



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1922/13

In the matter between:

BOMBELA OPERATING COMPANY (PTY) LTD

Applicant

and

JACKSON. MTHUKWANE N.O

First Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Second Respondent

UTATU SARHWU

Third Respondent

CLIFFORD MORAKE

Fourth Respondent

Heard: 23 February 2017

Delivered: 30 January 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicant, Bombela Operating Company (Pty) Ltd (Bombela) seeks an order reviewing and setting aside the arbitration award issued by the first respondent (Commissioner), acting under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA). In his award, the

Commissioner had found that the dismissal of the fourth respondent, Mr Clifford Morake (Morake) was procedurally and substantively unfair, and had ordered that he be reinstated with retrospective effect, including payment of back-pay in the amount of R191 354.52.

- [2] The matter was initially enrolled for a pre-hearing on 11 August 2016. On that day the matter came before Van Niekerk J, who had issued an order in terms of which the late filing of the review application and the late filing of the answering affidavit was condoned.

Background:

- [3] Bombela is a private enterprise that operates the Gautrain and its related bus services. Morake, prior to his dismissal, held the position of Customer Service Officer ("CSO"), and was responsible for the North Sector of the Gautrain service. Morake commenced employment with Bombela on 1 November 2009 and was dismissed on 11 December 2012 after a disciplinary enquiry based on allegations of gross misconduct. It was alleged that he had assaulted a customer at the Gautrain Midrand Station in the evening of 13 October 2012.

The Arbitration proceedings:

- [4] Aggrieved by the dismissal, Morake, through his Union UTATU, referred an unfair dismissal dispute to the CCMA. Conciliation having failed, the dispute came before the Commissioner for arbitration. At the arbitration proceedings, three (3) witnesses testified on behalf of Bombela, being, Carl Cornelson (Cornelson), its IT Manager and Chairperson of the internal disciplinary hearing; Trevor Johnstone (Johnstone) the Internal Investigator, and David Tsotetsi (Tsotetsi), Bombela's Customer Service Supervisor at the Gautrain Midrand Station. Morake testified in his own case and had also called upon Palesa Motsie to testify on his behalf.
- [5] The following facts were not seriously in dispute before the Commissioner;
- a) The incident that led to the allegations of misconduct and ultimate dismissal of Morake took place late on Saturday night of

13 October 2012 at Midrand Station. Morake was in an office performing administrative duties when he was called by Palesa Motsie to attend to a scene unfolding at or near the ticket office. Upon his arrival there was a female passenger (Vilakazi), who appeared to have had difficulties with the scanning of her card in order to exit the station.

- b) Tsotetsi had initially approached Vilakazi with a view of attempting to assist her use her card to exit. Whilst Tsotetsi was attempting to assist her, a male person, who it turned out was Vilakazi's companion, Mr Mashalani (Mashalani), and who had already exited then confronted Tsotetsi, and wanted to ascertain what the problem was with his companion's card.
- c) Commotion then ensued, and it was at that point that Morake, who had been called by Motsie had intervened. Mashalani, who was on the other side of the turnstiles had then used his card to get back to where Vilakazi and others were. Morake then attempted to explain to Mashalani that he should not check in as he might attract a penalty if he exceeds ten (10) minutes within the station. Things turned for the worse when Mashalani refused to exit the station when directed to do so.

[6] Tsotetsi's testimony was that when Morake came to intervene, he had asked Mashalani, who appeared to be under the influence of alcohol to wait whilst Vilakazi being assisted. Vilakazi according to Tsotetsi also appeared to be under the influence of alcohol. At that stage, Mashalani then checked back into the station, and Morake advised him that he faced a fine if he exceeded his ten minutes in the system. It is at that stage that Mashalani refused to heed Morake's instructions and started to verbally abuse the latter, hurling profanities at him.

[7] Morake according to Tsotetsi then called security personnel to assist in containing the situation. Mashalani had nonetheless continued to verbally abuse Morake and security personnel. Tsotetsi's contention was that Morake was involved in the removal of Mashalani. He however did not witness any physical contact or altercation between Morake and Mashalani.

- [8] Motsie, Bombela's Customer Service Attendant (CSA) on duty on the day of the incident, testified that before the commotion, she was approached by Vilakazi to assist her in loading her Gautrain card with R30. As Motsie was busy at the time with another customer, Tsotetsi then assisted Vilakazi as per her request. After the reloading of the card, Vilakazi attempted to exit the station but could not. She then went back to the ticket office, where her card was analysed by Motsie, who had established through the system that Vilakazi had not checked-in at her previous boarding station.
- [9] When Vilakazi was questioned about where she had boarded the train, she became rude and stated that it did not matter where she boarded, her only concern was exiting the station. At that point Motsie left the ticket office and went to seek the assistance of Morake, who was already aware of the commotion.
- [10] At the ticket office, Morake introduced himself as the Station Manager and asked what the problem was. He then proceeded to explain Bombela's rules and regulations to Vilakazi. At that point Mashalani re-entered the Station, and Morake then explained to him that he may attract a penalty of R200 if he exceeds ten (10) within the station. Mashalani then uttered the words "*I don't f...ing care let my girlfriend out*". Morake attempted to reprimand Mashalani and had called security personnel to assist.
- [11] According to Motsie, it was clear to her that both Vilakazi and Mashalani were under the influence of alcohol. This came from her observation that they both smelt of alcohol, were rude, uncontrollable, and had continuously hurled profanities towards Morake. As far as Motsie was aware, Morake did not assault the customer. She conceded that Morake did touch Mashalani, *albeit* not in a violent manner.
- [12] Morake's testimony was that at the time of the incident, he was in his office when he heard commotion and noise coming from the ticket office. He was approached by Motsie to come and assist in containing the unfolding situation at the ticket office. Upon his arrival, Tsotetsi explained to him what the problem was, including that Vilakazi was refusing to cooperate with him and to

tell him where she had boarded the train. Morake's testimony was that as he arrived on the scene, Vilakazi looked at him and said '*another black manager!*' and continued the verbal abuse. While still talking to Vilakazi, Mashalani, who had already exited the system and was on the other end of the exit starting pointing fingers at him, also verbally abusing him.

- [13] Morake with the assistance of Tsotetsi had then discovered that Vilakazi could not exit the system as she had not checked in with her new card when she boarded the train at the previous station. Morake attempted to explain to Vilakazi what the problem was and at that stage, Mashalani re-entered the station, hurling obscenities at Morake, including making references to his (Morake's) mother's private parts. He accused Morake and other staff members of incompetency in his profanity laced tirade.
- [14] Whilst Morake was trying to calm Mashalani down, Vilakazi, at the same time ran towards the platform, and security officers together with Morake ran after her to calm her down as her conduct on the station platform was regarded as unsafe. Mashalani on the other hand had continued to verbally Morake and security officers. The security officers according to Morake appeared to be reluctant to confront Mashalani.
- [15] Morake continued to tell Mashalani to vacate the station but to no avail, as the latter continued with his verbal abuse. It was at that point that Morake had made physical contact with Mashalani, by touching him on the shoulder, neck area and back in an attempt to remove him from the station. He had ultimately succeeded in removing Mashalani from the station.
- [16] Under cross-examination and when confronted with the video footage of the incident, Morake maintained that he had merely touched Mashalani in an attempt to remove him from the station. He denied having forcefully pushed him or attempted to dispossess him of his mobile phone. He contended that Mashalani attempted to take a photograph of him and in trying to prevent him from doing that, his (Mashalani's) mobile phone fell to the ground. He denied having sought to dispossess Mashalani of his phone.

- [17] Johnstone, an Internal Investigator for Bombela had investigated the allegations against Morake. He could only testify in regard to what was seen on the video footage. Under cross examination, Johnstone conceded that from the video footage, a security personnel could be seen even before Morake come to the scene. In his opinion, the security personnel were primarily responsible for the physical removal of transgressors on the stations. Where they failed to do so, members of the South African Police Service, who were ordinarily stationed at each Gautrain station could be called upon to assist. He confirmed that in this case, members of the security personnel present at the scene stood by while the transgressors caused commotion.
- [18] In dismissing Morake, Cornelson testified that he considered the former's position in the company, which required of him to manage conflict situations at the stations; the video footage from which it could be seen that Morake had indeed assaulted the customer, and the fact that employees who had committed similar transgressions in the past were dismissed.
- [19] In regard to the procedural fairness of the dismissal, Morake had testified that at the disciplinary enquiry, he was not afforded an opportunity to state his case or lead the evidence of his own witness, Tsotetsi. The chairperson, Cornelson had according to Morake, simply called Tsotetsi and asked him a few questions before excusing him
- [20] Cornelson had conceded that Morake did not give evidence in his defence and that his representative at the enquiry 'stated his case on his behalf'. He further conceded that Morake's representative never told him that the former did not wish to testify. He further conceded that Tsotetsi, who was supposed to have testified on behalf of Morake was called in and only asked questions by him instead of the initiator, but that he had merely asked 'clarity questions' after viewing the video footage. He nonetheless conceded that he had not followed company policy in regard to the presentation of evidence in the hearing.

The arbitration award:

- [21] In his arbitration ward, the Commissioner concluded that the dismissal of Morake was both procedurally and substantively unfair. In considering the

procedural fairness of the dismissal the Commissioner referred to Schedule 8 of the Code of Good Practice: Dismissal.¹ He accepted the evidence of Tsotetsi and Morake that the Presiding Chairperson of the hearing was the first person to pose question to Tsotetsi as the witness of the employee and that the representative of the employee was the last person to pose question as oppose to them leading their witness. The Commissioner further reasoned that the evidence of Cornelson was weak and unconvincing, and as such was to be rejected, whilst that presented by and on behalf of Morake was probable. He thus concluded that Morake was not afforded an opportunity to state his case at the internal disciplinary hearing.

- [22] In regards to substantive fairness of the dismissal, the Commissioner accepted the video footage as authentic evidence, and that Morake had indeed pushed Mashalani twice towards the exit contrary to his and Motsie's evidence that he had merely touched him. The Commissioner further accept that there was an argument between Morake and Mashalani and as such, Morake was guilty of assault.
- [23] In regards to sanction, the Commissioner held that provocation was an acceptable factor in mitigation and accepted that the evidence indicated that indeed Morake was provoked, particularly in view of the verbal abuse hurled towards him. He further accepted the assault was not of such a serious nature as it only amounted to a push of Mashalani towards the exit. The push was for the sole intention of ejecting Mashalani from the station. The Commissioner further took into account that Morake had a clean disciplinary record. Further taking into account that Mashalani was verbally abusive and that the assault was not of a serious nature, the Commissioner concluded that the sanction was too harsh, and that Bombela should have considered a less severe one.

The grounds of review and evaluation:

¹ **4 Fair procedure**

- (1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations.

[24] Bombela attacked the award on a variety of grounds, including that the Commissioner's findings were not that of a reasonable decision maker in the light of the fact that he;

- a) failed to apply his mind to the evidence, or failed to take into account certain evidence;
- b) made factual findings that did not correspond with the evidence and documents presented;
- c) failed to conduct the proceedings properly, and/or failed to comply with the provisions of the LRA;
- d) failed to apply the Arbitration Guidelines prior to taking a decision to reinstate;
- e) exceeded his powers in terms of the LRA

[25] The test on review is whether the decision of the Commissioner under review is one which a reasonable decision maker could not have made in the light of the material placed before him or her². The review test was explained as follows in *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*³

"...That test involves the reviewing court examining the merits of the case '*in the round*' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator... The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decisionmaker could reach in the light of the issues and the evidence."

And,

² *Sidumo v Rustenburg Platinum Mines Ltd and Another* [2007] 12 BLLR 1097 (CC) at para [110]

³ [2013] 11 BLLR 1074 (SCA) at para 12 - 13

'The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the Sidumo test. And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid *'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'*. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that ... awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. The Sidumo test will, however, justify setting aside an award on review if the decision is *'entirely disconnected with the evidence'* or is *'unsupported by any evidence' and involves speculation by the commissioner.*' (Authorities omitted)

- [26] To the extent that the primary basis of Bombela's case was that the Commissioner committed an irregularity as he had either failed to apply his mind to the evidence presented, or had ignored that evidence, or had made findings that were in conflict with the evidence presented, in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁴, it was held that;

'...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. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues *albeit* material as rendering the award liable to be set aside on the grounds of process-related review.'⁵

And,

'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

⁴ (2014) 35 ILJ 943 (LAC)

⁵ At para 15

came to a conclusion which was reasonable to justify the decisions he or she arrived at.’⁶

And,

‘In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those 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 of dealing with the arbitrator’s award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.’⁷

[27] Applying the above principles to the facts of this case, and further in line with the approach adopted in *Goldfields*⁸, the first question to be answered is whether the process that the Commissioner employed gave the parties a full opportunity to have their say in respect of the dispute. This is bearing in mind that in terms of the provisions of section 138(1) of the LRA, an arbitrator is entitled to conduct the arbitration proceedings in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, as long as he or she deals with the substantial merits of the dispute with the minimum of legal formalities.

[28] The submissions made on behalf of Bombela in its written heads of argument, *i.e.*, that the Commissioner allowed Morake’s representative to give a lengthy opening statement, thus allowing him to give evidence, or allowed him to interfere with its representative, or that the Commissioner made irrelevant statements such as ‘*you might as well call the tea-lady*’ amount to nick-picking.

⁶ At para 16

⁷ At para 18

⁸ At para 20, where it was held that;

‘... The questions to ask are these: (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 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? and (v) Is the arbitrator’s decision one that another decision-maker could reasonably have arrived at based on the evidence’

These submissions go against the grain of what was stated in *Goldfields* that it is not for the review Court to examine each factor of the arbitration proceedings and to invariably conclude that there was some procedural irregularity sufficient to have the award set aside.

- [29] Upon a perusal of the transcribed record, and in the light of the latitude usually granted to Commissioners in the conduct of the proceedings, there is therefore no basis for any conclusion to be made that these alleged irregularities effectively denied Bombela any right to have its say in respect of the dispute.
- [30] The Commissioner as can be gleaned from the record may have made certain remarks, which the Bombela's representatives deemed inappropriate. There was however nothing in those remarks that can be construed as depriving the parties of a fair hearing. The complaints surrounding Morake's representative being afforded a lengthy opportunity to make opening or closing arguments are equally a red-herring. It is trite that a representative in arbitration proceedings merely presents a case on behalf of a party. There is nothing in the award or the pleadings that demonstrates that the Commissioner treated these opening or closing statements made on behalf of Morake at the proceedings as evidence.
- [31] There can be no doubt in this case that the Commissioner was alive to the issues he was required to arbitrate or determine. He had correctly pointed out that the onus was upon Bombela to demonstrate on a balance of probabilities that the dismissal of Morake was substantively and procedurally fair. Central to the allegations that led to the dismissal was whether Morake had assaulted a customer at Midrand Station. Despite Morake and Motsie's contentions that the customer was not assaulted, but was merely pushed towards the exit of the station, the Commissioner had correctly found (based also on the video evidence presented) that the conduct in question, i.e., pushing the customer twice, constituted an assault.
- [32] Bombela however takes issue with the Commissioner's conclusions in regards to sanction, contending that the latter failed to take into account the nature of the assault, Morake's position, the fact that Morake had continuously denied

having assaulted the customer, and the fact that provocation was never raised as a defence until during his cross-examination.

[33] In *Sidumo*, it was held that;

'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances'⁹

[34] In arriving at the conclusion in regards to sanction, the Commissioner took into account that Morake was '*severely insulted*'¹⁰, and further had regard to the circumstances under which the assault took place. He found that Morake was indeed provoked, and that the nature of the assault was not serious as this was not a case where he had thrown '*an upper cut or slapped*'¹¹ the customer, as the intention was merely to eject him from the station.

[35] Obviously, the Commissioner's approach and conclusions in regards to the seriousness of the misconduct in question is out of kilter with the principles applicable to an assessment of the gravity of misconduct pertaining to assault. For an assault to have taken place, it need not have been accompanied with an '*upper cut*', or a *slap*. An assault by definition can take a variety of forms, and the legal requirements are the intentional and unlawful application of physical force, however slight, to the body of the complainant, or the threat that such force will be applied¹². In this case, there was such application of physical force.

[36] By its very nature, assault is a serious form of misconduct. This however does not imply that every case of assault should be met with a dismissal, in that it is acknowledged that defences such as provocation may negate the unlawfulness of that conduct.

⁹ At para 79

¹⁰ Paragraph 32 of the award

¹¹ Paragraph 34 of the award

¹² See John Grogan: Dismissal at page 182

[37] The issue in this case is whether there was provocation as found by the Commissioner. In my view, the question should be answered in the affirmative. Further based on the following factors which were not seriously disputed as presented before the Commissioner, it should be accepted that Morake was compelled to act in the manner he did. These factors include that;

- a) Morake was called upon to the scene to intervene. On his evidence and that of Tsotetsi and Motsie, the two customers were clearly under the influence of alcohol, were vulgar, obstinate, abusive and generally uncooperative with Bombela's staff present trying to help them or to contain the situation. On Morake's uncontested evidence, the abuse and vulgarity were particularly directed towards him, and in the most personal and lewd manner.
- b) The customers had clearly broken the rules of Gautrain at the time, more particularly in regards to the use of the Gautrain card, the re-entering of the station, the running by Vilakazi on the platform when she had no reason to, being unruly and under the influence of alcohol, and failing to cooperate with authorised members of staff when requested to do so;
- c) Motsie, Tsotetsi and Morake could not, despite all their best endeavours, control the customers.
- d) Morake's evidence was that security personnel called upon to contain the situation stood idle and did nothing whilst the scene unfolded. Johnstone from his observation of the video footage confirmed the security personnel's inaction in the face of the commotion that took place.
- e) The submissions made on behalf of Bombela that there was nothing from the video footage to suggest that Morake had requested the security to intervene are unsustainable. This is particularly so since despite security personnel being seen on the footage, no attempt was made to call them as witnesses, and further since the video footage is muted.

- f) Part of Morake's responsibilities included maintaining order in the station, and with the benefit of hindsight, I accept that members of the SAPS should have been called to assist in the light of the security personnel's reluctance to do so. It is however easy to be wise after the fact. The circumstances at the time, and when all else had failed, required of Morake to physically deal with a clearly inebriated customer in order to eject him out of the station.
- g) The steps taken by Morake in the circumstances in an attempt to remove the customer out of the station were clearly the exigencies of the situation, and it should be accepted that there was no malice or intention (as required by the definition of assault) on the part of Morake to ultimately conduct himself in the manner he did.

[38] In arriving at the conclusion that the sanction of dismissal was inappropriate, the Commissioner also took into account that Morake had a clean service record, and that he was a supervisor. Inasmuch as it is accepted that a clean service record on its own does not justify a reinstatement, there is no suggestion in this case that this is the only factor upon which the Commissioner arrived at his decision. In the circumstances, and in the light of the conclusions reached that Morake acted in the manner that he did because the circumstances at the time required of him to do so, I am satisfied that upon a consideration of all the factors, the Commissioner's conclusions on the substantive fairness of the dismissal cannot be said to be those that a reasonable decision maker could not have arrived at.

[39] It is trite that once a Commissioner or this Court concludes that a sanction of dismissal was not appropriate, the remedy that should follow in accordance with the provisions of section 193 (1) of the LRA is that of reinstatement, unless there are factors contemplated under section 193 (2) of the LRA that militates against such relief.

[40] It was submitted on behalf of Bombela that in regards to the remedy of reinstatement, the issue of a trust relationship was not raised in the evidence before the Commissioner. It was nonetheless contended that the issue should

have been considered within the context of the misconduct in question and Morake's senior position in the company.

- [41] It is now trite that a breakdown in a trust relationship between an employer and an employee can be established without the necessity of evidence being led in that regard, particularly in circumstances where such a breakdown can be inferred from the nature and gravity of the proven misconduct¹³. In this case, inasmuch as the assault was proven, it has already been stated that such conduct took place in circumstances that were forced upon Morake. It is accepted that Morake is not entitled to assault customers of Bombela. However, given the circumstances of this case, there is no basis to conclude that Morake's conduct had broken the trust relationship.
- [42] It was correctly conceded on behalf of Morake that some sanction in the light of the Commissioner's conclusions in regard to assault having taken place would have been appropriate. Bombela on the other hand had contended that a reinstatement was not appropriate in circumstances where Morake approached the arbitration without clean hands. In my view, even if there is merit in Bombela's contentions, that issue on its own is not sufficient to deprive Morake of an order of reinstatement. In the light of the concessions made on behalf of Morake, it is my view that the order of reinstatement should have been accompanied by some form of censure, which issue I will address shortly.
- [43] In regard to whether the dismissal was procedurally fair, it is accepted in line with the approach set out in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*¹⁴ that even though employees are entitled to be heard

¹³ *Impala Platinum Ltd v Jansen* [2017] 4 BLLR 325; (2017) ILJ 896 (LAC). See also *Woolworths (Pty) Ltd v Mabija and Others* [2016] 5 BLLR 454 (LAC) at 458 para 21, where it was held that;

'The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonesty, cannot be visited with a dismissal without any evidence as to the impact of the misconduct. In some cases, the more outstandingly bad conduct of an employee would warrant an inference that trust relationship has been destroyed. It is, however, always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair.'

¹⁴ (2006) 27 ILJ 1644 (LC)

and to present defences to allegations against them, employers were not required to conduct disciplinary proceedings in a manner akin to a criminal or civil trial.

[44] In this case, the Commissioner took into account the provisions of Item 4 of Schedule 8 of the Code of Good Practice, and further had regard to the principles set out in *Avril Elizabeth*. He concluded that based on Cornelson's concessions that Morake did not present his case as he had thought that his representative had testified on his behalf when he cross-examined the company's witnesses, the disciplinary proceedings were procedurally irregular. This finding was also based on Cornelson's conduct of calling in a witness that Morake intended to call, asking him question before Morake's representative could do so.

[45] A fundamental principle of due process is that an accused person must be afforded an opportunity to state his or her case, and to refute the allegations against him or her. Representatives at any proceedings, including disciplinary enquiries are not there to testify on behalf of parties, unless they have specifically indicated that intention. It is not for chairpersons to assume that the representatives are there to testify on behalf of employees. In the absence of Morake having been afforded an opportunity to state his case in respect of the allegations against him, and further irrespective of whether he had made a written statement or not prior to the enquiry, it should be concluded on that ground alone that indeed the Commissioner's finding that the dismissal was procedurally unfair is unassailable.

Conclusions:

[46] Having had regard to the totality of the evidence before the Commissioner, I am satisfied there is nothing to suggest that his decision was entirely disconnected with the evidence, or was unsupported by any evidence, or had involved speculation on his part. I am further satisfied that the Commissioner properly identified and understood the nature of the dispute he was required to arbitrate, considered the principal issue before him; evaluated the facts presented at the hearing, and came to a conclusion which was reasonable to

justify the decisions he had arrived at. In essence, the award, other than the absence of censure accompanying reinstatement, is one that falls within a band of reasonableness.

[47] To the extent that it is concluded that Morake deserved some form of censure with his reinstatement, I am of the view that all the material was placed before the Court, and given the circumstances of this case, little purpose would be served by remitting this matter back to the CCMA simply for a reconsideration of this issue. Accordingly, I am of the view that the remedy of reinstatement, should have been accompanied by a final written warning.

[48] I have further had regard to the requirements of law and fairness, and I am not convinced that a cost order is warranted in this case.

Order:

[49] Accordingly, the following order is made;

1. The application to review and set aside the arbitration award issued by the First Respondent is dismissed.
2. The First Respondent's award is however amended, to reflect that the order of retrospective reinstatement of the Third Respondent is to be accompanied by a written final warning to be placed on his employment record.
3. There is no order as to costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. S Bernhardt

Instructed by:

Yusuf Nagdee Attorneys

For the Fourth Respondent:

Ms. TC Ralehoko of
Cheadle Thompson & Haysom Inc.

LABOUR COURT