THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR607/2013

In the matter between:

BILLION GROUP (PTY) LIMITED	**Applicant**
and	
MOTHUSI MOSHESHE	**First Respondent**
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION*.*	**Second Respondent**
MOTLATSI PHALA *N.O.*	**Third Respondent**

Heard: 15 January 2015

Delivered: 7 August 2015

JUDGMENT

OLIVIER, A J

<u>Introduction</u>

[1] This matter concerns an application by the Applicant to review and set aside an arbitration award of the Third Respondent in his capacity as Commissioner of the CCMA, the Second Respondent. This application has been brought in terms of Section 145 of the Labour Relations Act ("the LRA").

[2] The First Respondent was dismissed by the Applicant on 15 November 2011 based on charges relating to his alleged poor performance. The First Respondent then pursued his dismissal as an unfair dismissal dispute to the CCMA and the matter came before the Third Respondent for arbitration and was heard over a number of days and finalised on 14 March 2013.

[3] Pursuant to these arbitration proceedings, the Third Respondent then determined that the dismissal of the First Respondent by the Applicant was both substantively and procedurally unfair. The Third Respondent then ordered the Applicant to pay the First Respondent R216 666.68 which is four months compensation calculated at the monthly rate of R54 166.67. This determination by the Third Respondent forms the subject matter of the review application brought by the Applicant which application was according to the First Respondent only served and filed by 13 May 2013. The Applicant contends that the application was served on the Second and Third Respondents on 3 May 2013 by hand on the attorney for the First Respondent, Tracy Sischy Attorneys on 6 May 2013.

[4] The First Respondent contended that the application was made outside of the time period provided for in Section 145 of the LRA. The Applicant has similarly contended that the answering affidavit filed by the First Respondent was filed outside of the time periods provided for in Rule 7A.

[5] I have considered the relevant condonation application filed by the First Respondent as well as the condonation application made by the Applicant's representative from the bar at the hearing of this matter. I am of the view that the Applicant was at all relevant times entitled to form the view that Tracy Sischy Attorneys were still the attorneys of record on behalf of the First Respondent and that the application could, accordingly, be served at her address. The Applicant did proceed to also serve by registered post a copy of the application on the First

Respondent. The application was served within the relevant time periods on all the relevant parties prior to the expiry of the six week period. I, accordingly, find that there was substantial compliance by the Applicant with the provisions of Section 145 in respect of the relevant time periods. In respect of the late filing of the answering affidavit by the First Respondent, I find that the period of delay in filing such answering affidavit is substantial. In essence, the First Respondent relies on the negligence of both his attorney and counsel. I have considered the facts and circumstances put forward by the First Respondent in this regard and have formed the view that it would cause undue prejudice and hardship to the First Respondent should I not condone such late filing. I, accordingly, condone the late filing of the First Respondent's answering affidavit. The matter will, therefore, be considered as an opposed review application.

<u>Background facts:</u>

[6] The Applicant conducts a business as an owner and manager of various retail properties. It has operations in Gauteng as well as in the Eastern Cape. The main witness called by the Applicant at the arbitration proceedings was Mr Thabo Lebelo, the Applicant's financial director. Mr Lebelo has been a qualified Chartered Accountant since 2001, commencing work for the Applicant on or about 6 June 2010. During June 2010, Mrs Anne Botes was employed by the Applicant as its Financial Manager. She, however, resigned during May 2010 with 2 months' notice; her last working day being 7 August 2010.

[7] Mr Lebelo identified the First Respondent as a possible applicant to replace Ms Botes. The First Respondent is a qualified Trainee Accountant. The First Respondent was requested to submit his CV to the Applicant and the Applicant, thereafter, employed him as the Group Financial Manager on 26 July 2010 in terms of a fixed term contract with a 6 month duration. The fixed term contract was due to expire on 31 January 2011.

[8] The First Respondent's duties included amongst others:

8.1. the preparation of monthly management accounts for Hemingway's Shopping Centre and the Mdantsane Shopping Centre;

8.2. the preparation of monthly VAT returns for three companies in the Group and the submissions of these VAT returns to SARS;

8.3. the preparation of payroll returns (ie the returns to SARS in terms of which UIF, SDL and PAYE are paid to SARS for the Applicant and Billion Property Services (Pty) Limited.) The First Respondent was also responsible for the submission of the said payroll tax returns to SARS, preparing cheques for such payments to SARS and ensuring that these cheques were submitted to the bank on time; and

8.4. attending to payroll which included calculating annual adjustments to various employees' salaries.

[9] It is common cause that the First Respondent reported to Mr Lebelo as his direct supervisor and if necessary, the First Respondent would report to the Applicant's CEO, Mr Ngebulana. As a senior manager, the First Respondent was part of the Applicant's management committee and headed the Finance Department. During the latter part of October 2010, Mr Lebelo had cause to write a performance appraisal letter to the First Respondent about a number of issues of concern relating to the First Respondent's performance which included the failure to prepare management accounts. On 18 October, Mr Lebelo also convened a counselling meeting with the First Respondent relating to, *inter alia,* the issue of completing the management accounts on time. The First Respondent was also, *inter alia,* requested to prepare management statements for Hemingway's and Mdantsane. When such statements were submitted to Mr Lebelo, he noted that there were no supporting schedules, no workings and some of the items were incorrect. Typically management statements should be in the form of a file with supporting documents. For instance, under long term liabilities, the amount was incorrect. Mr Lebelo then had a discussion with the First Respondent about what he regarded as incorrect figures. The company was in the process of considering a listing and such management accounts were required. A number of other instances then also occurred which the Applicant regarded as poor performance by the First Respondent of his duties.

[10] On 4 November 2010, the First Respondent was handed a “Notification to attend poor work performance investigation” which was scheduled for 9 November 2010. The First Respondent attended the hearing on 9 November 2010 and requested to have legal representation. He was, however, informed that he could not have legal representation but would be allowed to be assisted by his sister.

[11] The Applicant was represented by Dr Ebersohn, its attorney. The chairperson was an external person Ms Smit from GEO. The First Respondent's sister was not available to attend the hearing. The First Respondent further requested that the allegations against him be clarified. It became apparent to the chairperson that the Applicant had charged the employee with gross negligence but that the notification referred to "formal poor performance inquiry". The First Respondent stated that although he was prepared for the inquiry as the notice was issued, he requested a postponement in order to prepare for the correct inquiry and to take advice on the best way forward. Ms Smit, at the time, formed the view that there could indeed be confusion between the misconduct and the poor performance hearing. She recommended that the matter be postponed to allow for fair procedure to be followed and that the Applicant should reissue the notice of inquiry as either a performance inquiry or a disciplinary inquiry and to allow the First Respondent sufficient time to prepare. She issued such ruling on 10 November 2010.

[12] Immediately thereafter the Applicant served the First Respondent with another notice entitled “Notification to Attend a Final Poor Work Performance Investigation” and scheduled such hearing for 14 November 2010. This charge sheet contained the following complaints or charges against the First Respondent:

12.1. gross negligence in that you failed to timeously complete and submit VAT assessment returns for the Hemingway Shopping Centre, Phomella Property Investments and Mdantsane Shopping Centres. In respect of the month of September 2010, which assessments were due by 29 October 2010 with the result that SARS will impose severe penalties and interest on the respective subsidiaries of Billion Group;

12.2. gross negligence in that you incorrectly completed the VAT assessment return for the Hemingway's Shopping Centre by failing to make provision for the said subsidiary's bad debts, which if it had not been corrected by management, could have resulted in an overpayment of R644 830.79;

12.3. gross negligence in that you failed to complete the September 2010 PAYE, SDL and UIF for Billion Group (Pty) Limited and Billion Property Services (Pty) Limited timeously leaving no time for review and a cheque to be signed and deposited before the bank closed on 5 November 2010 which will result in SARS imposing a penalty and interest;

12.4. gross negligence in that you have still failed to prepare proper management accounts for Billion Group which is causing an embarrassment to the Billion Group and which may have adverse consequences for the listing of one of the Billion Group's subsidiaries;

12.5. negligence in that you have failed to correctly adjust the employees' salary for October 2010; and

12.6. gross negligence, alternatively, negligence in that you failed to attend to the loading of payments on the computer system and/or failed to attend to such loading timeously, causing embarrassment to the Billion Group and its subsidiaries.

The Charge Sheet also had the following sentence after the aforesaid 6 charges:

> '…thereby irreparably damaging and destroying the trust relationship between you and your employer.'

[13] On the date of the hearing, 14 November 2010, the First Respondent was accompanied by his legal representative Mr Zwane from Lebea and Associates. The First Respondent then noted that the Applicant had changed the chairperson, Mrs H Smit who had made the ruling that led to the adjournment on 12 November and that she had been replaced by Mrs Louise van Aswegan, an attorney. Mr Zwane then brought an application for legal representation before Mrs Van Aswegan. The Applicant was again represented by Dr Ebersohn, its attorney. Ms Van Aswegan considered the application for legal representation and declined it. The First Respondent was forced to continue with the hearing representing himself. The First Respondent also formed the view that the chairperson was not in control of the process and took instructions from Dr Ebersohn, the Applicant's legal representative.

[14] Following the hearing, the First Respondent was found guilty on 5 charges and dismissed on 15 November 2010 by the Applicant after it accepted the recommendation by Mrs Van Aswegan that dismissal was an appropriate penalty.

[15] The First Respondent then referred the dispute to the CCMA on 6 December 2010. The matter was subsequently referred to arbitration after the conciliation failed.

[16] In his award, the Third Respondent ruled that the hearing of 12 November 2010 was not a proper poor work performance investigation and that the findings of the chairperson showed that she conducted a disciplinary hearing. In addition, the Second Respondent also made a finding that the Applicant, having chosen a poor performance process, was required to follow such process. The Third Respondent found that the fact that the Applicant had in fact charged the First Respondent with negligence and gross negligence had created confusion as to whether it was in fact a poor performance investigation or a disciplinary hearing where misconduct had to be considered. The Third Respondent found that the findings of the chairperson showed that, in fact, the First Respondent was subjected to a disciplinary hearing because he was found guilty of 5 charges and the penalty of dismissal was imposed. According to the Third Respondent, the Applicant incorrectly labelled the process a poor performance investigation and had deliberately conflated issues in order to achieve a predetermined outcome. According to the Third Respondent, the chairperson of the hearing had lost control of the hearing process and was directed by the company's legal representative who effectively made the decision, *inter alia,* it was the First Respondent's desire to be legally represented and while his appointed legal representative was addressing the chairperson and after the chairperson had made the decision to dismiss the application for legal representation, Dr Ebersohn said "tata bye bye" to Mr Zwane. According to the Third Respondent, such hearing was fatally flawed and the outcome was a foregone conclusion. The Third Respondent concluded with the following finding:

> ‘The so-called hearing was fatally flawed and grossly unfair. It is therefore my finding that dismissal of the Applicant was procedurally and substantively unfair. The Applicant's relief was that the CCMA should order the Respondent to pay him for the remainder of the contract. I do not have powers to make such an order. However, the Applicant did not pray for reinstatement or reemployment what should follow logically is an order for compensation.’

[17] The Third Respondent then determined that the Applicant should pay the Third Respondent compensation equal to an amount of 4 months' salary at R54 166.67 a month.

The grounds of review of the Applicant

[18] The Applicant raised seven grounds of review in its heads of argument. They are:

18.1. the Third Respondent awarded more compensation than what the First Respondent sought and what the arbitrator could award in law to the First Respondent;

18.2. the Third Respondent failed to record the evidence of Mr Lebelo that was given during cross-examination and re-examination and failed to record the evidence given by the First Respondent during cross-examination;

18.3. the Third Respondent ignored the parties' written submissions and the ignored the First Respondent's opening statement;

18.4. the Third Respondent failed to deal with the substance of the dispute namely whether dismissal was substantively unfair;

18.5. the Third Respondent did not address the First Respondent's allegation that 5 complaints against him were *mala fide;*

18.6. the Third Respondent unfairly allowed the First Respondent to present new documentary evidence after the Applicant had closed its case, and unfairly precluded the Applicant from cross-examining the First Respondent after introducing a relevant document into evidence during the Respondent's cross-examination;

18.7. the award is unreasonable.

[19] I had the benefit of the voluminous heads of argument prepared by the Applicant's representative, Dr Ebersohn. Such heads consisted of a bundle of 99 pages. The First Respondent's counsel, Advocate Mphahlele similarly prepared heads of argument. I am indebted to both the legal representatives for their thorough preparation and presentation of the relevant facts and arguments.

Considering the grounds of review raised by the Applicant, I am of the view that the following grounds are the most pertinent:

19.1. that the first Respondent failed to deal with substance of a dispute namely whether dismissal was substantively unfair; and

19.2. the award is unreasonable.

[20] In his award, the Third Respondent states that because the First Respondent's dismissal was procedurally unfair his dismissal was also substantively unfair. (See paragraph 6.15 of the award).

[21] Having carefully considered the contents of the award, it is clear that the First Respondent does not analyse the evidence (which evidence is according to the Applicant incompletely recorded in his award). In his award, the First Respondent does not deal with the merits of the Applicant's five complaints in respect of which the First Respondent was found guilty.

[22] The Applicant submits that one of the primary duties of the First Respondent was to determine whether the Respondent was guilty of poor work performance as alleged by the Applicant (ie whether the First Respondent was guilty of the five complaints). The Third Respondent also had to consider whether the First Respondent's dismissal was substantively fair based on the aforesaid findings.

[23] It is the Applicant's argument that the Third Respondent, by failing to determine whether the First Respondent was guilty of the five complaints of poor work performance, therefore, misconstrued the nature of the inquiry that he was required to undertake and as such, the Applicant submits that the Third Respondent committed misconduct in relation to his duties.

[24] I also had careful regard to the record and it is clear that most of the evidence presented during the course of the arbitration proceedings pertained to the question whether the First Respondent was guilty of the five complaints.

[25] The Applicant further alleges that the award is unreasonable insofar as the First Respondent held that the First Respondent's dismissal was procedurally and substantively unfair. The Applicant in the heads of argument then proceeds with a thorough analysis of the evidence that was led by Mr Lebelo as well as the

other witnesses of the Applicant. In particular, the Applicant submits that the evidence clearly shows that the First Respondent was guilty of negligence in respect of the instances listed under the five charges. In respect of charge 4, he was also guilty of poor work performance for the following reasons:

25.1. the First Respondent knew what the performance standard was, namely, that he had to prepare correct/proper management accounts supported by the necessary documents. Mr Lebelo informed the Respondent about this on 25 October 2010 and again confirmed it in his email of 27 October 2010;

25.2. the First Respondent's performance fell short of the standard (which he admitted in his heads of argument) and after 25 October 2010, the Respondent never came back to Mr Lebelo with management accounts containing supporting documents and figures/mistakes which had still not been corrected;

25.3. the First Respondent had ample opportunity to prepare proper management accounts, especially taking into account his own undertakings. In respect of complaint no. 5, the Applicant also alleged that the Respondent was negligent in that he incorrectly adjusted certain employee's salary for October 2010. Mr Lebelo testified that the First Respondent incorrectly calculated the employee's salary increases with the result that certain employee's received an excessive salary increase to which they were not entitled. This caused a financial loss to the Applicant as it had to pay too much to these employees;

25.4. in respect of charge 3, the First Respondent also knew exactly what the standard was that was required of him, namely that he had to ensure that the payroll returns were submitted timeously and that the payments to SARS was made timeously. The Applicant submitted that the First Respondent waited until the last day to attend to the aforesaid in the context of what happened on 29 October 2010 and was as such negligent. He was also negligent in that he failed to enquire where Mr Ngebulana was and whether he would be available to sign the cheques on the last day, namely 5 November 2010;

25.5. in respect of complaint no. 3, the late preparation and submission of the payroll returns the Chairperson found the First Respondent guilty of gross negligence in this regard. It is common cause that the First Respondent had to calculate the UIF, SDL and PAYE and had to ensure that this was paid to SARS by the relevant companies. He also had to prepare the payroll tax returns to be submitted to SARS and had to do so timeously. The Applicant submitted that the First Respondent waited until the last day, namely 5 November to do the necessary calculations and only prepared the payroll tax returns and the two cheques on 5 November for signature;

25.6. in respect of complaint no. 2, the Respondent's VAT calculations for Hemingways were incorrect. The Applicant alleges that the First Respondent was grossly negligent in that he completed the VAT return for Hemingways without making provision for said Company's bad debts and if the same had not been corrected by management it would have resulted in overpayment of R644 830.79. It is the First Respondent's defence that Hemingways had no formal or written Bad Debit Policy and that he was of the opinion that it would be illegal to claim more bad debt. The Applicant argued that such defence did not have merit;

25.7. in respect of complaint no. 1, it was alleged by the Applicant that the Respondent was grossly negligent in that he failed to timeously complete and submit VAT assessment returns for the relevant subsidiary companies of the Applicant in respect of the month of September 2010. These assessments were due by 29 October 2010. These returns were submitted late and with the result that SARS imposed penalties and interest on the respective subsidiaries of the Applicant. Substantial evidence was led by Mr Lebelo in this regard. Although the First Respondents defence was that he was unable to obtain the relevant information from representatives in East London timeously because of problems with his gmail address, it was common cause that the returns in respect of the three subsidiary companies were submitted late and that SARS had to impose penalties and interest. This was as a direct result of the First Respondent's conduct.

25.8. on the First Respondent's own version, he had not even started with the preparation of the said VAT returns by midday on 29 October 2010 and had not obtained the relevant information from the Eastern Cape. The Applicant submitted that any reasonable employee in the position of the First Respondent would have foreseen that something may happen on the last day which prevents VAT returns from being prepared and/or filed.

[26] From the aforesaid, it is therefore clear that the nature of the charges against the First Respondent related to poor performance of his duties, that he was fully aware of the relevant standard and that it was alleged by the Applicant that his conduct fell short of what a reasonable manager would have done in the circumstances. To a certain degree, there is, therefore, a conflation between the elements necessary to prove poor performance and misconduct. It was, however, the Third Respondent's duty to properly consider the nature of the evidence and charges and to weigh such evidence and arrive at a reasonable conclusion as to whether the Applicant had been able to prove such charges on a balance of probabilities. This, he failed to do.

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

[27] An arbitration award can be reviewed on the grounds listed in section 145 of the LRA, i.e if there is a defect in the award. Defect means that the Commissioner:

27.1. Committed a misconduct in relation to the duties of the Commissioner;

27.2. Committed a gross irregularity in the conduct of the arbitration proceedings;

27.3. Exceeded the Commissioner's powers; or

27.4. The award was improperly obtained.

[28] The main objective of a review is for the Labour Court to determine whether a Commissioner had perpetrated some irregularity that has denied the other party a fair hearing. This may be determined from the manner in which the hearing was conducted, from the manner in which the Commissioner approached the evidence or from the conclusion the Commissioner drew from the evidence.

[29] Generally, slight procedural irregularities or minor errors of reasoning do not constitute grounds for review if they did not materially prejudice a party. Where, however, a procedural misdirection or an error of reasoning denies a party a fair hearing, the Court is entitled to intervene.

[30] The starting point in determining the power of the Labour Court to intervene is as stated above in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[1] According to the Constitutional Court, the main objective of review is to determine whether the Commissioner has perpetrated some irregularity that has denied either party a fair hearing. A review of a Commissioner's decision is not an appeal. The test in the *Sidumo* matter reduces the significance of an arbitrator's reasons because the reviewing Court applying the test examines the result. There is a low threshold of interference set by *Sidumo*.

[31] In one of the most recent cases i.e *Herholdt v Nedbank Limited* (*Congress of South African Trade Unions as Amicus Curiae),*[2] the Supreme Court of Appeal held that the test is as follows:

> 'A review of CCMA awards is permissible if a defect within the proceedings fall within one of the grounds in Section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii) the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. The 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 the relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if the effect is to render the outcome unreasonable.'

[32] Where a Commissioner evaluated all the facts presented at the hearing and came to a conclusion, the question is whether that conclusion is reasonable based on the evidence before him. It needs to be considered whether the Commissioner's decision falls within a band in which reasonable Commissioners might reasonably agree.

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[1] (2007) 281 ILJ 2405 (CC).
[2] (2013) 34 ILJ 2795 (SCA) at para 25.

[33] In *Malelane Toyota v CCMA,*[3] the arbitrator also failed to understand that an arbitration is a *de novo* hearing. The arbitrator was preoccupied with the evidence presented during the disciplinary inquiry and ignored the evidence presented during the arbitration proceedings. In this matter, the arbitrator failed to determine whether the employee's dismissal was substantively fair based on the evidence presented during the arbitration hearing. Mlambo, J stated the following:

> 'His preoccupation with the internal disciplinary process, whilst understandable in certain respects, was erroneous in regard to the substantive fairness of Ngwenya's dismissal. To determine the substantive fairness he had to consider the evidence placed before him which he did not.'[4]

[34] In *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others,*[5] the Labour Appeal Court, subsequent to the decision by the SCA and in *Herholdt* referred to above, expressed itself as follows on the relevant review test after *Sidumo*:

> '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 decisions he or she arrived at.
>
> The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.
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> In a review conducted under section 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of these factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach to dealing with the arbitrators award is improper as the reviewing court must necessarily consider

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[3] (1999) 6 BLLR 555 (LC).
[4] *Ibid* at para 14.
[5] (2014) 1 BLLR 20 (LAC) at paras 16 - 18.

> the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.'

[35] In *Goldfields,* the LAC was satisfied that the Commissioner had misconceived the nature of the enquiry. The Commissioner had confused the two forms of dismissal, namely, dismissal based on misconduct and that relating to poor performance. By doing so, he committed a gross irregularity in the conduct of the proceedings. The next question was whether this was enough in itself to nullify the award. The court found that it can only be the case if an error led the Commissioner to a conclusion that could not have been arrived at by a reasonable decision maker on the evidence.

[36] It is my view that the *dicta* in the *Herholdt, Gold Fields* and *Malelane Toyota* decisions above find application in the present matter based on the review grounds submitted by the Applicant. It is clear that the Third Respondent having made a finding that the disciplinary proceedings were procedurally unfair jumped to the conclusion that this also led to a fatally defective hearing and therefore substantive unfairness. The two do not necessarily follow. The Second Respondent as a result of such misdirection failed to consider the relevant evidence as to whether the Applicant was able to prove on a balance of probability whether the First Respondent was guilty of the six charges brought against him. The Third Applicant, therefore, misconceived the nature of the inquiry and what was required of him in the circumstances. His failure to consider the relevant evidence relating to the five charges makes his finding that there was substantive unfairness unreasonable. The finding by the Second Respondent that the dismissals were substantively unfair is, therefore, reviewable and stands to be set aside.

[37] The Applicant has requested that the matter is to be referred back to another arbitrator for a fresh hearing. I am of the view that the evidence, as contained in the record, taking into account the Applicant's version as well as that of the First Respondent provides a sufficient basis for this Court to supplant such finding which makes it unnecessary to refer it back for a fresh hearing. In this regard, I am also guided by the fact that the fixed term contract on which the First Respondent was appointed, was due to terminate through an effluxion of time and as provided for in the agreement by 31 January 2011. The First Respondent

was dismissed on 15 November 2010 and, as such, there was only a further two and a half months left of his fixed term contract.

[38] In view of the aforesaid, I find that there were indeed substantive reasons for the Applicant to have formed the view that the First Respondent was not able to conduct his services as a senior manager at the required level or standard as required in the circumstances, and that sufficient grounds existed for the termination of his employment. It is also highly unlikely that in such circumstances the Applicant would have offered the First Respondent a further fixed term contract or have extended such contract. I, therefore, find that the dismissal on 15 November 2010 was substantively fair.

The Second Respondent's finding of procedural unfairness

[39] The First Respondent held that the decision of the chairperson to deny the First Respondent's legal representation was ill-considered taking into account the nature of the issues raised in support of such application. The Applicant, in the heads of argument, submitted that in order for the Second Respondent to have determined whether the chairperson's refusal to allow the First Respondent's legal representation for purposes of the investigation was correct/fair, had to take the following facts and issues into account:

39.1. the First Respondent had no absolute right to be legally represented during the investigation;

39.2. the chairperson of the investigation had the discretion whether to allow the First Respondent legal representation;

39.3. the Applicant's disciplinary code did not allow for employees to be legally represented;

39.4. the Applicant had verbally indicated to the respondent that it wanted to keep the proceedings internal and, as such, would only allow the Respondent to be represented by his sister;

39.5. the nature of the complaints against the First Respondent all related to his performance and the First Respondent indicated that he understood the complaints and that he will answer questions about his performance;

39.6. the degree of factual and legal complexity of the complaints; the First Respondent's case was that they were not factually or legally complex;

39.7. the potential seriousness of the consequences of an adverse finding against the First Respondent;

39.8. the fact that the applicant would be assisted during the investigation by an attorney and whether the investigation would be fair if the employer was not allowed legal representation.

[40] To a large extent, the representative of the First Respondent agreed with the aforesaid legal position as set out by the Applicant. The First Respondent, however, argued that the Third Respondent was conscious of the importance of legal representation and applied the legal principles correctly. According to the First Respondent, the mere fact that the chairperson considered the issue of legal representation and declined the First Respondent the right to be legally represented while the Applicant was represented by its attorney, Dr Ebershon, speaks volumes.

[41] It is clear from the record and the findings of the chairperson of the inquiry that she did not properly consider the factor of the comparative abilities of the representatives and/or parties at the disciplinary proceedings and whether it would be fair if the First Respondent was not allowed legal representation but the Applicant was allowed to be represented by Dr Ebershon. In the matter of *MEC: Department of Finance, Economic Affairs and Tourism Northern Province v Mahumani*,[6] the SCA asserted that it will be required of the presiding officer to apply his mind to the need for legal representation after considering the circumstances of the case. It is my view that on a full conspectus of all the circumstances, it was indeed unfair of the chairperson not to allow legal representation, particularly where the First Respondent had to continue to represent himself in a matter which did in fact contain quite complex factual issues. He was also confused in his own mind as to whether it was indeed a hearing relating to misconduct or in relation to allegations of poor performance. The unequal ability in dealing with such factual and legal issues was quite

[6] [2005] 2 BLLR 173 (SCA) at para 15.

apparent in that Dr Ebershon, who is an experienced legal representative, was allowed to represent the Applicant's case and cross-examine the First Respondent who at the same time had to keep his wits about him to represent himself in such hearing and to testify as well. From the record, it is clear that the chairperson failed to properly consider such factor and even allowed Dr Ebershon, without any censure to, in a cynical, if not sarcastic manner, reply to the First Respondent's legal representative with a "tata, bye bye" when he left after she had made the decision not to allow legal representation.

[42] In the circumstances, I find that the refusal to allow legal representation in such circumstances constitutes procedural unfairness. The nature of the evidence led at the arbitration proceedings where both parties were in fact represented by legal representatives speaks volumes in this regard. I am of the view that the First Respondent was indeed at a distinct disadvantage at the hearing. The fact that he had to represent himself, lead evidence and face the cross-examination of an experienced litigator without the assistance of his legal representative was prejudicial and unfair.

<u>The appropriate remedy</u>

[43] Section 193(1)(c) of the Labour Relations Act[7] provides that an arbitrator appointed in terms of the Act who determines that a dismissal is unfair, towards compensation. When dealing with the discretion, such as provided for in section 193(1)(c) of the LRA, the Court must consider if the arbitrator properly took into account all the factors and circumstances in coming to his decision and the decision arrived at is justified.

[44] In essence, therefore, a review of the discretion exercised in terms of section 193(1)(c) of the LRA is essentially no different to an appeal because the reviewing court will be required to consider all the facts and circumstances which the arbitrator had before himself or herself and then decide based on a proper evaluation of those facts and circumstances whether or not the decision was judicially a correct one.[8] In *Kemp t/a Centralmed v Rawlings*, Zondo, JP (as he then was) also held specifically in relation to the exercise of the discretion under

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[7] Act No. 66 of 1996 (as amended) ("the LRA").
[8] *Kemp t/a Centralmed v Rawlings* (2009) 30 *ILJ* 2677 (LAC).

section 193(1)(c) of the LRA that the "ultimate question" that the arbitrator has to answer in determining whether compensation should or should not be granted is which one of the two options would better meet the requirements of fairness, having regard to the circumstances of the case? The reviewing court is required to evaluate all the facts and circumstances that the arbitrator had before him or her and then decide, based on the underlying fairness to both the employer and employee, whether the decision was judicially correct. According to the Court, the arbitrator passes a moral or value judgment on the basis of the requirements of fairness and justice and this is not the normal reasonable review test that is to be applied.

[45] The aforesaid approach in the *Kemp* case was also followed in *Kukard v GKD Delkor (Pty) Limited*.[9] Having found that the Third Respondent was indeed correct in having found that there was procedural unfairness, I am of the view that it is not fair to refer the decision on the appropriate amount of compensation to be awarded back to the Second Respondent for a fresh hearing. I am of the view that all the relevant facts and circumstances are properly before this Court as contained in the record and the issues have also been appropriately addressed by the relevant legal representatives in argument. The Respondent had referred the dispute to the Second Respondent in terms of which he challenged the substantive and the procedural fairness of his dismissal. In both the First Respondent's referral to conciliation and in his referral to arbitration, the relief that the Respondent sought was to be paid out for the remainder of his employment contract, The remainder of the contract after 15 November 2010, being the dismissal date, is therefore two and a half months' salary. The date on which the employment contract would have terminated was 31 January 2011. From the record, it is also clear that the First Respondent's representative also confirmed to the arbitrator that the "fight" between the parties was about two and a half months.

[46] It is furthermore trite that where an employee was employed in terms of a fixed contract, an arbitrator cannot award more compensation to the employee who was unfairly dismissed than what the said employee would have earned during

[9] [2015] 1 BLLR 63 (LAC) at para 31.

the remainder of its employment.[10] In the circumstances, I determine that the appropriate remedy in terms of section 193(1)(c), where compensation is to be ordered relating to the unfairness of a dismissal based on the procedural defect, could not have been more than two and a half months' salary. The Third Respondent erred in awarding four months of compensation and in any event failed to take the aforesaid factors into account.

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

47.1. the dismissal of the First Respondent was substantively fair;

47.2. the dismissal of the First Respondent was, procedurally unfair;

47.3. the Applicant is ordered to pay the First Respondent an amount equal to two and a half months' compensation, calculated at the monthly rate of R54 166.67 with interest calculated at the prescribed rate from the date of the hearing of this matter being 15 January 2015;

47.4. no order as to costs is made.

Olivier, AJ

Acting Judge of the Labour Court of South Africa

[10] *Tshongweni v Ekurhuleni Metropolitan Municipality* (2012) *ILJ* 2847 (LAC) at para 40.

<u>Appearances</u>

For the Applicant:	Dr Ebersohn
For the Respondents:	Advocate Mphahlele
Instructed by:	Tracy Sischy Attorneys