator of the Motor Industry 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 Act[1] (“the LRA”).

[2] The third respondent was dismissed by the applicant on 22 December 2011, based on three charges relating to the third respondent being grossly insubordinate / insolent, and behaving in a threatening manner. The third respondent pursued her dispute as an unfair dismissal to the first respondent, and the matter came before the second respondent for arbitration on 29 May 2012. In an award dated 8 June 2012, the second respondent determined that

[1] 66 of 1995.

the dismissal of the third respondent by the applicant was substantively unfair, and directed that the applicant had to compensate the third respondent in an amount equivalent to three months' salary (following a variation award issued on 5 August 2012). It is these determinations by the second respondent that forms the subject matter of the review application brought by the applicant.

<u>Background facts</u>

[3] The third respondent commenced employment at the applicant's Boksburg branch on 23 March 2011, initially on a three month fixed term contract and thereafter in a permanent capacity. The third respondent was an accounts supervisor at the Boksburg branch of the applicant at the time this dispute arose, but appeared to have been a bookkeeper before that.

[4] The applicant experienced difficulties with the group accountant employed at the Boksburg branch in September 2011 in that, that accountant simply could not cope with the workload at the branch and had no assistance. The applicant then envisaged to utilise the third respondent as assistant to the group accountant. According to the applicant, it gave this a trial so to speak, but unfortunately; found that the third respondent did not have the knowledge and experience to fulfil this task. The applicant then retained the services of a qualified bookkeeper to assist the group accountant, albeit on a temporary basis.

[5] According to the applicant, and after this external bookkeeper started working with the group accountant, it quickly became apparent that there were material difficulties with the applicant's accounting structures and processes. Once these difficulties had been rectified, it then became apparent that the applicant actually did not require the position of accounts supervisor, in addition to a bookkeeper. To put it simply, and with the proper financial / accounting systems and practices in place, the applicant's contention was that all the functions fulfilled by the third respondent was no longer needed, and could be done by the accountant and bookkeeper.

[6] The third respondent, on the other hand, had a different version of events. According to the third respondent, this bookkeeper, Manet Van Rensburg ("Van Rensburg") was a temporary employee who in fact simply took over her position. The third respondent stated that she was "floating around", so to speak, after Van Rensburg took over her position, and in fact saw no reason why she (the third respondent) could not go back to this position as Van Rensburg was simply a temporary employee.

[7] The applicant stated that as a result of its decision to make the above operational and structural changes, the applicant then contemplated the possible retrenchment of the third respondent. This being contemplated, the acting branch manager of the Boksburg branch, Anton Botha ("Botha") then convened a meeting with the third respondent to inform her of this and of the fact that the applicant intended to embark upon a restructuring process as a result of the possible redundancy of her position. This meeting took place on 12 December 2011. Botha told the third respondent that the applicant would implement a retrenchment process, but should the third respondent prefer, there was the option of voluntary retrenchment. Again, the third respondent had a different version of the events on 12 December 2011 and contended that Botha gave her the option to resign or face a retrenchment process and it was clear the applicant had already decided she must go.

[8] What is common cause is that the third respondent was not happy with the events on 12 December 2011, and stated that she would not resign and that she would equally not accept any retrenchment processes. The applicant stated that this left it with no alternative but to commence a restructuring process and on 13 December 2011, the third respondent was called to a further meeting and presented with a notice of intention to restructure. According to the applicant, and in this meeting of 13 December 2011, the notice was also explained to the third respondent.

[9] The third respondent's version of the events of this meeting is that she was presented with the notice of intention to retrench as well as a voluntary retrenchment agreement. The third respondent stated that she was told to sign the voluntary retrenchment agreement, which she refused to do. She was then told by Botha that she was retrenched and that he wanted her to leave immediately. According to the contentions of the applicant, the third respondent actually asked what her package would be and she was informed one weeks' salary per year of service, but the third respondent scoffed at this proposition and asked when she could leave and it was explained that she could leave immediately if she wanted, but a further consultation needed to be held with her. According to the applicant, the third respondent stated that she actually wanted to leave immediately and that the applicant would hear from the CCMA. Thus, there existed two conflicting versions that in my view lay at the heart of this matter, the one being that the third respondent was retrenched with immediate effect and told to leave immediately because she refused to sign the voluntary retrenchment agreement, and the other version that it was actually the third respondent that asked to leave immediately despite the still pending retrenchment process.

[10] It was common cause that the third respondent left the meeting on 13 December 2011 upset and went to her office to collect her things and conclude her affairs. It was equally common cause that a fellow employee, Brent Henderson ("Henderson"), was asked by Botha to accompany her to her office to ensure that the third respondent did not out of spite delete information from the applicant's accounting system.

[11] The third respondent did not immediately leave her office and according to her version, was still deleting personal information on her computer when Botha came to her and confronted her about why she had not already left. The third respondent stated that she was finishing off and Botha stated that how long it could take to just clear out an office. The third respondent stated that Botha

swore at her and as she was already upset from the earlier events and what he was doing to her now she reacted by swearing at him to leave her office. According to the version of the applicant, all Botha did was to go to the third respondent's office and ask when she was leaving when he found her still working on her computer and it was the third respondent who then swore at Botha telling him to leave her office. The applicant also contended that third respondent also told Botha that her husband would come and assault him but the third respondent disputed she ever did such a thing. According to the applicant, the third respondent then refused to leave the premises when Botha instructed her and Botha was then compelled to instruct security to remove her from the premises. Once again, therefore, there were two irreconcilable versions as to the events in the third respondent's office on 13 December 2011.

[12] Following the above events, the third respondent on 13 December 2011, was charged with three charges. These charges were:

> '1) Gross insolence in that you on the 13th day of December 2011 spoke in a rude, aggressive and unbecoming manner to your manager;
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> 2) Gross misconduct and/or verbal assault in that on the 13th day of December 2011 you verbally threatened your manager;
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> 3) Gross insubordination in that on the 13th day of December 2011 you have refused a direct and lawful instruction to leave the premises due to your threatening behaviour.'

[13] The disciplinary hearing was convened for 19 December 2011. The chairperson of the disciplinary hearing was an official of the South African United Employers Organization. According to the applicant, the third respondent actually pleaded guilty to the first charge against her, and pleaded not guilty to the second and third charges. The third respondent contended that she never pleaded guilty but what she had done was to admit that she was rude and disrespectful towards

Botha but specifically raised she was provoked in doing this. The chairperson however entered a guilty plea on this first charge and also found the third respondent guilty of the second and third charges. The chairperson then considered the issue of an appropriate sanction, and recommended that the third respondent be summarily dismissed. The chairperson prepared a written finding, which was handed to the third respondent on 22 December 2011. The third respondent was then dismissed.

[14] The third respondent then pursued her dismissal to the first respondent as an unfair dismissal and this dispute ultimately came before the second respondent, who made the finding in favour of the third respondent referred to above. Initially, the award of the second respondent recorded six months' salary as compensation in the sum of R60 000.00 but this was later varied by the second respondent in terms of Section 144 of the LRA to three months' salary which actually is the correct determination considering the third respondent's salary of R20 000.00 per month.

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

<u>The relevant test for review</u>

[16] In the judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ held that in light of the constitutional requirement (in s 33 (1) of the Constitution) 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 Court set the threshold test for the reasonableness of an award or ruling as: '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:

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[2] (2007) 28 ILJ 2405 (CC).
[3] Ibid at para 110.
[4] (2008) 29 ILJ 2461 (CC) at para 134.

> '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] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[5] the LAC dealt with this review test and said:

> '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.'

[19] The Court in *Fidelity Cash Management Service* also described what the *Sidumo* review test envisaged, where the Court said:[6]

> '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 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

[5] (2008) 29 ILJ 964 (LAC) at para 96.
[6] Id at para 102.

> 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:[7]

> '…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 H 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.'

[20] Two very recent considerations of the *Sidumo* test bears reference. The SCA in *Herholdt v Nedbank Ltd and Another*[8] concluded as follows:[9]

> '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 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.'

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[7] Id at para 103.
[8] [2013] 11 BLLR 1074 (SCA) Cachalia and Wallis JJA.
[9] Id at para 25.

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.

[21] The LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[10] applied the *Sidumo* test as follows:[11]

> '*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'

The Court further said:[12]

> '…. 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:[13]

> '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

[10] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.
[11] Id at para 14.
[12] Id at para 15.
[13] Id at para 16.

came to a conclusion which was reasonable to justify the decision he or she arrived at.'

[22] The above simply postulates a two tier review test. The first step in a review enquiry is to consider or determine if an irregularity indeed existed in 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 found to exist, it must be determined if the irregularity is material meaning that the irregularity 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. This approach of also requiring materiality of the irregularity takes care of the imperative that not every possible individual irregularity that may exist would be contemplated by the review test as the review test requires the irregularity in the first place to be 'gross'.[14] If the review court should find that no material irregularity exists in the first instance, the matter is at an end, no further determinations needs to be made, and the review must fail.

[23] Should the review court however conclude that a material irregularity indeed exists, the second step in the review test then is 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? The review court, in essence, takes the

[14] See Section 145(2)(ii).

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.

[24] 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.

<u>The award of the second respondent</u>

[25] The second respondent firstly recorded that the third respondent disputed all the charges against her.

[26] The second respondent found that the third respondent was issued with a 'retrenchment separation letter' which she refused to sign. The second respondent further found that Botha told the third respondent to leave the premises immediately when she refused to sign this letter, and asked other employees to ensure that she did not delete anything from the computer.

[27] The second respondent recorded that the third respondent's version of the material events was not disputed. This version was that she was upset at being retrenched and Botha came to her office and asked her when does she think she was going to leave and Botha then swore at her. The third respondent being upset and in response then swore at Botha. The third respondent never threatened Botha with her husband. The second respondent then accepted this version of the third respondent.

[28] The second respondent stated that one must be mindful of the fact that "emotions were high". The second respondent recorded that the reason for this is that the third respondent was given the option to resign or be retrenched, and she was then upset about her forced retrenchment. When Botha then first swore at her, the third respondent could not be blamed for how she reacted. In essence, the second respondent accepted that the third respondent was provoked.

[29] The second respondent concluded by finding that the applicant did not want the third respondent any more. The second respondent found that the third respondent's position was taken over by someone else and she was given the option of resignation or being retrenched, and that her dismissal as a result was a "smokescreen" for covering up these unlawful actions of the applicant. The second respondent also found that the applicant had taken advice about the retrenchment of the third respondent and after being advised of its wrongdoing then fabricated the charges to cover up its conduct.

[30] The second respondent concluded that the third respondent's dismissal was substantively unfair. The second respondent ultimately found that three months' salary (after the variation) for this substantively unfair dismissal was "just and equitable".

<u>The review grounds of the applicant</u>

[31] The applicant submitted that the second respondent committed several reviewable irregularities in her determination, consideration and application of the evidence of the applicant's witnesses. In this regard, the applicant raised the following issues which according to the applicant, was entirely ignored and negated by the second respondent: (1) the applicant in fact did dispute the version that it was Botha who swore first, and in fact led evidence that Botha never swore; (2) The applicant led corroborated testimony that the third respondent threatened Botha with her husband; (3) the undisputed evidence in

the arbitration was that the third respondent actually pleaded guilty to the first charge in the disciplinary hearing; (4) There was never any evidence that the third respondent was retrenched, and the actual evidence was the institution of a retrenchment process; (5) The undisputed evidence was that the third respondent was simply offered the option of a voluntary retrenchment package, which was her right to refuse and which she did; (6) The retrenchment process was still ongoing; (7) The third respondent was in fact the one who behaved unacceptably in the first consultation meeting on 13 December 2011 and wanted to leave immediately; (8) The applicant was compelled to charge the third respondent for her behaviour; and (9) there was no evidence to the effect that the third respondent was asked to leave the premises because she refused to sign the retrenchment letter. The applicant contended that if all these issues were considered by the second respondent, she could not have reasonably come to the conclusion that she did.

[32] The applicant also contended that the second respondent exceeded the bounds of her authority by enquiring into the retrenchment process when she was not called on to do so. According to the applicant, the second respondent in fact decided on the fairness of the retrenchment process, when this was not in issue, and that the second respondent's decision was materially influenced by her views on the retrenchment.

[33] Added to this, the applicant contended that if the second respondent alerted it to the fact that she would consider if the retrenchment was genuine and proper, the applicant could and would have presented evidence about this and called witnesses. The crux of the case of the applicant in this respect is that the second respondent deprived it of a fair hearing.

[34] It was further submitted by the applicant that the undisputed evidence was that the only document Botha actually gave the third respondent was the notice of intention to restructure and was never given an actual notice of retrenchment, but

despite this, the second respondent found that the third respondent was given a retrenchment letter which was a material irregularity.

[35] The applicant also took issue with the second respondent's determination as to how the third respondent came to leave the premises. The applicant expressed the view that the second respondent materially misconstrued the evidence in this regard. The evidence was that already on 12 December 2011, the issue of the voluntary separation package was discussed with the third respondent and she already said she was not interested. This means that the refusal to sign the separation agreement could not have been the reason for the third respondent immediately leaving on 13 December 2011. The meeting on 13 December 2011 was to present the letter of intention to restructure and a first consultation.

[36] The second respondent, according to the applicant, had particular consideration of the fact that Botha was not called as a witness. The applicant took issue with this on the basis that the second respondent ignored that Botha was not necessary as other witnesses presented direct evidence in this regard and it was explained that Botha was no longer employed by the applicant.

[37] As a general proposition, the applicant also takes issue with the second respondent's assessment and determination of the probabilities, and the credibility findings that she made.

[38] The applicant finally submitted that the second respondent in awarding compensation simply awarded six months' remuneration without proper reason or motivation, and that such award of six months' remuneration was a reviewable irregularity.

<u>Merits of the review: substantive fairness</u>

[39] In terms of the review test as articulated above, I will first consider whether any material irregularities exist in the award and reasoning of the second respondent.

I do not intend to deal with each and every individual review ground raised by the applicant as set out above as all these individual review grounds can be dealt with under the broader categories specifically discussed in this judgment. Unfortunately for the applicant, however, a proper consideration of all the material evidence on record and the comparison thereof to the award of the second respondent reveals that there is very little merit in any of the grounds of review raised by the applicant.

[40] I intend to immediately dispose of the third charge of insubordination. There was no evidence of any instruction being issued to the third respondent which she disobeyed. The common cause evidence was in fact that the third respondent went to pack up her belongings and delete her personal content on her computer as part and parcel of leaving the premises as required by the applicant from her. The problem Botha had with her was not that she was refusing to leave, but that she was not leaving fast enough. This is not insubordination. In terms of the applicant's own version in the arbitration, Botha required that the third respondent be escorted from the premises not because she refused to leave, but because the third respondent threatened Botha with her husband. Again, this has nothing to do with insubordination. None of the witnesses of the applicant said anything about the third respondent refusing to leave when told to do so and Botha did not testify. There is accordingly no substance whatsoever in this charge, and it remained completely unproven. It simply does not require further consideration. In any event, as will be discussed below, it is my view that the applicant's case was principally based on the actual conduct of the third respondent on 13 December 2011, firstly during the meeting on that date and the following events after that as manifested in the first and second charges.

[41] The second respondent commenced her reasoning by finding that the third respondent disputed all the charges against her. As stated above, the applicant takes issue with this based on the contention that the third respondent pleaded guilty to the first charge. Now it is true that if the third respondent indeed pleaded

guilty to this charge, the second respondent would have to accept that the misconduct in this regard was not disputed by the third respondent and the only issue that would need determination was the appropriate sanction for such misconduct. It would have been a material irregularity for the second respondent to have simply ignored and negated such a guilty plea. In *SA Fibre Yarn Rugs Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[15] it was held as follows:

> 'As I have already mentioned, since the employee had pleaded guilty to the charge of unjustifiable absence, the real issue that the commissioner was required to decide was whether the sanction of dismissal was fair in the circumstances. ….'

And in *Clinix Private Hospital Soweto (Pty) Ltd v Ralefeta No and Others*[16], the Court said:

> 'It is very significant that the third respondent had pleaded guilty to insolence and insubordination at the disciplinary hearing whereas she denied guilt at the arbitration hearing. The arbitrator clearly did not apply his mind to this clear indication that the third respondent's version was probably false.'

[42] The crisp issue then is, in order for the applicant to establish the existence of such a material irregularity on the part of the second respondent in the arbitration proceeding, whether the third respondent in fact and actually pleaded guilty to this first charge. Considering the implications of a guilty plea to the applicant's own case and considering that the applicant had the duty to prove that the third respondent's dismissal was fair, it was imperative for the applicant to have at least established a *prima facie* case that the third respondent indeed pleaded guilty. The record, unfortunately for the applicant, shows that it dismally failed in

[15] (2005) 26 ILJ 921 (LC) at para 12. See also *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 1238 (LC) at para 20.
[16] (2007) 28 ILJ 1075 (LC) at para 8.

this regard. The issue of the guilty plea arose at the very start of the arbitration proceedings. The third respondent in her opening address stated that she disputed all three charges. The applicant's representative then enquired about the third respondent having pleaded guilty to the first charge in the disciplinary hearing. The third respondent answered that she never pleaded guilty. The third respondent explained her statement in this regard by saying "I didn't plead guilty I have said I am guilty but I am not guilty because I was provoked …" The applicant was thus clearly alerted to what the issue was, and what it had to show and was in fact warned by the second respondent to lead evidence in this regard. Instead, the applicant led no evidence about the guilty plea. The chairperson was not called to substantiate his recording of a guilty plea and on what basis it was done. The one and only piece of evidence the applicant had to substantiate a guilty plea was that which was recorded in the disciplinary hearing finding, which remained unsubstantiated in evidence. Opposed to this was the direct testimony by the third respondent that she never pleaded guilty.

[43] Based on the above, I am quite satisfied that the second respondent was indeed correct in recording that the third respondent disputed all the charges against her. The applicant simply did not establish the existence of a guilty plea. The second respondent was thus entitled to enquire into the merits of the first charge, and I can find no irregularity in the second respondent then properly doing so, as will be addressed hereunder.

[44] The next issue to consider is the two conflicting versions of the applicant and the third respondent as far as it concerns the events in the meeting on 13 December 2011 and in the third respondent's office later on the same day. It must be remembered that the second respondent found that the version of the third respondent was undisputed and that is why she accepted the third respondent's version. The first question then is whether the record in fact substantiated this conclusion, because if it does not, a material irregularity may well be found to exist.

[45] The first issue to consider in this regard is the fact that Botha was not called as a witness. The second respondent was very much alive to this difficulty and this is one of the grounds of review raised by the applicant. The fact is that only Botha could testify as to the events in the meeting on 13 December 2011. None of the applicant's witnesses actually called could shed any light on these events in this meeting and, in particular, could not contradict the third respondent's contention that Botha told her in that meeting to leave immediately when she refused to sign the voluntary retrenchment agreement. The applicant contends it explained that Botha could not be called because he was no longer working for the applicant, and the record shows that this was indeed said. However, this explanation as it stands is in any event an abysmal explanation. If the applicant wanted its failure to call Botha not to be held against it, it needed to do a whole lot more. It would have to explain that it was unable to ascertain the whereabouts of Botha and explained the efforts it actually took to do so. Or, and if it knew the whereabouts of Botha, it would have had to explain why Botha was unable to testify and why a subpoena could not serve to secure his presence at the arbitration.

[46] I am left with the distinct impression that the applicant did not want to call Botha because he may not have substantiated the applicant's version of events. This being the case, the failure to call Botha as a witness must weigh heavily against the applicant, as the second respondent properly and justifiably considered, and determined. In *ABSA Investment Management Services (Pty) Ltd v Crowhurst,*[17] it was said: '.... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case. Compare Zeffertt et al SA Law of Evidence (5 ed) at 128-30.' In *General Food Industries Ltd v Food and Allied Workers Union,*[18] the following was said, which in my view can equally be applied in the current matter: 'In my view, if the respondent wanted to challenge the appellant's version of what transpired at certain meetings and union officials or shop stewards were

[17] (2006) 27 ILJ 107 (LAC) at para 14.
[18] (2004) 25 ILJ 1260 (LAC) at para 46.

present at such meetings, it should have adduced their evidence...'. The Court in *Simelane and Others v Letamo Estate,*[19] adopted a similar approach and said: 'Failure to produce a witness who is available and who is clearly able to give relevant evidence leads to an adverse inference being drawn by the court …'. I make a final reference in this respect to *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd*[20] where it was held as follows which in my view is directly applicable to the current matter:

> 'Thus in my view the respondent having put forward a prima facie case that Mr Ntsoane for the union and the applicant had conceded in correspondence to what transpired between the parties, it was for the union to have called him to clarify these issues, failing which to provide an explanation for such failure. There was no explanation why Mr Ntsoane was not produced as a witness and therefore the inference to be drawn is that the applicant feared that he would give adverse evidence against the applicant or for that matter confirm the version of the respondent. It is a well-established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn. ….'

Based on the above principles, I am compelled to conclude that Botha did not testify because they would in fact damage the applicant's case by testifying.

[47] My conclusion in this regard is further cemented by the actual evidence of Yolande Anagnostopoulos ("Anagnostopoulos"), who testified for the applicant. She was the HR manager, and was for some or other inexplicable reason not involved in the conducting of the retrenchment process, as one would expect to be the case where an employer has an HR manager. Despite this being suspicious in itself, Anagnostopoulos then goes further and actually stated that at the time when Botha was presenting the third respondent with the retrenchment documents on 13 December 2011, it had already been decided that the third

[19] (2007) 28 ILJ 2053 (LC) at paras 22 and 23.
[20] (2009) 30 ILJ 1379 (LC) at para 29.

respondent would be retrenched that she could go immediately or work out her notice. Referring specifically to Botha, Anagnostopoulos said that he wanted her to leave immediately after she refused to sign the retrenchment agreement. Anagnostopoulos also confirmed that she was not in the meeting at all and thus could not comment on what Botha actually said. Considering this was the applicant's own and only witness in this respect, the only rational and reasonable conclusion that can be drawn from this is that Botha did exactly that, and this fully corresponds with the third respondent's version. One has to thus accept that Botha was not called because he would not support the applicant's version.

[48] Therefore, and insofar as the second respondent accepted the version of the third respondent with regard to what transpired in the meeting on 13 December 2011, this determination is entirely reasonable, and in my view unassailable. This means that the proper evidence before the second respondent thus was that the applicant (by way of Botha) confronted the third respondent in the meeting on 13 December 2011 on the basis that she either sign the retrenchment agreement or leave immediately, and when she refused to sign the agreement, she was told to pack up her office and leave immediately. There is no dispute that this agreement was pre-signed by the applicant, actually existed, and was part of the documentary evidence. The fact that this was the proper evidence has quite some significance to the provocation issue as will be addressed hereunder. What this conclusion also does mean is that there is no merit whatsoever in the contention raised by the applicant as part of its review grounds that there was no voluntary retrenchment even offered to the third respondent on 13 December 2011.

[49] This then leaves the events in the third respondent's office on 13 December 2011. The applicant's evidence in this regard is equally unsupportive of its case. Anagnostopoulos could actually shed no light on these events, specifically saying she was not there when the events happened. However, and what is really in my view an indictment on the case of the applicant is the testimony of Henderson,

who was actually in my view quite a forthright and honest witness. What Henderson testified is that Botha came to him and told him to unplug the third respondent computer to hurry her along. Henderson stated that the third respondent and Botha exchanged words and "threats" passed between the two. Henderson said that there was a lot of anger between the two parties and that he personally felt it was a personal issue between the two and nothing "against the company". He also confirmed that the third respondent was upset about the offer being made to her to leave the company. Henderson also confirmed that Botha indeed came to the third respondent to ask why she was still there and should hurry packing up which set off the whole confrontation. This evidence of Henderson, as a whole, certainly appears to support the version of the third respondent.

[50] The applicant also led the testimony of Chantal Mare ("Mare"). Mare confirmed that Botha came and asked the third respondent when she would be finished packing up so she could leave the premises, and that later on, Botha asked her (Mare) to telephone security to remove the third respondent because she threatened him. Mare said she heard the third respondent swearing at Botha and threatening him with her husband. Mare did however say that Botha had her removed from the premises by security because she did not leave immediately and threatened Botha. I have my doubts about the credibility of the evidence of Mare. She only heard what the third respondent said but could not say what Botha said. There were also contradictions in her evidence about the third respondent telephoning her husband and her evidence on the conduct of Botha was at odds with the testimony of Henderson which was far more credible. Finally, and despite initially saying that Botha "confronted" the third respondent she later changed this version. However, and based on the consideration of probabilities, as discussed hereunder, a conclusive credibility finding on the evidence of Mare is not that important.

[51] Considering some of the evidence of Henderson and the evidence of Mare, I do

accept the applicant's contention that the third respondent's version about the events in her office on 13 December 2011 was not undisputed as the second respondent found it was. Because the second respondent accepted the third respondent's version of events for this reason alone, the second respondent committed a material irregularity. That is however not the end of the enquiry. The question now is whether the second respondent's acceptance of the version of the third respondent with regard to the events in her office on 13 December 2011 is nonetheless a reasonable outcome that could be arrived at. The answer to this in my view can be found in a proper determination of the probabilities. After all, and in *SFW Group Ltd and Another v Martell et Cie and Others,*[21] the Court said:

> '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.'

[52] The determination of probabilities entails a consideration of the record of evidence as a whole, for the purposes of establishing what would be most natural, plausible and logical inference to be drawn from such evidence. In *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport,*[22] 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.[23] In *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co,*[24] it was said:

> '…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 <u>which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable)</u>.' (emphasis added)

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[21] 2003 (1) SA 11 (SCA) at para 5.
[22] (2000) 21 ILJ 2585 (SCA) at para 9.
[23] See also *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E.
[24] 1985 (3) SA 916 (A) at 939I-J.

[53] What is apparent from the evidence is that the third respondent was in fact told on 13 December 2011 to pack her things and leave immediately, and this upset her. It also did not help that Botha in fact sent a chaperone with the third respondent to her office, in essence indicating that he did not trust her when there was no reason for this. It is equally apparent that Botha was becoming impatient because the third respondent was not leaving quick enough and actually came to hurry her along. In the course of getting the third respondent to leave, and considering the third respondent was already upset by the events, a verbal altercation between her and Botha then ensued. It is based on all of these facts that it is entirely probable that the third respondent acted as she did in response to what happened to her in the first place, was not the aggressor in this instance, and was actually provoked. I also find it unlikely that Botha never swore at the third respondent as suggested by Mare especially considering the evidence of Henderson. Accordingly, and despite the second respondent acting irregularly in concluding that the third respondent's evidence was undisputed, the fact remains that the ultimate conclusion arrived at by the second respondent with regard to the events on 13 December 2011 remained a reasonable outcome, fully supported by the probabilities.

[54] In the end, there is simply no basis for me to interfere with the conclusions the second respondent arrived at with regards to all the events that took place on 13 December 2011. Principally, the conclusions of the second respondent simply do not constitute irregularities, and despite the one irregularity that does exist as set out above, the outcome still remains a reasonable outcome.

[55] The applicant's review issues also included a complaint that the second respondent decided on the fairness of the retrenchment when she was not called on to do so. This criticism is entirely misplaced. It was very much raised as an issue from the outset that the third respondent contended that she was actually dismissed on 13 December 2011 prior to the disciplinary hearing. At the start of the arbitration, the third respondent actually said she was twice dismissed and

the applicant disputed the first dismissal. The second respondent resolved the issue by recording that as it was at least common cause that the third respondent was dismissed following the disciplinary enquiry on 19 December 2011, the case should focus on that. I have no difficulty with this approach which I consider to have been the proper course of action for the second respondent to follow. In terms of Section 138(1) of the LRA, a commissioner may conduct arbitration proceedings in any manner that a commissioner deems fit.[25] As the Court said in *CUSA v Tao Ying Metal Industries and Others:*[26]

> 'Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'…. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

The second respondent in the end only determined the fairness of the dismissal resulting from the disciplinary enquiry on 19 December 2011. The second respondent never pronounced on the fairness of the dismissal contended by the third respondent to have happened on 13 December 2011. The second respondent properly identified the true issue in dispute that she was required to determine, being the fairness of the dismissal which took place on 22 December 2011 and in my view, only considered the preceding events (including the retrenchment issue) as part and parcel of the overall determination whether this dismissal was fair. In *National Union of Metalworkers of SA and Others v Bader*

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[25] Section 138(1) reads 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'
[26] *CUSA v Tao Ying Metal Industries and Others* (supra) at para 65.

Bop (Pty) Ltd and Another,[27] 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 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.'

The above ratio would equally apply to arbitrators conducting arbitration.[28]

[56] Also in *CUSA v Tao Ying Metal Industries and Others,*[29] 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 may only emerge once all the evidence is in'. This is exactly what happened *in casu*, and the second respondent determined the matter accordingly.

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[27] (2003) 24 ILJ 305 (CC) at para.52.

[28] *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.

[29] Id at para 66.

[57] Therefore, and despite it being true that the second respondent indeed considered the issue of the retrenchment in the circumstances of this matter, it would have been remiss of her not to do so. As stated above, and considering the true nature of the dispute and all the facts relating to it, the consideration of this issue must be seen in proper context. This context has nothing to do with the issue as to whether the retrenchment itself is fair or unfair, but involves the very issue raised by the third respondent that she was provoked and as a possible explanation on the probabilities as to why the applicant in fact acted towards the third respondent as it did in this matter. The manner in which the second respondent considered the retrenchment issue is clearly indicative of this approach. To put it in simple terms – with the third respondent simply being moved out of her position, then being asked to resign or face a retrenchment process, then being told to sign a retrenchment agreement or leave immediately, and then finally in fact being expeditiously ousted from the premises, there is little wonder that she became upset and acted in the manner that formed the subject matter of the disciplinary charges against her. This being the case, then surely it must have been apparent to the applicant that to discipline the third respondent was entirely inappropriate, and with the applicant persisting in doing so could reasonably lead to the conclusion that the applicant had an ulterior motive. This motive, according to the second respondent, was to try and camouflage the clearly botched retrenchment. There can be nothing wrong with this approach of the second respondent, and in my view is an approach consistent with logic and common sense in determining the true dispute.

[58] This then neatly leads to the consideration of the provocation issue. The defence of the third respondent was that she was provoked by the applicant. In my view, the third respondent's provocation defence has proper merit, and this is an issue the second respondent herself appreciated and in the end, also determined to be the case. The fact is that the applicant was required to prove that the reason why it dismissed the third respondent was fair. In *Fidelity Cash Management*

Service,[30] the Court held:

> '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)

These reasons, according to the applicant, are firmly grounded on the manner in which the third respondent behaved on 13 December 2011 in her office after the meeting on the same day. It therefore must be a fundamental part of this fairness determination that the reason why the third respondent behaved as she did must be decided – hence the provocation defence. If there is provocation, then surely the dismissal of the third respondent for the reasons given cannot be fair.

[59] Is provocation then established? In *Tedco Plastics (Pty) Ltd v National Union of Metalworkers of SA and Others,*[31] the Court dealt with the concept of provocation and said:

> '…Whatever the correct legal categorization, however, the very fact that a person's actions were a reaction to the conduct of another does not mean that the law will come to their aid. Certainly, in the case of delictual liability, it appears that two requirements will have to be met, namely, that the provocative conduct must be such that the reaction to it by way of physical assault was reasonable, ie would a reasonable person in the position of the person have acted as he did in the face of the provocation ; and, that the conduct must be an immediate and reasonable retaliation, ie it must follow immediately on the provocation and not be out of proportion to the nature and degree of the provocative behaviour (Neethling et al at 94).'

Based on this test, one must ask if a reasonable person in the position of the third respondent could have acted as she did in the face of what happened to

[30] (*supra*) footnote 5 at para 32.
[31] (2000) 21 ILJ 2710 (LC) at para 15.

her, and whether her reaction was immediate and not out of proportion to what had happened to her.

[60] In my view, what actually happened to the third respondent was reprehensible. She was confronted on 12 December and told to resign or face retrenchment proceedings. This took place against the background of the third respondent having been replaced by another new and temporary employee. The third respondent declined to resign and stated that she would challenge retrenchment. The applicant did not leave matters there. The next day, 13 December 2011, the third respondent is called to a meeting handed a notice of intention to retrench, and was in fact also given a pre-prepared and already signed retrenchment agreement. The third respondent is instructed to sign the agreement or leave immediately. When the third respondent then refuses to sign, she is actually told to pack her things and leave immediately. It is apparent to all she is upset, and rightly so. The applicant then adds insult to injury by sending her back to her desk with a chaperone and when she does not leave fast enough, Botha comes to hurry her along in a rather condescending and in itself provocative manner. For the third respondent to react as she did is entirely understandable and justifiable, and is certainly consistent with the action of a reasonable person in the position of the third respondent in the circumstances. The applicant showed complete disrespect to the third respondent as an employee and the employment rights that accrued to her. I refer to the following *dictum* from the judgment in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others,*[32] which I consider quite apposite *in casu*:

> '…The history of South African labour relations reveals all too often the contempt with which employers treated employees whose dignity was all too often sacrificed upon the alter of an avaricious desire to extract the maximum profit from the workforce and powered by a racist disregard for the interests of employees. Employers must not only treat employees with respect but must

[32] (2007) 28 ILJ 2238 (LAC) at para 29.

> comport themselves with the knowledge that there exists an obligation upon them to exercise power in the most responsible possible manner ….'

[61] The reaction of the third respondent to the behaviour meted out to her was immediate and at the end of what must have been a taxing two days. It was certainly not out of proportion with the events she had been confronted with. It must also be considered that the final reaction of the third respondent was instigated by the conduct of Botha in pressurizing her to leave quicker. This led to a personal confrontation between two persons, which was exactly what Henderson testified it was. There is simply nothing disproportionate between how the third respondent behaved and the behaviour meted out to her.

[62] The third respondent's defence of provocation must be sustained which is what the second respondent did. This conclusion of the second respondent is rational, reasonable, fully in accordance with the evidence properly before her, and not in any manner irregular. In the circumstances, the third respondent simply did not commit the misconduct she had been charged with in respect of the first and second charges, and the second respondent's conclusion that this was the case is upheld.

[63] Even accepting that the third respondent did commit misconduct on 13 December 2011, the outcome arrived at by the second respondent can nonetheless be sustained as a reasonable outcome for an entirely different reason, fully supported by the evidence. This reason is that dismissal as a sanction would be entirely inappropriate, considering the conduct meted out to the third respondent and the manner in which she was provoked. It also cannot be ignored that in my view, the applicant actually had an ulterior motive in proceeding with disciplinary action against the third respondent. In *Afrox Ltd v National Bargaining Council for the Chemical Industry and Others*[33] the Court said:

[33] (2006) 27 ILJ 1111 (LC) at para 19.

> '…. Whereas the conduct complained of is most certainly serious, it is not dismissible conduct per se, in all circumstances. The arbitrator cannot be faulted for taking the surrounding circumstances into account, namely the provocation and the evidence which was led regarding the revenge motive of the two employees in question.'

[64] Recently, a similar approach was followed in *ASA Metals (Pty) Ltd (Dilokong Chrome) v Commission for Conciliation, Mediation and Arbitration and Others*[34] and the Court held as follows:

> 'In conclusion, it is my view that, despite the unsatisfactory nature of the award, it cannot be said that it is a decision which a reasonable decision maker could not have reached. Whilst it is true that the commissioner sought to rely on provocation and private defence as justification for his conclusion that the sanction of dismissal was too harsh, these are however not the only reasons which the commissioner articulated for his conclusion.
>
> Factors such as clean record prior to the incident and the circumstances under which the incident of assault took place were also taken into account as a justification for the conclusion that dismissal was too harsh. The commissioner further took into account the well conceded fact that Madutlela was aggressive. For me even if one were to remove provocation and private defence, the remaining factors in the commissioner's reasoning still render his award reasonable.'

[65] I conclude by referring to the fact that the first and second charges are really one and the same charge, being that of unacceptable behaviour of the third respondent towards her manager on 13 December 2011, and these charges were in fact split. This splitting of charges was in my view done to bolster the applicant's case against the third respondent. This matter is in fact comparative to what the Court deal with in *Volkswagen SA (Pty) Ltd v Koorts NO and*

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34 (2013) 34 ILJ 350 (LC) at paras 30 – 31.

Others.[35]. The following extract from the judgment is pertinent, and in my view supports what has been set out above:[36]

> '…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.'

Of further relevance is the judgment in *Ntshangane v Speciality Metals CC*[37] 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 explanation to formulate a third charge took the issue beyond the realms of fairness. ….'

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[35] (2011) 32 ILJ 1892 (LAC).
[36] Id at para 33.
[37] (1998) 19 ILJ 584 (LC) at para 15 – 17.

[66] Accordingly, and in light of all of the above, I conclude that the second respondent's determination that the dismissal of the third respondent was substantively unfair is for the most part not an irregularity in the first instance, and in any event an outcome a reasonable decision-maker could come to. The second respondent's finding of substantive unfairness is thus upheld.

<u>The issue of the relief</u>

[67] This then only leaves the issue of relief. The applicant has taken issue with the compensation award of the second respondent. Now it is so that the second respondent simply determined the amount of compensation based on citing that it was "fair and equitable", but did not motivate why she so awarded. This failure would constitute an irregularity, and in this regard I refer to what the Court said in *Matjhabeng Municipality v Mothupi No and Others*:[38]

> '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 respect.'

[38] (2011) 32 ILJ 2154 (LC) at paras 47 – 48.

[68] It is trite that the determination of the quantum of compensation awarded in unfair dismissal arbitration proceedings by an arbitrator entails the exercise of discretion. As to how this discretion is to be exercised, reference is made to the well-known considerations as set out in the judgment of *Ferodo (Pty) Ltd v De Ruiter.*[39] In *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others,*[40] 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.'

[69] The second respondent's lack of reasoning and motivation why she decided to award the quantum of compensation she did would thus constitute a material irregularity. I am accordingly compelled in the circumstances to determine the issue of appropriate compensation based on the evidence already on record in order to determine whether the quantum of the compensation awarded is nonetheless a reasonable outcome. The applicant maintains its challenge based on a six months' salary award, but as stated above, this was varied by the second respondent to three months. Considering the issue whether such three months' salary award is a reasonable outcome, I consider that the conduct of the applicant towards the third respondent was entirely unacceptable, that the third respondent was actually provoked, and that the third respondent should never

[39] (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.'
[40] (2007) 28 *ILJ* 2238 (LAC) at para 30.

have been disciplined in the first place. I accept that the third respondent had short service. Based on these considerations, I have set out above, I can see no reason to interfere with the second respondent's decision to award the third respondent three months' salary in compensation, which I consider to be consistent with the exercise of a judicial discretion. I would in fact have awarded the third respondent more compensation, and consider the second respondent as having been generous to the applicant.

[70] As a matter of law, in any event, this Court should not too readily interfere with determinations made by CCMA commissioners with regard to the quantum of compensation. In *Kemp t/a Centralmed v Rawlins,*[41] it was held that in principle, the issue of compensation can be decided by the Court in its own judgment, which principle would also clearly apply to an arbitrator deciding on compensation. The Court in *Kemp* further said, specifically relating to compensation:[42]

> 'From the above it is clear that in the case of a narrow discretion - that is a situation where the tribunal or court has available to it a number of courses from which to choose - its decision can only be interfered with by a court of appeal on very limited grounds such as where the tribunal or court-
>
> (a) did not exercise a judicial discretion; or
>
> (b) exercised its discretion capriciously; or
>
> (c) exercised its discretion upon a wrong principle; or
>
> (d) has not brought its unbiased judgment to bear on the question; or
>
> (e) has not acted for substantial reason (see *Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335); or

[41] (2009) 30 ILJ 2677 (LAC) at para 3; see also *Media Workers Association of SA and Others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) at 1397I-1398B.
[42] Id at para 21.

(f) has misconducted itself on the facts (Constitutional Court judgment in the *National Coalition for Gay and Lesbian Equality* case at para 11); or

(g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in *National Coalition for Gay & Lesbian Equality* at para 11).'

I do not consider the second respondent's determination of compensation to fall foul of any of the above considerations. There is accordingly no basis to interfere with the second respondent's award of compensation. It is upheld.

<u>Costs</u>

[71] The applicant has also pertinently raised the issue of costs of the applicant's urgent application to stay a warrant of execution issued by the third respondent, brought by the applicant on 13 December 2012. It is trite that a pending review application does not stay an arbitration award, and thus the third respondent was well within her rights to have pursued certification of the award in her favour and have a warrant of execution issued, despite any pending review. The fact is that it is not unusual that individual litigants pursue execution of arbitration awards in their favour, and employer parties have to bring urgent proceedings to stay such execution pending the review application. The fact remains that the applicant did not comply with the arbitration award in favour of the third respondent which is what prompted the third respondent to act as she did. The reason for non compliance by the applicant with the award was these review proceedings, and although justified at the time as a basis for non compliance, this review application has now been determined to have no merit. I consider there to be an inextricable link between the urgent application and the review, especially concerning the issue of costs, and where the review fails, the third respondent should not be burdened with the costs of the urgent application. I in any event have a wide discretion when it comes to the issue of costs, by virtue of the

provisions of Section 162(1) and (2) of the LRA. In applying my discretion, and also considering the above reasons, I do not believe any costs award against the third respondent would be appropriate in this instance. Such a costs award would certainly not, in my view, be fair. I accordingly determine that no order as to costs be made in respect of any of the legal proceedings relating to this matter, which would include the urgent application.

Order

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

72.1 The applicant's review application is dismissed.

72.2 There is no order as to costs, both in these review proceedings, and in the applicant's urgent application to stay the execution of the arbitration award in favour of the third respondent.

72.3 The Registrar is directed to forward a copy of this judgment to the third respondent.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: M E Duvenage of Duvenage Attorneys

FOR THE THIRD RESPONDENT: None