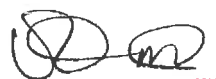


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(3) REVISED.

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT PORT ELIZABETH

Case no: PR 142/13

In the matter between:

THE SA LIBRARY FOR THE BLIND

First Applicant

and

THE COMMISSION FOR CONCILIATION,

First Respondent

MEDIATION AND ARBITRATION

COMMISSIONER AMON NYONDO (N.O.)

Second Respondent

ALAN GROOTBOOM

Third Respondent

Heard: 30 May 2018

Delivered: 28 August 2018

Summary: (Review – dismissal – misconduct – failure to take remedial steps to remedy performance deficiencies – reneging on agreement to extend probationary period – charge of insubordination and failing to communicate with and report regularly to CEO – arbitrator misconstruing true nature of dismissal dispute – procedural unfairness relating to framing of a charge which prejudiced employee's ability to anticipate the scope of the defence he needed)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is a review of an arbitration award in which the arbitrator found that the dismissal of the third respondent, Grootboom, for misconduct was procedurally and substantively unfair and awarded him compensation of 12 months' remuneration.
- [2] There is also an opposed condonation application for the late filing of Grootboom's answering affidavit. The supplementary affidavit was filed on 17 March 2014, but owing to problems with the corresponding attorneys, the answering affidavit, which his attorneys thought had been filed, *albeit* significantly late, in August 2014 appears not to have been filed after all. This necessitating them refiling it on 23 April 2015 and the attendant delay is unjustifiable.

Background

- [3] Grootboom was appointed on 1 November 2011 for a 12 month probation period.
- [4] In the last month of his probation, Grootboom filed a grievance against the director. Somewhat bizarrely, the grievance was laid at the request of the Director himself, so that Grootboom's apparent complaints about him could be properly aired.
- [5] The grievance hearing held on 3 October was chaired by the chairperson of the SALB, Judge Z Yacoob. There were a number of outcomes of that hearing, of which some of the salient ones were: Grootboom was expected to make a greater effort to adapt and fit into the culture of the organisation than the director had to make to accommodate Grootboom; the Director was expected to make a more concerted effort to change the manner in which he engaged with Grootboom; Professional counselling for Grootboom was

to be investigated to; unresolved disagreements between him and the director would be referred to the audit committee.

- [6] Most importantly, because of the poor working relationship and the fact that Grootboom's permanent employment was to be reviewed at the end of October, the chairman decided that the confirmation, extension or termination of Grootboom's service would be considered at the board meeting scheduled for 29 October 2012.
- [7] It was recorded at the grievance hearing that the director proposed that Grootboom's probation be extended for six months, as he was not in favour of confirming his permanent employment at that stage. The chairperson, said he would not make any recommendations to the board in this regard but expressed the view that, in his view, such an extension was a reasonable proposal. The human resources manager also supported this view and expressed the opinion that it would take time to arrange counselling for Grootboom and that the remaining months of his initial probation period would not be enough to determine if he could fit in with the organisational culture. Whether the remaining months would be sufficient to see enough progress had been made by Grootboom was also raised by the human resources director. The minute of the grievance meeting concludes with the following sentence:

Grootboom reiterated that he is opposed to the suggestion but said he will abide by the decision of the board.

- [8] When the board meeting took place on 29 October, it was conveyed to Grootboom that the board had decided, based on the outcome of the grievance meeting, to extend his probation by six months. Grootboom was not in a position to respond there and then to the board's proposal despite his previous commitment to abide by the board's decision. When Grootboom's probation was discussed at the board meeting, the chairperson of the board summarised the situation and made the following points:

8.1 The board was not in a position at that stage to confirm his permanent appointment but was willing to extend his probation for six months provided "that the terms of the agreement that you entered into is

complied with by you. In other words, that you get professional help, that we pay for the first four sessions, the trick is reported as a professional person given to us so that we can adjust basis for evaluating conferment or otherwise.”

8.2 The fact that a grievance has been lodged against the director was not held against him, but the agreement reached in the grievance meeting had been taken into account.

8.3 The chairperson then specifically asked Grootboom:

(T)herefore what we would like to know from you because in a sense a lot depends on the extent to which you embrace the idea that you will be here for another six months, because if you do not fully embrace the idea then you start of the negative footing anyway. That's why we would like to ask you, bearing in mind that we not in a position to confirm particularly in light of the fact that the minutes record that you feel that you should not be extended, how you feel about being extended, and do you think it would help and our review prepared to stay on those conditions. What is your feeling about it?

(Emphasis added)

Grootboom answered directly:

As I previously said, I will abide by the decision of the board and I will then, basically if the board decides that I will be extended, I will abide by that decision.

The chairperson obviously felt that Grootboom had not expressed his own view on the wisdom of the proposal as such and asked:

But if you were asked whether the board should extend you or not, what would you say?

(emphasis added)

Grootboom's response to the question and the concluding exchange went like this:

Grootboom: It's a difficult question.

Chairperson: I know

Grootboom: It is unfair for me to answer it.

Chairperson: So you won't answer it?

Grootboom: No

Chairperson: Okay thank you very much. Anything else any other member of the board wants to know? (No response) thank you, Grootboom. We will continue our discussions without you.

Grootboom: Thanks.

- [9] In consequence of his unwillingness to respond at the meeting, a letter confirming the board's stance and requesting his response to the proposed extension of the probation until 30 April 2013 was issued to him the day after the board meeting. The letter also advised Grootboom that when it convened again in February 2013 it would consider a report from the Council and the director and if things had not improved by then it would advise him of the board's intention not to confirm his permanent appointment. Grootboom then made it clear in writing that he did not accept the extension of his probation.
- [10] Following his rejection of the proposal, the proposed counselling never took place and a disciplinary process was instituted early in November 2012.
- [11] Grootboom was charged with two counts of misconduct. The first was that he allegedly failed to satisfactorily report to his senior manager (the director) on work-related matters and failed to communicate with him on strategic and other work-related matters. The second charge was one of insubordination in that, despite having previously agreed that he would abide by board's decision to extend his probation and to attend a series of counselling sessions if that is what the board decided, he blatantly reneged on that commitment when the board took such a decision, by refusing to accept it.
- [12] In relation to the first charge, the presiding officer of the disciplinary hearing found that Grootboom had failed to live up to the requirements of his position in so far as communicating with, and reporting to the director was concerned. Despite being made aware of his weaknesses and having those brought to his attention, he made no effort to improve. Even though the conduct complained of was more in the form of unsatisfactory work performance, it was nonetheless a disciplinary offence and he was guilty of it.

- [13] In relation to the second charge, the chairperson found, on the undisputed minutes of that grievance hearing meeting, that Grootboom had indicated that he was opposed to the director's suggestion that his probation be extended by six months, but nevertheless had agreed that he would abide by the board decision. The minutes of the board meeting on 29 October also indicated that he repeated this undertaking, albeit reluctantly. However, later he failed to abide by the undertaking. Although the presiding officer was not convinced that this amounted to insubordination, it nonetheless amounted to a failure to honour an undertaking given to the employer and amounted to serious misconduct.
- [14] The presiding officer went on to consider the question of sanction. He decided to recommend Grootboom's dismissal and dismissed the suggestion by Grootboom's representative that the original proposal of an extended probation be adopted as an alternative, because Grootboom himself had shown no positive interest in that option and had previously rejected it. In the light of Grootboom's negative attitude in that respect, a further six months of extended probation with counselling was unlikely to change the situation.

The arbitration award

- [15] It is noteworthy that the arbitrator described his task as having to decide whether Grootboom's dismissal "relating to probation" was fair and not, whether his dismissal for misconduct was fair.
- [16] The arbitrator found that the SALB had not complied with item 8(h) of Schedule 8 of the LRA Code of Good Practice: Dismissal. That provision states that, an employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. He found that the extension of the probation had been unilaterally decided by the SALB without giving him an opportunity to make representations. It is clear that this was the crux of the arbitrator's reasoning on the fairness of the dismissal. As he stated: "This was a fatal anomaly on the part of the respondent, and it confirmed that they did not need to be reminded about

the obligation because they did not want to honour it. They were determined they would discuss the matter in the absence of the applicant.”

- [17] Further, the arbitrator found that the assessments of Grootboom's performance for the last two quarters of his employment were not genuine because the director had simply filled in the assessment form and asked him to comment on them if he wished, without holding any discussion with him about issues where there was a divergence of opinion in the assessment. The arbitrator was also clearly of the view that because the proposed counselling for Grootboom, which had been contemplated in the October grievance hearing had not been arranged before the end of the fourth quarter of his employment, this was a further indication that the assessment process was not a genuine one.
- [18] In addition, the arbitrator found that Grootboom's rejection of the extension was not improper because the extension was unfairly imposed on him in the absence of giving him a chance to make representations despite the fact that he had indicated he was opposed to agreeing to an extension.
- [19] The arbitrator also found that the presiding officer at the enquiry had formulated his own charge and found Grootboom guilty of that. This was a reference to the presiding officer deciding that Grootboom's conduct could not be characterised as insubordination but that his failure to honour the undertaking given amounted to misconduct of a serious nature. The arbitrator also found that the presiding officer had decided that Grootboom was not guilty of the first charge of frequently failing to report satisfactorily to his senior manager on work-related matters. The arbitrator does not explain his reasoning in this regard but it might be explained by the somewhat contradictory reasoning of the presiding officer who had concluded:

“I am satisfied then on a balance of probabilities that Grootboom, throughout his tenure at the library, failed to live up to the requirements of his position in so far as communicating with and reporting to director is concerned, that he was aware of his weaknesses in this regard, having had them brought to his attention at each assessment, and that he made no effort to improve. In the circumstances although I am not satisfied that this amounted to misconduct I am satisfied falls under the general description of unsatisfactory work

performance which is a disciplinary offence. Therefore he is found guilty of that offence."

- [20] The arbitrator further found there was also no evidence that Grootboom was not performing his CFO function effectively and if the SALB had a different view it could have been sorted out by inviting him to make representations *before considering whether to extend his probation*, instead of which it hauled him before a disciplinary enquiry. Added to this was the fact that the SALB had received good audit reports during Grootboom's tenure as the CFO and the stigma of being dismissed for failing to perform adequately during his probation would make it difficult for him to find employment in an environment regulated by the Public Finance Management Act 1 of 1999.
- [21] Nevertheless, the arbitrator accepted that the strained interpersonal relationship between Grootboom and the director made reinstatement impracticable. Given that this was the only reason he did not reinstate the applicant and the fact that it was unlikely as a public servant that he would be re-employed without special approval by the relevant executive authority, the arbitrator decided that an award of 12 months' remuneration as compensation was appropriate.

Grounds of review:

- [22] The SALB attacks the arbitrator's award on the ground that it was unreasonable and accordingly defective within the meaning of the term in section 145 (2) (ii) of the Labour Relations Act, 66 of 1995. The alleged flaws it identified in the arbitrator's reasoning included:
- 22.1 The arbitrator's finding that Grootboom had no opportunity to make representations to the board. This finding is directly at odds with the minutes of the board meeting.
- 22.2 The arbitrator ignored the fact that Grootboom had agreed to accept an extension of his probation if that is what the board decided. What the minutes of the meeting clearly reflect is that Grootboom said that he would abide by decision of the board if it decided that his probation would be extended, but he would not commit himself to agree that it *should* be extended. Similarly, when the issue of proposing an

extension of his probation was broached in the grievance meeting, the minutes record that Grootboom “reiterated that he is opposed to the suggestion but said he will abide by the decision of the board.”

22.3 The arbitrator misconstrued the charges the presiding officer had considered. The Presiding Officer had correctly found that Grootboom’s performance was substandard and he had reneged on an undertaking to accept the board’s decision which constituted misconduct. In any event, the presiding officer justifiably found that there would be no point in extending the probation as Grootboom’s representative had proposed as an alternative to dismissal, because Grootboom had indicated he was opposed to it.

22.4 The arbitrator misconstrued the nature of the arbitration which entailed a hearing *de novo* and not a consideration of the reasoning of the presiding officer.

22.5 The arbitrator’s alleged failure to consider the fairness of the dismissal in the light of the following facts led the arbitrator to misconceive the nature of the true enquiry, which was whether the applicant could be expected to continue to employ a senior manager who had not met the required standards but who simultaneously refused to accept an extension of his probation period subject to counselling:

22.5.1 The senior position held by Grootboom, which was second only to the Director.

22.5.2 The fact that Grootboom was on probation.

22.5.3 That he had been warned and counselled previously about his managerial weaknesses.

22.5.4 That Grootboom had accepted the board would decide on his probation but had then reneged on that undertaking.

22.5.5 Grootboom in any event declined to make representations to the board on the question of his probationary status, and

22.5.6 The relationship was irreparable.

- [23] The SALB further contends that in finding that Grootboom's dismissal was procedurally unfair, the arbitrator failed to appreciate that he was supposed to assess the fairness of the disciplinary enquiry and not base his finding on the conduct of the board of directors meeting in October. It is noteworthy in this regard that, at the commencement of the arbitration, Grootboom's stated complaint about procedural fairness related to the grievance hearing not being conducted as per the grievance procedure because it was not concluded and the disciplinary process had been conducted without his employment status being defined.
- [24] The SALB also argues that when deciding on the extent of compensation, the arbitrator only took account of Grootboom's prospects of finding alternative employment and based that entirely on his own speculation without any evidence being led on the issue. The arbitrator also ignored the fact that Grootboom's alleged unforthcoming attitude related to his wider managerial functions and not the performance of his core duties as a CFO. He also allegedly failed to take account of the fact that the breakdown in the employment relationship could not be solely attributed to the applicant.
- [25] In addition, the arbitrator failed to consider what the applicant could reasonably have done when Grootboom refused to accept an extension of his probationary period subject to him undergoing communication skill training at the applicant's expense.
- [26] Lastly, in emphasising the fact that Grootboom ought not to have been dismissed at the end of his probation without hearing his representations, the arbitrator failed to appreciate that the board wanted to extend his probation.

Evaluation

- [27] It is now a well-established principle that in order to succeed with a review on the basis of flaws in the reasoning of an arbitrator, the applicant must demonstrate not only that such flaws existed but that the outcome of the arbitration would necessarily have been altered if those flaws did not exist:

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling

indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. 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 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.¹

- [28] Undoubtedly, Grootboom's dismissal for misconduct would not have arisen as early as it did if he had not refused to accept the extension of his probation period subject to him undergoing professional counselling to assist him to fit in with the organisational culture and to be more resilient in working with the director's management style. Once Grootboom refused to accept the decision of the board to extend his probation subject to counselling, it unavoidably raised the question whether or not the employment relationship could continue. Grootboom acknowledged as much in his own evidence when he said that his refusal to accept the board's decision to extend his probation meant that either his position would be made permanent or his contract would be terminated. He clearly foresaw the consequences of his *volte face*. The SALB decided that, since Grootboom did not accept his continued status as a probationer it would

¹ *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at 2813

address the problems which had arisen using disciplinary proceedings. It could have decided to address the problem as simply a work performance issue, but it would have been difficult to address Grootboom's about-face on the agreement on the way forward as a work performance issue, when it concerned an act of bad faith on his part.

- [29] Because the board chose to deal with Grootboom's conduct as a disciplinary matter and to dismiss him on grounds of misconduct, the arbitrator was obliged to evaluate the fairness of the dismissal in the same terms. Instead, he effectively decided the fairness of the dismissal on the basis whether or not Grootboom had been fairly dismissed as if he was an employee still on probation. This led him to find, amongst other things, that the proceedings of the board meeting at which Grootboom's extended probation was debated did not constitute a fair hearing. What the arbitrator was supposed to have evaluated when considering procedural fairness was the *subsequent* disciplinary enquiry. The arbitrator's misconstruction of the issue he had to address constituted a fundamental misdirection by the arbitrator causing him to ask the wrong questions and arrive at answers he was not required to. Consequently, he also failed to determine the real nature dispute he was required to determine.
- [30] Even if he had correctly treated Grootboom's dismissal as a matter of poor performance involving a probationer, it is difficult to understand how the arbitrator could have concluded that Grootboom was not given an opportunity to make representations to the board. Grootboom had been expressly invited and even pressed by the chairperson of the board to express his views, not only on whether he would accept the outcome of its deliberations, but also whether he personally believed his probation should be extended or not. He firmly and unequivocally declined that invitation. In his testimony at the arbitration, he claimed that he needed legal advice before answering that question, but at the time he was asked he never even hinted that this was the reason for his reticence, nor did he say he would like a further opportunity to think about his response to the question before committing himself. Grootboom was the second most senior manager after the director. He was not a junior employee afraid to speak his mind. It is difficult to understand why he could not articulate his reason for refusing to

answer the question asked by the chairperson, beyond merely saying that it was unfair for him to answer it.

[31] This narrative also relates directly to the second charge which led to Grootboom's dismissal. In this regard, I agree it was not unreasonable of the arbitrator to conclude that the presiding officer of the disciplinary hearing had reformulated the charge of insubordination relating to Grootboom's failure to honour the undertaking he made at the disciplinary enquiry, and confirmed at the board meeting, that he would abide by board's decision on the extension of his probation. In the circumstances, Grootboom rightly could have been surprised to have been found guilty of another form of misconduct in relation to the second charge. In my view, the arbitrator cannot be faulted for concluding that the charge for which Grootboom was found guilty, namely of reneging on an agreement, was of a different character to a charge of insubordination, which concerns a willful failure to obey an instruction and entails an implicit challenge to managerial authority. In so far as this act of bad faith played an important part in the decision to dismiss Grootboom, it is difficult for the applicant to contend that he ought to have been prepared to meet that charge as an alternative to a charge of insubordination. Even though the insubordination charge was predicated on his failure to abide by the commitment to extend his probation, it would not have been obvious on the face of it that the description of factual basis for the charge could support a finding of insubordination. If the board had not labelled the charge as one of insubordination and merely set out the facts on which the charge was based or reframed it as an act of bad faith, he would have been made aware that a defence based on the principles of insubordination would not be enough. Grootboom said as much in his evidence when he stated that he could not understand how he could be charged with insubordination when he had not been given any instruction. Moreover, Grootboom contended in his evidence at the arbitration that if the extension of his probation had been an instruction, it made no sense why he was asked to sign whether or not he accepted the board's decision and its conditions concerning the six month extension of his probation contract.

[32] I am well aware of the principle that charges in disciplinary proceedings need not be framed with the precision of criminal charges and that the

factual basis of a charge of acting in bad faith was set out in describing the charge of insubordination, but by stating that such conduct amounted to insubordination and bearing in mind the fact that the definition of insubordination has been the subject of countless judgments defining its scope and meaning², it was not unreasonable for Grootboom to believe he could not be found guilty of insubordination based on the factual basis set out in the charge. This might have led him to believe he did not have to defend himself against a charge of breach of trust, or acting in bad faith. In my view, this was sufficient basis to justify the arbitrator's finding that Grootboom's dismissal was procedurally unfair.

- [33] Nonetheless, in treating his dismissal as the dismissal of a probationer, the arbitrator simply failed to address the fact that Grootboom had expressly agreed to accept an extension of his probation if the board decided it should be extended, and then effectively repudiated that agreement by refusing to accept an extension of his probation, which necessarily would have raised the question whether his full time employment was justified based on his performance to date. The board felt he had not demonstrated his suitability and wanted to give him a further opportunity to do so with assistance. He first accepted then rejected that arrangement after the board had decided on that course of action on the understanding he would abide by it.
- [34] It is true the board could, at that juncture, have held an enquiry to determine if his appointment should be confirmed or whether his service should be terminated on the basis that he had not performed satisfactorily. It decided instead to address his conduct not on the basis of an enquiry into his capabilities, but whether his poor performance amounted to misconduct because he willfully failed to make any effort to address his shortcomings and whether, together with his *mala fides* in reneging on the agreement, this warranted his dismissal. The arbitrator decided to view the substantive merits of the case through the prism of a dismissal for poor performance of a probationer, because he obviously believed that is how the board should have dealt with the matter. However, what the arbitrator ought to have done

² See e.g. *Palluci Home Depot (Pty) Ltd v Herskowitz & others* (2015) 36 ILJ 1511 (LAC) at 1526-7, paras [29] – [30] or *Jorgensen v I Kat Computing (Pty) Ltd & others* (2018) 39 ILJ 785 (LAC) at 789-791, paras [16] – [23].

instead was to take the reasons given by the board at face value and determine if it could justify Grootboom's dismissal on grounds of misconduct, even if it could have dealt with the problem differently. This was a material misdirection causing him to undertake an enquiry he was not supposed to undertake. It resulted in him making a finding of substantive unfairness evaluated against a ground of dismissal the employer did not rely on.

- [35] As mentioned, the board also contended that insofar as it might be argued that the arbitrator did consider the matter in disciplinary terms, he misconstrued the charges the presiding officer had considered. It is correct as mentioned above that the presiding officer decided that Grootboom's failure to honour the agreement to extend his probation was not the same as a charge of insubordination, but found it amounted to serious misconduct. In this sense, it was not altogether unreasonable of the arbitrator to find that the chairperson had identified the underlying conduct on which the badly ill-fitting charge of insubordination was based as a form of misconduct in its own right and had not relied on the stated charge of insubordination. What the arbitrator misunderstood is that, apart from the question of procedural unfairness, his function was to determine if that misconduct identified by the chairperson and relied on by the employer as one of the reasons for dismissal was a justifiable reason for dismissal. Instead, he appeared to assume he was performing a review function in relation to the findings of the chairperson. This confusion about the role he was playing once again led the arbitrator to fail to address the problem he was supposed to address.
- [36] Had the arbitrator recognized that the formulation of the charge was a procedural issue but the substance of the misconduct concerned what the presiding officer actually found Grootboom guilty of, the arbitrator would have realised he had to determine if indeed Grootboom's act of reneging on an undertaking made twice which had the consequence of creating an untenable situation for the employer amounted to a serious act of bad faith which undermined the employment relationship. On the evidence, he would have found it difficult to conclude that such conduct was not severely

destructive of the trust relationship especially given that the undertakings had been made in a formal context and to the chairperson of the board.

- [37] On the arbitrator's finding on the first charge, he again based his reasoning on that of the presiding officer instead of coming to his own conclusion on the evidence before him. I have cited the somewhat convoluted reasoning of the chairperson in paragraph [19] above which appears to have led the arbitrator to decide that the presiding officer had acquitted Grootboom on the first charge. The essence of the presiding officer's reasoning was that, Grootboom had his shortcomings brought to his attention but made no effort to address them and he therefore found him guilty of 'misconduct' in the form of 'poor work performance'. Though badly expressed, it is apparent that the arbitrator did regard Grootboom's failure to address his shortcoming as a form of misconduct because he made no meaningful attempt to rectify them: in other words his failure to improve was not because of some inability on his part but because he *willfully* chose not to. A willful failure to perform and an inability to perform is what distinguishes poor performance due to misconduct and poor performance due to incapacity.³ The arbitrator failed to consider this afresh as he ought to have. Had he done so, it would have been difficult to conclude that, it was due to Grootboom's inability that he failed to communicate properly, but rather that he was satisfied that provided he performed his financial responsibilities well that is where his obligations ended.
- [38] In the circumstances of dealing with Grootboom's recalcitrance in being willing to adapt his behavior and being unwilling to accept assistance in correcting it and manipulating the issue of the extension of his probation to the embarrassment of the board, the arbitrator would have struggled to justify his retention in the senior position he held, notwithstanding his undisputed competence in matters financial.
- [39] Consequently, I am satisfied that even though there was some justification for finding his dismissal was procedurally unfair, there was no reasonable justification on the evidence before him for finding the dismissal

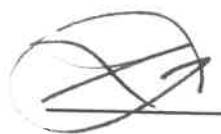
³ See *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No & others* (2013) 34 ILJ 2347 (LC) at 2382-4, paragraphs [74]-[79].

substantively unfair. This finding necessitates a variation of the award and the relief.

- [40] On the question of costs, I can understand why Grootboom would have defended the award in his favour especially given the complications of the matter and a cost award would be inappropriate.

Order

- [1] The arbitration award dated 17 September 2013 issued by the second respondent ('the arbitrator') under case number ECPE 1407-13 is reviewed and set aside, save that the arbitrator's finding that the third respondent's dismissal was procedurally unfair is upheld.
- [2] The arbitrator's finding in the said award that the third respondent's dismissal was substantively unfair is substituted with a finding that his dismissal was substantively fair.
- [3] The relief of compensation of twelve months' remuneration awarded by the arbitrator is substituted with an order that the applicant must, within fifteen (15) days of this judgment, pay the third respondent an amount of three months' remuneration, calculated at the date of his dismissal, as compensation for his procedurally unfair dismissal.
- [4] No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

J Grogan instructed by
Wheeldon Rushmere & Cole

RESPONDENT:

S Cokile of S Cokile Inc
Attorneys

LABOUR COURT