IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR875/15

In the matter between:

THABO SERAKALA **Applicant**

and

NATIONAL BARGAINING COUNCIL
FOR THE ROAD FREIGHT, LOGITSICS INDUSTRY
("NBCRFLI") **First Respondent**

COMMISSIONER SHAAM FRIEDMAN **Second Respondent**

DHL SUPPLY CHAIN **Third Respondent**

Heard: 11 January 2019

1.

Delivered: 14 May 2019

Summary: Review application - CCMA arbitration proceedings – review of proceedings– test for review – s 145 of LRA 1995 – arbitrator failing to follow applicable provisions of Code of Good Practice – failure to allow applicant – a lay person an opportunity to ask all questions – as such committing material error of law – award reviewable-reinstatement-backpay.

JUDGMENT

MTHALANE. AJ

Introduction

[1] The applicant approached this Court seeking an order that the award issued by the second respondent ("the Commissioner"), under the auspices of the first respondent ("the NBCRFLI") and under case number GPRFBC 32746, be reviewed and set aside and that the matter be remitted to the NBCRFLI for a hearing *de novo* before a commissioner other than the second respondent.

[2] This Court has been approached to determine whether the conclusion of the Commissioner is based on the facts and whether he reached a fair and equitable decision. The only time this Court will interfere with an award is when it is one that could not have been reasonably made considering the evidence properly presented before the arbitrator.[1] This Court in deciding this matter must be guided by the six pillar requirements.[2]

Background

[3] The applicant was employed as a Reach Truck Driver earning a monthly salary of R 6 698.00. His duties involved moving pallets of stock between locations using a reach truck. He was dismissed on 23 October 2014 for reasons related to incapacity due to ill health. It appears that between December 2013 and August 2014, the applicant was involved in four incidents whilst performing his duties at work.

[1] *Kievits Kroon Country Estate (Pty) Limited v Mmoledi and others* (2014) 35 ILJ 209 (SCA) at para 20.

[2] *Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others* [2014] 1 BLLR 20 (LAC), at para 20: "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*." (Emphasis added.)

[4] In February 2014, the applicant, on his own accord, consulted an Optometrist, Osmans Optical, who diagnosed the applicant with “allergic conjunctivitis”, an eye inflammation caused by an allergic reaction.

[5] On 24 February 2014, the applicant, on the third respondent’s instruction, visited the Travel Clinic and consulted the company doctor, Dr Gerber, for a further eye examination. It appears that the applicant informed Dr Gerber that his eye problem was as a result of Handy Andy entering his eye. When transporting a pallet of Handy Andy, a bottle had dislodged from the pallet, fallen, broken and sprayed into his face and eyes.

[6] Following the examination, Dr Gerber issued a report addressed to the third respondent wherein he recorded his findings. Dr Gerber recorded that the applicant had poor vision on his left eye and that the eye was red and painful. Dr Gerber further recorded as follows:

- “Patient needs assessment at Ophthalmologist for treatment of his painful red eye. The Ophthalmologist needs to give us a short report on the diagnosis, treatment plan, and whether the condition is related to the Handy Andy in his eye more than a month ago.

- The employer needs to make a decision to fill in the Employers report and take him to a Private Ophthalmologist as per the DHL IOD policy, or if this incident was investigated and found not to be an IPD, he needs to take his referral letter to OR Tambo Hospital Eye Clinic and weekday early morning.

- The employer needs to compare his vision to his previous medical done to assess whether it has deteriorated,

- He is only fit for general work not on heights until his vision is corrected to a minimum of 20/30 each eye best correction. Restricted from height work and any driving of any moving vehicle.”

[7] It is not clear from the record, but it appears that sometime between February and March 2014, the applicant was issued with prescription glasses by

Osmans Optical. He was thereafter allowed to continue with his duties as a driver.

[8] On 11 April 2014, the applicant was involved in an incident whilst driving a reach truck. He tried to apply the brakes, but the machine did not stop and eventually crashed against the barrier of the front door and damaged the door. He reported this incident.

[9] On 21 August 2014, the applicant dropped a pallet whilst attempting to lift the pallet using the reach truck. The applicant did not suffer any injuries and there was no stock damage. The applicant reported this incident and an incident report was completed. The applicant attributed the incident to poor eye sight.

[10] On 29 August 2014, a similar incident happened. This time, some stock was damaged. The applicant again attributed this incident to poor eye sight.

[11] On September 2014, the third respondent convened what it calls an "incapacity hearing" to "investigate" the extent of the applicant's incapacity. It appears from the written record of the discussion that took place during the hearing that the third respondent had enquired whether the applicant had been to the OR Tambo Hospital Eye Clinic ("the Eye Clinic") as recommended by Dr Gerber. The applicant advised the third respondent that he had attended the Eye Clinic but was not furnished with a report. The applicant was instructed to "*go to his doctor for a detailed medical report and not to drive*…"[3].

[12] It appears that around the same time, the third respondent also requested a report from Osmans Optical but was advised on 15 September 2014 that the applicant had instructed Osmans Optical not to release his medical records.

[13] On 1 October 2014, on the third respondent's instructions, the applicant consulted with Spec Savers who compiled a report to the effect that the

[3] Record: P91.

applicant was suspected to have glaucoma and recommended that he consults with an Ophthalmologist as soon as possible for further evaluation. This report was submitted to the third respondent[4].

[14] A further "incapacity enquiry" was convened on 23 October 2014 where after the applicant's services were terminated for reasons related to "incapacity". On 28 October 2014, the applicant appealed his dismissal.

[15] On 31 October 2014 and prior to the appeal hearing, the applicant consulted Dr Rahman, an Ophthalmologist, at Lakeview Hospital who recommended that the applicant be assisted with new spectacles. It appears from the outcome of the appeal proceedings dated 3 November 2014 that the chairperson of the appeal, Mr Andre Niemann ("Mr Niemann") had received and read Dr Rahman's report but nevertheless upheld the applicant's dismissal.

The arbitration proceedings

[16] An alleged unfair dismissal dispute was referred by the applicant to the NBCRFLI and after unsuccessful conciliation, the matter was set down for arbitration before the Commissioner. The third respondent was represented by Miss N Yakeni ("Miss Yakeni") and the applicant represented himself.

[17] The third respondent's contention at the arbitration proceedings was *inter alia*, that the applicant had not, despite several requests, provided a medical report from the Eye Clinic, detailing the nature of his ailment; and that there were no alternative positions available[5].

[18] The applicant's main claim was that his dismissal was unfair because (a) the third respondent had not followed the recommendations of Dr Gerber; and (b) he had as early as February 2014 attended to the Eye Clinic as instructed to

[4] Ibid: P86.
[5] Ibid: P2 and P4.

do [he had advised the third respondent of his attendance and they had at no time requested a report until August 2014].

[19] Evidence on behalf of the third respondent was led by Ms Yvone Frazer ("Ms Frazer"), the Operations Manager. She testified that the applicant was involved in four incidents between December 2013 and September 2014[6]. The applicant suffered from an eye problem, his services were terminated because he refused to see an eye specialist and that the third respondent has health and safety rules on site. She further testified that notwithstanding Dr Gerber's report, the applicant did not attend at the Eye Clinic. The applicant did not provide any proof during the enquiry that he had seen an eye specialist. The third respondent had looked for available vacancies for the applicant but there were none available[7].

[20] When asked by Ms Yakeni if the applicant had lodged an appeal following his dismissal, Ms Frazer confirmed that the applicant did. Ms Frazer was thereafter asked whether the applicant had submitted proof at the appeal hearing that he had seen an eye specialist as directed and Ms Frazer responded, *"No not at all."*[8]

[21] Under cross examination, the applicant put to Ms Frazer that had the third respondent followed Dr Gerber's recommendations, the incidents in April and August 2014 would not have happened and her response was that the applicant resumed his duties as a driver because "*he got glasses*"[9].

[22] She denied that the applicant's eye problem was caused as result of the Handy Andy spillage in his eye as there was no record that the applicant reported such an incident[10].

[6] Ibid: P6-7.
[7] Ibid: P11.
[8] Ibid. My emphasis.
[9] Ibid: P14.
[10] Ibid: P6.

[23] However, during her closing argument, Ms Yakeni, conceded that after the Handy Andy incident was brought to the third respondent's attention, the applicant was referred to the Travel Clinic where after Dr Gerber diagnosed him with an eye problem and referred him to the OR Tambo Eye Clinic[11].

[24] Ms Yakeni furthermore conceded that the applicant presented the third respondent with "a slip" which indicated that the applicant had attended to the Eye Clinic as recommended[12].

[25] Ms Yakeni further submitted that the incapacity enquiry was to explore the possibility of "*going through the disability process*" and had the applicant cooperated, the third respondent would have applied for a disability benefit for the applicant[13].

[26] The applicant's testimony was that sometime in December 2013 or January 2014, whilst packing pallets of Handy Andy at work, a bottle dislodged and fell on him. The Handy Andy sprayed in his eyes. He reported the incident to his supervisor and thereafter consulted with his private doctor. He submitted a sicknote to the third respondent. On 24 February 2014, he went to the Travel Clinic where he was examined by Dr Gerber who, amongst others, recommended that he attends to the Eye Clinic for an examination by a specialist. On 25 February 2014, he went to the Eye Clinic. He had not asked the clinic for his test results because the third respondent had not asked him to bring back the results. That was the end of the matter. The third respondent did not raise the issue again until 9 August 2014, approximately 6 months later[14].

[27] On 9 August 2014, the third respondent asked the applicant for his eye test results from the Eye Clinic. He went to the Eye Clinic but was not provided with a report. The reason for this is that, the results could be different as the

[11] Record: P24, last paragraph.
[12] Ibid.
[13] Ibid P25.
[14] Ibid. P18, last paragraph and P19.

alleged incident occurred a long time ago and as such, the Eye Clinic recommended that the results from the Travel Clinic be used. He told the third respondent that the doctor would not give him his results for the reasons advanced above and that it should therefore use the results from the Travel Clinic. Accordingly, the third respondent referred him to another company doctor, Spec Savers, who recommended that he sees an Ophthalmologist. As the third respondent was not going to pay the Ophthalmologist, he waited until 25 October 2014, being his pay day and consulted with the doctor on 31 October 2014. The applicant confirmed that he was issued with prescription glasses by Dr Osman but could not recall the date in which the glasses were issued to him[15].

The award

[28] The Commissioner found that the applicant had been uncooperative and obstructive. There is no record of the incident of the spilling of Handy Andy. There was also no record of the applicant consulting an in-house sister. The applicant, at a stage in his treatment, requested that his doctor not furnish the third respondent with his medical report.

[29] He found further that the third respondent had attempted to assist the applicant in trying to obtain good medical care however the applicant was unable to furnish the third respondent with a report regarding the extent of his eye sight problem.

[30] The Commissioner thereafter held that due to the nature of the third respondent's business, the applicant could not be accommodated in the absence of this information and that there was clearly a lack of cooperation from the applicant. The Commissioner thus found that the third respondent had no alternative but to terminate the services of the applicant.

The grounds for review and submissions

[15] Record: P19-18.

[31] Following the hearing of this matter, the applicant, in amplification of its grounds for review, delivered supplementary heads of argument. The applicant attacked the award on a variety of grounds, principle amongst which were that:

31.1 The Commissioner asserted that the applicant could not ask any further questions during his cross examination[16];

31.2 There is nothing to suggest that the applicant was uncooperative and obstructive. It was impractical for the applicant to obtain a medical report 8 months after the incident, when no such request had been communicated to him earlier. The only formal request directed to the applicant was for him to see a specialist at the Eye Clinic, which he did on 25 February 2014 – the request for a report was only formally put to the applicant in September 2014.

[32] The third respondent opposed the application on the ground that it had requested the reports from the applicant on several occasions and more than once requested him to see a specialist. The applicant only went to see the specialist on 31 October 2014, a few days after his dismissal and the report from the eye specialist was only presented at arbitration. The third respondent submitted that it would therefore be unfair for it to have relied on a report which at the time of the applicant's dismissal did not exist. Accordingly, the award is one which any reasonable decision maker would have reached.

[33] Further submissions in this regard will be considered within the context of the evaluation as below.

<u>The review test and evaluation</u>

[16] See: Transcribed record on p.17.

[34] The test on review is whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach in relation to the evidence before him or her[17]. The Supreme Court of Appeal, in *Herholdt v Nedbank (COSATU as amicus curiae*)[18] summarised the review test as follows:

> "……the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.[19]"

[35] In a further explication of the review test, the Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others)*[20] held that in assessing whether the result of an award is unreasonable, the reviewing court should not adopt a piecemeal approach, and must further enquire whether:

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

[17] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at para 110.
[18] 2013 (6) SA 224 (SCA) at para 25.
[19] At para 25.
[20] [2014] 1 BLLR 20 (LAC) at para 20.

[36] In this case, the applicant was dismissed for incapacity related to ill-health, it can be accepted that the starting point for the Commissioner was to have regard to, and consider the provisions of Items 10-11 of the Code of Good Practice: Dismissal, which are binding on all commissioners as dictated by the provisions of section 188 (2) of the Labour Relations Act[21] (LRA).

[37] The provisions of Item 10 and 11 as contained in Schedule 8 reads as follows:

> "**10 Incapacity: Ill health or injury**
>
> (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
>
> (2) In the process of the investigation referred to in subsection (1) the employee should be allowed to state a case in response and to be assistance by a trade union representative or fellow employee.
>
> (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of incapacity may also be relevant….
>
> (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in those circumstances.
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> **11. Guidelines in cases of dismissal arising from ill health or injury**

[21] 66 of 1995, as amended.

> Any person determining whether a dismissal arising from ill health or injury is unfair should consider –
>
> a) whether or not the employee is capable of performing the work;
>
> b) if the employee is not capable –
>
> (i) the extent to which the employee is able to perform the work;
>
> (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
>
> (iii) the availability of any suitable alternative work."

[38] The above provisions were interpreted by Molemela AJA (as she then was) in *IMATU obo Strydom v Witzenburg Municipality & others*[22] as follows:

> "My reading of item 10 and 11 gives me the impression that an incapacity enquiry is mainly aimed at assessing whether the employee is capable of performing his or her duties, be it in the position he or she occupied before the enquiry or in any suitable alternative position. I am of the view that the conclusion as to the employee's capability or otherwise can only be reached once a proper assessment of the employee's condition has been made. Importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee's work circumstances so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available.
>
> I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognised as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would, under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.
>
> The afore-mentioned obligations of the employer as set out in items 10 and 11 of Schedule 8 to the LRA are inter-related with similar obligations in the

[22] [2012] 7 BLLR 660 (LAC) at paras 6 – 9. Own emphasis.

> Employment Equity Act 55 of 1998. In their work, Employment Equity Law 2001: 7-3 to 7.4, J L Pretorius et al submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but, is a duty that is implied in the concept of unfair discrimination in a general sense "and …„is one of the judicial and legislative tools for realising substantive equality". I agree with this submission. Surely noncompliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?
>
> **I am of the view that the provisions of item 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair**……"

[39] It is my view that the Commissioner did not understand the nature of the dispute he was required to arbitrate, which was to do a proper assessment of the applicant's capability to continue working as contemplated in Item 10 and 11 of Schedule 8 of the LRA.

[40] The Commissioner was still obliged to do a proper assessment of the applicant's capability to continue working, whether or not the applicant was "uncooperative" and "obstructive".

[41] It appears that the Commissioner's failure to do a proper assessment is premised on the third respondent's reason for a dismissal which has its genesis in the allegations that the applicant refused to submit a report from an Ophthalmologist.

[42] I have not found any evidence to support the third respondent's contention that the applicant refused to submit a report from an Ophthalmologist neither have I found any evidence to support the Commissioner's finding that the applicant was uncooperative and obstructive.

[43] On the contrary, on 24 February 2014, the applicant submitted a report from Dr Gerber, which the third respondent simply ignored and provided no assistance to the applicant. On 1 October 2014, the applicant submitted a

further medical report from Spec Savers as instructed by the third respondent and on 31 October 2014, the applicant submitted a further report from Dr Rahman.

[44] The third respondent contends that it only became aware of Dr Rahman's report for the first-time at the arbitration proceedings. As already stated above, when asked if the applicant submitted proof at the appeal hearing that he had consulted an eye specialist as directed, Ms Frazer said "*No not all*".

[45] I have perused the evidence that was before the Commissioner which includes the outcome of the appeal hearing. It is not true that the third respondent only became aware of this report at arbitration.

[46] Dr Rahman's report was submitted by the applicant at the appeal hearing. This is recorded on the appeal outcome. The chairperson of the appeal outcome records in his outcome that:

> "On the 31st of October, Mr Serakalala visited an Ophthalmologist, one Dr. Khursheeda Rahman, who prescribed that he should be issued with new spectacles".[23]

[47] I accept that the medical report of Dr Rahman was only submitted by the applicant at the appeal hearing (as the third respondent was not going to pay the Ophthalmologist, he waited until 25 October 2014, being his pay day and consulted with Dr Rahman on 31 October 2014)[24]. Be that as it may, the fact that the applicant was afforded an opportunity to appeal and presented the report prior to the outcome of the appeal can only support the conclusion that the decision to dismiss him on the basis that he had failed to make available the report from an Ophthalmologist is spurious and unfair.

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[23] Record: P 62.

[24] The third respondent is also largely to blame. The third respondent waited 8 months before requesting the report from the OR Tambo Eye Clinic. Furthermore, the applicant explained that his medical aid was exhausted and therefore had to wait until his next pay date to consult an Ophthalmologist. I accept the applicant's explanation.

[48] The Commissioner simply ignored these reports. This conduct on the part of the Commissioner flies in the face of the well-established principle of our law, stated in *Sidumo* case (*supra*):

> "It follows, therefore, that where a commissioner fails to have regard to material facts the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because it is wrong, but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."[25]

[49] Accordingly, to the extent that the central issue was the provision of medical certificates indicating the nature of the illness of the applicant, Dr Rahman's report in my view answered the third respondent's enquiries to a large extent. According to Dr Rahman's report, the applicant's incapacity could be remedied by mere spectacles. To this end, any contention that the applicant's dismissal was fair because the applicant had been uncooperative and obstructive, on the basis that he had not provided the medical reports as requested cannot be sustained. Even if Dr Rahman's report was only submitted at arbitration, the Commissioner had a duty to take that evidence into account. It is trite that an arbitrator must decide a case on the evidence before him and not what was before the chairperson[26]. If an arbitration hearing is a hearing *de novo*, then there is no valid reason why the additional evidence that was presented at the arbitration hearing was not considered. Failure to consider all the relevant evidence clearly resulted in the third respondent failing to do a proper assessment of the applicant's capability to continue working, as contemplated in Item 10 and 11 of Schedule 8.

[25] At para 268.
[26] Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others [2012] 7 BLLR 660 (LAC); (2012).

[50] The Commissioner did not end there. On page 16 of the transcribed record, the Commissioner simply stopped the applicant from continuing with his cross examination of Ms Frazer. On page 17 of the record, the applicant asks Ms Frazer, what I believe was a pertinent question, namely when did the third respondent become aware that he had spectacles and in response thereto the Commissioner says as follows: *"Alright sorry no more questions…"*

[51] Had the Commissioner allowed the applicant, who was unrepresented and a lay person, an opportunity to ask all questions he intended, the applicant may very well have raised the fact that Dr Rahman's report was presented at the appeal hearing and asked Ms Frazer why the report was not considered by the chairperson. However, his cross examination of Ms Frazer was stopped abruptly by the Commissioner. It is my finding therefore that the Commissioner did not give the applicant a full opportunity to have his say in respect of the dispute and prevented a fair trial of the issues, rendering his award reviewable.

[52] When consideration is had to all the above circumstances, it stands to reason that the decision reached by the Commissioner was one that a reasonable decision-maker could not reach and thus falls to be set aside on review.

[53] Considering that the applicant was dismissed in October 2014 and to avoid any further delays which may prejudice the parties, in particular the applicant, it is my view that this Court is in as good a position as the NBCRFLI to determine the matter.

[54] For the reasons already set out above, it is my finding that the applicant's dismissal was both substantively and procedurally unfair.

[55] I have noted that the relief sought by the applicant was that of reinstatement, alternatively compensation. It is trite that the primary remedy is that of reinstatement, except where same is inappropriate in which event compensation should be ordered.

[56] The parties have not given me any reasons why retrospective reinstatement would not be an appropriate remedy.

[57] In the circumstances, I therefore make the following.

Order

2. The arbitration award issued by the second respondent is reviewed and set aside;

3. The arbitration award is substituted with an order that the applicant's dismissal was substantively and procedurally unfair;

4. The applicant is reinstated with backpay from date of dismissal;

5. There is no order as to costs.

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G. Mthalane

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr R Makoele of De Beers Makoele Inc.

For the third respondent: Adv. N Moyo instructed by Roy Ramdaw & Ass Inc