THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JR 2514/13

In the matter between:

GLOBAL SUPPLY CHAIN SERVICES (PTY) LTD t/a GLOBALTRACK	Applicant
And	
HENDRICUS VAN SPAENDONCK	First Respondent
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second respondent
RAFFEE, NASIMA *N.O*	Third Respondent

Heard: 16 February 2017

Delivered: 27 February 2017

Order Corrected: 3 March 2017

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award issued by the third respondent (the arbitrator). In her award, the arbitrator found that the first respondent (the employee) had been unfairly dismissed by the applicant, and ordered that he be compensated in an amount equivalent to 12 months' remuneration, some R 950 000.

Factual background

[2] The material facts are recorded in the award under review and I do not intend to repeat them here. It is sufficient to state that the employee was engaged during 2009 as the applicant's chief operating officer. The applicant's chief executive officer (and sole shareholder) is Pieter Smits. In terms of the employee's contract of employment, he was entitled to the use of a company credit card. The relevant term of the contract assumed some significance in the arbitration proceedings. It reads as follows:

> 3. Expenses
>
> GSCS undertakes to reimburse Hein for all expenses necessarily incurred in the course and scope of his carrying out of his duties which expenses may include travel, cell phone accommodation, but not limited thereto. Expenses outside the normal scope of business above R5000.00 need to be authorised by the CEO.

[3] During February 2013, the employee was required to attend a disciplinary enquiry to answer to charges of fraud, alternatively, gross dishonesty. The basis of the charges was an allegation that the employee had used the company credit

card to incur personal expenses, and that he had misrepresented to the applicant alternatively failed to disclose his liability in respect of the purchases when it was incumbent on him to do so.

[4] The disciplinary enquiry was conducted by an independent chair. The employee was found guilty of the charges and dismissed.

[5] The employee did not dispute that he had used the company credit card to incur expenses of a personal nature. These included expenses related to renovations that the employee had effected to his home, treating his girlfriend to theatre productions and dinner, paying golf club fees and the like. At his disciplinary enquiry, the employee contended that in terms of clause 3 of his employment contract, he was entitled to incur personal expenses to a value of less than R 5000 on the applicant's account. This contention was rejected by the chair of the enquiry. In the arbitration hearing, the employee contended that there was a tacit agreement between him and Smits to the effect that that they were both entitled to use the company credit card to incur personal expenses within reasonable limits, and that in terms of this agreement, they both claimed expenses of a personal nature.

The award

[6] In her award, the arbitrator acknowledged the dispute of fact that served before her. Contrary to the employee's version, Smits had testified that the employee had no right in terms of his contract of employment or otherwise to use the company credit card for personal expenses. He testified that he (Smits) maintained a strict distinction between business and personal expenditure, that he did not use the company credit card to incur the personal expenses and that no other employee used business credit cards for personal expenditure.

[7] The arbitrator recognised that the dispute stood to be resolved on a balance of

probabilities. Her resolution of the factual dispute and her reasoning are apparent from the following paragraphs:

> 60. In determining the probabilities of the versions before me I cannot view the events in a vacuum. It is common cause that the Applicant and Smits were extremely good friends and their working relationship emanated from this friendship.
> 61. I also take cognisance of the fact that at no stage did the applicant attempt to conceal the fact he had made private purchases on the company credit card. At all times he was forthright with regard to purchases made on the company credit card. This is not indicative of an intention to defraud the company.
> 62. The applicant justified his use of the business credit card for private purchases in terms of clause 3 of the contract. Smits interpreted this clause of the contract. Smits interpreted this clause to mean that if the applicant was required to do something outside of the normal scope of his duties, for example, purchase a printer which could be more than R5000.00 he would need to obtain permission. If the printer was less than R5000.00 he would not require Smits permission.
> 63. Clause 3, is clearly ambiguous. Expenses outside the normal scope of business could well mean purchases of private nature, and if, exceeding R5000.00 would have to be authorised by Smits. There is no doubt that the applicant interpreted the clause as such, because all of his private expenses, save for the coastal hire transaction, were under R5000.00.
> 64. The applicant explained that he had hired equipment for a coastal hire and that he was under the impression that the deposit on the equipment would be reserved and not passed through as a sale transaction.
> 65. Although the applicant was negligent in not ensuring the whole amount would be debited to the respondent, I am not convinced that he intended to defraud the respondent. The applicant also claimed to have sometimes used the business credit card in error. It was noted that if he mixed up the cards that the reverse situation would happen, that is that he would use is (sic) personal credit card for business purchases. However this was an assumption drawn by the respondent, because no evidence was presented to show that the applicant never used his personal credit card for business purchases.

66. It was pointed out that the applicant's private expenditure on the business card became more frequent. This could be attributed to the applicant being cash strapped as a result of the renovations of his house. This might well be the case. However, it is interesting to note that the applicant at no stage attempted to conceal these transactions or make an attempt to pass them off as business expenses. He admitted the expenses for what they were.

67. The applicant cited examples where Smits had used his business credit card for personal expenditure. One example was where he filled his girlfriend's car with petrol using the business card, and, the applicant spoke of times they would go out and joke about the director was going to pay that night. Smits was unable to recall these incidents and his responses to it was a bare denial, that it never happened. This is improbable.

68. The applicant's defence was always that he has from time to time the business card was issued to him, use it for personal expenses and he listed transactions dating to 2010. The nature of some transactions blatantly of a personal nature.

69. It is highly improbable that it would have escaped the scrutiny of Kirchner, Smits and Vogel as Smits described himself meticulous.

70. With regard to charge 2, the respondent's evidence was that the applicant committed a further misconduct by not disclosing his private expenditure on the company credit card after having given the opportunity to "come clean". The applicant was asked to disclose "other deductions". Why would the applicant disclose his private expenses? He had never done so in the past

71. Furthermore the respondent asked for disclosure in a somewhat surreptitious manner. When the applicant was directly confronted with accusations, he was frank about his use of the company credit card for private expenditure. This indicates that there was no interest to defraud the respondent. If there was, surely he would have attempted to conceal the transactions.

72. On the evidence before me, I find the dismissal to be substantively unfair.

Grounds for review

[8] The grounds for review raised in the founding affidavit broadly concern the arbitrator's dealing with the evidence. In particular, the applicant contends that

the arbitrator failed to apply her mind to the evidence before her and failed to draw rational conclusions from that evidence; that she arrived at conclusions not supported by the evidence before her; that she misconstrued the incident of onus; and that she failed to take into account the totality of the circumstances in determining the matter. As a consequence, the applicant contends that the arbitrator reached a decision which no reasonable decision-maker could have reached on the available evidence. The applicant's grounds were amplified in argument when applicant's counsel submitted that the arbitrator failed to appreciate that the employee stood in a fiduciary relationship to the applicant, and that he was not entitled to use the applicant's funds for his own purpose. This failure had the consequence that the arbitrator applied 'wrong principles' and that she sought to justify and give credence to what amounted to unlawful conduct.

The applicable legal principles

[9] The applicable legal principles are not in dispute. The test established by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) and affirmed by the Supreme Court Of Appeal in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae [2013] 11 BLLR 1074 (SCA) empowers this court to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. What this amounts to is an outcomes-based enquiry. The Labour Appeal Court has made clear that reasonableness does not equate to correctness and that a decision made by an arbitrator that is wrong will pass muster provided it is not so wrong as to be unreasonable (see *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) per Davis JA, who at paragraph 18 of the judgment emphasised the need to distinguish between reviews and appeals).

[10] The manner in which the review court should assess the evidence that served before an arbitrator to determine the reasonableness of the result was the subject of a judgment by the Labour appeal Court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 197 (LAC). The LAC (per Waglay JP) held as follows:

> In a review conducted under section 145(2) (a) (ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award as improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.

[11] In other words, even if an applicant in a review application is able to identify some misdirection on the part of the arbitrator (for example, as in the present instance, a failure to consider material facts or to attach weight to relevant evidence or attach weight to irrelevant evidence and the like), that is not in itself a basis for a review for want of reasonableness; the resultant decision must fall outside of a band of decisions to which a reasonable decision-maker could come on the same material.

[12] The LAC more recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In *Head of Department of Education v Mofokeng and Others* [reference] Murphy AJA said the following:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [(2013) 34 *ILJ* 2795 (SCA)]and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* [(2014) 35 *ILJ* 943 (LAC)]; have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the

reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

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

Analysis

[13] Turning then to the merits of the application, as I have indicated, the applicant attacks the outcome of the arbitration proceedings as unreasonable primarily on account of the arbitrator's failure properly to assess the evidence before her. It should be recalled that during the arbitration proceedings (and indeed throughout the disciplinary hearing), the employee did not dispute having incurred personal expenses on the company credit card. In essence, the issue that the arbitrator was required to decide was whether the employee, as he contended, was entitled to do so or whether his use of the card was dishonest. It is also not in dispute that the employee's defences to the charge of dishonest conduct were variously that the terms of his contract entitled him to incur personal expenses on the company credit card, that there was a tacit agreement between him and Smits that he could do so, and that he had on occasion used the company credit card in error.

[14] The extract from the arbitration award quoted above suggests that the arbitrator upheld all of these defences. She did so first by concluding that the terms of clause 3 of the employment contract were 'ambiguous' and that subjectively, the employee had interpreted the clause to mean that he was entitled to incur personal expenses on the company's account provided the amounts were less than R5 000. This interpretation was sustained on the basis that but for one transaction, the admitted personal expenses did not exceed that limit. The arbitrator also appears to have found that that there was a tacit agreement between the first respondent and Smits to the effect that the first respondent was permitted to incur reasonable personal expenses on the card. Although there is no express finding of a tacit agreement, the arbitrator finds that the employee had not concealed the affected transactions or passed them off as business expenses, that Smits had used his own card for personal expenses and that the nature of the employee's claims could not have escaped the attention of Smits and the applicant's bookkeeper. On this basis, it would appear, the arbitrator suggests that there was an agreement to the effect that the employee was

entitled to incur reasonable personal expenses on the card. Thirdly, the arbitrator found that although the first respondent's conduct in using the company credit card could amount to negligence on his part, he had not been dishonest because he could have 'mixed up' the cards.

[15] The reviewability of factual findings is all the more difficult to assess when the arbitrator fails to adopt the correct approach to the determination of factual disputes. The manner in which factual disputes are to be determined is set out in *SFW Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), where the Supreme Court of Appeal said the following:

> The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and it evaluation of the

> general probabilities in the other. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail' (at 14 I -15 D).

[16] The arbitrator failed to make any findings as to the credibility of the parties' respective witnesses, or their reliability. Instead, the arbitrator omitted these steps and went directly to consider what she regarded as the probabilities of the respective versions before her. There are a number of indications on the record that have a direct bearing on the employee's credibility. The employee stated on a number of occasions that he intended to call particular witnesses to corroborate his evidence - he failed to call a single one. The arbitrator ought to have drawn an adverse inference, or at least factored this into the assessment of credibility. Further, the arbitrator did not have regard to the employee's admitted changing and mutually contradictory versions relating to the basis for his entitlement to incur personal expenses on the company credit card. This too was relevant to a credibility enquiry.

[17] In short - the first respondent's defence to the effect that clause 3 authorised him to incur personal expenses on the company credit card was not a primary defence at the arbitration hearing – it was a defence at the disciplinary hearing and appears to have been abandoned by the first respondent. Yet the arbitrator put great store by it. While clause 3 of the first respondent's contract of employment is not a model of concise drafting or clarity and may even be ambiguous, that is no basis for the finding that the clause either entitled the first respondent to incur personal expenses on the applicant's account, or that the first respondent subjectively believed on that basis that he was entitled to do so. While the arbitrator notes that this was a version advanced by the applicant during his disciplinary enquiry, it was, as I have indicated, not the primary defence advanced at the arbitration hearing. In fact, it was a version that emerged for the first time when the first respondent gave evidence, after the applicant had closed its case and in the face of a concession by the employee

that Smits would not be aware of any tacit agreement or the terms of any such agreement. In effect therefore, the arbitrator made a factual finding on the basis of untested evidence, a misdirection that inevitably renders an award reviewable.

[18] In any event, the arbitrator simply fails to deal with any competing interpretations of clause 3, or to scrutinise the first respondent's evidence in the light of an interpretation that is more consistent with upholding the fiduciary relationship owed by the first respondent to the applicant, and with generally applicable standards of ethics and corporate governance. That interpretation is perfectly discernible from the terms of the clause – i.e. that business expenses incurred in the normal course (travel, cell phone, accommodation and the like would be for the applicant's account as would other business expenses outside of that particular scope, but for expenses exceeding R 5000, which Smits would need to approve.

[19] Further, there was no evidence before the arbitrator to justify the conclusion that there was a tacit agreement between the first respondent and Smits to the effect that the first respondent was entitled to incur reasonable personal expenses on the card. The first respondent's evidence was vague – he was unable to recount any details of the agreement that he contended for. Further, as I have indicated, he conceded in cross-examination that it was possible that Smits was not aware of the terms of the agreement. Contrary to what the arbitrator found, it is highly improbable that a corporate entity would permit a director to use a company credit card for personal expenses without having to account for those expenses or repay them which in essence, was the content of the tacit agreement the first respondent alleged. The first respondent conceded under cross-examination that appropriate checks and balances were required, including the keeping of a proper record and accountability for reimbursement. The first respondent went on to testify that no checks and balances were in place. The arbitrator does not deal with these issues, and without any cogent reasons, dismissed the versions of Smits and the bookkeeper to the effect that a strict line was maintained between

business and personal expenses and that the use of the company credit card was limited strictly to business expenses.

[20] In so far as the arbitrator found it more probable that the first respondent's personal expenses would not have escaped the scrutiny of Smits, the bookkeeper and the auditors, this finding overlooks the clear evidence of Smits and the bookkeeper was that they were unaware of the first respondent's private purchases. There is no cogent reason to have rejected that evidence. The first respondent conceded during cross-examination that neither Smits nor the bookkeeper would be able to assess, merely by looking at the bank statements, whether the expenses were business or personal. Smits and the bookkeeper emphatically stated that they were unaware that the first respondent was uing the company credit card for personal expenses. Again, there is no cogent reason to have rejected this evidence, not does the arbitrator proffer one. Further, the employee conceded under cross-examination that there was no evidence to suggest that Smits had abused the company credit card issued to him, or that he was aware of the employee's personal expenditure on the card issued to the employee.

[21] In so far as the first respondent admitted to making mistakes in respect of purchases including those at Builder's Warehouse, Ster Kinekor, Jade Lee Electric and Computicket. These 'mistakes' were not explained in any detail by the first respondent, a factor ignored by the arbitrator except to the extent that she observed that the first respondent's more frequent use of the company credit card '*could be attributed to the Applicant being cash strapped as a result of the renovations of his house. This might well be the case'*. However, the arbitrator went on to justify these purchases on the basis that the first respondent did not attempt to conceal them. This begs the question – if the first respondent did not attempt to conceal personal expenses, why did he not disclose them? Disclosure was made only after the first respondent was directly confronted with the allegation of abusing the company credit card.

[22] In regard to the incident of onus, it should be recalled that the arbitrator found that the first respondent had, at most, been negligent in the transaction involving Coastal Hire and the hiring of equipment, and that his use of the company credit card could be attributed to error on his part. Although the arbitrator appears to accept this, she dismissed any suggestion of dishonesty on the basis the applicant had drawn an assumption and failed to present evidence to show that the employee never used his personal credit card for business expenses. What the arbitrator overlooks is the fact that it was the employee who had raised the defence of the mistaken use of the company credit card – it was not for the applicant to show that the employee's personal credit card had been used for company expenses. This is clearly evidence that was peculiarly within the knowledge of the employee and ought to have been forthcoming from him.

[24] To the extent that procedural fairness is an issue in the present proceedings, the arbitrator found there to the conduct of the disciplinary hearing, the applicant's dismissal was procedurally unfair because the chair of the disciplinary hearing ought to have postponed the hearing to afford the first respondent an opportunity to call a witness, and that the proceedings had been 'rushed' so that the applicant could escape the payment of the first respondent's bonus. What the commissioner's finding overlooks is the nature and extent of the right to procedural fairness. This was fully considered in this court in *Avril Elizabeth Home of the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC), where the court held that the Code of Good Practice: Dismissal required no more than that the employer investigate any alleged misconduct, provide the employee with an opportunity to respond to any allegation of misconduct with the assistance of a representative where requested and that the employer make a decision and communicate it to the employee. The enquiry conducted by the applicant met this standard, and to the extent that the arbitrator's finding demanded more of the applicant, the arbitrator misdirected herself in making the finding that she did. It also warrants mention that the applicant 'rushed' the

hearing to avoid paying the first respondent a bonus is not one that can be sustained by reference to the evidence – this is an issue raised by the first respondent in his opening address and then obliquely raised by the applicant's representative referred to in his cross-examination of the first respondent.

[25] In summary, the arbitrator failed to apply her mind to the evidence before her and failed properly to deal with and resolve the dispute of fact and failed properly to have regard to the probabilities of the competing versions that served before her. The first respondent's version was improbable, and the arbitrator ought to have made a finding to that effect. Further, the arbitrator misconceived the nature of the enquiry into procedural fairness. Her misdirection and misconception had the result that the outcome of the arbitration proceedings (her decision that the first respondent's dismissal was substantively and procedurally unfair) falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.

[26] The court has a discretion to remit the matter for rehearing or to substitute the arbitrator's order. In my view, little purpose would be served by remitting the matter to the second respondent. All of the relevant evidence has been placed before the court, and the court is as good a position as any commissioner to make a decision. The record discloses that the first respondent, on his own version, used his company credit card to make purchases of a personal nature. The evidence does not support the conclusion that either his contract of employment entitled the first respondent to do so, or that he had a tacit agreement with Smits to make such purchases. That being so, and given particularly the fiduciary relationship on which the first respondent stood in relation to the applicant and the standard of ethics and governance that applied to him as a director of the applicant, his conduct comprised an act of serious misconduct that warranted his dismissal. The arbitrator's award therefore stands to be substituted with a finding that the first respondent's dismissal was substantively and procedurally fair.

[27] In relation to costs, both parties submitted that costs ought properly to follow the result. I see no reason to differ – the requirements of the law and fairness referred to in s 162 of the LRA do not dictate otherwise. I intend to exclude from the costs order the costs of the Rule 11 application that was withdrawn on 10 August 2016. It also follows that I need not consider the first respondent's application in terms of s 158(1) (c).

For the above reasons, I make the following order:

1. The arbitration award issued by the third respondent on 11 November 2013 is reviewed and set aside.
2. The third respondent's award is substituted by the following:

'The applicant's dismissal was substantively and procedurally fair'.

3. The first respondent is to pay the costs of the review application.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. N Cassim SC, with him Adv. M Lennox, instructed by Eversheds.
For the first respondent: Adv. W Bekker, instructed by Moni Attorneys.