



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1269/2014

In the matter between:

MOSATIWA PATRICK NCHAUPA

Applicant

and

**COMMISSIONER THANDIWE
TSHAYANA NO**

First Respondent

DISPUTE RESOLUTION CENTRE

Second Respondent

TRENTYRE (PTY) LTD

Third Respondent

Heard: 22 February 2017

Delivered: 12 Jul 2018

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

- [1] The applicant seeks an order reviewing and setting aside the arbitration award issued by the first respondent (Commissioner) dated 8 May 2014. The Commissioner found that the dismissal of the applicant by the third respondent (Employer) was substantively and procedurally fair. The applicant further seeks an order that the award be replaced with one to the effect that his dismissal was both substantively and procedurally unfair. The review application is opposed.

[2] The employer dismissed the applicant, a general worker, on 23 May 2013 on allegations of desertion. Aggrieved by the dismissal, the applicant referred a dispute to the second respondent (DRC) and when conciliation failed, the dispute came before the Commissioner where the following evidence was led;

2.1 The employer operates a factory and has a staff complement of 52 employees. In the morning of 2 May 2013 at about 09h00, the factory experienced a power outage, which it was estimated would take about two days to restore. All employees were then informed that they could knock off, and to further leave their contact details with the employer's Robert Radebe in the event that power was restored sooner. They were further advised that in the event that they were not contacted, they should all report for duty on the following Monday (6 May 2013). Power to the factory was restored on the Saturday of 4 May 2013.

2.2 On 6 May 2013, all the employees returned to work except the applicant. The employer's witness, and its Regional HR Manager, Werner Pieterse's testimony was that the applicant telephonically contacted him on 10 May 2013 and complained about not being paid his salary. Upon being asked the reason he had not been paid, the applicant's response was that he had not reported for duty due to power failure at the factory.

2.3 Pieterse then informed him that power had been restored since 4 May 2013 and that he should contact his supervisor and report for duty on 13 May 2013, failing which he would face disciplinary action. The applicant arrived at the factory on the day in question and contacted Pieterse, informing that he had been dismissed. Pieterse however told him that he could not have been dismissed without a hearing and he should go back to work. Pieterse never heard from the applicant thereafter.

2.4 A supervisor, Jackson Moletsane testified that he returned to work on 6 May 2013, and only saw the applicant on 13 May 2013, and he was not in his work clothes. The applicant had requested a letter from the employer to take to his creditors, which confirmed that he had not worked

in the previous week, and had refused to resume his duties as instructed. Moletsane in the presence of the factory manager, Patrick Mashego and another employee, Robert Radebe, told the applicant that the company would dismiss him if he failed to return to his duties, and it is at that stage that the applicant had requested a letter of dismissal. Moletsane again told him to go to work but he still refused to change into his work clothes and left, saying that he had been dismissed.

- 2.5 The next time Moletsane saw the applicant was at a disciplinary hearing on 23 May 2013. He was afforded an opportunity to find a representative and when he came back to the hearing, he said that he could not find anyone to represent him and had told the chairperson of the enquiry, Mashego to proceed nonetheless. Moletsane's further testimony was that the applicant had no permission to be off duty from 6 May 2013, and attempts to contact him between 13 and 23 May 2013 were unsuccessful.
- 2.6 The evidence of the employer's factory manager, Patrick Mashego was to confirm that indeed the applicant had not returned to work on 6 May 2013. Mashego only saw him on 13 May 2013, when he directed him to speak to his supervisor.
- 2.7 Mashego next saw the applicant on 23 May 2013 at about 13h00. The applicant requested a dismissal letter from him, alleging that he was dismissed by Jackson Moletsane, the supervisor. Mashego told him that he was not dismissed, and further told him that he was contacted via telegram and 'SMS' to report for duty. The applicant had confirmed having received the 'SMS', but still insisted on being provided with his dismissal letter. Mashego then said to the applicant that a proper disciplinary hearing can be held, and afforded the applicant an opportunity to get a representative. He nonetheless insisted that the hearing should proceed as he wanted his dismissal letter. Mashego then proceeded with a hearing. It was however apparent to Mashego that the applicant was not interested in continuing his employment with the employer, flowing from his refusal to resume duties earlier as instructed

by his supervisor, and also from his conduct of removing his personal belongings from his locker.

- 2.8 According to Mashego, the applicant further failed to show remorse or intention to resume duties, as he simply wanted his dismissal letter. When he came to the premises on 13 May 2013 it was only to get a letter for his creditors and had refused to report for duty. Between 6 and 13 May 2013 he had not contacted the employer and thereafter, he only came back on 23 May 2013 to demand a dismissal letter.
- 2.9 Mashego under cross-examination had denied that the applicant had left his contact number on 2 May 2013, and further denied that he had arrived at 06h40 on 13 May 2013 to resume duties. He further denied that the applicant was replaced by another employee as of 23 May 2013, and stated that he was only replaced on 20 June 2013 subsequent to his dismissal.
- 2.10 The applicant's case before the Commissioner was that he had not been contacted by the employer after 2 May 2013, and he had instead, contacted Pieterse on 10 May 2013, and informed him that he was waiting for a call as to when to come back to work. Pieterse had promised to come back to him but never did. Later during the course of that day he had again called Pieterse, who had not answered his call.
- 2.11 On 13 May 2013 he had reported for duty at 06h40. He called Mashego who informed him that he was off duty for more than five days and should have brought a medical certificate. He informed him that he was not sick and had waited for a call since 2 May 2013. Mashego nonetheless told him that he had absconded and was therefore dismissed, and further that he should leave the premises.
- 2.12 Having left, he then called the employer's Nicky van der Bergh of HR and informed her that he was dismissed by Patrick. Van der Bergh undertook to arrange for a hearing. On 23 May 2013 he went to the employer's premises after having received a call the previous day from a colleague whose identity he refused to disclose as it might jeopardise his

employment. The colleague had informed him that Mashego wanted to see him. When he did, Mashego called him to his office and also called Jackson Moletsane as a witness. He was given documents to sign, and although he did not understand the contents of the documents, he had signed some and not all of them upon realising that the documents confirmed his dismissal. According to the applicant, the meeting with Mashego was not a hearing as he was simply asked to sign documents to confirm that he was dismissed, which documents were pre-completed.

2.13 Under cross-examination, the applicant denied that he had received any 'SMS' from the employer during his absence, even though he conceded that he had received a call from his colleague on 22 May 2013 on the same phone number. He further denied that he came to the premises simply to get a dismissal letter, as his intention was to first ascertain from the manager the reason he was not called after the power was restored at the factory. He denied that he was afforded an opportunity to get a representative and insisted that no hearing was held.

[3] As already indicated, the Commissioner having analysed the evidence came to a conclusion that the applicant's dismissal was substantively and procedurally fair.

The grounds of review:

[4] Central to the grounds of review is that the Commissioner;

4.1 Conducted the arbitration proceedings in a biased manner, treated the employer differently, and failed to deal properly with objections raised on behalf of the applicant. In this regard, it was submitted that the Commissioner shouted at the applicant; interrupted him when he was answering questions, and/or that he interrupted his attorney during the cross-examination of the employer's witnesses; assisted the employer's case; and/or answered questions on behalf of witnesses¹. It was submitted that the interruptions by the Commissioner and her insistence

¹ In reference to page 164 and 148 of the transcribed record of proceedings

that the applicant's attorney should move to other questions deprived the applicant of the *audi alterem partem* rule.

4.2 The Commissioner committed a gross irregularity by refusing to grant the applicant a postponement in circumstances where his attorney was ill despite a formal request and presentation of a copy of a medical certificate in that regard. This had forced the applicant to be represented by another attorney who was not familiar with the matter. On the other hand, the Commissioner had refused the employer a postponement and had proceeded in its absence on 7 October 2013, and subsequently granted a rescission in circumstances where the employer's explanation for not attending the proceedings was inexcusable.

4.3 Failed to apply her mind to the evidence and reached a decision that a reasonable decision maker could not reach, as she failed to consider all the relevant facts, details and evidence pertaining to the matter. This was more specifically in regard to in relation to the discrepancy in the dates reflected in the record of the disciplinary proceedings.

The review test and evaluation:

[5] The test on review in our law is well established. It is whether the award of the Commissioner falls within a band of decisions which a reasonable decision-maker could come to based on the available material². The principles reiterated in *Goldfields*³ are even more apposite in this case given its factual matrix. The

² See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 14, where it was held that;

"*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material."

³ At para 16 and 20

issue is whether the Commissioner considered the principal issue before her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions she arrived at. In this regard, the pertinent questions to be asked by the review court are;

- (i) In terms of her duty to deal with the matter with the minimum of legal formalities, did the process that the Commissioner employ give the parties a full opportunity to have their say in respect of the dispute?
- (ii) Did the Commissioner identify the dispute she was required to arbitrate?
- (iii) Did the arbitrator understand the nature of the dispute she was required to arbitrate?
- (iv) Did she deal with the substantial merits of the dispute? and
- (v) Is the Commissioner's decision one that another decision-maker could reasonably have arrived at based on the evidence?

[6] In this case, I did not understand the applicant's case to be that the Commissioner's award is flawed on account of her failing to identify the principal issues before her or failing to understand the nature of the dispute required to be determined. As can be gleaned from the grounds of review, the Commissioner is taken to task for being biased, for failing to afford the applicant a say in respect of the dispute, and further for failing to consider all the evidence presented before her, and thus arrived at an outcome that was not reasonable.

[7] It is further submitted that the Commissioner was biased, and did not treat the parties equally, especially when it came to her alleged interruptions of the cross-examination of the employer's witnesses or the presentation of the applicant's evidence. I find no merit in this submission. It is a trite principle that commissioners must be afforded some degree of latitude in the manner in which they conduct proceedings, and not all forms of intervention on their part necessarily amounts to bias.

[8] In terms of the provisions of section 138 of the LRA, a Commissioner may conduct the arbitration proceedings in a manner that she considers appropriate

in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities.

- [9] In *Impala Platinum Ltd v Jansen*⁴, it was confirmed that section 138 of the LRA gives the Commissioner a discretion as to the form of the proceedings and the manner in which the proceedings are conducted. This implies that the role of the Commissioner may be more investigative than adversarial, and it is accepted that commissioners have relative *carte blanche* to conduct the proceedings with the minimum of legal formalities in an inquisitorial or investigative mode⁵.
- [10] The test for reasonable apprehension of bias is therefore an objective one, which is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Commissioner has not brought an impartial mind to bear in the adjudication of the dispute⁶. It follows that once a conclusion is reached that the Commissioner had not dealt with the dispute in an even-handed manner, it cannot be said that the parties were afforded an opportunity to have their say in respect of their cases, and this would obviously have a distorting effect on any conclusions reached.
- [11] In this case, it is significant to note that despite the dismissal being related to ordinary misconduct and objections raised, the Commissioner for reasons that appear on record⁷, allowed the applicant to be legally represented, whilst the employer was represented by its HR Manager. This might not appear significant on face value, but it raises doubt about whether there is merit in the contention that on the correct facts, there was cause to reasonably apprehend that the

⁴ (2017) ILJ 896 (LAC) at para

⁵ At para 22 to 25

⁶ See *S v Department of Education, Western Cape* (CA10/15) [2016] ZALAC 24 (13 June 2016) at para 35; *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC); See also *CA BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers Union and Another* (1992) 13 ILJ 80-3 (A) 817F-I, where it was held that:

'For present purposes there may be adopted the definition of 'bias' stated in the House of Lords by Lord Thankerton in *Franklin v Minister of Town & Country Planning* [1947] UKHL 3; 1948 AC 87 (HL) at 103. It was there said that the proper significance of the word- 'is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office'.

⁷ Page 184 - 185

Commissioner had not brought an impartial mind to bear in the adjudication of the dispute.

- [12] The applicant further relied on the Commissioner's intervention when he was under cross-examination, and his legal representative had objected to the Commissioner's conduct⁸. This was in circumstances where a question was posed to the applicant about the events of 13 May 2013 and the fact that he was not in his work clothes and thus could not have clocked in. When the applicant answered, the Commissioner intervened, and pointed out that the answer in response to the question was in relation to the events of 22 May 2013, and not of 13 May 2013. The applicant's legal representative objected, protesting that the Commissioner was shouting at the applicant, and it was for the employer's representative to raise the issue with the applicant not the Commissioner. That objection descended to a point where the legal representative started to accuse the Commissioner of being biased as she had intervened in his cross-examination of the employer's witnesses and of the applicant, and had shouted at the latter.
- [13] I can clearly not find any merit in the contention that the Commissioner was biased by raising with a witness that he was not answering the question posed to him. A glance of the record at the portions referred to indicates that the legal representative was of the view that the Commissioner should remain uninvolved in the matter and not to raise her concerns where questions posed were not answered within the context in which they were asked. If a witness does not answer the question posed for whatever reason, it is for the Commissioner to point that out, and to afford the witness an opportunity to answer the question within the context it was asked, and before an adverse inference can be drawn from a failure to answer questions. Commissioners being in charge of the proceedings cannot let witnesses ramble along with irrelevant issues they were not asked about. The mere fact that objections or concerns are raised in the course of proceedings about the Commissioner's alleged impartiality, does not lead to an inference of bias on the part of the Commissioner.

⁸ Page 163 of the transcribed record.

- [14] Upon a reflection of the transcribed record and exchanges between the Commissioner and the applicant's legal representative, I am satisfied that the Commissioner was within her rights to point out that the applicant was not answering the question posed. She might have raised it in a tone unacceptable to the applicant's representative, but it cannot invariably be concluded from that conduct that she had displayed bias.
- [15] The record of proceedings as indexed and paginated is not in sequential order of the proceedings before the Commissioner. Be that as it may, to the extent that one is able to follow the sequence of proceedings by reading the record in a manner that makes logic, it does not indicate a Commissioner with a pre-disposition in favour of one over the other. That complaint for some reason only came about after the applicant's initial representative was substituted. Before then, it does not appear that the initial legal representative had cause to complain about the manner with which proceedings were conducted. At most, the record indicates an even handed approach by the Commissioner whose main objective was to ascertain the facts as called upon her in terms of the provisions of section 138 of the LRA, and in circumstances where for a variety of reasons, objections, interjections and concerns about her conduct were raised, more specifically during the cross-examination of the applicant. To the extent that there might be merit in the manner in which the Commissioner intervened, such intervention as correctly pointed out on behalf of the employer in these proceedings cannot be regarded as so unreasonable as to render the entire proceedings unfair.
- [16] A further concern raised surrounding the Commissioner's alleged bias pertained to her refusal to grant the applicant a postponement on the grounds that his representative was indisposed, whilst the employer's absence from the proceedings was condoned subsequent to a rescission application, its initial request for a postponement having been declined.
- [17] It is not clear from the record as to how the Commissioner had dealt with the applicant's request for a postponement in the light of his initial legal representative being ill. Be that as it may, from what may be made of the record, the legal representative that took over the matter was able to cross-examine

the employer's witnesses and to properly present the applicant's case. Significantly however, the initial default award in favour of the applicant was granted by another Commissioner (Yusuf Nagdee), whilst the rescission application was granted by Commissioner van Aarde. As to how the Commissioner in this case can be said to have been biased when she was not involved in either the granting of the default award or its rescission is beyond comprehension. Furthermore, and as also correctly pointed out on behalf of the employer, I fail to appreciate in what sense the failure to grant the applicant a postponement prejudiced him when he was ultimately legally represented for the remainder of the proceedings, and when it is not apparent from the record whether the representative had difficulties in presenting his case. The comparison sought to be drawn by the applicant in regard to the requests for a postponement by both parties at varying times of the arbitration proceedings is in my view a red herring.

- [18] In regards to the substantive fairness of the dismissal, and to the extent that the applicant was alleged to have deserted, it is accepted that an employee is deemed to have deserted when he/she has actually intimated expressly or by implication that he or she does not intend to return to work. Desertion is a form of misconduct which entitles the employer to take disciplinary action against an employee, and is further regarded as a repudiation or breach of contract by an employee, which the employer is entitled to accept or reject. The acceptance of repudiation amounts to dismissal if the employee once again tenders his/her services.⁹
- [19] The issue is whether on the facts, there was an unexplained prolonged absence from duty, and in the same vein, whether an intention not to return to work was established¹⁰. This Court in *Impact Ltd (Mondi Packaging SA (Pty) Ltd) v National Bargaining Council for the Wood and Paper Sector and Others*¹¹ held that the real issue underlying substantive fairness in dismissals related to

⁹ See *SACWU v Dyasi* (2001) 7 BLLR 731 (LAC); *SABC v CCMA and Others* (2001) 22 ILJ 487 (LC) at para 16; *Khulani Fidelity Services Group v Commission for Conciliation Mediation and Arbitration and Others* [2009] 7 BLLR 664 (LC).

¹⁰ See *SABC v CCMA and Others* at para 13.

¹¹ (2013) 34 ILJ 2266 (LC) at para 21

desertion is whether the employee had advanced satisfactory justification for his or her extended unauthorised absence. Thus, the element of intention becomes a secondary issue.

[20] Based on the evidence placed before the Commissioner, it is my view that her conclusions that the dismissal of the applicant was substantively fair are unassailable in that;

20.1 All employees upon being told to go home on 2 May 2013 following the power outage at the factory, were further informed to leave their contact details, and to return to work on 6 May 2013 if not contacted earlier. Only the applicant failed to report for duty on 6 May 2013. The Commissioner's rejection of the applicant's version that he did not come back on 6 May 2013 as he was waiting for a call is in my view a reasonable one, as all other employees had returned for duty on 6 May 2013 without being contacted.

20.2 The applicant was absent from duty between 6 and 23 May 2013 without permission, and had called Pieterse on 10 May 2013. He was informed to contact his supervisor or to report for duty on 13 May 2013 failing which he would be disciplined. When he arrived at the factory on 13 May 2013, it was not for the purposes of resuming his duties, and there was no merit in his contention that he merely wanted to see the factory manager for an explanation as to the reason he had not been called before 6 May 2013. It does not appear from the record that his case was that other employees who did not arrive on 6 May 2013 were called.

20.3 The applicant as the Commissioner correctly found, only contacted the HR department on 10 May 2013 after realising that he was not paid, and his version that he did not contact his supervisors or anyone in the company as he did not have their contact details was also not probable. Equally improbable was the applicant's version that he was dismissed by Mashego or Moletsane on 13 May 2013. It is apparent that he only come to the premises on that date to demand a letter to take to his

creditors, having complained earlier on 10 May 2013 to Pieterse that he had not been paid. He had no intention of resuming his duties on that day despite being instructed to do so. Even if he was under the impression that he might have been dismissed, on his own version, Van den Bergh informed him that he was not dismissed, especially if a hearing had not been held.

20.4 There was no reason upon the evidence presented, to doubt the employer's version that attempts were made to contact the applicant via telegram without success, and further that an 'SMS' was sent to him to advise him to return to work, failing which he would face disciplinary action. Nothing further could have been required of the employer if it had made every effort to contact the applicant at his last known details available to it. On the applicant's own version, he only informed the employer of his new contact details on 13 May 2013.

20.5 In the end, it was apparent that the applicant had not reported for duty from 6 May 2013, and his excuse was correctly found to be improbable by the Commissioner. He had thus not proffered a justification for his unauthorised absence. It was common cause that the applicant had called Pieterse on 10 May 2013, and was informed to report for duty. There is nonetheless no explanation as to the reason he had not made any such contact earlier.

20.6 When the applicant attended the employer's premises on 23 May 2013, by then the employer was within its rights to have concluded from his absence and his conduct of 10 and 13 May 2013, that he had no intention of resuming his tasks, and to consequently subject him to discipline. There can therefore be no merit in the contention that the mere fact that he had contacted the employer on 10 May 2013 and arrived at the premises on 13 May 2013 evinced an intention to return to work.

[21] In regards to procedural fairness, the Commissioner accepted that the applicant was advised of the disciplinary enquiry on 20 May 2013 by way of telegram, and that was the day that he had also referred a dispute, alleging that he was

dismissed on 2 May 2013. The applicant had attended the disciplinary enquiry scheduled for 23 May 2013 despite his main intention being to receive a letter of dismissal, and wanted the hearing to proceed since he only wanted a dismissal letter.

- [22] There was a dispute before the Commissioner as to whether the disciplinary enquiry had taken place or not. There is a record of the disciplinary hearing held on 23 May 2013 at 13h30, which the applicant contended was prepared long before the hearing, and to which he was merely expected to attach his signature.
- [23] Curious with the record (checklist) as completed by the chairperson is that it indicates incorrect dates. For example, page 28 (70) of the record indicates that proceedings were adjourned on 16 May 2013 for the purposes of evaluating evidence, when the enquiry took place on 23 May 2013.
- [24] Much was made during Mashego's testimony that the date was incorrectly inserted, and the Commissioner appeared to have been persuaded by the explanation that this was purely a human error, as Mashego had used a template to complete the checklist. It was at that point that the applicant had complained that the Commissioner had unduly interrupted his attorney's cross-examination of Mashego in that respect.
- [25] The Commissioner may have interrupted his legal representative when cross-examining Mashego in regards to discrepancies in the dates. However, the record¹² reflects that upon that interruption, the attorney nonetheless indicated to the witness and the Commissioner that he was no longer asking questions along those lines and had proceeded to ask other questions. Unlike other instances where the attorney had objected to interruptions by the Commissioner and complained of her being biased, he had simply moved on to another question.
- [26] The issue however remains whether the applicant was subjected to a proper and fair disciplinary enquiry, bearing in mind the principles set out in *Avril*

¹² Pages 148 -149 of the transcribed record.

*Elizabeth Home for the Mentally Handicapped v CCMA and Others*¹³. Mashego's evidence under cross-examination was that the internal disciplinary record (*pro forma* checklist) and comments were completed in a typed form by him as the proceedings progressed¹⁴. Further under cross-examination, Mashego had indicated that he had typed the comments in the afternoon¹⁵. It is either he had typed the comments as the hearing progressed or later in the day after the hearing as he alleged, taking into account that the hearing purportedly started at 13h30. On his version, the hearing adjourned for 30 minutes before handing down sanction, and it is not clear from the record as to how long the proceedings took place.

[27] Based on the above contradictions, and the applicant's insistence that the hearing never took place, and further bolstered by Mashego's own evidence that he had to hurry up those proceedings as the applicant simply wanted his dismissal letter, it is doubted that a proper disciplinary hearing took place. In circumstances where an employee is accused of desertion, an employer must not willy-nilly impose a sanction of dismissal prior to affording that an employee the benefit of a properly constituted enquiry if he comes back, even if an employee simply seeks confirmation of a dismissal. In this case, despite the applicant having refused to reveal the identity of the colleague who had called him on 22 May 2013 to come and see Mashego the following day, it can be accepted that he could not have known that he was coming in for a disciplinary enquiry, it having been accepted that his correct details were only known on 13 May 2013. Further on Mashego's own version, he had thought that the applicant came in that day in response to a telegram sent to him, and a disciplinary enquiry had not been planned for that day, and was only convened when the applicant insisted on getting a dismissal letter.

[28] In line with the doubts expressed above, and the apparent haste with which the purported hearing was convened, it is my view that the Commissioner's conclusions that there was indeed a proper disciplinary hearing cannot be reasonable, and there was no reason to reject the applicant's contentions that

¹³ (2006) 27 ILJ 1644 (LC).

¹⁴ Cross-examination line 7 Page 146 of the transcribed record.

¹⁵ Page 149 line 7 of the transcribed record.

the checklist was prepared before the enquiry, and that he was merely expected to attach his signature.

- [29] There is a dispute as to whether the applicant was afforded an opportunity to secure a representative. Even if he had, and in the light of the dispute surrounding whether he knew that he was to be subjected to an enquiry, there is no reason why Mashego had acted hastily and proceeded with the enquiry in the manner he did. It is irrelevant that the applicant came in on 23 May 2013 to simply request a dismissal letter. The fact of the matter is that Mashego wanted to convene a disciplinary hearing, and fairness under the circumstances would have dictated that the enquiry be postponed to a date arranged with the applicant, and to enable him to prepare for the hearing and to secure the necessary representation. On the contrary, it appears that the hearing and the decision on sanction were predetermined, thus making the dismissal procedurally unfair.
- [30] In the light of the conclusions reached above, it follows that the finding of the Commissioner in respect of procedural fairness of the dismissal ought to be reviewed and set aside. The Commissioner's conclusions reached in regards to substantive fairness however in my view fall within a band of reasonableness, and there is no reason to interfere with them.
- [31] No purpose would be served with an order remitting this matter back to the DRC simply for the purposes of a determination of procedural fairness. The Court has had regard to the records of the arbitration and internal disciplinary proceedings, and is satisfied that it is in a position to substitute the award in regards to procedural fairness, and to determine just and equitable compensation.
- [32] It has already been said elsewhere in this judgment that a decision to dismiss should not be taken lightly and without a proper disciplinary process being followed. In this case, it is apparent from the facts, the evidence of Mashego, and the record of the disciplinary proceedings that the applicant was not afforded an opportunity of a fair hearing. Even if that hearing could have resulted in a dismissal, that however is not the issue. What makes it worse in

this case is that in order to cover up for a lack of a proper hearing, the employer for whatever reason, relied on a record which clearly appears to have been prepared and finalised before the actual hearing. In my view, the gross nature of the procedural unfairness dictates that the applicant be awarded compensation in the amount equal to four months' salary, which I deem to be just and equitable in the circumstances.

[33] I have further had regard to the issue of costs, and I am of the view that upon a consideration of the requirements of law and fairness, such an order is not warranted given the conclusions reached in respect of the review application.

[34] Accordingly, the following order is made;

Order:

1. The arbitration award issued by the first respondent is reviewed and set aside only in respect of a finding on procedural fairness.
2. That part of the award is substituted with an order that;
 - (a) The dismissal of the applicant (Mosatiwa Patrick Nchaupa) was procedurally unfair.
 - (b) The third respondent (Employer) is ordered to pay to the applicant, compensation equal to four months' salary calculated at his rate of remuneration as at 23 May 2013.
3. There is no order as to costs.

E. Tlhotlhemaje
Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate CJ Malan

Instructed by: Schindlers Attorneys (*Pro Bono*)

For the Third Respondent: Advocate. L Malan

Instructed by: Bowman Gilfillan Inc

LABOUR COURT