IN THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

Reportable

CASE NO: J190/15 & JR2361/16

In the matter between:-

PASSENGER RAIL AGENCY

OF SOUTH AFRICA **Plaintiff**

and

SHIRLEY MOREKI **First Respondent**

COMMISSIONER TERRENCE SERERO N.O. **Second Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Third Respondent**

Heard: 08 March 2017

Delivered: 28 March 2017

Summary: Rescission sought against a default judgment granted in terms of section 158(1)(c) of the LRA. Applicant had filed notice of opposition

without answering affidavit to the rescission. No notice of set down served on applicant. Rescission granted on strength of paragraph 11.4.1 of the Practice Manual which is clearer than Rule 7(6) and (6A) read with section 165 of the LRA. Review of arbitration award which found dismissal to have been both procedurally and substantively unfair. Arbitrator had found the informal procedure followed by the employer to have been unfair since no exceptional circumstances had been established in terms of item 4(4) of Schedule 8 to the LRA. Court found that the minimum standards set out in item 4(1) of the Schedule were independently sufficient to satisfy procedural fairness without reference to the requirements of sub-item(4) thereof. On substantive fairness, the arbitrator failed to consider all the charges and evidence adduced. Review granted and award set aside.

JUDGMENT

SKOSANA AJ

[1] This matter involves several applications which were consolidated by a court order. Only the review and rescission applications are subject matters of this judgment since it was agreed between the parties with the permission of this Court that only these two applications be dealt with. The other applications are ancillary and dependent on the outcome of these two. Throughout this judgment I refer to the Passenger Rail Agency of South

Africa (PRASA) as applicant and Ms Shirley Moreki as the respondent notwithstanding the different manner in which they are cited in the various applications.

Brief Background

[2] The respondent was employed as an area manager by the applicant but was subsequently dismissed from her employment on 29 October 2014. The dismissal followed the finding of guilt on the following charges of misconduct:

> 2.1 Gross negligence, in that, the respondent in her capacity as area manager at Area 1 West, during August and October 2013 negligently and recklessly failed to keep proper detailed stock control register or records of rolls received by her or staff in her office, indicating the movement and utilization of ticket rolls while she knew that it was wrong to do so;
>
> 2.2 That during the same period and in the same capacity she carelessly failed to detect that the box marked 186 was missing or stolen from New Canada storeroom until it was discovered on 17 October 2013, abandoned at Phomolong station while she was responsible for control and management of all ticket roll material in her area;
>
> 2.3 That during the same period and in the same capacity, she negligently failed to detect that the box marked 186 with roll numbers 85916, 85977, 85978, 85979 and 85980 was missing or

stolen from New Canada storeroom, which could have sold approximately 9000 train tickets to the value of R1 800 000-00 and which caused potential loss to Metrorail;

2.4 That in the same period and capacity, she circulated a false list of boxes and TIM roll numbers to Protection and Security and South African Police Services ("SAPS") alleging theft which resulted in a wasteful investigation being embarked upon by the Protection and Security department which was caused by her failure to verify the truthfulness of the incident;

2.5 That in the same period and capacity she negligently provided a false list of boxes as stolen, thereby influencing and compelling the company to conduct polygraph testing to customer services employees including herself, thereby causing trauma to staff and monetary loss to the company;

2.6 Gross dereliction of duties in that she, in the same period and in the same capacity, abdicated her responsibility to junior officials by giving or delegating the keeping and recording of roll stock to junior officials without providing guidance and direction;

2.7 Gross misconduct in that during the same period and capacity she failed to carry out her responsibility as a manager to ensure that the ticket rolls are kept safely and recorded;

2.8 That in the same capacity and period, she failed to secure a box marked 186 with ticket roll numbers 85916, 85977, 85978, 85979 and 85980, which cost approximately R137-83 each;

2.9 That in the same capacity and period, she caused unnecessary and fruitless expenditure in that Metrorail had to acquire and pay for a series of polygraph tests conducted on some of the customer services employees including herself;

2.10 Gross dishonesty in that in the same capacity and period, she was dishonest in intentionally and falsely writing a report stating that the ticket rolls were stolen;

2.11 That in the same period and capacity, she was grossly dishonest by reporting TIM rolls as stolen while she had personally taken them to Mr. Deon Strydom's office; and

2.12 That in the same period and capacity she became dishonest by falsely stating that Mr Mbetse had returned and transported the Durban ticket rolls stock to the regional office.

[3] The respondent referred the dispute to the CCMA alleging that her dismissal was both substantively and procedurally unfair. The arbitrator found that indeed the dismissal was both procedurally and substantively unfair. I shall return to the details of this finding of the arbitrator when I deal with the review application. The arbitration award is dated 04 September 2015 and the applicant alleges that it had received it on 07 September 2015.

[4] On 01 October 2015, the respondent brought an application to this Court to make the arbitration award an order of court in terms of section 158(1) (c) of the Labour Relations Act[1](LRA). The respondent alleges that the application was not opposed as a result of which she applied for its set down. In the meantime, and on 30 November 2015, the applicant lodged a review application containing a condonation application for the late filing of such review, and seeking to stay any judgment or order that may have been granted against it pending the outcome of the review. It also sought to stay any execution process that might have been brought as well pending the review.

[5] The section 158(1)(c) application was heard on 23 February 2016 by Mahosi AJ and the arbitration award was made an order of court. Such order was granted in the absence of the applicant.

[6] Apart from other interlocutory legal processes, the applicant brought an application for rescission of the court order of Mahosi AJ. Such rescission application was brought in June 2016 wherein an order condoning the late filing thereof was also sought. Both the rescission and the review applications are opposed by the respondent.

Rescission Application

[7] The applicant contends that when it brought the review application it was not aware that there would be a necessity to seek rescission of a court order. In other words, the review application was brought before the arbitration award was made an order of court.

[1] Act 66 of 1995

[8] The applicant contends further that, as it had filed a notice of opposition to the rescission application, clause 11.4.1 of the Labour Court Practice Manual applied and required the respondent to request the Registrar to enroll the application on the opposed roll and to serve a notice of set down on all parties. Clause 11.4.1 of the Practice Manual provides:

> "11.4.1 If the respondent has delivered a notice of intention to oppose but failed to deliver an answering affidavit within the prescribed time limit, the Registrar must at the request of the applicant, enroll the application on the opposed roll and serve a notice of set down on all parties".[emphasis added]

[9] The applicant submitted that this was not done as a result of which it was not aware that the rescission application had been set down for 23 February 2016 and consequently, the order was granted erroneously in its absence as contemplated in section 165 of the LRA.

[10] As regards condonation, the applicant submits that it had brought an urgent application for the staying of execution immediately after learning of the default court order which knowledge came to it through the service of the respondent's application to execute such court order. After the urgent application had been dismissed for lack of urgency, it sought undertakings from the respondent not to execute the court order but to no avail. The applicant also emphasized that there are good prospects of success of the review application and that in the circumstances condonation ought to be granted.

[11] In response to the applicant's submissions, the respondent who was represented by Mr Majare, submitted that the rescission application was

properly served and that, though the applicant had filed a notice of opposition, it did not file an opposing affidavit and therefore it was not entitled to be notified of the date of hearing of the rescission application. The respondent submitted that paragraph 11.4.1 of the Practice Manual deals with a situation where the opposing affidavit is filed out of time and not a situation where it has not been filed at all.

[12] The respondent further referred to Rule 7(6) (b) and (6A) of the Labour Court Rules which provide as follows:

> "(b) The Registrar must notify the parties of the date, time and place for hearing of the application but need not notify a respondent who has not delivered an answering affidavit in support of its opposition of the application.
>
> (6A) An application to make a settlement agreement or arbitration award an order of court which is unopposed must be enrolled by the Registrar on notice to the applicant. The court may make any competent order in the absence of the parties."

[13] The respondent argues, on the basis of this Rule, that the applicant was not entitled to a notification of the date of hearing of the rescission application.

[14] As far as condonation is concerned, the respondent insisted that there is a lack of explanation of the period from 03 May to 03 June 2016.

[15] It is clear from the above that the main issue in the rescission application is whether or not the applicant was entitled to be notified of the set down of the rescission application in view of the fact that it had only filed the notice of opposition and not an opposing affidavit. In my view, the fact that the Rule requires a notice of opposition to be filed separately from, though simultaneously with, the answering affidavit is an indication that the notice

of opposition has a particular purpose to serve. I enquired from the respondent as to whether the notice of opposition is merely a useless piece of paper to which I did not receive a clear response.

[16] Paragraph 11.4.1 of the Practice Manual is much clearer than Rule 7(6) and (6A). It places an obligation on the applicant to request the Registrar to, first, enroll such an application on the opposed motion roll and second, to serve a notice of set down on all parties. I agree with Mr. Adonis representing the applicant that the respondent did not argue that the provisions of the Practice Manual were unenforceable in this regard or that they were superseded by those of Rule 7(6).

[17] Moreover, Rule 7(6A) which refers to a section 158(1)(c) application states that when such application is unopposed, it must be enrolled by the Registrar on notice to the applicant. I have serious misgivings in the argument that 'unopposed' application includes an application where a notice of opposition has been filed without an answering affidavit. Rule 7(6) does not specify whether such an application should be set down on an opposed or unopposed roll, while the Practice Manual fills that lacuna by providing that it be set down on an opposed roll and parties thereto be notified thereof. It is therefore my conclusion that the respondent had to ensure that the applicant is served with a notice of set down or somehow notified of the date of hearing of the rescission as contemplated by the Practice Manual.

[18] Having concluded as stated above, the need for a long explanation in the condonation application is eliminated. In other words, if the applicant was not aware of a date of hearing of the rescission application and only became aware thereof at a time when the respondent sought to execute, there is no need for an explanation for the period up to the time of such application for execution of the default order. The respondent has raised an issue about the period from 03 May to 03 June 2016. In my view, such period of delay, if any, is negligible, in view of the total delay that has taken place in this matter. Moreover, it is clear from the totality of the facts in this case that the applicant was not merely sitting back and doing nothing about the matter but tried as much as it could, taking into account the disappointments and ill advices that may have been given, to bring this matter to finality and at no stage abandoned its rights to pursue the matter.

[19] I am also of the view that the review application raises some important legal issues some of which have not been clearly pronounced upon by this Court and the Labour Appeal Court. That is already an indication that there are reasonable prospects of success of the review application which is all that must be satisfied under this requirement of good cause.

[20] Even if I am wrong in the assessment of good cause, the applicant has satisfied the requirements of section 165(a) of the LRA, namely that the judgment was sought and/or granted in error and in the absence of the applicant. In *Mutebwa v Mutebwa*[2], the Constitutional Court clarified the

[2] 2001 (2) SA 193 (CC) paras [15] and [16]

position as follows in relation to Rule 42(1)(a) of the Uniform Rules, which is worded in similar terms as section 165(a) of the LRA:

> "[15] I shall now consider whether a proper case for rescission has been made under Rule 42 of the Rules of the High Court. Rule 42(1)(a) empowers the Court to rescind an order erroneously sought or erroneously granted in the absence of the party seeking rescission provided that such party is affected by such order or judgment. The prerequisite factors for granting rescission under this Rule are the following. Firstly, the judgment must have been erroneously sought or erroneously granted; secondly, such judgment must have been granted in the absence of the applicant; and, lastly, the applicant's rights or interest must be affected by the judgment."
>
> [16] Once those three requirements are established, the applicant would ordinarily be entitled to succeed, *cadit quaestio*. He is not required to show good cause in addition thereto. See *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) at 578G; *De Sousa v Kerr* 1978 (3) SA 635 (W)."

[21] I am satisfied that the applicant is entitled to succeed on the latter basis as well. I therefore find that in the conspectus of the evidence placed before me, a proper case has been made out by the applicant for the rescission.

Review

[22] The review application is essentially based on the contention that the award is not reasonable and is irrational in view of the facts that were placed before the arbitrator as outlined above. The arbitrator found that the dismissal of the respondent was both procedurally and substantively unfair.

[23] As far as procedural unfairness is concerned, the arbitrator based his finding on the fact that no formal or oral disciplinary hearing had been held against the respondent. In brief, the following took place, and is common cause between the parties:

23.1 The applicant had commissioned an investigation into the alleged burglary and theft of ticket rolls at new customer services Area 1 West and also the discovery of Durban TIM rolls at Phomolong station. In its report, the investigation team concluded, among other things, that the respondent had committed a number of acts of misconducts.

23.2 As a result of the investigation, the applicant issued a notice of disciplinary hearing against the respondent in which it set out the charges as paraphrased above. The charges were served on the respondent on 16 April 2014.

23.3 There were various delays in the disciplinary process up to 15 October 2014 when the applicant issued a notice to the respondent requesting her to file written representations against the adverse findings made in the investigation report and the acts of misconducts as contained in the charge sheet. The letter also cautioned the respondent that should no written representations be made, management will take a decision on the basis of the information at hand.

23.4 The respondent responded to such letter by stating that she was entitled to an oral disciplinary hearing and requested that such hearing be held. She did not, however, deal with any of the allegations contained in the letter nor did she seek further information or documentation in order to be able to make such representations. As warned in the letter, the applicant then took a decision to dismiss the respondent and informed the respondent accordingly.

[24] On the basis of the above facts, the applicant contends in the review proceedings that it relied for the procedure in question on item 4 of Schedule 8 of the LRA as well as its Disciplinary Code.

[25] For the sake of completeness, I quote the relevant provisions of item 4 of Schedule 8 of the LRA:

"***4 Fair procedure***

(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

(2)…

(3)…

(4) In exceptional circumstances, if the employer cannot reasonably be expected to comply with these guidelines, the employer may dispense with pre-dismissal procedures."

[26] For the purpose of this judgment, it is only necessary to refer to the argument of the respondent. The respondent argues that the relevant part of the schedule is item 4(4) which requires exceptional circumstances to exist and reasons why the employer cannot reasonably be expected to comply with the guidelines before the procedure followed by the applicant could be applied. The respondent therefore concludes that the arbitrator was correct in stating that the applicant did not prove exceptional circumstances since the delay in the conclusion of the arbitration proceedings was not exclusively due to the fault of the respondent and that in fact a number of postponements had been occasioned by the applicant and in any event the presiding officer had a discretion to refuse any postponement in appropriate circumstances.

[27] I am in disagreement with the submissions made by the respondent and the interpretation accorded by the arbitrator to item 4 of Schedule 8. This item of Schedule 8 makes the following compulsory requirements as a minimum standard for a fair procedure, namely:

27.1 That an investigation should be conducted to establish whether there are grounds for dismissal and that investigation does not need to be a formal enquiry. A formal enquiry is in this context a reference to an oral hearing set-up.

27.2 The employer must notify the employee of the allegations and be sure that the employee understands such allegations;

27.3 The employer should allow the employee an opportunity to state a case in response to the allegations;

27.4 The employer should allow the employee a reasonable time to prepare the response and to the assistance of a trade union representative or a fellow employee; and

27.5 Finally, after the enquiry the employer should communicate its decision to the employee preferably in writing.

[28] The above stated requirements constitute a minimum standard for procedural fairness in respect of a dismissal[3]. The above requirements relate both the oral disciplinary hearing and a disciplinary process through correspondence such as the one that occurred in this case.

[29] Item 4(4) of Schedule 8 deals with a situation where the employer wishes to dispense with the pre-dismissal procedures and such pre- dismissal procedures are those that conform to the standard set out in sub-item (1) of item 4 as outlined above. In other words, where the employer wishes to dispense with the standard set out in sub-item (1), it must comply with the requirements of sub-item (4). This would be the case, where for instance, the employer does not afford the employee an *audi* or pre-dismissal process because witnesses are afraid to testify[4], or where it is impossible to serve the disciplinary notice on the employee. In that case, the employer cannot reasonably be expected to comply with the guidelines in sub-item (1) and, upon showing exceptional circumstances, it is permitted to dispense with the procedures that must normally precede a dismissal.

[3] *Avril Elizabeth Home for the Mentally Handicapped v CCMA* [2006] 9 BLLR 833 (LC) at 838
[4] *FAWU v Premier Foods Ltd* [2010] 9 BLLR 903 (LC)

[30] The respondent referred me to the decision of this Court in *Nkosinathi Khena v PRASA*[5] where the Court held in relation to the Disciplinary Code of the applicant, as follows:

> "…..The Disciplinary Code has to be considered holistically and it is evident that it makes provision for a system of corrective and progressive discipline and accept that a formal disciplinary process would not be necessary where the misconduct or transgression is of a less serious nature and the corrective measure is counselling or the imposed sanction is a verbal or a written warning. However, where the charged employee is as senior as the Applicant, where the charges are seemingly serious and the possible outcome is dismissal, it can hardly be argued that a formal disciplinary process should not be invoked under those circumstances. More so, where the employer elected to appoint a chairperson and prosecutor……"
>
> Furthermore the Applicant's case is PRASA elected to proceed with a formal disciplinary enquiry when it issued a charge sheet on 24 October 2016 wherein it was recorded that the applicant has a right to be legally represented, to give evidence and call witnesses and to cross examine PRASA's witnesses. Having conferred these rights upon the Applicant, PRASA was not at liberty to unilaterally withdraw them."

[31] I am in respectful disagreement with the findings made in the above case.

31.1 First, nowhere in item 4 of Schedule 8 is there a reference to the informal procedure being applicable only in serious cases or in cases of employees who are not in the upper echelon of employees. This item deals particularly with dismissal, the ultimate serious cases in the employment environment.

31.2 Further this is not expressly provided for in the disciplinary code of the applicant. Anyway, it was not the respondent's case in the present proceedings that the procedure applied by the applicant was only applicable in less serious cases and to junior

[5] *[2016] ZALCJHB 457* at para [34] to [35],

employees. So in that regard, the case relied upon by the respondent is distinguishable from the present one.

31.3 The selective application of the requirement of procedural fairness to senior employees is also unjustified.[6] On the contrary, the Labour Appeal Court[7] has expressed the view that the intention of the LRA is to do away with rigid procedural requirements, and the principle that an employee need merely be given an opportunity to state a case, applies even more strongly where senior managerial employees are involved.

31.4 Second, it is not clear what is meant by the conferral of a right and the unilateral withdrawal thereof. If the disciplinary code and the Code of Good Practice (Item 4 of Schedule 8) make room for a less formal process to be followed (as opposed to a formal oral disciplinary enquiry), it ought to be open to the employer to follow anyone of such processes as long as such process complies with the minimum standard set in item 4(1). The respondent did not seek to argue that either the Disciplinary Code of the applicant was legally invalid or that Schedule 4(1) was not applicable or was legally unenforceable for some or other reason. Furthermore, the applicant has not waived its right or prerogative to follow the less formal process.

31.5 The legal concept of '*election*' in the contractual context, applies where a party has to make an election between two inconsistent and mutually exclusive remedies. Once he has elected one of the remedies such as specific performance, he is taken to have abandoned the other such as claiming cancellation and damages as he cannot approbate and reprobate[8].In this case, there is no question of remedies in the first place and the two pre-dismissal

[6] *Nitrophoska (Pty) Ltd v CCMA* [2011] BLLR 765 (LC)
[7] *JDG Trading (Pty) Ltd t/a Price ' n Pride v Brundson* (2000) 21 ILJ 501 (LAC); *Somyo v Ross Poultry Breeders* (Pty) Ltd [1997] 7 BLLR 862 (LAC)
[8] *Absa Bank Ltd v Moore and Another* 2017 (1) SA 255 (CC) para 35

processes are not inconsistent with each other or mutually destructive. There is also no contention that the process applied fell short of the minimum standard set out in the Code of Good Practice or the applicant's disciplinary code.

31.6 As far as stringent procedural standards set out in the disciplinary code are concerned, the LAC pronounced itself as follows, in *Highveld District Council v CCMA*[9]:

> "The mere fact that a procedure is an agreed one does not, however, make it fair. By the same token, the fact that an agreed procedure was not followed does not in itself mean that the procedure actually followed was unfair."

In Avril Elizabeth Home for the Mentally Handicapped v CCMA**[10]**, Van Niekerk AJ (as he then was) stated thus:

> "When the Code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by item 4 of the Code requires the conducting of an investigation, notification to the employee of any allegations that may flow from that investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee."

31.7 In my view, the propriety or otherwise of the procedure followed should be assessed, not on the basis of an earlier election or the existence or absence of exceptional circumstances but rather on whether or not the chosen process resulted in a proper ventilation of the issues raised and consequently in procedural fairness.

---

[9] (2003) 23 ILJ 517 (LAC) para 15
[10] (supra) at 841

31.8 Where the informal process is chosen by the employer, the question whether or not there has been such proper ventilation of issues can only be answered in the light of the representations made by or on behalf of the employee. It follows that where the employee has failed to make representations as to the charges or allegations in issue, as in the present case, the question of procedural fairness does not arise in that regard. The employee cannot complain that she was not afforded the *audi* when she did not state by way of written representations as to which aspects she deserves an oral hearing.

31.9 In fact, the applicant in this case may have resorted to this informal process precisely to determine from the requested written representations whether or not the respondent had any defence or a defence that warranted an oral hearing or she was merely fancifully defending for the purposes of delay, as in the situation of a summary judgment application.

[32] Similarly, the respondent's reliance on the case of *Solidarity*[11] is ill-conceived. The paragraph quoted from that case states[12]:

> "It is clear that until the SABC issued the schedule 8 notices, the more comprehensive hearing contemplated in its disciplinary code was precisely the kind of disciplinary proceeding it envisaged. When it issued the schedule 8 notices, the contents of those notices merely called on the applicants to respond to charges stated in the vaguest form, without offering any form of hearing of the kind previously envisaged…. A plain reading of that provision does not support the SABC's interpretation that it provides it with an election between different procedures. The most plausible interpretation of the provision is that, an employee is entitled to a disciplinary procedure that conforms both with the SABC code and procedures and with schedule 8".

[11] *Solidarity v South African Broadcasting Corporation* [2016] ZALCJHB 273 at para [49]
[12] At para 50

[33] On a close reading of the above quotation it becomes clear that the facts of that case are distinguishable from those of the present case in that the disciplinary code of the SABC contained particular provisions which emphasized the importance of holding an oral disciplinary hearing. Moreover, the court found that the contents of the notices which were given to the employees in that case were vague and did not offer any form of hearing of the kind previously envisaged. In the present case, there is no contention that the notice given to the respondent was vague in so far as the allegations against her were concerned. In fact, the notice referred to the investigation report and also attached the charges against the respondent. It is the respondent who elected not to make written representations as requested despite the clear warning of the consequences thereof. The applicant was left with little choice but to consider what was placed before it through the investigation report without the benefit of the respondent's written representations as requested. The process followed may have been unfortunate but I do not see any basis for finding such process to have been unfair as contemplated in the LRA.

[34] In the result, I am of the view that the arbitrator misapplied the provisions of the applicant's disciplinary code as well as the provisions of the Code of Good Practice in finding that the applicant had to establish exceptional circumstances before applying the informal procedure and that, since such exceptional circumstances were absent, the procedure followed was unfair. The corollary is that the arbitration award is unreasonable or irrational in that regard.

[35] As far as the merits are concerned, the applicant argued that the arbitrator focused on only one charge against the employee in the midst of many charges. When confronted with this question, the respondent's representative could only refer to a portion of the arbitration award where the arbitrator merely enumerated the charges against the respondent but he could not show me any portion where the other charges, other than the first

one, were dealt with. Actually, this point was conceded on behalf of the respondent.

[36] I am in any event of the view that the evidence presented before the arbitrator was sufficient for the finding of guilt on the charges preferred against the respondent. The respondent essentially raised the defence that her subordinates in her area of operation were responsible for the violations. Her defence was not that there was no violation or breach of the set standard for the areas concerned. I have a difficulty in accepting the arbitrator's finding that the subordinates ought to have been held accountable for such occurrences and that the respondent was exonerated therefrom. It is obvious that the buck stops with her as the head and the accounting officer for those areas and divisions.

[37] In the result, I find that the arbitration award does not pass the threshold of reasonableness when regard is had to the evidence placed before the arbitrator and the conclusion that he reached. Consequently, the applicant has made out a case for the review of the award.

[38] I need not deal in details with the well-established body of our case law regarding the reasonableness test of an award. However, I find it imperative to quote the decision of *Goldfield Mining SA (Pty) Ltd v CCMA*[13], where the Labour Appeal Court held as follows:

> "…The enquiry... extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material".

[39] My conclusion is that the decision of the arbitrator in the present case falls outside the band of decisions to which a reasonable decision-maker could come on the available facts.

[40] As regards costs, both parties submitted that costs should follow the result. However, I must take into account the complex principles raised in this matter which in my view have not yet been clarified by the body of existing

[13] [2014] 1 [BLLR] 20 (LAC) at para [14]

case law. I also understand that a person who is not subjected to a disciplinary process in the conventional sense before her dismissal would want to test the correctness of the procedure followed, particularly in the absence of clarity of our law in that regard.

[41] Consequently, I make the following order:

Order

1. The applications for condonation for the late filing of the rescission and review applications are granted.
2. The rescission application is granted.
3. The application for review is granted.
4. The arbitration award is hereby reviewed and set aside.
5. The dismissal of the respondent is both procedurally and substantively fair.

6. There is no order as to costs.

_____
DT Skosana
Acting Judge of the Labour Court

Appearances

For the Applicant : Mr L.P Adonisi

Instructed by : Msikinya Attorneys & Associates

For the Respondent: Mr DM Majare

Instructed by : Majare Attorneys