THE LABOUR COURT OF SOUTH AFRICA
DURBAN

Reportable

Case no: D178 /2014

In the matter between:

HILLSIDE ALUMINIUM (PTY) LTD **Applicant**

and

MOSES MATHUSE **First Respondent**

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **Second Respondent**

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL **Third Respondent**

HUMPHREY NDABA *N.O* **Fourth Respondent**

Heard : 1 April 2016

Delivered : 24 May 2016

Summary: Review application. Evidence. Status of disciplinary record at arbitration. Arbitrator could not consider and accept mitigating factors reflected in minutes of the disciplinary enquiry when no evidence was adduced on those minutes and in the absence of an agreement that the record would be evidence at the arbitration. Arbitrator considered evidence not properly before him and failed to consider factors he was required to. Made no independent determination

regarding the appropriateness of the sanction. Award is reviewed and set aside and the matter is remitted for determination on limited issues.

JUDGMENT

PRINSLOO J.

Introduction

[1] The Applicant seeks to review and set aside an arbitration award issued on 27 November 2013 wherein the Fourth Respondent ('the arbitrator') found the First Respondent's dismissal procedurally fair but substantively unfair and ordered the Applicant to re-instate him prospectively with effect from 9 December 2013.

[2] The Second Respondent ('NUMSA') opposed the application on behalf of the First Respondent.

Background facts

[3] The background facts are summarised as follows:

[4] On 1 June 1996, the Applicant employed the First Respondent ('Mathuse') as a specialist: contractor management. His duties included the management of contracts between the Applicant and service providers. In his capacity as specialist and in the course of performing his duties, Mathuse had access to information relating to the service providers.

[5] Mathuse was dismissed on 26 July 2012 for reasons related to misconduct after a disciplinary process was followed.

[6] The misconduct Mathuse was dismissed for was gross insubordination in that on 30 April 2012 and 15 May 2012 he refused to co-operate with the investigation into his alleged misconduct by repeatedly stating that he wished to remain silent and to respond to the questions in a formal hearing.

[7] The charge of gross insubordination followed a statement submitted on 22 March 2012 by Mr Deon Arumugam ('Arumugam'), the owner of TB Industrial, a company that responded to the Applicant's invitation for tenders for cleaning services. The value of the tender was R 100 million and Arumugam implicated Mathuse in tender fraud by alleging that Mathuse handed over confidential

information, including copies of invoices, quotations and tender prices to a competitor of TB Industrial and also a bidder in the same tender process. The allegation was that Mathuse leaked the confidential information in exchange for shares.

[8] The Applicant's code of business conduct provides *inter alia* that the failure to co-operate in investigations of possible breaches regarding an employee's own behaviour constitutes misconduct and may result in disciplinary action. This is referred to as the 'co-operation rule'.

[9] Mathuse was bound by the terms and conditions of his contract of employment and his contract provided that he was required to comply with the Applicant's policies and procedures and that included compliance with the co-operation rule.

[10] As part of the Applicant's investigation into the allegations made on 22 March 2012, Mathuse was invited to make written representations in response to Arumugam's allegations and on 23 March 2012 Mathuse recorded that *'the allegations brought against me are too general to understand as they are not specific, hence why I should not be suspended."* Mathuse was however suspended on 26 March 2012.

[11] Mathuse made a written statement on 20 April 2012, at the request of Khwela, an employee relations (ER) specialist. The request for a statement still related to response to Arumugam's allegations and the fact that Mathuse was implicated in tender fraud. In his statement, Mathuse said that he has no objection to make a statement but he added *inter alia* that *"I am unable to do so as the information provided to me is insufficient. Also I would prefer to make the statement with the benefits of having my union representative present. I kindly request for the company to make this available so that I may be able to contribute as required."*

[12] Griesel, a security specialist, who was appointed to investigate the allegations, subsequently liaised with Mathuse and he reiterated the provisions of the co-operation rule. On 26 April 2012 Mathuse and a shop steward attended a meeting with Griesel, during which meeting Mathuse was informed of the allegations that were made against him and Mathuse was requested to respond to the following specific questions:

"1. Have you ever removed any TD Industrial invoice, specifically the October 2011 invoice from the contractor management files, at any point during the period 2010 until at present?

2. Have you ever contacted or made any such attempts to contact Jerry Mogobane (allegedly known as an employee of TD Industrial) and or David Myeni (alleged to be an erstwhile employee of TD Industrial) between the period October 2011 to date?

3. Were any payments ever made, at any period until present, by Deon Arumugam (directly or otherwise) owner of TD Industrial for your personal/private benefit, possibly for car instalment and/or child/ children's school fees? (Please note if the payments were indeed made but were for any other reason than stated above, kindly furnish the correct information thereto)."

[13] Mathuse responded to the aforesaid questions as follows: *"I wish to remain silent and wish to answer this question in the formal enquiry."*

[14] On 14 May 2012, Mathuse was formally instructed in writing to furnish a written response to the three questions by 08:00 on 15 May 2012 and he was once again made aware of the provisions of the co-operation rule.

[15] On 15 May 2012 Mathuse responded in writing to the aforesaid questions that *"I wish to remain silent and wish to answer this question in the formal enquiry."*

[16] On 25 May 2012 Mathuse was charged with misconduct relating to gross insubordination in that on 30 April 2012 and 15 May 2012 he refused to co-operate with the investigation into his alleged misconduct by repeatedly stating that he wished to remain silent and to respond to the questions in a formal hearing.

[17] The disciplinary enquiry was subsequently held and Mathuse was found guilty and dismissed.

[18] Mathuse referred an unfair dismissal dispute to the Third Respondent ('MEIBC'). The issue to be decided was whether Mathuse's dismissal was substantively and procedurally unfair.

<u>The arbitration proceedings</u>

[19] The Applicant called three witnesses to testify at the arbitration proceedings. Ms Khwela ('Khwela'), the ER specialist testified that she informed Mathuse on 20 April 2012 that he was required to make a statement in respect of the allegations. Mathuse required further information before he would make a statement. Mathuse was subsequently issued with a written instruction to respond to the allegations by 15 May 2012 and Khwela explained to him that should he fail to comply with the instruction, it would lead to disciplinary action.

[20] Khwela testified that Mathuse confirmed that he understood the contents of the letter, yet on 15 May 2012 he responded by stating that he would remain silent and respond only in a formal enquiry. Subsequent to this response, Khwela met with Mathuse and his representatives and attempted to obtain a response from him, as it was a management instruction for Mathuse to provide a response. He however provided the same response and provided no response to the allegations at all.

[21] Mr Makhola ('Makhola') testified that Mathuse reported to him. He was approached by Arumugam who made the allegations that Mathuse disclosed information that could have influenced the tender process for a contract that was due for renewal and out on tender. The Applicant's code of business conduct prescribes that if any allegation of misconduct is brought to the Applicant's attention, action should be taken and the action he took was to instruct Mathuse to make written representations regarding the allegations and why he should not be suspended. Mathuse indicated that the allegations were too vague and subsequently Makhola referred it for further investigation. Mathuse was suspended pending the outcome of the investigation.

[22] Makhola testified in respect of the applicable policies and the importance of the rules and the fact that Mathuse was aware of the code of business conduct. Makhola testified that after he requested Mathuse to provide a statement to the allegations and after his instruction that the matter be investigated, a number of individuals attempted to obtain a statement from Mathuse, without any success.

[23] Makhola testified that the trust relationship was broken as Mathuse, understanding the seriousness of the allegations that were made against him, elected not to co-operate with the investigation and that Mathuse could not be

reinstated. Reinstating Mathuse would result in pandemonium and would cause other employees to defy the rule.

[24] Mr Griesel ('Griesel') was the last witness called by the Applicant and he testified that he is employed as a specialist security and his main function is security management and to conduct investigations into misconduct and accidents. He testified that he was appointed to investigate allegations against Mathuse and he described Mathuse's conduct during the investigation as uncooperative. Mathuse refused to comment on the allegations and to respond to questions and said that he would submit a written response to specific questions. The only response that was received from Mathuse was that he wished to remain silent and would respond in a formal hearing. This response was despite an agreement that Mathuse would respond in writing to specific questions and despite the fact that the specific questions were forwarded to Mathuse.

[25] Mathuse testified and his case was that his dismissal was procedurally and substantively unfair. He testified that Khwela and Griesel were not his line managers and they could not have given him instructions to comply with. His testimony was that ER should not have been involved, but his line manager, Makhola, should have been involved and had Makhola investigated him, his response would have been different and he would have co-operated with Makhola. At the arbitration he denied any involvement in the allegations as made by Arumugam and testified that if those questions were posed at the disciplinary hearing, he would have denied any involvement. He did not provide that explanation at his disciplinary enquiry as he was focussed on the issue of insubordination and nothing more. He further complained that the chairperson of the disciplinary hearing was biased in that he refused to recuse himself.

[26] The arbitrator found Mathuse's dismissal procedurally fair and substantively unfair and ordered his prospective reinstatement without back pay with effect from 9 December 2013.

Analysis of the arbitrator's findings and grounds for review

[27] The arbitrator found Mathuse's dismissal procedurally fair and the Applicant took no issue with that and the findings on procedural fairness require no further consideration and is not subject to review.

[28] In the analysis of the evidence and in consideration of the charge of misconduct Mathuse was dismissed for, the arbitrator found that the Applicant's code required of Mathuse to co-operate in investigations of breaches of an employee's own behaviour and failure to do so, may result in disciplinary action. The charge levelled against Mathuse essentially related to his refusal to co-operate in the investigation of possible breaches regarding his own behaviour. In the circumstances Mathuse had no right to remain silent and it was irrelevant whether the instruction was given by a superior or person of equivalent rank and after Griesel provided the further information that Mathuse requested, his refusal to answer specific questions constituted a refusal to co-operate.

[29] The arbitrator accepted that on a balance of probabilities the Applicant has shown that Mathuse refused to co-operate with his own investigation. The misconduct Mathuse was dismissed for, was gross insubordination and the arbitrator, apart from finding that Mathuse refused to co-operate with the investigation, made no findings on whether Mathuse was indeed guilty and whether his conduct constituted gross insubordination.

[30] The arbitrator, without finding Mathuse guilty of gross insubordination, then proceeded to consider whether dismissal was an appropriate sanction. The arbitrator concluded that dismissal was a sanction too harsh and he based this finding on mainly two factors that he had considered. The first is that at the disciplinary hearing no one posed a question as to whether Mathuse was still refusing to answer the questions or whether he was prepared to honour his undertaking to cooperate at a formal enquiry. In the arbitration, Mathuse provided answers to all the questions asked by Griesel when the arbitrator asked him those same questions.

[31] The second main consideration was the mitigating factors presented at the disciplinary enquiry. The arbitrator considered that the parties agreed that the disciplinary record is a fair reflection of what transpired at the disciplinary hearing and he listed all the mitigating factors as raised by Mathuse at his disciplinary enquiry. The arbitrator found the sanction of dismissal too harsh as the mitigating factors were not contested at the disciplinary enquiry, the Applicant raised no aggravating factors and Mathuse, at the arbitration, provided positive responses to the specific questions asked.

[32] Having found the sanction of dismissal too harsh, the arbitrator considered the appropriate remedy for the unfair dismissal and he held that since Mathuse was not innocent and indeed committed misconduct, prospective reinstatement without back pay would be appropriate. The arbitrator found that he had to award the primary remedy of reinstatement. He justified this finding by stating that Mathuse did not refuse to answer the questions, but only undertook to answer the questions at a formal enquiry. Mathuse's conduct was unacceptable, however he answered the questions when asked at the arbitration proceedings. So the arbitrator found.

[33] The Applicant raised a number of grounds for review in the founding affidavit but the gist of the review is that the arbitrator committed a gross irregularity as contemplated in section 145(2)(a)(ii) of the the Labour Relations Act[1] ('the Act').

[34] The Applicant's complaints on review are that the arbitrator misconceived the nature of the enquiry, that he failed to analyse the evidence before him holistically, more specifically in relation to the issue he had to decide on the appropriateness of the sanction, he failed to determine whether Mathuse was guilty of insubordination, that he ignored relevant factors such as the importance of the rule that was breached, the impact of Mathuse's defiance in refusing to comply with the rule and instructions and the impact of Mathuse's conduct on the trust relationship.

[35] The Applicant took issue with the fact that the arbitrator considered the disciplinary record and relied on the fact that the Applicant has not raised aggravating factors at the disciplinary enquiry and that the mitigating factors were uncontested. These issues were not raised at the arbitration and were not put to the Applicant's witnesses.

[36] The Applicant subsequently filed a supplementary affidavit to supplement the grounds for review. A perusal of the supplementary affidavit reveals no new or additional grounds for review, but rather a repetition of the grounds already raised in the founding affidavit, albeit now under specific numbered headings.

[37] The matter was set down for argument on 9 March 2016, but was postponed to 1 April 2016 by agreement between the parties. Subsequent to the postponement, the Applicant delivered a further supplementary affidavit, purporting to introduce

[1] Act 66 of 1995.

a new ground for review namely that the arbitrator acted procedurally unfairly by relying on the record of the disciplinary enquiry as if it constituted evidence before him.

[38] The application is opposed. The Second Respondent ('NUMSA') objected to the introduction of a new ground for review by the filing of a further supplementary affidavit. The objection is that the Applicant now seeks to supplement the original grounds for review and to do so at this stage, is extremely late, the new ground for review is not properly before Court in the absence of an application for condonation and Mathuse will be prejudiced as his memory of what transpired has dimmed over time.

[39] NUMSA however filed an answering affidavit to the further supplementary affidavit.

[40] Mr Schumann for the First and Second Respondents submitted that it would be unfair to allow the Applicant to keep on supplementing its case in the absence of a satisfactory explanation and the explanation tendered by the Applicant does not constitute a satisfactory explanation.

[41] Mr Myburgh for the Applicant submitted that the first issue to be decided is whether the introduction of the further supplementary affidavit should be allowed.

[42] It is trite that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case and that it is basically a question of fairness to both sides[2]. An important consideration is prejudice.

[43] I have considered the so-called new ground for review that the Applicant seeks to introduce and it relates to the fact that the arbitrator accepted the evidence that was adduced at the disciplinary enquiry as evidence before him and in doing so he committed a reviewable defect. I will fully deal with the merit of this ground for review *infra*.

[44] A perusal of the founding affidavit shows that the Applicant has from the onset taken issue with the manner in which the arbitrator dealt with the evidence before him and with the fact that the arbitrator relied on the disciplinary record in the manner he did. In my view the ground for the review as raised by the Applicant in the further supplementary affidavit is not entirely new, it is a ground

[2] *James Brown and Hamer (Pty) Ltd v Simmons* 1963 (4) SA 656 (A).

for review that is connected to the grounds for review raised in the founding affidavit and the issue taken with the acceptance of the disciplinary record in the manner the arbitrator did, is not a new complaint.

[45] NUMSA on behalf of Mathuse ('the Respondents') was able to file an answering affidavit to the further supplementary affidavit and it does not appear from the contents of the answering affidavit that the Respondents were unable to file an answer or that they were prejudiced in doing so.

[46] As the ground for review is not entirely new, it is not actually adding to the Applicant's case and the Respondents were able to file an answer to that, I am satisfied that NUMSA and Mathuse will not be prejudiced should the further supplementary affidavit and the answer thereto be allowed as further affidavits in this matter.

[47] I therefore allow the filing of the further affidavits.

[48] In my view the Applicant's review is limited to the arbitrator's findings on the appropriateness of the sanction of dismissal and the consequential relief of reinstatement.

[49] I will first deal with the attack on the appropriateness of the sanction. Before I deal with the merits of this ground for review, the status of the disciplinary record as evidence in the arbitration calls for consideration.

[50] The arbitrator concluded that dismissal was too harsh and the mitigating factors presented at the disciplinary enquiry were the main factors that informed and influenced this decision.

[51] It is apparent from the award that the arbitrator considered the fact that the parties agreed that the disciplinary record is a fair reflection of what transpired at the disciplinary hearing. The arbitrator listed all the mitigating factors raised by Mathuse at his disciplinary enquiry and found the sanction of dismissal too harsh as the mitigating factors were not contested at the disciplinary enquiry and the Applicant raised no aggravating factors.

[52] The Applicant's case is that in finding as aforesaid, the arbitrator relied on 'evidence' that was not properly before him and in doing so without notice to the parties and without affording them an opportunity to contest that, he committed a

reviewable defect and had the arbitrator not gone procedurally wrong, he would have upheld Mathuse's dismissal.

[53] It is evident from the arbitration award that the arbitrator listed 19 factors presented in mitigation, as he found them in the minutes of the disciplinary hearing, and that the issue of mitigating and aggravating factors had a material impact on the arbitrator's decision on the appropriateness of the sanction. In fact, it determined the entire outcome of the arbitration.

[54] The Respondents admit that the arbitrator took into consideration the mitigating factors presented at the disciplinary hearing but argued that the arbitrator was entitled to do so. This is so because the parties agreed that the transcript of the disciplinary hearing was what it purported to be and that it was a true reflection of what transpired during the disciplinary hearing. The Respondents submitted that the minutes of the disciplinary enquiry and what was recorded therein were properly placed before the arbitrator, it was admissible as evidence and the arbitrator was entitled to accept the minutes as evidence.

[55] The parties clearly hold a different view as to whether the arbitrator was entitled to rely on the minutes of the disciplinary hearing based on the agreement that it is what it purported to be and a fair reflection of what transpired at the disciplinary hearing.

<u>The status of the disciplinary record as evidence before the arbitrator</u>

[56] In litigation parties would prepare bundles of documents and the documents included in the trial bundles, would be included as documentary evidence which the parties intend to rely on in support of their respective cases. It is a common practice for parties to agree on the status of the documents to be included in the trial bundle.

[57] In my view there are three possible scenarios.

[58] The first scenario is where there is no agreement on the authenticity or status of documents or where the authenticity is disputed. In such instances the party wishing to produce a document and wants to rely on the document as evidence, has to prove the authenticity of the document by leading evidence and if the authenticity is not proved or admitted, the document is inadmissible, may not be used in cross-examination and cannot be considered as evidence.

[59] The second scenario is where parties agree that documents are what they purport to be. This means that the party wishing to rely on the document, does not have to prove the authenticity of the document but may lead evidence and rely on the document on the basis that it is what it purports to be. In this instance documents must be introduced as evidence and cross-examination on such documents is permissible. The presiding officer can accept the document as evidence insofar as it was properly introduced by witnesses. Where a document is agreed to be what it purports to be, but no evidence is adduced on the document, the presiding officer cannot *mero motu* consider such document as evidence merely because it is included in a trial bundle.

[60] The third scenario is where the parties agree that the documents in the bundle should be regarded as evidence. In this instance the presiding officer is entitled to accept the contents of the documentary evidence as if it were evidence adduced before him or her and even if no witness testifies about it, it can be considered as relevant and admissible evidence.

[61] Where the document is a transcript or record of another proceeding, the same principles apply. Where the parties agreed that the transcript is what it purports to be and a true reflection of what purports to be recorded, it means that the record is authentic and correctly reflects that the proceedings indeed took place. In this scenario contradictions in testimony could be canvassed during cross-examination. The presiding officer is entitled to consider the portions of the transcribed record that were introduced by witnesses, either in evidence in chief or cross-examination, as evidence. The presiding officer cannot merely accept the entire record as evidence, but can accept as evidence those portions introduced by witnesses.

[62] Where the parties agreed that the entire transcript should be regarded as evidence before the presiding officer, the entire record could be considered and accepted as if it was evidence that was adduced before the tribunal where it was introduced, without the need for evidence to be adduced on it. In this scenario the evidence given at the disciplinary hearing is regarded as evidence at the arbitration. This is an extraordinary scenario and requires an explicit and clear agreement between the parties.

[63] *In casu* it is common cause that the parties agreed that the record of the disciplinary hearing was what it purports to be and that it was a fair reflection of what transpired. As such the parties could use the record in cross-examination and as part of the evidence they wanted to introduce.

[64] There was no agreement between the parties that the record of the disciplinary hearing would be accepted as evidence in the arbitration. The agreement was limited to an acceptance that it was what it purported to be.

[65] In argument before this Court Mr Myburgh submitted that the arbitrator was, in the absence of an agreement that the record would be evidence before him, not free to dip into the record of the disciplinary hearing and to take from that record what he likes and to use that in the determination of the issues.

[66] Mr Schumann on the other hand submitted that the technical rules of the law of evidence do not apply in arbitration proceedings as the rule of fairness applies. In my view fairness is to be determined by considering all the facts and evidence and even in arbitration proceedings one cannot escape the application of the law of evidence. This is more so where the parties are represented.

[67] It is common cause that at no point during the arbitration did any of the parties refer to the portion in the record that deals with the mitigating and aggravating factors and that was not part of the facts placed before the arbitrator.

[68] In my view the arbitrator could, in the absence of an explicit agreement that the record would be evidence in the arbitration, only consider those portions of the record the parties introduced as evidence by way of testimony.

[69] In *Karan Beef (Pty) Ltd v Mbovane NO and others*[3] this Court found that a conclusion based on evidence not properly before the arbitrator was unreasonable. It was held that:

> "The commissioner also accepted the evidence that the second test was done based on the transcript of the disciplinary hearing. The commissioner accepted this evidence despite the fact that the two security officers who testified during the disciplinary hearing did not testify before her and there was no evidence that

[3] (2008) 29 ILJ 2959 (LC)

> the parties had agreed that the record of the disciplinary hearing would serve as evidence at the arbitration hearing.
>
> It is therefore my view that the conclusion by the commissioner that the second test was done was unreasonable because she arrived at this conclusion on evidence which was not properly before her."

[70] If I am wrong in finding that the arbitrator could not have considered the portion of the record as he did and if the arbitrator was indeed entitled to consider the record of the disciplinary hearing because of the agreement between the parties, another important factor comes into play.

[71] The *audi alteram partem* rule requires that parties and their representatives be given an opportunity to be heard in regards to every matter and every piece of evidence the arbitrator may take into account[4]. Where the *audi alteram partem* rule is not complied with, parties are denied a fair hearing.

[72] *In casu* the arbitrator considered factors that were not canvassed in evidence, he never alerted the parties to the fact that he would use and consider it in deciding the fairness of Mathuse's dismissal and that he never invited the parties or afforded them the opportunity to lead evidence or make submissions on the factors he intended to consider.

[73] Even if the arbitrator was entitled to consider the record of the disciplinary enquiry, he could not have considered it without alerting the parties to the fact that he would consider it, more so where those facts had a material impact on the outcome of the arbitration.

Grounds for review

[74] As already alluded to, the Applicant raised a number of grounds for review but in my view there are two main grounds for review and the Applicant's case is two-fold. On the one hand issue is taken with the arbitrator's finding regarding the appropriateness of the sanction and on the other hand is the issue of reinstatement.

The appropriateness of the sanction of dismissal

[4] *Portnet (A division of Transnet Ltd) v Finnemore and others* (1999) 2 BLLR 151 (LC).

[75] The first main ground for review relates to the finding regarding the appropriateness of the sanction. In summary the Applicant's case is that in deciding the appropriateness of the sanction, the arbitrator considered evidence that was not properly before him, that he failed to analyse the evidence before him holistically, he failed to determine whether Mathuse was guilty of insubordination, that he ignored relevant factors such as the importance of the rule that was breached, the impact of Mathuse's defiance in refusing to comply with the rule and instructions and the impact of Mathuse's conduct on the trust relationship.

[76] The second main ground for review relates to the decision to reinstate Mathuse and on the issue of reinstatement the Applicant's case is that the arbitrator failed to take all the evidence before him into consideration and he misconceived the enquiry.

[77] I will deal with the two main grounds for review separately. However, in my view the manner in which the arbitrator dealt with the evidence that was before him, how he assessed the evidence and the findings he made based on that evidence is central in considering all the grounds for review. A crucial issue to be decided is not only whether the arbitrator ignored relevant evidence, but also whether he considered evidence not properly before him when he considered the appropriateness of the sanction of dismissal.

[78] The arbitrator's finding that the sanction of dismissal was too harsh, was premised on three reasons.

[79] Firstly, that Mathuse was not asked at his disciplinary enquiry whether he was prepared to honour his undertaking to cooperate at a formal enquiry. Mathuse provided positive responses to the questions he previously and consistently refused to respond to when they were posed to him by the arbitrator at the arbitration.

[80] The arbitrator regarded the positive responses as a ground to find the sanction of dismissal too harsh. In this respect he misconceived the enquiry and ignored the evidence adduced by the Applicant in respect of Mathuse's persistent refusal to co-operate and the evidence that it constituted gross insubordination. The arbitrator found that Mathuse refused to co-operate, but made no findings on whether Mathuse was indeed guilty of gross insubordination, despite the fact that

it was a material issue he had to decide and despite the fact that the Applicant adduced evidence regarding Mathuse's misconduct which related to gross insubordination.

[81] Secondly the arbitrator found that the sanction of dismissal was too harsh on account of the 19 mitigating factors raised by Mathuse in the disciplinary enquiry and thirdly on account of the fact that at the disciplinary hearing *'no aggravating factors were raised by the company representative nor were the mitigating factors disputed."*

[82] The mitigating and aggravating factors considered by the arbitrator is nothing more than an extract quoted from the minutes of the disciplinary hearing. The arbitrator found that the mitigating factors were not contested and the Applicant raised no aggravating factors. At the arbitration Mathuse gave no evidence in mitigation of the sanction, let alone traverse the 19 factors the arbitrator listed in mitigation, nor were these factors in mitigation advanced in arguments submitted at the arbitration. The arbitrator's findings in this respect were not based on evidence before him, but were based on a portion of the record no evidence was adduced.

[83] I have already found that the arbitrator was not entitled to consider such portion of the record in the absence of an explicit agreement that the record would stand as evidence. In the event he was so entitled, he should have applied the *audi alteram partem* rule and alerted the parties to the fact that he would consider those factors and afforded them the opportunity to be heard on that.

[84] The fact that the arbitrator considered factors without affording the parties an opportunity to respond thereto by way of evidence or submissions, constituted a disregard for the rules of natural justice and deprived the parties of a fair hearing.

[85] The issue about the determination of the appropriateness of the sanction, however goes further and is to some extent connected to the Applicant's case that the arbitrator misconceived the nature of the enquiry because he did not determine whether Mathuse was guilty of gross insubordination or not. Logic dictates that there should be a finding on guilt in respect of the charge of misconduct before there can be a proper consideration of the appropriateness of the sanction.

[86] *In casu* the arbitrator accepted that the Applicant has shown that Mathuse refused to co-operate with his own investigation. He never made a finding in respect of the misconduct Mathuse was dismissed for and he failed to determine whether Mathuse was guilty of gross insubordination or not. The point of departure of the arbitrator's enquiry into the appropriateness of the sanction, could not have been anything else but that Mathuse merely refused to co-operate with an investigation. The arbitrator approached the determination of the appropriateness of the sanction without making a finding on gross insubordination, a material issue he had to decide first. In considering the appropriateness of the sanction the arbitrator lost sight of the fact that Mathuse was dismissed for gross insubordination.

[87] The Constitutional Court in *Sidumo*[5] has set out the factors to be considered in determining the fairness of the sanction. Those are as follows:

> "In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
>
> To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

[88] A consideration of these factors is glaringly absent from the arbitration award.

[89] This, in my view, flows from the arbitrator's failure to make a finding on whether Mathuse was indeed guilty of gross insubordination or not and is a perpetuation of the failure to decide the material issues.

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[5] (2007) 28 ILJ 2405 (CC) at paras 78 and 79.

[90] *In casu* the minutes of the disciplinary enquiry listed 19 factors in mitigation which the arbitrator regarded and accepted as uncontested and which clearly influenced the outcome of the arbitration. In fact, the consideration of these 19 mitigating factors played a dominant role in the decision that the sanction of dismissal was too harsh.

[91] It is evident that the arbitrator dismally failed to consider any of the factors as set out in *Sidumo* and he equally failed to consider all the relevant circumstances to decide whether Mathuse's dismissal was an appropriate and fair sanction.

[92] The arbitrator was required to determine the appropriateness of the sanction of dismissal *de novo* and independently, based on the evidence placed before him and with due consideration of the relevant factors.

[93] The arbitrator did none of that. He merely repeated factors listed in the minutes of the disciplinary enquiry without any independent determination of the appropriateness of the sanction. The arbitrator dismally failed to carry out his duties when he failed to decide material issues.

Reinstatement

[94] The second ground for review relates to the relief of reinstatement.

[95] The arbitrator found that Mathuse should be reinstated as he did not refuse to answer the questions *in toto*, he only undertook to answer at a formal enquiry and although his conduct was unacceptable, he answered the questions satisfactory when asked at the arbitration. The arbitrator held further that it was unfortunate that that Mathuse was not asked whether he was prepared to answer the questions at his disciplinary hearing after he was found guilty.

[96] The reasoning of the arbitrator in determining an appropriate remedy is astonishing and it is not surprising that the Applicant takes issue with the reinstatement.

[97] The Applicant's case is that on a proper assessment of the evidence, the decision that the sanction of dismissal was inappropriate and reinstatement was appropriate, is unreasonable for a number of reasons. Those are *inter alia* that the arbitrator never determined whether Mathuse was guilty of gross insubordination, he never properly assessed the gravity of Mathuse's

misconduct, he failed to consider the evidence the Applicant's witnesses adduced about the gravity of the misconduct and the breakdown of the trust relationship. What is more is the fact that the arbitrator reinstated Mathuse prospectively, effectively suspending Mathuse for 16 months without pay and the Applicant submitted that this is manifestly irrational and an acknowledgement that the sanction of dismissal was fair.

[98] In finding that Mathuse should be reinstated for the reasons set out in the arbitration award and already alluded to, the arbitrator ignored material evidence and misdirected himself. Had he considered the evidence properly, he could not have ordered Mathuse's reinstatement. For the arbitrator to order prospective reinstatement with 16 months without pay underlines the inappropriateness of reinstatement.

The test on review

[99] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo*[6] as whether the decision reached by the arbitrator is one that a reasonable decision maker could not reached. 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.

[100] In *Goldfields Mining South Africa v Moreki*[7] the Labour Appeal Court held that:

> "In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[101] Following the Supreme Court of Appeal judgment in *Herholdt*[8] and the Labour Appeal Court's judgment in *Gold Fields*,[9] the Labour Appeal Court handed down another important judgment in *Head of the Department of Education v*

[6] *Supra*
[7] (2014) 35 *ILJ* 943 (LAC).

[8] [2013] 11 BLLR 1074 (SCA).

[9] [2014] 1 BLLR 20 (LAC).

Mofokeng.[10] In this judgment the Court provided the following exposition of the review test:

> "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 inquiry. 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 inquiry, 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."

[102] In summary: I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable.

[103] Viewed cumulatively, and in line with the analysis as set out in *Mofokeng,* the arbitrator's failure to consider the evidence adduced or, as the flip side of the same coin, his consideration of evidence that was not properly before him, was material to the determination of the dispute and led him to misconceive the nature of the enquiry.

[10] [2015] 1 BLLR 50 (LAC), para 33.

[104] The arbitrator failed to address the principal issues he had to determine, such as whether Matushe was indeed grossly insubordinate and whether dismissal was an appropriate sanction based on the evidence before him and the factors he had to consider.

[105] Based on the above, I am persuaded that the arbitration award cannot stand and should be interfered with on review.

Relief

[106] This leaves the issue of relief.

[107] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Mathuse's dismissal was procedurally and substantively fair.

[108] Mr Myburgh submitted that in the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter. He submitted that the Court is in as a good position as the MEIBC to decide the matter and should thus finally determine the matter by substituting the award with and order that Mathuse's dismissal was fair.

[109] In my view the the appropriateness of the sanction of dismissal is a material issue to be decided. The Applicant takes issue with the fact that such a material aspect was decided without affording the Applicant an opportunity to lead evidence on it or to make any submissions on it and without hearing any evidence on it, with specific reference to the factors the arbitrator considered in this regard.

[110] No evidence was placed before the arbitrator on the appropriateness of the sanction with reference to the mitigating and aggravating factors that were considered and no such evidence is before this Court to consider. For this reason the Court is not in a position to substitute the award for a finding that Mathuse's dismissal was fair.

[111] The matter should be remitted to the MEIBC as there is not sufficient information on material issues upon which this Court can finally determine the matter.

[112] The remittal is limited and the only issues to be decided are whether Mathuse was guilty of gross insubordination as no finding on this was ever made and

whether dismissal was an appropriate sanction. It follows that the appropriate relief will be decided *de novo* after proper consideration of the aforesaid issues.

[113] The remittal of the aforesaid issues and the determination thereof is to be done on the existing transcribed record of the arbitration proceedings.

[114] Mr Myburgh stated that the Applicant is not seeking a cost order against Mathuse. I agree with the Applicant's position in respect of costs as this is a case where the conduct of the arbitrator deprived the parties of a fair hearing and the interests of justice and fairness would at this stage be best served by no cost order.

Order

[115] In the premises I make the following order:

1. The arbitration award issued on 27 November 2013 under case number MEKN 6605 is reviewed and set aside in the following extent:

2. The arbitrator's findings on procedural fairness are confirmed.

3. The matter is remitted to the MEIBC in relation to substantive fairness on the following terms:

   3.1 The only issues to be decided *de novo* are whether the First Respondent was guilty of gross insubordination and whether dismissal was an appropriate sanction;

   3.2 The appropriate relief if any, is to be decided *de novo* after determination of the aforesaid issues;

   3.3 The determination of the issues set out in paragraph 3.1 and 3.2 of this order is to be made on the existing transcribed record of the arbitration proceedings;

   3.4 The presiding arbitrator may permit the parties to adduce evidence on the appropriateness of the sanction.

4. There is no order as to costs.

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C. Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant : Advocate A Myburgh SC

Instructed by : Norton Rose Fulbright South Africa Inc Attorneys

For the First and

Second Respondents: Advocate P Schumann

Instructed by : Brett Purdon Attorneys