



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case no: C882/2015

In the matter between:

TVET SA (PTY) LTD

Applicant

and

LISA DOROTHY SWANEPOEL

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

BELLA GOLDMAN N.O

Third Respondent

Heard: 12 May 2016

Delivered: 23 May 2017

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

- [1] The applicant seeks an order reviewing and correcting the arbitration award issued by the third respondent (Commissioner) under case number WECT7539-15 dated 28 August 2015. In the award, the Commissioner

found that the dismissal of the first respondent (Swanepoel) was both substantively and procedurally unfair, and had ordered the applicant to pay her compensation equivalent to eight months' salary which came to R160.000.00. Swanepoel opposed the application.

Background:

- [2] The applicant is in the business of providing education and training services to the clothing industry. It has its principal business/head office in Cape Town. Swanepoel was employed with effect from 2009 until 20 April 2015 when she was dismissed for alleged incapacity due to ill-health. At the time of her dismissal she was the applicant's Regional Administrator.
- [3] It is common cause that on 14 February 2015, Swanepoel was in Kimberley on a work-related trip when she was attacked in an attempted vehicle hijacking incident. In the course of the attack, her mobile phone was stolen and somehow the perpetrators were unsuccessful in taking the vehicle from her as she managed to drive off. Subsequent to this incident, Swanepoel was diagnosed with PTSD, and was given compassionate leave for two days between 16 and 18 February 2015. Between 19 and 27 February 2015 she had reported for duty.
- [4] Between 2 and 8 March, Swanepoel was booked off sick by her Clinical Psychologist, Rani Prinsloo, on the basis that she suffered from Acute Stress Disorder. On 3 March 2015, and whilst on sick leave, Swanepoel was called to a meeting, where he was informed of a restructuring taking place within the applicant. She was further informed that as a consequence of the restructuring, she had an option of either accepting an alternative position as Regional Manager at a reduced salary, or be retrenched. She had opted for the alternative position. She was again booked off sick between 9 and 16 March 2015 by Dr Schronen on account of suffering from PTSD. She had however reported for duty between 16 and 24 March 2015.
- [5] On 10 March 2015, the applicant's attorneys of record caused a letter to be written to Dr. Schronen, to request further and relevant medical

evidence regarding Swanepoel's condition, and further requested that it be indicated whether she was fit to perform her duties.

- [6] Between 25 March and 8 April 2015, Swanepoel was again placed on sick leave. Dr. Schronen on 20 April 2015 placed her on extended sick leave until 4 May 2015 due to her condition. Whilst on extended sick leave on 9 April 2015, she was then sent an e-mail by Pretorius, the Human Resources Director, advising her to report for duty on that day at 11 'due to Incapacity/Ill-health' as medical reports about her condition had not been received. On the same date she was then issued with a notice to attend incapacity enquiry scheduled for 13 April 2015. She was subsequently dismissed, with her last day at work being 30 April 2015.

The arbitration proceedings:

- [7] An alleged unfair dismissal dispute was referred by Swanepoel to the second respondent (CCMA), and after unsuccessful conciliation, the matter was set down for arbitration before the Commissioner. Swanepoel's main claim was that her dismissal was procedurally and substantively unfair, particularly since the applicant had not followed the provisions of Items 8, 10 and 11 of Schedule 8, Code of Good Practice as contained in the Labour Relations Act. Her contention was that no investigations were conducted to establish the nature and extent of her incapacity prior to dismissing her, and further that the applicant had not investigated all possible alternatives to accommodate her, or alternatively, adapted her duties to her condition.
- [8] The applicant's contention on the other hand at the arbitration proceedings was *inter alia* that Swanepoel had not, despite several requests, provided a medical report detailing the nature of her ailment, and indicating how long it was expected that she would be off duty.
- [9] Evidence on behalf of the applicant was led by Willem Moolman, who had acted as the chairperson of the enquiry leading to Swanepoel's dismissal. His testimony was that Swanepoel from the medical reports, suffered from PTSD following the hijacking incident, and had also confirmed receipt of a

medical report from a Doctor Schronen on 16 April 2015 regarding her condition. The issue however before the enquiry was that the report had long been requested by the applicant and Swanepoel had not assisted in securing it until 16 April 2015. The report from Dr Schronen simply recorded that Swanepoel's condition was treatable over time, but that she was currently (then) unable to report for duty. The Doctor also stated that further consultations were to be held with her weekly, and to monitor her response to medication.

[10] Moolman's evidence in the light of this report was that Swanepoel was unable to perform her duties, and as per the outcome¹, she was to be 'temporarily boarded'. Moolman further testified that the outcome reached was to enable Swanepoel to claim from the UIF. Swanepoel according to Moolman had not asked to be placed in another position. He had nevertheless conceded that the applicant had not considered whether she could be placed in another position.

[11] Another witness, Corne Pretorius, who had also represented the applicant in the arbitration proceedings, had testified to the effect that from 25 February 2015, Swanepoel was asked to produce a medical report detailing the nature of her ailment, and which would indicate how long she was likely to be off duty. Pretorius confirmed having had a meeting with Swanepoel to discuss the restructuring options, and had also at that meeting, asked her for her medical report, even though at that stage there had been one report submitted by a Doctor Rani Prinsloo. As a consequence of the failure to submit a detailed medical report despite requests on 2, 18 and 27 March, 9 and 13 April 2015, a decision was then taken to institute an enquiry. Even when those proceedings commenced, Swanepoel was again asked to produce a report and was afforded time to do so. Ultimately however, the decision to dismiss her according to Pretorius, was based on the fact that the applicant was under pressure from an operational point of view.

¹ Page 156 of record of proceedings

- [12] Swanepoel had during the arbitration proceedings described in detail, the hijacking incident that left her traumatised. She then took off about 27 days' sick leave. Whilst on sick leave, the applicant had called her to a meeting to discuss restructuring. She met with Pretorius who had informed her of the two alternatives. She denied however that Pretorius had asked her to submit her detailed medical reports, and contended that she had in any event submitted her medical certificates to justify her sick leave.
- [13] At about the same period, Swanepoel was then advised by a Jennifer Choice of the applicant to attend a PTSD programme at her own cost, and to attend counselling sessions about twice a month during working hours. Swanepoel further complained about the fact that the applicant had failed to assist her with her claim with the Workmen's Compensation claim.
- [14] According to Swanepoel, she had during her absence from 14 February 2015, kept the applicant informed of her whereabouts and medical progress. The applicant's attorneys had nonetheless sent a letter of demand to Doctor Schronen, to ask for her medical report, which she had in any event asked the doctor to issue.
- [15] In regard to her dismissal, Swanepoel's contention was that the applicant's conduct towards her had exacerbated her medical condition, and that it had not offered to reduce her work load or considered placing her in a less stressful work environment in order to assist her with her recovery process.

The award:

- [16] The Commissioner in analysing the evidence had regard to the provisions of items 10 and 11 of schedule 8 and concluded that the applicant had not given consideration to factors contained in item 10 (4). This included not being assisted with her therapy sessions which she was informed she would have to take unpaid leave which she had to apply for two weeks' in advance, and which in any event would be granted if operational requirements permitted. The Commissioner lamented the fact that the

applicant took no consideration that Swanepoel's condition resulted from an incident she suffered in the course of her duties, and the fact that she would have to pay for her own treatment.

[17] The Commissioner also held that the applicant unduly put Swanepoel under pressure by calling her to a meeting to discuss restructuring, especially after her traumatic incident, and also questioned the reason the applicant's attorneys had written a letter of demand to Swanepoel's doctor to request her detailed medical report. The Commissioner held the view that all of these factors were merely meant to harass and put pressure on Swanepoel.

[18] Other factors which the Commissioner considered as unfair related to threats made to Swanepoel to charge her with misconduct, which threats was never carried out, the failure to assist her with her Workmen's compensation claim. The Commissioner having accepted the evidence of Pretorius that Swanepoel was dismissed as she was not fit for work, and for not furnishing the applicant with a detailed medical report, further concluded that there was no attempt on the part of the chairperson of the enquiry to follow the laws pertaining to incapacity in Schedule 8.

The grounds of review and submissions:

[19] The applicant attacked the award on a variety of grounds, principal amongst which were that;

- a) The Commissioner failed to determine whether Swanepoel was dismissed for a fair reason, i.e., in that she was not fit to perform her work. To this end, it was contended that the unequivocal evidence on record indicated that she was unfit to perform her work, and that she would only recover from that state in the long term.
- b) Other than failing to consider whether Swanepoel was fit to perform her duties for the foreseeable future, the Commissioner failed to consider whether the applicant could reasonably have been

expected to continue to employ her, and thus in this regard, misconceived the nature of the enquiry.

- c) The Commissioner misconceived her duties under the LRA by failing to appreciate that she was obliged to give effect to, or deal with the evidence that Swanepoel was unfit to perform her duties in the long term.
- d) The Commissioner failed to appreciate that to the extent that the applicant should have investigated alternative positions in which to accommodate Swanepoel, its failure to do so was at best a procedural failing and could not determine the question whether the employee was on the evidence available, fit to perform her duties.
- e) The Commissioner misconceived her duties by failing to appreciate that as a matter of law of evidence, once the evidence before her made out a strong *prima facie* case justifying the dismissal, there was an onus of rebuttal on Swanepoel to provide evidence of alternatives in which she could have been accommodated, and not on the employer to rule out all such alternatives.

[20] Swanepoel opposed the application on the grounds that there was no basis for a conclusion to be reached that the Commissioner misconceived her duties in finding that her dismissal was procedurally and substantively unfair, and that her decision was one that a reasonable decision maker could reach. Further submissions in this regard will be considered within the context of the evaluation as below.

The review test and evaluation:

[21] The test on review is whether the decision reached by the arbitrator is one that a reasonable decision maker could not reach in relation to the evidence before him or her². The Supreme Court of Appeal, in *Herholdt v*

² Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at para 110.

*Nedbank (Cosatu as amicus curiae)*³ summarised the review test as follows:

“.....the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls 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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.⁴”

[22] Central to the applicant’s grounds of review is that the Commissioner misconceived the nature of the enquiry in determining whether the dismissal of Swanepoel was procedurally and substantively fair. In this regard, it was contended that the Commissioner misconceived her duties by relying on the applicant’s procedural failure to exhaust all alternatives during consultation prior to dismissal for incapacity, irrespective of the subsequent evidence during the arbitration proceedings that established that there were no reasonable alternatives.

[23] Where this court can conclude that a Commissioner misconstrued the nature of the enquiry at arbitration proceedings, or undertook an enquiry in a misconceived manner, it follows that the Commissioner cannot be said to have arrived at a reasonable result, as there would not have been a fair trial of the issues. This principle was expressed in *Head of the Department of Education v Mofokeng and Others*⁵ as follows;

“The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then

³ 2013 (6) SA 224 (SCA)

⁴ At para 25

⁵ [2015] 1 BLLR 50 (LAC) at paragraphs [30] to [34]

ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

[24] In a further explication of the review test, and to the extent that it was argued in this case that the Commissioner had misconstrued the nature of the enquiry, the Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others*⁶ held that in assessing whether the result of an award is unreasonable, the reviewing court should not adopt a piecemeal approach, and must further enquire whether;

“..... (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence?⁷

[25] In this case, as Swanepoel was dismissed for incapacity related to ill-health, it can be accepted that the starting point for the Commissioner was to have regard to, and consider the provisions of Items 10-11 of the Code of Good Practice: Dismissal, which are binding on all Commissioners as dictated by the provisions of section 188 (2) of the LRA. As per paragraphs 38 to 39 of the award, the Commissioner was clearly alive to these provisions. The applicant nevertheless contended that the

⁶ [2014] 1 BLLR 20 (LAC) at para 14

⁷ At para 20

Commissioner failed to appreciate and comply with her duties under section 188 of the LRA in applying these provisions correctly.

[26] The provisions of Item 10 and 11 as contained in Schedule 8 read as follows;

“10 Incapacity: Ill health or injury

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed to state a case in response and to be assisted by a trade union representative or fellow employee.
- (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of incapacity may also be relevant.....
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in those circumstances.

“11. Guidelines in cases of dismissal arising from ill health or injury -

Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

- a) whether or not the employee is capable of performing the work;
- b) if the employee is not capable –

- (i) the extent to which the employee is able to perform the work;
- (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
- (iii) the availability of any suitable alternative work."

[27] The above provisions were interpreted by Molemela AJA (as she then was) in *IMATU obo Strydom v Witzenburg Municipality & others*⁸ as follows;

"My reading of item 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. I am of the view that the conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available.

I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognised as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would, under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

The afore-mentioned obligations of the employer as set out in items 10 and 11 of Schedule 8 to the LRA are inter-related with similar obligations in the Employment Equity Act 55 of 1998. In their work,

⁸ [2012] 7 BLLR 660 (LAC) at paras 6 - 9

Employment Equity Law 2001: 7-3 to 7.4, J L Pretorius et al submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but, is a duty that is implied in the concept of unfair discrimination in a general sense "and ...is one of the judicial and legislative tools for realising substantive equality". I agree with this submission. Surely noncompliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?

I am of the view that the provisions of item 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair....."

[28] The issue therefore is whether the Commissioner correctly applied the general principles embodied in Items 10 and 11 to the evidence that was presented before her, and further took into account the nature of the onus under section 192 of the LRA. As a point of departure, there can be no dispute as per the evidence presented before the Commissioner that Swanepoel was indeed incapacitated as a consequence of the hijacking incident. This fact can be gleaned from the medical reports as shall be referred to later in this judgment.

[29] In accordance with the provisions of section 188 (1) (a) of the LRA, the reason for the dismissal must be fair. The reason for a dismissal in this case has its genesis in the 'allegations' or the nature of the enquiry leading to the dismissal. The notice of incapacity enquiry⁹ issued to Swanepoel read as follows;

- "1. You are required to attend an incapacity enquiry at, to assess your medical incapacity to continue your employment due to your ill-health.*
- 2. A doctor's certificate (s) must be provided for your period of absence. The certificate must reflect the nature of your illness, if you are fit for duty and if not the length of your absenteeism*

[30] At the time that the disciplinary or incapacity enquiry was convened, inclusive of 16 April 2015, it can be accepted that Swanepoel had made

⁹ Page 152 of the record of proceedings

available, various medical reports in respect of her condition. To the extent that the central issue in regards to the notice was the provision of medical certificates indicating the nature of the illness, the periods of absence, and whether Swanepoel was fit for duty or not, these reports in my view answered the applicant's enquiries to a large extent. To this end, any contention that Swanepoel's dismissal was fair as contended by Pretorius at the arbitration proceedings, on the basis that she had not provided the medical certificates as requested cannot be sustainable, as she had done so. Those reports were made available and it does not appear anywhere in the record that they were not accepted because they were late.

[31] At some point during his evidence, Pretorius was asked by the Commissioner whether he disputed the medical reports. His answer was that the contents of reports, and not the reports themselves were disputed. If this was the case, unfortunately for Pretorius, he could not have been in a position to dispute the contents of the report unless through the evidence of a medical practitioner or a psychologist. It was therefore simply not sufficient for the applicant to dispute the contents of the medical reports without evidence in rebuttal.

[32] As can further be gleaned from the record of proceedings¹⁰, it would appear that the sole purpose that Pretorius would have wanted Swanepoel's doctors, especially Dr Schronen to testify, was for him to give reasons why the reports were not furnished on time. As to what value an answer to that question would have added to the determination of the main issues is unclear, as the report which was sought was ultimately made available and accepted. As the Commissioner had correctly pointed out, it was for the applicant to subpoena Dr Schronen if it wanted to, and not for the Commissioner to subpoena a witness.

[33] It is accepted that on the principles long established in *Mgobhozi v Naidoo NO and Others*¹¹ that generally, medical certificates not in the form of an

¹⁰ Line 5 – 25 at page 495

¹¹ (2006) 27 ILJ 786 (LAC)

affidavit constitute hearsay evidence. However, where the medical certificate itself is not contested, and a party merely seeks to know the reason from the medical practitioner why that certificate was not made available at a particular time when requested, rather than be questioned on the contents of it, this in my view cannot add any value to the determination of whether an employee was permanently or temporarily incapacitated. In any event, at some point during the arbitration proceedings, Pretorius had reserved the applicant's right to subpoena Dr Schronen. The applicant nevertheless opted not to do so.

[34] I accept that the medical report of Dr Schronen took longer than necessary to be available. Be that as it may, the fact that Moolman gave Swanepoel an opportunity to secure that report, which she had ultimately done and presented prior to the final outcome being made can only support her contention that the decision to dismiss her on the basis that she had failed to make available those reports is spurious and unfair in the extreme. The Commissioner was therefore correct in rejecting Pretorius' assertion that Swanepoel was dismissed for not producing the required information about her condition.

[35] I did not understand it to be the applicant's case that these medical reports did not answer its concerns. The report that was issued by the Clinical Psychologist, Rani Prinsloo on 25 February 2015 reads as follows;

"To whom it may concern,

As you are aware, Lisa Swanepoel was involved in an attempted hijacking and robbery while working away from the office.

This traumatic incident has resulted in her currently being under severe psychological strain. Her symptoms include: hyperarousal, exaggerated startle response, flashbacks, nightmares, social avoidance, anxiety and panic. There are various triggers associated with the trauma that induce a feeling of anxiety and panic, such as driving alone, and being alone. These symptoms should decrease over time as we work therapeutically, but is not an instant process.

It is recommended that Lisa continue therapy until these symptoms reside. Various accommodations also need to be made at work for the time being. If she has to go into an area she will feel unsafe, it would be advisable if a driver can accompany her, as the anxiety or panic attacks it will trigger at present to drive in areas alone where she feels unsafe will render her incapable of performing what is expected.

Please understand that at present she is psychologically vulnerable.

Kind regards...."

[36] Following the convening of the incapacity enquiry, Dr. Schronen had then issued a detailed medical report on 15 April 2015, and had confirmed *inter alia* that;

- a) *Swanepoel was seen on a regular basis and was diagnosed with severe PTSD as a result of the hijacking incident*
- b) *She was currently on medication and was receiving psychotherapy;*
- c) *The condition was treatable in the long term and the prognosis in her case should be good*
- d) *Currently she was not able to function at work and she was given sick leave.*
- e) *She would be monitored every week to monitor her response to medication*

[37] From the medical certificates/reports that that were before Moolman, I did not understand the applicant's case to be that it disputed the fact that Swanepoel was incapacitated. Whether the incapacity was permanent or temporary was an issue to be assessed and determined from the various medical reports. Prior to examining how Moolman dealt with these reports in arriving at his conclusion, an observation made by the Commissioner in regards to the provisions of items 10 and 11 is worth repeating.

[38] The Commissioner took into account that in accordance with item 10 (4), and to the extent that Swanepoel was injured on duty, the applicant failed to give particular attention to her. On the contrary according to the Commissioner, the applicant took actions that in fact compounded Swanepoel's condition, viz, how it dealt with Swanepoel's requests to

attend therapy sessions, which the applicant had told her that she would only do so at her cost, or by taking unpaid leave which she had to apply for in advance, and which in any event it could be granted if the operational requirements permitted.

[39] The Commissioner further in regards to the requirements of item 10 (4) pointed out that amidst Swanepoel's medical problems, the applicant saw it fit to call her to attend a restructuring meeting whilst she was on sick leave, and further threatened to subject her to some misconduct investigation.

[40] In my view, the conclusions reached by the Commissioner as above cannot be faulted, as the provisions of item 10 (4) places a particular obligation, onerous as it may seem, on the employer in circumstances where an employee suffered an injury on duty. There is therefore no basis for any conclusion to be reached that the factors identified by the Commissioner as being contrary to the purport of item 10 (4) had no relevance to, or relation to the decision reached. These incidents or factors should also be viewed within the context of Swanepoel being compelled to make hard choices pertaining to her future employment as a result of the applicant's restructuring hardly a few days after her traumatic incident. These events were clearly not conducive to Swanepoel's healing or recovery process, and had further impacted on the question whether the applicant had accommodated Swanepoel and her incapacity.

[41] The applicant for whatever reasons, paid scant regard to the Commissioner's observations in this regard when contending that the award was reviewable. These factors were properly considered within an application of the provisions of item 10 (4) of the Code, and I accept that the Commissioner's analysis and observations in this regard as pertinent to the issues and final determination as to whether the dismissal was fair.

[42] In regards to whether an assessment was made whether Swanepoel's incapacity was temporary or permanent, it is further instructive to note that during the arbitration proceedings, the Commissioner had pointed out and

questioned Moolman in regard to his conclusions having had regard to Dr. Schronen's latest report. Since on Moolman's version it was clear that Swanepoel was not fit duty, he was questioned about his outcome which was that she should be 'temporarily boarded'¹². In response to this pertinent question, Pretorius, who was then representing the applicant (and was to testify after Moolman), intervened and stated the statement referred to a dismissal, and that this was no longer an issue as it was common cause that Swanepoel was dismissed¹³. Moolman's direct response however was that reference to 'temporarily boarded' meant that Swanepoel could not be employed and claim benefits. It was only when Moolman was cross-examined by Swanepoel that Pretorius again intervened and 'clarified' that the outcome of 'temporarily board' was rectified at some point via e-mail, wherein Swanepoel was advised that she was in fact dismissed¹⁴. Moolman flowing from Pretorius' intervention then contended that in fact, Swanepoel was not furnished with a copy of his original outcome, and he confirmed that he had corrected his initial outcome, and replaced it with dismissal.

[43] In my view, it is at that point of Moolman's evidence that the applicant's case faltered. As per the requirements of section 188 (1) (a) of the LRA, the reason for the dismissal must be fair. An outcome to 'temporarily board' an employee following an incapacity enquiry means exactly that, and cannot be equated with a dismissal. As I understood Moolman's evidence, his decision to deem Swanepoel as 'temporarily boarded' in his understanding meant that this was to enable her to claim benefits from the Department of Labour for the period that she was not able to perform her functions¹⁵.

[44] From Moolman's conclusions as above despite Pretorius' interventions, it can be accepted that as the chairperson of the enquiry, he had made his own assessment of the medical reports, acknowledged and accepted that

¹² Pages Transcribed Record at pages 354 to 355, and also page 156 of the record

¹³ Line 12 of the transcribed record at page 354

¹⁴ Line 15 of the transcribed record at page 360

¹⁵ Line 15 of the record of proceedings at page 351

Swanepoel's condition was temporary, hence the initial decision not to dismiss her but to 'temporarily board' her. That conclusion was also in line with Dr Schronen's report which indicated that Swanepoel's condition was treatable in the long term and that her progress 'should be good'.

[45] The applicant as correctly pointed out on behalf of Swanepoel also conceded in its replying affidavit¹⁶ that from Dr Schronen's report, it was possible for Swanepoel to return to work. The fact that as at the time of the arbitration proceedings Swanepoel was still not capable of resuming her duties is neither here nor there contrary to the submissions made on behalf of the applicant, as it is the facts as presented to Moolman at the time of the incapacity enquiry that were determinative of whether her incapacity was temporary or permanent. The applicant in my view further appears to misinterpret the principle enunciated in *Unitrans Zululand (Pty) Ltd v Cebekhulu*¹⁷. That matter concerned a dismissal for operational reasons. The principle enunciated therein that with regard to procedural fairness, the question is not whether a fair procedure was followed in Court, but whether, prior to the dismissal, the employer followed a fair procedure¹⁸ remains of universal application irrespective of the reason or nature of the dismissal.

¹⁶ At paragraph 7.3

¹⁷ [2003] 7 BLLR (LAC)

¹⁸ At paragraph 25 where it was held that;

"It was contended on behalf of the respondent that the Court a quo erred in finding that the respondent's dismissal was substantively fair. The basis advanced in support of this contention was that the substantive and procedural fairness of the dismissal were so intricately linked that, once the Court a quo had found that the dismissal was procedurally unfair, it could not find that it was substantively fair because it was impossible to decide whether dismissal was the only option available when alternatives thereto including bumping had not been properly considered in the consultation process. This contention cannot be upheld. In relation to a dismissal, procedural fairness relates to the procedure followed in dismissing an employee. Substantive fairness relates to the existence of a fair reason to dismiss. In relation to substantive fairness the question is whether or not, on the evidence before the Court, and not on the evidence produced during the consultation process, a fair reason to dismiss existed. With regard to procedural fairness, the question is not whether a fair procedure was followed in Court. The question is whether, prior to the dismissal, the employer followed a fair procedure. The result hereof is, therefore, that, if the evidence placed before the court establishes a fair reason to dismiss which was present at the time of the dismissal, the dismissal is substantively fair. It does not matter, for purposes of determining the substantive fairness of the dismissal, that such reason was not the subject of discussion during the consultation process. The fact that the reason for dismissal was never a subject of consultation matters only at the level of procedure because in terms of sec 189 of the Act, it should be a subject of consultation."

[46] I did not however understand the principles enunciated in *Unitrans* in regard to substantive fairness to be of general application irrespective of the reason for a dismissal. A dismissal for misconduct or incapacity cannot by all accounts be the same as one for operational requirements, as different principles and guidelines apply as provided in Schedule 8 and section 189 of the LRA. An employer cannot therefore, for the purposes of a dismissal related to medical incapacity, rely on a different reason for the dismissal at arbitration proceedings. It is bound to justify the reason for the dismissal as it took place at the internal enquiry, as this is what the provisions of section 188 (2) of the LRA require of the Commissioner to determine. The fact that proceedings at arbitration are *de novo* does not imply that an employer is permitted to invent any reason unrelated to the original one for a dismissal based on misconduct or incapacity at arbitration proceedings.

[47] To come back to Moolman's initial outcome, if and as when it was altered at a later stage, it is not clear at what point this change took place and the reasons in that regard. An employer, or chairperson of an enquiry is not permitted in my view, after an enquiry of any nature and outcome in that regard, to unilaterally change that outcome without some form of procedure being followed. The affected employee is entitled to know the reasons, if any, why an initial and less harsh outcome was substituted with that of a dismissal. To simply attribute this procedural irregularity/unfairness as a 'mistake' that was later rectified by an e-mail appears to be an attempt at sugar-coating unfairness. The fact of the matter as the Commissioner pointed out during Moolman's evidence is that Swanepoel was not dismissed, and the later decision to suddenly dismiss her appears to be an afterthought. Furthermore, Pretorius' own version that the other reason for dismissing Swanepoel was due to the applicant's operational requirements casts doubts on the real reason Swanepoel was dismissed. Even if Pretorius' alternative reason was to be accepted, this could not have been fair as any dismissal based on

operational requirements had to be in compliance with the provisions of section 189 of the LRA.

[48] The issue of operational requirements was not one which formed the basis of the incapacity enquiry, and if indeed it was the reason that Swanepoel was dismissed, it could not have been fair. These observations however appear to be an issue which was neither explored with the Commissioner nor pursued with any seriousness by either party during these review proceedings. They are however indicative of the fact that the applicant does not appear to be certain as to the reason Swanepoel was dismissed.

[49] Significant however with Moolman's evidence was whether as the Commissioner had asked him, any attempts were made to accommodate Swanepoel to another job. This required an examination of the nature and extent of Swanepoel's incapacity. His response was that it had not occurred to him that she could be accommodated in a different position, and further that he was not aware that she had offered to come back to work subject to therapy¹⁹. From that evidence, the Commissioner's conclusions therefore that the applicant had not made any attempt to find out how long Swanepoel was likely to be unfit for duty, and/or made attempts to accommodate her, cannot be faulted.

[50] It is trite that the employer has a duty within the context of an incapacity enquiry to accommodate an incapacitated employee. This is even moreso in circumstances where that employee was injured in the course of her official duties. This means that possible alternatives must be explored and exhausted in consultation with the employee, and it is only thereafter that the ultimate decision to terminate the employment relationship can be considered. In this case, the recommendation of Dr Prinsloo was that Swanepoel should be accommodated, and the Commissioner's conclusion that the applicant was found wanting in this regard is unassailable.

¹⁹ Lines 10 – 24 of Transcribed Record at page 355

- [51] To the extent that Moolman had concluded that based on Dr Schronen's report Swanepoel was not fit for duty, there does not appear to be anything in his outcome report that indicated that other alternatives were looked at to accommodate Swanepoel's incapacity. On Moolman's own version, he was not aware that Swanepoel could be appointed in another position, and from the record of the enquiry, it does not appear that he had bothered to enquire from the applicant whether that could be done. As already indicted however, his initial inclination was to deem her as temporarily boarded.
- [52] The applicant's further submission was that the Commissioner misconceived her duty in that she mistakenly came to the conclusion that the failure by the applicant to follow a fair procedure automatically meant that the applicant was unable to prove that the dismissal was substantively justified. As pointed out in *IMATU obo Strydom*, the provisions of item 10 and 11 are inextricably tied, and non-compliance therewith would render a dismissal both procedurally and substantively unfair. Thus, once it was accepted that Swanepoel's incapacity was temporary, on Moolman's own version, it was apparent that the applicant had not made any attempts to accommodate her, let alone establish whether her incapacity could be accommodated. The invariable conclusion to be reached in the circumstances was that the dismissal could not have been procedurally and substantively fair. One can only conclude that an incapacity dismissal is the only option once all other avenues have been explored, including accommodating the incapacity through whatever means necessary.
- [53] It was submitted on behalf of the applicant that it had attempted to accommodate Swanepoel by providing her with a driver when she travelled in areas which were regarded as unsafe, but that she had stayed away from work for the vast majority of the period since the hijacking incident. This however is not the point, as first, she was off from duty as she was booked off sick, which fact does not appear to have been challenged. The second issue is that there was a need on the part of the

applicant to demonstrate that there were attempts to adapt her work circumstances so as to accommodate the incapacity, or adapt her duties, or provide her with alternative work if same is available. None of these were done as per the findings of the Commissioner, and it is not sufficient as the applicant had sought to do, to shift the onus on Swanepoel to demonstrate that her position (incapacity) could change and be able to fulfil her duties at some point.

[54] The applicant's further contention was that there was no medical evidence to suggest that had Swanepoel been permitted greater flexibility and less stressful circumstances in her job, she would have been able to return to work sooner. It was further contended that to the extent that the Commissioner advised Pretorius not to cross-examine Swanepoel on that issue, the review application ought to succeed. These contentions are unsustainable in that not every alleged irregularity on the part of a Commissioner leads to a reviewable defect. The ultimate test is whether as pointed out in *Goldfields*, the Commissioner in terms of her duty to deal with the matter with the minimum of legal formalities, gave the parties a full opportunity to have their say in respect of the dispute, i.e. whether there was a fair trial of the issues. In my view, the Commissioner cannot be said to be found wanting in this regard.

[55] On the whole therefore, upon an examination of the award and the pleadings as they are before the court, combined with the submissions made on behalf of the parties, I am satisfied that the Commissioner properly identified the dispute she was required to arbitrate, understood the nature of the dispute she was required to arbitrate, and dealt with the substantial merits of the dispute. There is no basis for a conclusion to be reached that in considering the provisions of Items 10 and 11 of the Code, the Commissioner did so incorrectly, or applied those principles in an incorrect manner. There is further no basis for a suggestion that the Commissioner diverted from the correct path in the conduct of the arbitration or failed to address the question raised for determination. In the end, the Commissioner's decision is one that another decision-maker

could reasonably have arrived at based on the evidence that was placed before her.

[56] I have further had regard to the considerations of law and fairness in respect of the issue of costs, and I am satisfied that there is no reason why Swanepoel should not be entitled to the costs of this application. In the premises, the following order is made;

Order:

- i. The application to review and set aside the arbitration award issued by the Third Respondent under case number WECT7539/15 dated 28 August 2015 is dismissed with costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. F Rautenbach

Instructed by:

Carelse Khan Attorneys

For the First Respondent:

Adv. G Viljoen

Instructed by:

Andrews & Co Attorneys

LABOUR COURT