

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case no: PR 193 /2017

In the matter between:

CAREWAYS WELLNESS (PTY) LTD

Applicant

and

SOLIDARITY obo M ADLAM

First Respondent

F SAULS N.O

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 31 January 2019

Delivered: 27 March 2019

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 31 July 2017 under case number ECPE1559-17 where the Second Respondent (the arbitrator) found Ms Adlam's (the employee) dismissal substantively and procedurally unfair and ordered the Applicant to pay her 12 months' compensation.

[2] The Third Respondent opposed the application.

The evidence adduced:

[3] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively and procedurally fair.

[4] The Applicant had employed the employee as an 'Onsite Wellbeing: National Coordinator' until her dismissal on 28 February 2017, for reasons related to the Applicant's operational requirements.

[5] In order to assess the arbitrator's findings, it is necessary to consider the evidence adduced at the arbitration proceedings.

[6] In 2015, Life Healthcare Services (Life) acquired Careways (the Applicant), a wellness company in order to expand and have a full component when they bid for tenders in the industrial and mining environment. Careways was not doing well and at the time it was in the process of liquidation. Life, when acquiring Careways, went through a section 197 of the Labour Relations Act¹ (the LRA) process and absorbed all the employees. As the business still struggled, the Applicant went through a retrenchment process that started in August 2016 and which resulted in employees being retrenched or demoted to lower positions.

[7] The employee was dismissed at the end of February 2017. In her opening statement at the commencement of the arbitration, the employee challenged procedural fairness on the basis that the Applicant has not followed a process that complied with section 189 of the LRA in that there was no notification issued and there were no proper consultation meetings held. In respect of substantive fairness, she indicated that she was the only one who was retrenched and she did not know the reason why she was retrenched.

[8] The Applicant's first witness, Ms Joyce van Niekerk, testified in her capacity as the regional manager of Careways for the Western and Eastern Cape. In August 2016 a business review of Careways was undertaken and the employee was interviewed with the view of understanding what her role in Careways was. In October 2016, Ms van Niekerk had another discussion with

¹ Act 66 of 1995 as amended.

the employee about her position. The wellness part of the business, where the employee was employed, was under review.

- [9] As early as September / October 2016, the employee's CV was sent out to other business units within the Life group to establish whether there was any alternative, suitable position for the employee. The employee was offered short term alternative positions, such as assisting with the reception or other administrative tasks, until the Applicant could find a suitable alternative position, but in the long term there was no reasonable alternative for the employee in Port Elizabeth.
- [10] On 5 October 2016, Ms van Niekerk had a meeting with the employee and she provided the 'consultation minutes' wherein the topics for discussion were recorded. Ms van Niekerk explained that the recorded topics were discussed with and explained to the employee and she gave her feedback and made comments on the topics. It is evident from the minutes that the reason for retrenchment was recorded as being that the Applicant did not have enough business to justify the full-time placement of a co-ordinator in the Eastern Cape region. As a result, it was proposed that the employee take over the duties of the receptionist, that her salary would not be affected and that it was a temporary arrangement while the Applicant was looking for an alternative placement of the employee. It was also recorded that the timing of the retrenchment was discussed, that the employee would consider the issues discussed and revert to Ms Van Niekerk and that the Applicant would respond to any alternatives to be proposed by the employee.
- [11] Ms van Niekerk testified that when she had this discussion with the employee in October 2016, the issues were not new to her due to the fact that Mr Neil Andershar, the business development manager, already had a discussion with the employee about her position and the business review that the Applicant initiated. Also prior to this discussion, the employee had already provided her CV to Ms van Niekerk for distribution within the company to try and find another suitable position. According to Ms van Niekerk, the employee was aware that her position was under review.
- [12] On the reason for the employee's retrenchment, Ms van Niekerk testified that the employee was responsible for coordinating onsite wellness days with

clients, which could be a one or sometimes as two-day event around wellness. Ms van Niekerk was told by the employee and other colleagues that there was not enough business to justify a full time coordinator. This was caused by the fact that Discovery took its business away from the Applicant and in general there was a substantial decrease in the wellness business, to the extent that the Applicant was reviewing it to see if it was worthwhile to continue with the wellness business at all. After the employee's retrenchment, the Applicant further reviewed the wellness business and there were further consultations with staff regarding possible retrenchments. In the past six months, the Applicant had done only one wellness day for a client in Port Elizabeth.

- [13] The employee was retrenched on 31 January 2017, with February 2017 being her notice month on account of the fact that her position became redundant and no suitable alternative position could be found.
- [14] Ms van Niekerk explained that retrenchment was the last option. The Applicant was taken over and during the process of streamlining, some positions were redundant or consolidated. The Applicant no longer has any wellness coordinator position as there were little wellness day events and due to the lack of business, there was no need for such a position anywhere.
- [15] In cross-examination Ms van Niekerk conceded that the employee was not issued with a written notice as envisaged in section 189(3) of the LRA. The explanation she tendered for not issuing the required notification was that the CEO requested her to have a conversation with the employee about the issues they discussed on 5 October 2016, as Ms van Niekerk was in Port Elizabeth on that day and there was no time to have the notification issued. Ms van Niekerk could not tender any explanation why the section 189(3) notice was never issued to the employee, even subsequent to the first meeting in October 2016.
- [16] It is evident from her evidence that Ms van Niekerk sent the employee an electronic mail (email) on 3 October 2016, informing her that she would be in Port Elizabeth on 5 October 2016 and that she was requesting 'a short meeting' with the employee. Ms van Niekerk had not informed the employee what the meeting was about and she prepared no agenda for the meeting. In her evidence, she explained that she had wanted to discuss something else

with the employee and was only instructed in the morning of 5 October 2016 to discuss the retrenchment issue with her. From this, it is evident that neither Ms van Niekerk nor the employee was expecting to have a section 189 consultation meeting on 5 October 2016.

- [17] The employee wrote an email to Ms van Niekerk (after the meeting of 5 October 2016) wherein she had pointed out that the Applicant was not following the correct procedure in terms of section 189 of the LRA and Ms van Niekerk explained that she forwarded that email to the Applicant's head office, who gave her advice and instructions on what to do next.
- [18] On 1 November 2016, the employee made written proposals and gave inputs subsequent to the discussion she had with Ms van Niekerk on 5 October 2016, yet Ms van Niekerk never responded to the email she received from the employee.
- [19] Ms van Niekerk had another informal meeting with the employee on 9 December 2016, which was scheduled as Ms van Niekerk was in Port Elizabeth on that date. On this date Ms van Niekerk confirmed with the employee that she was willing to relocate and Ms van Niekerk conveyed this message to the Applicant's head office.
- [20] On 12 December 2016, the employee addressed a letter to Ms van Niekerk, referring to the conversation of 9 December 2016 and confirming that she was willing to consider a position in Gauteng. The employee requested an official letter as her decision would be based on that. Correspondence followed between them and the employee persisted with her request that she be provided with a letter setting out what was offered to her so that she could consider the available options. Such a letter was never provided.
- [21] Ms van Niekerk explained that at the time a position was available in Illovo, but between December 2016 and January 2017, the Applicant decided not to continue with the position anymore. Ms van Niekerk had another discussion with the employee on 31 January 2017, informing her that the Applicant would proceed with retrenchment as there was no suitable alternative position available.

- [22] Ms van Niekerk conceded that the employee posed questions as to whether the entire wellness division was closed, and if not, why was she the first to be retrenched as she had the most years of service, etcetera, and those questions were never answered.
- [23] Ms van Niekerk conceded that there was a national coordinator wellness events position available in Johannesburg but that position was never offered to the employee. The reason was because the Applicant was considering outsourcing the wellness coordination to an outside service provider as the wellness component of the business was not doing well and is still not doing well.
- [24] Ms van Niekerk testified that the employee was doing very little work in terms of the position she occupied, because there was no work in the wellness events coordination. She could however not explain why the employee was not considered for other positions, notwithstanding her skills and willingness to relocate and the possibility of a transfer to a different division within the Life Group.
- [25] She conceded that there was no consultation with the employee on the issue of severance pay.
- [26] The employee testified that on 21 July 2016, Ms van Niekerk visited her office and they had a teleconference with Mr Andershar and during this discussion, they spoke to her about her role and whether she would consider moving to Illovo, since the Applicant did not have new business tasks to assign to her in Port Elizabeth, as Life was already doing most of the things the employee did at that point. The employee was told that the Applicant was unable to utilise her if she was based in Port Elizabeth. Initially the employee was reluctant to move to Johannesburg due to her personal circumstances, but shortly thereafter she indicated her willingness to relocate.
- [27] The employee explained that Life, like Careways, had their own business division and there was a duplication of roles after the takeover and it was made clear to her that there was no need for her position in Port Elizabeth.
- [28] After the discussion with Mr Andershar on 21 July 2016, the employee had no further discussions with him and apart from the meeting with Ms van Niekerk

on 5 October 2016, there was no other meeting where her possible move to Johannesburg was discussed.

- [29] The employee testified that the meeting with Ms van Niekerk on 5 October 2016 lasted for about 30 minutes and that Ms van Niekerk told her that there was not enough work for the position she held. The employee accepted this fact and explained that it was an issue that she flagged with the Applicant and she offered assistance to colleagues to keep busy. She explained that the Applicant lost the Discovery wellness contract at the end of 2015. Discovery was the Applicant's main source of work up to that point and in January and February 2016, the Applicant did not get a lot of work and by March 2016 the employee had sent her manager an email wherein she expressed her concern because of the lack of work and she asked whether there was a possibility that she could assist in other divisions of the business as the work she was doing, was not enough. She never received any response.
- [30] The employee's move to the reception was discussed in the meeting on 5 October 2016 and she agreed to assist with the receptionist post, but indicated that she was not too happy about it as she had skills and experience that could add more value to the business. This was in any event only a temporary arrangement.
- [31] The employee testified that she responded on 1 November 2016 to the minutes of the meeting held on 5 October 2016, which she received on 28 October 2016, and indicated that she had not received a notice as envisaged in section 189(3) of the LRA. She was scared when she saw that the minutes referred to the meeting as a consultation and after she obtained legal advice, she informed the Applicant that she did not regard the meeting as a consultation, as she did not receive the required notice. The employee gave inputs, as she was requested to do, to which the Applicant never responded and never gave her feedback.
- [32] The employee corroborated the evidence of Ms van Niekerk that they had a meeting on 9 December 2016 where she confirmed her willingness to relocate and that on 12 December 2016, she asked for formal letters setting out the available options.

- [33] The employee confirmed that after 9 December 2016, she did not have another meeting with Ms van Niekerk regarding her position. The next discussion with Ms van Niekerk was on 31 January 2017, when she was informed that her position was redundant, there was not enough work, there was no alternative position, and that the Applicant was going to retrench her.
- [34] The employee directed a number of questions to Ms van Niekerk, after she was informed that she would be retrenched, and she made follow up enquiries on when her questions would be responded to. The Applicant never responded to her.
- [35] In cross-examination the employee persisted with her position that no consultation was ever held with her as required by the LRA, the Applicant only had informal discussions with her. The meeting she had with Ms van Niekerk on 5 October 2016, was not a consultation in terms of section 189 of the LRA and in her view it was a meeting to discuss what else the employee could do within the business. The Applicant proposed that she assist with the receptionist position, which proposal she accepted, as at the time she did not think that she was going to lose her job. She explained that wellness had gone through many changes and always recovered and she assumed that it would recover again if the Applicant got new business and because Mr Andershar had said that he would do everything he could to revive the onsite wellness business. She knew the business was not doing well.

Analysis of the arbitrator's findings and the grounds for review

- [36] In his analysis of the evidence, the arbitrator recorded that the employee disputed that her dismissal was based on a fair procedure and that reasonable grounds existed for her dismissal. As both substantive and procedural fairness were in issue at the arbitration, an enquiry into both aspects of fairness was necessary.
- [37] The Applicant challenged the award on three main grounds: the arbitrator's finding on substantive unfairness, procedural unfairness and the relief awarded. I will deal with each of the grounds in turn *infra*.
- [38] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable.

The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

Substantive unfairness

[39] The Applicant's case is that the arbitrator failed to apply his mind to the evidence before him by finding the employee's dismissal substantively unfair as there was no real dispute that a valid commercial reason existed for the employee's dismissal. The evidence before the arbitrator was that Life acquired Careways in circumstances where Careways' business was ailing and almost under liquidation, and after a section 197 transfer of the Applicant's employees was finalised, a business review was undertaken in respect of the entire wellness business, which included a consideration of the employee's role in the business. The review of the wellness business was ongoing with further possible and actual retrenchments on the table. It was common cause that the wellness business was struggling as a result of the cancellation of their biggest client, Discovery. Furthermore, there was not enough work for the employee in the position that she occupied, to justify her full-time placement in the position and on her own version, the employee was aware of this and she even raised concerns about her lack of work. The evidence further was that there was a duplication of roles and functions after the section 197 transfer and the employee was aware of this. It is evident from the evidence adduced that the employee was not occupied with work at full capacity and that her position did not have enough work.

[40] The employee conceded that when the Discovery contract was lost at the end of 2015, the Applicant lost its main source of work and not much new work was coming in after that, to the extent that she raised her concerns about her lack of work by March 2016.

[41] The Applicant further adduced evidence that it was considering to outsource the wellness business component as there was very little wellness coordination work being done. It was not viable for the Applicant to retain the

² (2007) 28 ILJ 2405 (CC) at para 110.

role of wellness coordinator in its operations, whether in Johannesburg or elsewhere, thus a position in Johannesburg was not a viable alternative.

[42] The arbitrator found, based on the evidence, that the employee's dismissal was substantively unfair. It is not apparent from the arbitration award what the basis for the finding on substantive unfairness was.

[43] It is evident from the arbitration award that the *ratio decidendi* in the award is confined to findings on procedural fairness and that there is no finding to support the conclusion that the employee's dismissal was substantively unfair. It appears that the arbitrator conflated procedural fairness with substantive fairness. The result of this is that he failed to evaluate a critical aspect of the dispute he had to adjudicate and that he concluded substantive unfairness, without any consideration of the issue and in the absence of findings on substantive fairness.

[44] It is apparent that the arbitrator did not consider whether a fair reason to retrench the employee existed before he concluded that her dismissal was substantively unfair. A perusal of the award shows that the arbitrator failed to consider any of the factors relating to the issue of substantive fairness that were presented in evidence during the arbitration proceedings.

[45] In my view, there is merit in the Applicant's first ground for review. I am satisfied on the facts and evidence placed before the arbitrator, that had the issue been evaluated as required, a reasonable decision maker could not have concluded that the employee's dismissal was substantively unfair.

Procedural unfairness

[46] It was common cause that the employee was not issued with a section 189(3) of the LRA notice. Section 189(3) requires of an employer to issue a written notice to the employee to consult with it and to disclose in writing all the relevant information, as set out in the said section. The arbitrator held that the purpose thereof was to ensure a meaningful joint consensus seeking process between the parties and to endeavour to reach agreement on the possibilities to avoid the envisaged retrenchment and if that was not possible, to determine the manner in which the retrenchment will take place. The arbitrator found that there was no evidence of such a process initiated by the Applicant and

participated in by the employee. The Applicant's case that the meeting held with the employee on 5 October 2016, 9 December 2016 and 31 January 2017 constituted consultation as prescribed in section 189 of the LRA, was seriously misplaced and disingenuous.

- [47] The arbitrator held that the starting point of the consultation process should have been to invite the employee in writing to a consultation process, to inform her of all the matters set out in section 189(3)(a)-(j) and to enable her to prepare for the consultation. The Applicant's failure to do so denied the employee the opportunity to meaningfully consult. The Applicant did not provide the employee with the necessary information, as it was by way of legislation required to have done.
- [48] The arbitrator found that there was no evidence that the Applicant has complied with the provisions of the LRA and the meetings that the employee had with Ms van Niekerk, were problematic in that Ms van Niekerk was in no position to react to any of the initiatives proposed by the employee, she had to refer back to the head office or the CEO and she had no mandate to respond to the employee or to conclude anything as she had to refer everything for further decisions. These decisions, however, were not conveyed to the employee in a process of consultation and it never reached the employee for her input.
- [49] The employee sent numerous emails to the Applicant wherein she asked for information and she made attempts to get clarity on the process, and the only response she received from Ms van Niekerk, was that she had submitted her requests to head office. There was no reply to the employee's indication of her willingness to relocate to Johannesburg and no offer of any alternative position was made to the employee. There was no discussion on suitable alternative positions and none was put on the table for consultation and consideration in a meaningful way.
- [50] The arbitrator found, based on the evidence, that the employee's dismissal was procedurally unfair.
- [51] The Applicant's case is that the arbitrator failed to undertake a balanced assessment into whether a genuine consultation process was followed and

instead he adopted a tick-box approach that placed form over substance. The formal non-compliance with section 189 of the LRA did not undermine the purpose of consultation or render the employee's dismissal unfair. A consultation process took place during which the employee was provided with various information listed in section 189(3) and she was consulted on various topics prescribed by section 189. In short, the Applicant's case is that there was substantial compliance with the procedural fairness requirements of section 189 of the LRA.

[52] In my view there is no merit in this ground for review.

[53] I cannot agree that the arbitrator took a tick-box approach and that there was a proper consultation process during which the employee was consulted on the topics prescribed by section 189 of the LRA.

[54] It is evident that the Applicant did not comply with the formal procedural requirements of section 189(3) of the LRA. On Ms van Niekerk's own version, she was not the employee's line manager and the so-called 'consultations' she had with the employee, were not because she was the employee's manager who understood what the employee's role and functions were or because she was in a position to answer questions and to take the process forward or because she had a mandate to conclude the process, but rather because she happened to be in Port Elizabeth from time to time and was asked to meet with the employee as and when she was in Port Elizabeth.

[55] The arbitrator's finding that the Applicant's case that the meeting held with the employee on 5 October 2016, 9 December 2016 and 31 January 2017 constituted consultation as prescribed in section 189 of the LRA, was seriously misplaced and disingenuous, is not unreasonable in view of the evidence that was placed before him.

[56] It may be so that the employee was aware that her position was under review, but being aware that a position was under review, is not the same as being aware that in fact a retrenchment process was unfolding and that dismissal was a reality.

[57] It is evident that material aspects, as required in section 189 of the LRA, were not discussed with the employee. The failure to do so resulted in a number of

questions raised by the employee on issues that should have been discussed in the joint consensus seeking process, for instance the number of employees to be affected and the proposed method of selecting which employees to dismiss. To make matters worse, the Applicant did not respond to the employee.

[58] On Ms van Niekerk's version, the issue of severance pay was not discussed with the employee.

[59] In the minutes of the meeting held on 5 October 2016 it was recorded that the employee was to consider the discussion and to revert to Ms van Niekerk and that Ms van Niekerk would respond to any alternatives proposed by the employee. The employee provided Ms van Niekerk with her inputs in writing and she raised certain questions. The only response she received was that Ms van Niekerk had referred it to head office. On Ms van Niekerk's own version she did not respond to the employee because she did not have answers.

[60] In *Johnson & Johnson (Pty) Ltd v CWIU*³ the Labour Appeal Court (LAC) has held that:

'The important implication is that a mechanical 'checklist' kind of approach to determine whether section 189 has been complied with is inappropriate. The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved.'

[61] It is by now trite that fairness is a matter of substance and not form and that a joint consensus-seeking process is not evaluated by means of a mechanical checklist. Implicit in the requirement of engaging in a meaningful joint consensus-seeking process and the attempt to reach consensus on the topics prescribed by section 189(2) of the LRA, is a fair opportunity to make meaningful proposals in respect of the proposed retrenchment. The employee should be given notice and be afforded 'the opportunity to come to terms with the situation, to reflect on the matter, to seek advice and prepare for consultation and only then can a fair and genuine consultation begin.'⁴

³ [1998] 12 BLLR 1209 (LAC) at para 29.

⁴ *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC).

[62] In *Edcon v Steenkamp and Others*⁵ the LAC made reference to the provisions of section 189 of the LRA in general terms and held that:

‘...The section imposes a number of duties on the consulting parties in apparently peremptory terms. Thus, for instance, the employer ‘must’ consult, ‘must’ issues a written notice and ‘must’ select according to fair criteria. Employers frequently fail to comply with these provisions. The courts have not in the past regarded such failures to result in invalid dismissals leading to automatic reinstatement. The remedy for non-compliance will be compensation or a pre-emptive interdict where the failure is exclusively of a procedural nature, or otherwise reinstatement or re-employment at the discretion of the court after taking account of a range of factual considerations. Again, the notion that a retrenchment which does not comply with the requirements of the section must be deemed to be invalid and a nullity, is foreign to the scheme and purpose of section 189A of the LRA which provides discrete and effective remedies for redressing flaws in the process’.

[63] The duties imposed by section 189 of the LRA are peremptory and it is not for an employer to decide and cherry pick which ones they want to comply with and which ones they want to disregard. The remedy for non-compliance is compensation or reinstatement or re-employment at the discretion of the bargaining council or court, after taking into consideration a range of factual considerations.

[64] Not every breach of section 189 of the LRA makes the retrenchment unfair and I have alluded to the fact that the proper approach is to determine whether the purpose of the said section had been achieved.

[65] In my view the purpose of section 189 of the LRA has not been achieved *in casu* as there was no proper joint consensus-seeking process. In fact, the employee was treated unfairly in that she was deprived of her right to have and participate in such a process. The only engagement was limited to sporadic, informal meetings with Ms van Niekerk, that were wholly inadequate to qualify as consensus-seeking consultations, as envisaged in section 189(3) of the LRA.

⁵ (2015) 36 ILJ 1469 (LAC) at para 51.

- [66] The Applicant's non-compliance with section 189 indeed undermined the purpose of consultation and rendered the employee's dismissal unfair.
- [67] There is no merit in this ground for review and the arbitrator's finding on procedural fairness is reasonable and is not to be interfered with on review.

Relief awarded

- [68] Section 194 of the LRA provides for limits on compensation and prescribes that the compensation awarded to an employee whose dismissal is found to be unfair, must be just and equitable in all the circumstances and may not be more than the equivalent of 12 months' remuneration.
- [69] The application of section 194 of the LRA and the awarding of compensation entails the exercise of a discretion to determine the quantum of compensation within the parameters set in section 194(1) of the LRA. The awarding of maximum compensation should be reserved for the most egregious of unfair dismissals.
- [70] The employee was awarded compensation equivalent to 12 months' remuneration. The arbitrator considered the fact that the employee had 18 years' service and had it not been that the Applicant had lost major clients, she would in all probability have continued with her employment at the Applicant. She has now, at an advanced stage of her life, to attempt to start her working life all over again, through no fault of hers. The Applicant should have treated her fairly, but failed to do so.
- [71] The Applicant's case is that the compensation that was awarded to the employee was not just and equitable as the arbitrator was wrong in finding the employee's dismissal substantively unfair and he ignored the extent to which the Applicant had complied with the procedural requirements of section 189 of the LRA.
- [72] In my view there is merit in this ground for review.
- [73] It is apparent from the arbitrator's findings that he accepted that the employee would have continued with her employment with the Applicant, had it not been that the Applicant lost major clients. This effectively finds that there was a business rationale for the employee's dismissal and that the termination of her

services was caused by the loss of major clients. This is a factor that should have played a role in the awarding of just and equitable compensation.

[74] The arbitrator's finding that the employee was substantively unfairly dismissed, distorted the enquiry into what would constitute just and equitable compensation. The arbitrator clearly determined the question of compensation based on his finding that the employee's dismissal was both substantively and procedurally unfair. The distorted enquiry led the arbitrator to grant maximum compensation, when such was not justified and cannot be regarded as just and equitable in all the circumstances.

[75] The quantum of compensation should be reduced to reflect compensation that is just and equitable in circumstances where the employee's dismissal was procedurally unfair and substantively fair. In my view, compensation equivalent to six months' remuneration will be just and equitable.

Relief

[76] This leaves the issue of relief.

[77] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that the employee's dismissal was procedurally and substantively fair. Alternatively, the Applicant seeks an order remitting the matter for a hearing *de novo*.

[78] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter. A matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to finally determine the matter.

[79] *In casu*, I am indeed in a position to decide and finally determine the matter on the record as the record before me is complete and the parties' cases were fully ventilated. It is also in the interest of justice to determine the matter finally and not to order a re-hearing of the matter as the employee's dismissal took place as far back as 2017 and this matter should be and could be brought to finality.

[80] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.

[81] In the premises, I make the following order:

Order

1. The arbitration award issued on 31 July 2017 under case number ECPE1559-17 is reviewed and set aside;
2. The arbitration award is substituted with the following:
 - 2.1. The dismissal of Ms Madeleine Adlam was substantively fair and procedurally unfair;
 - 2.2. The Applicant is ordered to pay Ms Madeleine Adlam compensation equivalent to six months' remuneration calculated at her rate of remuneration on the date of dismissal;
 - 2.3. The Applicant is ordered to pay the compensation to Ms Madeleine Adlam by no later than 18 April 2019.
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate R Itzkin

Instructed by: Edward Nathan Sonnenbergs Inc Attorneys

Third Respondent: Ms Nel of Solidarity

LABOUR COURT