**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JR 408 / 22

In the matter between:

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| **CMC GLOBAL OUTSOURCING (PTY) LTD** | **First Applicant** |
| **RTT GROUP (PTY) LTD** | **Second Applicant** |

and

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| **EUGENE VAN NIEKERK** | **First Respondent** |
| **NOMUSA MBHELE *N.O.*** | **Second Respondent** |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **Third Respondent** |

**Heard**: **25 October 2023**

**Delivered**: **8 May 2024**

**This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 8 May 2024**

**Summary: Review – matter concerns issue as to whether dismissal exists – constitutes issue of jurisdiction – principles considered – test for review – s 145 of LRA 1995 – reasonable outcome test does not apply – review considered on the basis of a *de novo* determination of whether award is right or wrong**

**Nature of dispute – principles considered – dispute one of dismissal for operational requirements – CCMA has jurisdiction – jurisdictional point dismissed**

**Employment relationship – s 198A(3)(b) of LRA considered – client of TES deemed to be sole employer – no further employment relationship with TES –**

**cannot rely on initial contract concluded between TES and employee – no dual employment relationship exists**

**Dismissal – principles relating to existence of dismissal considered – no evidence of dismissal of employee by client – no conduct by client bringing about termination of employment – dismissal not proven – finding of arbitrator that employee dismissed by client in error and reviewable – relief afforded against client incompetent and set aside**

**Employment contract – employee concluding new employment contract with TES – nothing in s 198A(3)(b) prohibiting such contract – finding by arbitrator that such contract invalid erroneous – employee entitled to take up employment with TES again even after application of s 198A(3)(b)**

**Dismissal – employee dismissed by TES after taking up employment with TES – such dismissal for operational requirements – dismissal both substantively and procedurally unfair – finding of arbitrator of unfair dismissal unassailable on review – award of arbitrator in this respect upheld**

**Dismissal – relief for unfair dismissal – compensation sought – employee entitled to compensation award for unfair dismissal against TES – principles considered – compensation awarded by arbitrator excessive and irregular – compensation award substituted**

**Review of award – finding by arbitrator against client of TES wrong – review application granted in his respect – finding of unfair dismissal against TES justified and compensation awarded – award substituted with determination that employee unfairly dismissed by TES and that TES pay employee compensation**

**Judgment**

**SNYMAN, AJ**

Introduction

[1] In this case, the applicants have brought an application in terms of section 145 as read with section 158(1)(g) of the Labour Relations Act (LRA),[1] to review and set

[1] Act 66 of 1995 (as amended).

aside an arbitration award handed down by the second respondent, in her capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration (CCMA), being the third respondent.

[2] The dispute at hand concerns an unfair dismissal dispute pursued by the first respondent to the CCMA, which dispute was pursued against both the first and the second applicants. It is this unfair dismissal dispute that ultimately ended up before the second respondent for arbitration.

[3] In an arbitration award dated 13 February 2022, the second respondent made a number of pertinent findings. Firstly, the second respondent held that the first respondent's current contract of employment with the first applicant was null and void and that the second applicant was his employer. Secondly, the second respondent held that the first respondent's employer was the second applicant and that he had been dismissed by the second applicant for operational requirements. And finally, the second respondent concluded that the first respondent's dismissal was both substantively and procedurally unfair, and she ordered that the second applicant pay compensation to the first respondent in the sum of R150 000.00, being an amount equivalent to 10(ten) months' salary.

[4] The arbitration award was received by the applicants on 13 February 2022. On 1 March 2022, the applicants' review application was filed, in which the applicants sought to review and set aside the arbitration award of the second respondent. The review application has therefore been filed within the time limit as contemplated section 145(1) of the LRA and is properly before Court.

[5] I will now proceed to decide the applicants' review application by first setting out the relevant background facts. For ease of reference, I will refer to the first applicant as '*CMC*' and the second applicant as '*RTT*', and these two parties jointly as '*the applicants*'.

The relevant background

[6] CMC conducts business as a temporary employment service (TES). RTT is a freight, transport and logistics business, and is a client of CMC, with CMC providing

employees to RTT from time to time. CMC has a number of other clients as well, to whom it also provides employees as a TES.

[7] The first respondent was employed by CMC on 15 February 2021 in terms of a written contract of employment. The first respondent was then placed by CMC with RTT, dedicated to the '*OnDemand Sixty60*' operations of RTT. He rendered services initially as a compliance officer in these operations, and later as a quality officer, earning a remuneration of R15 000.00 per month. This function was in essence a controlling function relating to independent contractor motorcycle driver utilized by RTT in these operations.

[8] The 15 February 2021 contract of employment between CMC and the first respondent specifically records that CMC is in the business of a TES service to clients, and that the first respondent will be placed at a client of CMC accordingly, which in this case is as set out above. Clause 2.3 of this contract of employment stipulates that after three consecutive months, the first respondent would be deemed to be employed by the client (RTT) for the purposes of the LRA. However, clause 2.3 goes further and records: '*… This does not mean that the company will cease to be your employer after these 3 (three) months nor does it mean that there will be a transfer of employment to the client after these 3(three) months …*'. Clause 2.4 records that in terms of the commercial agreement between CMC and RTT, CMC would remain responsible for all industrial relations functions relating to the first respondent. The first respondent's remuneration is paid by CMC.

[9] There were further specific conditions of employment pertaining to the first respondent stipulated in annexure "A" to the 15 February 2021 contract of employment. In clause 3 of this annexure, it is recorded as follows:

'The employee agrees and understands that he will initially be deployed as compliance officer at On Demand Sixty 60, however also agrees and understands that he may be transferred and redeployed at other CMC clients / sites at the sole discretion of CMC (Pty) Ltd subject to varying employment terms and conditions due to changing operational requirements.'

[10] The first respondent remained placed on the OnDemand Sixty60 operations until August 2021, when it appeared that operational circumstances at RTT changed, in that the OnDemand Sixty60 operations diminished to the extent that a controlling function was no longer required. As a result, Gerrit Duvenhage (Duvenhage) from CMC went to the site at RTT to remove the first respondent off site for deployment elsewhere. CMC sought to apply clause 3 of annexure "A" to the contract of employment contract of 15 February 2021, in this regard, and thereby transfer the first respondent back to CMC, with effect from 1 September 2021. This move was perpetrated by CMC of its own accord, and Duvenhage at the time conveyed no reasons to the first respondent for this transfer, as he believed CMC was entitled to do so in terms of the contract of employment. But when the first respondent left the RTT site with Duvenhage, the first respondent did refer to a number of difficulties he had with the people he worked with at RTT.

[11] Pursuant to the aforesaid transfer, the first respondent then actually started working for CMC as a nightshift manager at the CMC head office in Bedford Avenue. A new contract of employment was entered into between the first respondent and CMC, or better stated, one of its subsidiaries called CMC Labonte Prop (Pty) Ltd, also on 1 September 2021, for this purpose.

[12] In terms of this 1 September 2021 contract of employment, which also contains an annexure "A", and was signed by the first respondent, the first respondent is appointed as a night shift manager at the same salary of R15 000.00 per month. This contract of employment contained similar provisions to the 15 February 2021 contract of employment where it comes to placement with a client beyond three months. Therefore, the first respondent was once again employed by CMC with effect from 1 September 2021.

[13] According to Duvenhage, the appointment of the first respondent as night shift manager was pending an alternative placement for the first respondent at another client of CMC, which client had a delivery service similar to that the first respondent was placed in at OnDemand Sixty60. However, this placement fell through, and according to CMC, that left it without an actual income earning placement immediately available for the first respondent.

[14] It is then that the CMC instituted operational requirements consultation proceedings in terms of section 189 of the LRA in respect of the first respondent. It issued the first respondent with a notice as contemplated by section 189(3) of the LRA on 8 September 2021. In terms of this notice, it was stated that the first respondent had been redeployed from OnDemand Sixty60 to head office due to operational issues, however those same issues have again arisen. This refers to the aforesaid envisaged posting having fallen through. It was stated that it was contemplated that the first respondent's employment may be terminated due to operational requirements. It was indicated that the first respondent would be consulted on alternatives to dismissal, however if termination of employment was on the cards, it was envisaged that this would happen on 8 October 2021.

[15] According to Duvenhage, and in the consultation on 8 September 2021 when the first respondent was presented with the section 189(3) notice, the first respondent informed him that CMC should continue to process his termination of employment and that the issuing of his exit documents, his UI19 and provident fund withdrawal be expedited. In a letter dated 9 September 2021, Duvenhage confirmed this discussion, and indicated that the first respondent would be contacted to collect this documentation. It was also indicated in this letter that the first respondent would be placed on a priority list should a future vacancy arise.

[16] There was another letter by CMC to the first respondent on 13 September 2021, calling on the first respondent to attend a meeting on 15 September 2021 to discuss the termination of his assignment and forthcoming re-deployment. The first respondent did not attend this meeting. On 16 September 2021, CMC sent another letter to the first respondent, calling on him to attend a consultation on 20 September 2021. The first respondent did not attend this consultation as well. I was however common cause that the first respondent was dismissed on 8 September 2021.

[17] What next happened is that on 27 September 2021, the first respondent referred two separate unfair dismissal disputes against both RTT and CMC to the CCMA for conciliation. These disputes were allocated case numbers GAEK 7867 – 21 and GAEK 7868 – 21 respectively. Both cases were unsuccessfully conciliated on 20 October 2021 and certificates of failure to settle issued. The parties then agreed for both disputes to be consolidated, and in a consolidation ruling dated 20 October

2021, the two disputes were consolidated under case number GAEK 7867 – 21. The first respondent then referred this consolidated dispute to arbitration on 22 October 2021.

[18] The dispute came before the second respondent for arbitration on 25 January 2022. The applicants were represented by Duvenhage, and the first respondent by an attorney. Following completion of the arbitration proceedings, and in an award dated 13 February 2021, the second respondent found that the first respondent had been dismissed by RTT, and that such dismissal was substantively and procedurally unfair. The second respondent made a compensation award against RTT in a sum of R150 000.00 being an amount equivalent to 10(ten) months' salary. No finding was made against CMC. The applicants were clearly not satisfied with this outcome, which led to the current review application now before me.

Test for review

[19] Where it comes to the review application by the applicants, the test for review to be applied is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] the Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'*[3]. This means that the award in question is tested against all the facts before the arbitrator to ascertain if it meets the requirement of reasonableness.[4] In conducting this test it is always necessary and important for the Court to enquire into and consider the merits of the matter and the entire evidence on record in deciding what is reasonable.[5] In *Herholdt v Nedbank Ltd and Another*[6] the Court said:

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[2] (2007) 28 ILJ 2405 (CC).

[3] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.

[4] See *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at para 43.

[5] Id at para 41.

[6] (2013) 34 *ILJ* 2795 (SCA) at para 25. See also *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at

'A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable. …'

[20] Based on the aforesaid, the first enquiry is to establish if there a failure or error on the part of the arbitrator. Second, and where there is such a failure or error, it must be shown that the outcome arrived at by the arbitrator was unreasonable as a result. It would only be if the consideration of the evidence and issues before the arbitrator shows that the outcome arrived at by the arbitrator cannot be sustained on any grounds, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[7] As said in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[8]:

'… the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review …'

[21] The above being said as constituting the general test for review, what is at stake in this case is also an instance where the applicants contend that the first respondent committed material errors of law. If an error of law is committed by an arbitrator, and that error of law is material, it would render the award arrived at to be unreasonable, and thus subject to being reviewed and set aside.[9] In fact, an award

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para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[7] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.

[8] (2015) 36 ILJ 1453 (LAC) at para 12.

[9] See *Head of Department of Education v Mofokeng and Others* (2015) 36 *ILJ* 2802 (LAC) at paras 32 – 33; *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 *ILJ* 1819 (LAC) at paras 21 – 22; *Civil and Power Generation Projects (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2055 (LC) at para 33.

based on a material error of law can be legitimately challenged not only on the basis of it being unreasonable, but also on the basis that the award would be incorrect.[10] The simple point is that a reasonable arbitrator will not commit a material error of law. The Court in *Herbert v Head of Education: Western Cape Education Department and Others*[11] articulated the following apposite summary:

'In *MacDonald's Transport* it was found that the LRA did not contemplate that a CCMA or bargaining council arbitrator, both statutory roles, would have the last word on the proper interpretation of an instrument as this would mean that a patently wrong interpretation would be left intact, which 'would be absurd'. The wrong interpretation of an instrument by an arbitrator could therefore constitute a reviewable irregularity as envisaged by s 145 of the LRA, in the sense that a reasonable arbitrator does not get a legal point wrong. The court concluded that either 'the reasonableness test is appropriate to both value judgments and legal interpretations. If not, "correctness" as a distinct test is necessary to address such matters'. This view was echoed in *NUMSA*, in which it was stated that an incorrect interpretation of the law by a commissioner constitutes a material error of law which 'will result in both an incorrect and unreasonable award', which 'can either be attacked on the basis of its correctness or for being unreasonable'.' [12]

And, as succinctly put in *Ekurhuleni Metropolitan Municipality v Mabusela NO and Others*[13]:

'… It is now established that the applicable test on review of a CCMA or bargaining council arbitrator's interpretation of a legal instrument is correctness and not reasonableness. A reasonable arbitrator is not supposed to get a legal point wrong …'

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[10] In *National Union of Metalworkers of SA v Assign Services and Others* (2017) 38 *ILJ* 1978 (LAC) at para 32, it was held: '*… An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable …*'. This judgment of the LAC was upheld by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as Amicus Curiae)* (2018) 39 *ILJ* 1911 (CC).

[11] (2022) 43 ILJ 1618 (LAC) at para 24.

[12] The Court was referring to *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 *ILJ* 2593 (LAC) at para 29, and *Assign Services* (*supra*).

[13] (2023) 44 ILJ 137 (LAC) at para 27.

[22] The application of the review test *in casu* however has one final nuance. It also concerns the issue as to whether RTT in fact dismissed the first respondent. Whether or not a dismissal exists is an issue of jurisdiction. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[14] the Court considered the review test postulated in *Sidumo supra*, and said:
'… Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise …' (emphasis added)

[23] The aforesaid means that where the issue to be considered on review is about the jurisdiction of the CCMA, it is not about a reasonable outcome. What happens is that the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator is right or wrong.[15] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[16] the Court articulated the enquiry as follows:
'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court …'
The aforesaid approach has been consistently applied in instances where the existence of a dismissal was at stake.[17]

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[14] (2008) 29 ILJ 964 (LAC) at para 101.

[15] See *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 22.

[16] (2008) 29 *ILJ* 2218 (LAC) at para 40.

[17] See: *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* (2013) 34 ILJ 1427 (LAC) at para 24; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21.

[24] Accordingly, and in this instance, I shall proceed to decide this matter based on the different applicable facets of the review test, as summarized above.

Analysis

[25] First things first. The applicants argued in this Court that the true nature of the dispute was a dismissal dispute relating to the first respondent having been dismissed for making a protected disclosure, which the CCMA would have no jurisdiction to arbitrate, as it would constitute an automatic unfair dismissal which can only be adjudicated in the Labour Court.[18] This contention was raised despite the dispute referred by the first respondent to the CCMA being an alleged unfair dismissal based on operational requirements, which would be an arbitrable dispute, as the first respondent was the only one affected.[19] The dispute was also conciliated and then referred to arbitration on such basis. In the opening address by the applicants, it was stated that the first respondent had been dismissed for operational requirements. Being legally represented, the first respondent through his attorney also made it clear that the dispute concerned a dismissal for operational requirements. All this seems obvious as to what the dispute was all about. But what bedevilled matters is when the first respondent came to testify in the arbitration, which I will turn to next.

[26] In giving his testimony, the first respondent made much of the fact that he believed he was removed off site at RTT because he had made a protected disclose concerning maleficence committed by managers at RTT. He in fact gave a detailed exposition as to why he believed he had been singled out for untoward treatment because of this. As will be addressed more fully later in this judgement, as this testimony has other implications as well, Duvenhage on behalf of the applicants immediately took issue with the impact this evidence and contention would have on the jurisdiction of the CCMA to arbitrate the matter.



[18] See section 187(1)(h) as read with section 191(5)(b)(i) of the LRA.

[19] See section 191(12)(a) of the LRA.

[27] Ordinarily, jurisdiction is determined on the basis of the case as pleaded.[20] However, and in arbitration proceedings before the CCMA, there are really no pleadings to speak of. It is therefore true that despite what may be contained in the referral documents, or the certificate of failure to settle, the true nature of a dispute may only emerge once all the evidence in a particular case has been presented. [21] In *September and Others v CMI Business Enterprise CC*[22] it was said that: '*In my view, the commissioner is not bound by a party's categorisation of the nature of the dispute. Rule 15 clearly intended the commissioner to have the right and power to investigate and identify the true nature of the dispute.*' Having so said, the Court then concluded:[23]

'The general rule is that the referral form and certificate of outcome constitute prima facie evidence of the nature of the dispute conciliated. However, if it is alleged that the nature of the dispute is in fact different from that reflected on such documents, the parties may adduce evidence as to the nature of the dispute.'

[28] It is based on the above principles that the applicants seized on the first respondent's testimony referred to above, as basis to challenge jurisdiction. I am

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[20] See *Gcaba v Minister for Safety and Security and Others* (2010) 31 *ILJ* 296 (CC) at para 75; *Mbatha v University of Zululand* (2014) 35 *ILJ* 349 (CC) at para 157; *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union on behalf of Members* (2015) 36 *ILJ* 624 (LAC) at para 21; *Moodley v Department of National Treasury and Others* (2017) 38 *ILJ* 1098 (LAC) at para 37.

[21] In *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 29 *ILJ* 2461 (CC) at para 65, the Court held: '*In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. … The dispute between the parties may only emerge once all the evidence is in*'. Similarly, in *Hotbake Systems (Pty) Ltd t/a the Rich Corporation of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 1516 (LAC) at para 21, it was held: '*The determination of the true nature of the dispute is a factual enquiry which may at times only emerge during the proceedings. …*'. See also *Health and Other Services Personnel Trade Union of SA on behalf of Tshambi v Department of Health, Kwazulu-Natal* (2016) 37 ILJ 1839 (LAC) at para 16; *National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) and Others* (2014) 35 ILJ 954 (LAC) at para 17.

[22] (2018) 39 *ILJ* 987 (CC) at para 43.

[23] Id at para 52.

unpersuaded that there is any merit in this challenge. First and foremost, the referral documents cannot be ignored and clearly identify the dispute as relating to operational requirements. Secondly, when this issue was raised in the course of the arbitration itself, the first respondent, through his attorney, made it clear that he was not relying on a dismissal based on having made a protected disclosure. It was re-affirmed that all the first respondent was relying on was a dismissal for operational requirements. On that basis, Duvenhage for the applicants was satisfied to proceed with the arbitration. Thirdly, and in the absence of pleadings, the opening addresses by the parties in an arbitration bind the parties in a manner similar to a pre-trial agreement.[24] Considering what was said in the opening addresses, the parties effectively bound themselves to a dispute concerning an unfair dismissal for operational requirements having to be decided. And finally, the first respondent never came out and said his dismissal was automatically unfair. In *Buscor (Pty) Ltd v Ntimbana NO and Others*[25] the Court held as follows, which in my view is quite apposite *in casu*:

'This contention is unsustainable as the individual employees did not testify, in the arbitration hearing, that their dismissal was automatically unfair as contemplated in s 187 of the LRA. To the extent that Buscor was of the view that the nature of the dispute was different to that reflected on the referral documents, it was required to lead evidence, at the arbitration hearing, on the real nature of the dispute. Needless to say, it took no such steps.

What ultimately emerged from the testimony of Buscor's own witnesses at the arbitration hearing, is that the individual employees were dismissed for giving false evidence in the unfair labour practice arbitration before Commissioner Dibden. As alluded to above, this was common cause between the parties. Thus for Buscor to contend, as it did for the first time in the review application, that the real dispute was not an unfair dismissal, but rather an automatically unfair dismissal, as contemplated in s 187 of the LRA, was disingenuous.'



[24] See *Fidelity Cash Management Service* (*supra*) at para 24; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* 2013) 34 ILJ 2347 (LC) at paras 61 – 62; *Tiger Brands Field Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALCJHB 216 (13 August 2013) at para 71.

[25] (2023) 44 ILJ 125 (LAC) at paras 28 – 29.

[29] In the end, it is my view that the jurisdictional objection raised by the applicants as to the nature of the dispute is opportunistic. It is clear that what the parties intended the CCMA to arbitrate was an unfair dismissal dispute for operational requirements. The fact that the first respondent may have held a personal view that his protected disclosure may have something to do with what happened, matters not. The jurisdictional objection is thus dismissed.

[30] Turning then to the merits of this case and as a point of departure in deciding the same, there is no dispute that CMC conducts business as a TES and employs and then places employees at its various clients, which includes RTT. It is also undisputed that the first respondent was placed at RTT in such context, and was earning an amount less than the earnings threshold as prescribed under section 6(3) of the Basic Conditions of Employment Act (BCEA).[26] It follows that this is an instance where section 198A of the LRA would find application.

[31] In terms of section 198(2) of the LRA,[27] when CMC first employed the first respondent to place him at RTT, CMC was deemed to be the employer of the first respondent, no matter what the parties may have contracted. But nonetheless, CMC concluded a written contract of employment with the first respondent, in the form of the 21 February 2021 contract of employment referred to earlier in this judgment. This employment contract contained all the ordinary terms one would associate with an employment contract between employer and employee. At this point, RTT stood outside the employment relationship between the first respondent and CMC, and all that existed was a contractual relationship between CMC and RTT in the form of CMC providing the first respondent as a resource / service to RTT.

[32] However, and because section 198A found application, things changed after the expiry of three months from the date when the first respondent was placed by CMC at RTT, because then he was no longer considered to be a temporary



[26] Act 75 of 1997 (as amended).

[27] Section 198(2) reads: '*For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer*.'.

employee.[28] The basis for this change can be found in section 198A(3) of the LRA, which reads:

'For the purposes of *this Act*, an *employee-*

*(a)* performing a temporary service as contemplated in subsection (1) for the client is the *employee* of the temporary employment services in terms of section 198 (2); or

*(b)* not performing such temporary service for the client is-

(i) deemed to be the *employee* of that client and the client is deemed to be the employer; and

(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.'

[33] But what does this change then mean? According to CMC, it means that RTT was in essence now added as an employer to the relationship between the parties. This appears clearly from clause 2.3 of the 15 February 2021 contract of employment which actually stipulates that after three consecutive months, the first respondent would be deemed to be employed by RTT, however this does not mean that CMC would cease to also be his employer. According to CMC, RTT would be the employer of the first respondent where it comes to the actual work to be provided and all aspects related thereto, whilst CMC would be his employer where it comes to paying him and in respect of all industrial relations and human resources issues. This contention was also advanced in this Court as one of the grounds of review, on the basis that the second respondent is alleged to have erred in applying section 198A(3)(b) by failing to appreciate that such section did not prevent CMC from still remaining as an employer of the first respondent, even if RTT was deemed to be the employer. In short, the case of CMC was that RTT was deemed to the employer in terms of section 198A(3)(a) '*for the purposes of the LRA*', and CMC would remain as his employer for everything else.

[34] The difficulty with this case of CMC is that it has been disposed of in the judgment of *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others*[29]. In that case, the TES sought to suggest the exact same kind of relationship following the application of the deeming provision in section 198A(3)(b)

[28] Of relevance *in casu*, section 198A(1)(a) reads: *'In this section, a 'temporary service' means work for a client by an employee - (a) for a period not exceeding three months …*'.

[29] (2018) 39 ILJ 1911 (CC).

making the client the employer. The so-called dual employment relationship was specifically propagated. The Court decisively dealt with this contention as follows:[30]

'A plain reading of s 198A(3)*(b)* clearly distinguishes between employees employed by the TES for temporary work and those deemed to be employed by the TES's client where the work is not temporary. Interpreting this section to mean that the client becomes 'one of the employers' strains the language used. If the legislature intended the client to become a joint or co-employer together with the TES, it could easily have provided for the client to 'also' be the employer.'

The Court concluded:[31]

'Regard being had to the language employed in s 198A(3)*(b)* read with ss 198 and 198A, the following is discernible …

*(c)* Section 198A(3)*(a)* provides that, when vulnerable employees are performing a temporary service as defined, they are deemed to be employees of the TES as contemplated in s 198(2).

*(d)* Section 198A(3)*(b)*(i) provides that when vulnerable employees are not performing a temporary service as defined, they are deemed to be the employees of the client.

*(e)* The deeming provisions in s 198(2) and s 198A(3)*(b)*(i) cannot operate at the same time.

*(f)* When marginal employees are not performing a temporary service as defined, then s 198A(3)*(b)*(ii) replaces s 198(2) as the operative deeming clause for the purposes of determining the identity of the employer …'

[35] It is therefore undeniable that the proposition advanced by CMC that it somehow remains a co-employer of the first respondent after expiry of the three months' period contemplated by section 198A(3)(b) is entirely without substance. Once this deeming provision is triggered, the first respondent only has one employer, and that employer would be RTT. But significantly, RTT does not become the employer as a result of a transfer of employment from CMC or as a result a new employment contract coming into existence between RTT and the first respondent. What actually happens is an automatic change of employer identity. *In casu*, and as

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[30] Id at para 54.

[31] Id at para 83. See also para 84 of the judgment, where the Court said: '*As stated above, the language used by the legislature in s 198A(3)(b) of the LRA is plain. And, when interpreted in context, it supports the sole-employer interpretation*.'.

soon as the three months' deadline is reached, and the first respondent tis still placed at RTT, he is automatically deemed to be an employee of RTT, going forward, on the same terms and conditions as RTT's other similar employees.[32]

[36] So where does all of this leave CMC, RTT, the first respondent, and the various contracts already concluded between them? This situation is known as the triangular relationship between the TES, the client, and the employee. This triangular relationship is not expunged as a result of the application of section 198A(3)(b). However, this continuing triangular relationship does not contemplate an employment relationship, as the employment relationship would forthwith only exist between the client and the employee. The triangular relationship is, properly considered, a commercial one. This was recognised in *Assign supra*, where the Court held:[33]
'In evaluating these arguments, it is necessary first to consider the 'triangular' nature of the TES/client/placed employee relationship. The triangular relationship exists to split the functions of the employer between the TES and the client for a fee. However, the functions for which the TES is responsible seldom relate to the actual work of the employee. Its primary responsibilities are to pay and manage the human-resources component of employment, while the day-to-day management, work allocations and performance assessment in most circumstances are conducted by the client only. The client is also responsible for the employees' working conditions because employees are placed on the client's premises. Importantly, the client also has the power to discontinue the employee's services. In a sense the TES is merely the third party that delivers the employee to the client. The employee does not contribute to the business of the TES, except as a commodity. And, on a practical level, the contract between a TES and a placed worker seldom constitutes an employment contract …'

[37] Applying the above *in casu*, it is clear that as from 16 May 2021, the identity of the employer of first respondent changed, from CMC to RTT, and going forward, RTT was his sole employer. However, the first respondent's relationship with CMC did not end. For as long as the underlying commercial agreement between CMC and RTT

[32] See section 198A(5) which reads: '*An employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.*'.
[33] Id at para 73.

continued to exist, CMC would continue to pay the first respondent and manage human resources and industrial relations issues pertaining to him. It is comparable to an outsourced management service between CMC and RTT, which enables CMC to deal with the first respondent within the parameters allowed by the commercial relationship between CMC and RTT. For example, CMC may conduct the disciplining of the first respondent, but it would do so at the behest and in the name of RTT as employer, applying RTT's rules, and what it does would then be attributed to RTT. As held in *Assign supra*:[34]

'… Section 198(2) gives rise to a statutory employment contract between the TES and the placed worker, which is altered in the event that s 198A(3)*(b)* is triggered. This is not a transfer to a new employment relationship but rather a change in the statutory attribution of responsibility as employer within the same triangular employment relationship. The triangular relationship then continues for as long as the commercial contract between the TES and the client remains in force and requires the TES to remunerate the workers …'

[38] The judgment in *Assign supra* was applied by the Court in *Victor and Others v Chep SA (Pty) Ltd and Others*[35] as follows:

'Section 198A(3)*(b)* of the LRA enacts another important deeming provision. It provides that an employee not performing a temporary service for a client is deemed to be an indefinitely employed employee of that client and the client is deemed to be the employer. Accordingly, while a TES is normally regarded as the employer of the workforce it procures and provides to perform work for the client, s 198A(3)*(b)* has introduced a different arrangement for employees falling below the specified earning threshold who work for more than three months. Such employees are deemed to be the client's employees. The contractual relationship between the client and the placed employee does not come into existence through a negotiated agreement or through the normal recruitment processes used by the client. Employees paid less than the threshold amount, and who work for a TES for more than three months, automatically become employed by the client …'

[34] Id at para 75.

[35] (2020) 41 ILJ 2802 (LAC) at para 6.

[39] The second respondent was alive to the implications of the judgment in *Assign*. She correctly held that RTT was the sole employer of the first respondent. She further correctly decided that that the provision in annexure "A" of the 15 February 2021 contract of employment to the effect that the first respondent may be transferred and redeployed at other CMC clients / sites at the sole discretion of CMC, would no longer be valid and binding, for the simple reason that CMC was not his employer, and such a provision could only apply for as long as the first respondent remained employed by CMC. One can hardly say that CMC was entitled to rely upon a contractual provision in an employment contract to instruct the first respondent to transfer to one of its other sites or other clients, where it was no longer the first respondent's employer. Therefore, these findings of the second respondent are unassailable on review, and CMC cannot rely on this contract as basis to transfer the first respondent back to it from RTT.

[40] However, the further findings of the second respondent do not fare as well. In my view, the second respondent takes the implications of the judgment in *Assign* and the provisions of section 198A(3)(b) too far. Section 198A(3)(b) is designed to protect vulnerable employees from businesses that seek to avoid their obligations as employers under the LRA.[36] This avoidance tactic was found in the stratagem of using the vehicle of a TES, which was never really intended for such purpose, as follows. Individual persons, who would ordinarily have been employees in the normal course, are secured through the TES for the business, and these persons would work for the business just like an employee would have done. However, and when the time comes, for example, to reduce staff numbers, or dismiss or incapacitate staff members, the business would simply give notice to the TES to remove the staff concerned, and these unfortunate individuals would then face the prospect of being dismissed without any compliance with the LRA, and simply on the basis that the TES would not have a job for them if they are not placed at the client. So, and what section 198A(3)(b) does is to make sure that the client of the TES carries all the obligations of an employer under the LRA as soon as it applies, and thus eliminate the above state of affairs.

[36] See *Assign* (*supra*) at paras 65 – 70.

[41] So then, the first question that must be answered is whether RTT, being the employer of the first respondent, actually dismissed the first respondent. This is because, *in casu*, there was no evidence that RTT ever gave the first respondent any kind of notice or communication that he was dismissed or removed from site. Section 186(1)(a) of the LRA *inter alia* defines dismissal as: *'Dismissal means that …. an employer has terminated employment with or without notice'*. This has been interpreted to mean that the employer engages in an act which brings the contract of employment to an end.[37] In *Ouwehand v Hout Bay Fishing Industries*[38] the Court described this as: *'…some overt act by the employer that is the proximate cause of the termination of employment. …*', whilst in *Chemical Energy Paper Printing Wood and Allied Workers Union v Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics*[39] the Court said that: *'… the respondent has taken some initiative to terminate the contract, and that the respondent's action has caused the termination …*'. It does not matter what kind of label was attached to the act of termination.[40] In *Uthukela District Municipality v Khoza and Others*[41], Court held as follows in this regard:[42]

'… In short, where the conduct of an employer brings about the termination of the contract of employment, whatever the motivation for this conduct may be, it has to be considered to be a dismissal of the employee as contemplated by the LRA. The simple question that must be asked is whether, was it not for the conduct of the employer, the employment contract would have endured. If the answer is yes, then there has to be a dismissal. It is important to cast the dismissal net as wide as possible, because it is an imperative in terms of the LRA and Constitution that terminations of employment, as far as possible, be tested against the fundamental principle of fairness …'

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[37] *National Union of Leather Workers v Barnard NO and Anothe*r (2001) 22 ILJ 2290 (LAC) at para 23

[38] (2004) 25 *ILJ* 731 (LC) at para 14 – 15. See also *National Union of Metalworkers of SA and Others v SA Five Engineering (Pty) Ltd and Others* (2007) 28 *ILJ* 1290 (LC) at para 41; *Ismail v B & B t/a Harvey World Travel Northcliff* (2014) 35 *ILJ* 696 (LC) at para 27.

[39] (2012) 33 *ILJ* 2386 (LC) at para 13. See also *Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC) at paras 31 and 33.

[40] *Marneweck v SEESA Ltd* (2009) 30 *ILJ* 2745 (LC) at para 31.

[41] [2015] ZALCD 19 (20 March 2015) at para 18.

[42] Id at para 65.

[42] It is of course true that the dismissal of an employee can be brought about by conduct on the part of the employer. Determining whether this is the case would be done by way of an objective assessment of all the factual circumstances, in order to ascertain whether the conduct of the employer is such as to establish a termination of employment.[43] As said in *Heath v A & N Paneelkloppers*:[44]

'Where the employer conducts itself in such a fashion that has the cause of bringing the employment relationship to an end, it must equally be considered to be a dismissal. Of course, such kind of behaviour may be readily apparent …'

[43] On the facts of this case, there is no indication that RTT sought to avoid any obligations it may have as an employer, vis-à-vis the first respondent. There was no written or verbal notice from RTT to CMC that required that the first respondent be removed from the OnDemand Sixty60 deployment, or away from or out of RTT. For all intents and purposes, RTT never sought to deal with the first respondent in any manner designed to bring about the termination of his employment.

[44] Duvenhage testified that the first respondent was never dismissed by RTT and conceded that the first respondent as dismissed by CMC on 8 September 2021 for operational requirements. According to Duvenhage, the first respondent was not escorted off site at RTT by anyone, and he stated that he came to collect the first respondent and left with him. In cross examination of Duvenhage, it was put to him that the first respondent was taken off site at RTT because of alleged misconduct and / or a protected disclosure made by the first respondent. Duvenhage disputed this, and answered as follows:

'… the uptake of the service of Sixty60 declined. So quite a number of drivers, of independent contractors were no longer utilised. So obviously on the management structure, or the Supervisory level there had to be an adjustment. He, Mr Van Niekerk, was the last one in okay. So there was a possibility and we could have



[43] See *Leshabane v Minister of Human Settlements and Others* (2024) 45 ILJ 833 (LC) at para 27; *Trio Glass* (*supra*) at para 36; *Ismail v B & B t/a Harvey World Travel Northcliff* (2014) 35 *ILJ* 696 (LC) at paras 27 – 28.

[44] (2015) 36 ILJ 1301 (LC) at para 31. See also *Marneweck* (*supra*) at para 32, where it was held: '*… as a matter of principle, an employment contract can be regarded as terminated based on the objective construction of the employer's conduct which unequivocally repudiates the contract ,,,*'.

retrenched him from RTT but we decided not to. Because we said well maybe he has got potential and we can utilise him in this other possibility that has developed …'
No alternative version was put to Duvenhage under cross examination, other than the allegation of the protected disclosure.[45]

[45] In presenting his testimony, the first respondent gave detailed evidence about what he considered unacceptable conduct of certain managers at RTT, and that he made a protected disclosure about fraudulent conduct on the part of such managers. He suggested that this was the cause why RTT wanted him to be removed. The first respondent also led testimony on how he was escorted off site at RTT, which was not put to Duvenhage under cross-examination to answer. In fact, Duvenhage's evidence on how and why he fetched the first respondent and came to leave the site was never disputed under cross examination.

[46] In essence, and according to the first respondent, his dismissal by RTT was evidenced by the fact that he was escorted off site at RTT. Whilst it is true that he was removed from the site, it is unclear why the first respondent believed he was so removed. As touched on above, the first respondent in his testimony made it clear that he was removed off site at RTT because of his protected disclosure. However, and if his removal from site constituted the act of dismissal of the first respondent, then the reason for that dismissed would be him having made a protected disclosure. As touched on above, this prompted Duvenhage to complain that the CCMA would not have jurisdiction to consider such a dismissal dispute. It must be emphasized that in response, the first respondent's attorney made it clear that the first respondent's case was that he was unfairly dismissed for operational requirements and that he did not rely on having made a protected disclosure. That being so, there was unfortunately no evidence presented by the first respondent that RTT wanted him removed from site for this latter reason. In fact, the only evidence of the dismissal of the first respondent for operational requirements was the one by CMC on 8

[45] In *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* (2005) 26 *ILJ* 1652 (LAC) at para 39, the Court said: *'… A failure to cross-examine may, in general, imply an acceptance of the witness' testimony…*'. And in *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 41, the Court held: *'… The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded….*'.

September 2021. An apposite illustration of the aforesaid is evident from the following exchange between Duvenhage and the first respondent during cross examination:
'MR DUVENHAGE: … Sir did you receive any letter of dismissal from RTT?
APPLICANT: No.
MR DUVENHAGE: Did you receive any notice that you were to be called to a meeting to discuss your dismissal?
APPLICANT: No.
MR DUVENHAGE: So the only dismissal letter that you received was from CMC, is that correct?
APPLICANT: Yes. On the second contract you gave me.'

[47] In my view, the first respondent did not prove that he had been dismissed by RTT. The second respondent however found that the '*act of moving*' the first respondent to CMC from RTT constituted a dismissal. But this mere eventuality cannot be said to constitute such a dismissal. There can be many reasons for it, and these reasons must be ventilated. The second respondent needed to determine who perpetrated the act of removal, or at least, at whose behest it was perpetrated and why. As is clear from the aforesaid summary, there was no evidence or indication that RTT was involved in anything relating to the removal of the first respondent off site and then his deployment at the CMC head office. The second respondent does not even pertinently conclude that RTT dismissed the first respondent. Accordingly, I am unconvinced that on the facts, it had ever been shown that RTT dismissed the first respondent, and as such, any finding against it would be incompetent, and thus reviewable.

[48] I believe that what the evidence showed is that when CMC contemplated the redundancy of the position of the first respondent with RTT due to the decline in the take up of the OnDemand Sixty60 service, it took the initiative, and based on its view that it could rely on clause 3 of annexure "A" to the 15 February 2021 contract of employment, effectively went and took the first respondent off site at RTT. The evidence also shows that CMC acted on the assumption that it was still in a permanent employment relationship with the first respondent and could simply place him where it required. This view is of course erroneous, but it does not change that what happened was not perpetrated by RTT. As an employee of RTT at this time, it would have been open to the first respondent to refuse being removed from site at

OnDemand Sixty60 when approached by CMC, for the simple reason that he was an employee of RTT and not of CMC. If he did that, and he was then forcibly, for the want of a better description, removed off site by CMC at the behest of or with the support of RTT, then one would have no hesitation in concluding that he was dismissed by RTT. But that is simply not what happened.

[49] In my view, what the evidence showed is that both CMC and the first respondent at all times laboured under the apprehension that the first respondent was always still a permanent employee of CMC and that he would fulfil various supervisory positions when needed. That he is why he never protested when he was removed from the OnDemand Sixty60 posting. He understood he would be given a new posting when removed from OnDemand Sixty60. In that context, and on 1 September 2021, he signed a new contract of employment as a nightshift manager at the same salary, posted at the CMC head office, which once again confirmed his status as permanent employee of CMC. This placement was a temporary measure until he could be placed at a specific post at a client. Had the events that then transpired at CMC in September 2021 giving rise to the dismissal of the first respondent not happened, I am quite sure there would have been no claim of unfair dismissal by the first respondent against RTT. I am convinced that the reliance on section 198A(3)(b) was an *ex post facto* stratagem, thought of by the first respondent's attorneys, in seeking to challenge his dismissal after the fact.

[50] The point is that even with the first respondent being a permanent employee of RTT as at the end of August 2021, there was nothing in law preventing him from leaving that employment and once again taking up employment with CMC. *Assign supra* does not stand in the way of such an eventuality. The reason is because such a decision is in the hands of the first respondent, and cannot be forced upon him by CMC. If he does not agree, then he remains employed by RTT, and any attempt to take him away from RTT could be seen as a dismissal by RTT. But if he agrees to take up employment at CMC, then the identity of his employer is substituted by agreement, and of his own volition. The latter event is what happened *in casu*. It is important to appreciate that I am not saying, at all, that employees can contract out of the application of section 198A(3)(b). That obviously is not allowed, as it would undermine the very protection that section seeks to bestow. What I am saying is that an employee that is by law deemed to be an employee of the client, given a choice,

can still agree to revert back to employment with the TES. It is surely similar to an employee deciding to take up a job at a previous employer.

[51] It is in the above context that the second respondent materially erred. According to the second respondent, the application of section 198A(3)(b) rendered the contract of employment concluded with the first respondent on 1 September 2021 to be null and void. However, this finding would be wrong. There is nothing in section 198A(3)(b) rendering any contract involving an employee, the TES and even the client null and void. Section 198A(3)(b) determines the identity of the employer. It does so by application of law. It does not remove or inhibit the contracting capacity of the employee. When the contract of employment of 1 September 2021 was concluded, the identity of the employer of the first respondent had long since changed to RTT. The application of section 198A(3)(b) had come, applied, and had gone. If the first respondent then decided to take up a job with his former employer, CMC, and signed a contract of employment with it, so be it. In any event, the validity of the contract signed on 1 September 2021 was never placed in issue by the first respondent, nor was it ever suggested to the witnesses for CMC that this contract was null and void.

[52] Therefore, what happened in this case on 1 September 2021, happened by agreement. That agreement did not involve RTT. It was an agreement between the first respondent and CMC, in terms of which the first respondent left RTT to take up employment with CMC. In fact, I believe that the first respondent was not averse to leaving RTT, considering all the problems he had there, emerging from his own evidence. He would thus get a fresh start on another assignment at CMC. There is no evidence to indicate that this agreement was not voluntarily concluded, or that the first respondent was somehow forced or coerced into concluding the same. As stated, the validity of the agreement was not even attacked at arbitration, and the first respondent himself actually sought to rely on it when presenting his case.

[53] For all the aforesaid reasons, I conclude that as of 1 September 2021, the first respondent was no longer employed by RTT, but was employed by CMC. It is true that the 1 September 2021 agreement refers to the employer as CMC Lebonte Prop, however Duvenhage made it clear in evidence that the first respondent was employed by CMC itself. It appeared that the reference to CMC Lebonte Prop was

tantamount to a 'client' reference, as this was the head office of CMC where the first respondent was stationed as a nightshift manager. Importantly, Duvenhage confirmed that the very idea behind this initial posting was that it would just be temporary, as the first respondent was to be deployed elsewhere in CMC at a client, and that he was considered a permanent employee of CMC.

[54] For all the reasons as set out above, I must conclude that any award made against RTT in this case would not be competent, would be irregular and made in error, and falls to be reviewed and set aside. However, and that being so, it still leaves CMC as the employer of the first respondent, and considering that it was common cause that the first respondent was dismissed by CMC on 8 September 2021 due to operational requirements, it then fell on CMC to prove that such dismissal was fair.

[55] For all the reasons to follow, I do not believe that the dismissal of the first respondent by CMC was fair. The question whether a dismissal for operational requirements is substantively fair is decided, as set out in *Chemical Workers Industrial Union and Others v Latex Surgical Products (Pty) Ltd*[46], as follows:

'Whether or not there was a fair reason for the dismissal of the individual appellants relates to a general question and a specific question. The general question is whether or not there was a fair reason for the dismissal of any employees. The specific one is whether there was a fair reason for the dismissal of the specific employees who were dismissed, which in this case, happened to be the individual appellants. The question of a fair reason to dismiss the specific employees who were dismissed goes to the question of the basis upon which they were selected for dismissal whereas the other question relates to whether or not there was a reason to dismiss any employees in the first place …'

In fact, and for the reasons to follow, I consider that the first respondent was poorly treated by CMC where it came to his dismissal.

[46] (2006) 27 ILJ 292 (LAC) at para 55.

[56] As already discussed to a large extent above, the first respondent could have remained employed at RTT, as he was by law deemed to be its permanent employee. But he decided to move back to CMC on the understanding of permanent employment there and a suitable placement elsewhere. Having been brought back into CMC on such basis and for such reason, only for CMC to retrench him eight days later, cannot be fair treatment. As the first respondent correctly testified:

'… you cannot tell me that you transferred me to assist me based on the fact that you basically retrenched me within eight days of working for you. It is like me signing a Contract of Employment and then after I start the company decides "oh we cannot afford you – okay bye-bye"'(sic)

[57] As to the rationale for the dismissal of the first respondent for operational requirements, I am unconvinced that CMC proved any justifiable reason for this. Duvenhage simply referred to a suitable posting at another client falling through, but he never explained why the first respondent could not have remained on as nightshift manager at head office until another suitable posting was found. Considering that the first respondent was brought back into the fold for the very reason of getting him another posting, it is simply an untenable proposition to say, after one week, that there is nothing else and he must face retrenchment. There was also no evidence as to what efforts CMC had embarked upon to see if there was any posting available for the first respondent anywhere else in the business. CMC jumped the gun, to a material extent, and this materially compromised any chance of substantive fairness.

[58] Also, in the context of substantive fairness, there is no evidence that CMC properly consulted on or even explored the issue of alternatives. It is clear to me that in the meeting of 8 September 2021 when the first respondent was handed the notice in terms of section 189(3), he was told there were no alternatives, because from the outset he was told he would only be placed if something comes up in future. The issue of selecting the first respondent for retrenchment faces similar difficulties. Duvenhage curtly refers to LIFO, but there is no indication that any selection criteria was ever applied. There was no exposition by CMC as to what the postings were that were in existence at CMC, which the first respondent could possibly fill but were currently filled by other employees, and why one of those employees that were posted in any one of those postings could not have been selected for retrenchment

with the first respondent being retained. In short, the first respondent was earmarked for retrenchment before any consultation even started.

[59] Because the first respondent was effectively presented with a *fait accompli*, any consultation with him would then simply pay lip service to the prescribed process under section 189 of the LRA, and would have little meaning.[47] Certainly, there was no information shared with the first respondent about his possible retrenchment, and why it was necessary. CMC was not open to any persuasion where it came to the retrenchment of the first respondent.[48] For these reasons, the attempts by CMC to invite the first respondent to further consultations on 15 and 20 September 2021 would simply have no effect when it comes to deciding whether the process in this case could be considered to be fair. In any event, the letter of 9 September 2021 made it clear to the first respondent that he must come and collect his termination documents. None of what happened *in casu* can by any semblance of the imagination be seen to constitute a fair process. The following *dictum* in *Havemann v Secequip (Pty) Ltd*[49] is apposite:

'A key purpose behind consultation is the protection of employment, with security of employment being a core constitutional value protected through the LRA. In *Supergroup Trading (Pty) Ltd v Janse van Rensburg* this Court criticised the consultation undertaken by an employer as a "charade" and "purposeless insofar as it deprived the Respondent of a chance to save his post or avoid his being selected for retrenchment. His representations on that score were to be fruitless because restructuring was a *fait accompli*." It was emphasised that –
'…the purpose of consultation is to try and save a job or position. If this cannot be done the next aim is to avoid dismissal by placing the person, whose post has become redundant, elsewhere. And if avoidance is not possible consultation concerns the extent to which the consequences of the retrenchment can be mitigated.''

[47] See *Van Rooyen and Others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 ILJ 2735 (LC) at para 19 as to what is actually required.

[48] *Association of Mineworkers and Construction Union and Others v Tanker Services (Pty) Ltd* (2018) 39 ILJ 2265 (LC) at para 22.

[49] (JA91/2014) [2016] ZALAC 53 (22 November 2016) at para 32. See also *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 36.

[60] Overall considered, the dismissal of the first respondent by CMC for operational requirements was both substantively and procedurally unfair. The second respondent, in her award, not only reasonably appreciated this, but her findings in this regard were correct. She found that Duvenhage was unable to support in evidence that the dismissal was for operational requirements. She also found that the first respondent was not properly consulted. These findings are unassailable on review.

[61] Because CMC unfairly dismissed the first respondent for operational requirements, the first respondent would obviously be entitled to consequential relief against CMC. The first respondent did not seek reinstatement, but instead sought compensation as contemplated by section 194 of the LRA. According to the second respondent, the 10(ten) months' salary in compensation she awarded was just and equitable. The second respondent however did not elaborate on why she so found.

[62] When considering the amount of compensation that should be awarded *in casu*, it must be taken into account that the dismissal of the first respondent was both substantively and procedurally unfair. It must also be considered that an award of compensation in the case of a finding of procedural unfairness includes a *solatium* due to the infringement of the employee's right to procedural fairness.[50] In *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[51] the Court considered the objective of compensatory relief under the LRA, and said:

'… it is a payment for the impairment of the employee's dignity. This monetary relief is referred to as a solatium and it constitutes a solace to provide satisfaction to an employee whose constitutionally protected right to fair labour practice has been violated. The solatium must be seen as a monetary offering or pacifier to satisfy the hurt feeling of the employee while at the same time penalising the employer. It is not however a token amount hence the need for it to be 'just and equitable' and to this end salary is used as one of the tools to determine what is 'just and equitable' …'

[50] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at para 41.

[51] (2015) 36 ILJ 2989 (LAC) at para 23.

[63] Compensation must be just and equitable. In section 194(1), it is provided that compensation must be *'just and equitable in all the circumstances'*.[52] As said in *Kemp t/a Centralmed v Rawlins*[53]: '*… The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything …*'. In order to decide what is just and equitable and fair in all circumstances, so as to arrive at an appropriate award of compensation, the second respondent as arbitrator had to exercise a judicial discretion. The normal basis upon which this discretion is to be exercised is enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*[54]*,* as thus:

'The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer.'

Further, '*considering everything*' as referred to in *Rawlins supra* must mean a consideration also of the scope and extent of the loss suffered by the employee, the nature and extent of the deviation from what would normally be considered to be fair, whether there may exist any justification for the conduct of any of the parties, any *mala fides* on the part of the employer, and the impact of the sum awarded on the employer or its business.[55]

[64] In this instance, and as said, the dismissal was substantively unfair, in that CMC simply could not prove a fair reason for the dismissal of the first respondent. Further, there was in essence a complete failure of process and compliance with section 189 of the LRA. But I also consider that the first respondent had very short

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[52] *Fouldien and Others v House of Trucks (Pty) Ltd* (2002) 23 *ILJ* 2259 (LC) at para 11; *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) at para 14.

[53] (2009) 30 *ILJ* 2677 (LAC) at para 27. The SCA in *Rawlins v Kemp t/a Centralmed* (2010) 31 *ILJ* 2325 (SCA) upheld the findings of the LAC.

[54] (2007) 28 *ILJ* 2238 (LAC) at para 30. See also *Mohlakoana v CCMA and Another* (2010) 31 *ILJ* 2688 (LC); *SA Post Office Ltd v Jansen Van Vuuren NO and Others* (2008) 29 *ILJ* 2793 (LC).

[55] See *Rawlins* (*supra*) at para 20; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 *ILJ* 974 (LAC).

service, being some seven months. I do not believe CMC was *mala fide*, and simply overhastily reacted to what it saw as an operational difficulty, instead of giving the situation time to properly unfold. I must confess that the manner in which the first respondent led his evidence in the arbitration left much to be desired, and was on occasion quite unacceptable. The first respondent also presented no evidence as to his current employment status or loss he may have suffered.

[65] All this considered, I believe a compensation award of 6 (six) months' salary in favour of the first respondent would have been appropriate. The first respondent's salary at the time of his dismissal amounted to R15 000.00 per month, and thus the first respondent would be entitled to compensation of R90 000.00. In awarding the first respondent compensation in the sum of R150 000.00, being an amount equivalent to 10(ten) months' salary, I do not believe the first respondent exercised a judicial discretion. The amount is excessive and unduly punitive to CMC, and considering that the first respondent had very short service and there was no evidence concerning his current employment status or loss suffered.

Conclusion

[66] For all the reasons as set out above, the second respondent's arbitration award against RTT cannot stand. There was simply insufficient evidence to show that RTT had dismissed the first respondent. The second respondent should have dismissed the unfair dismissal claim against RTT for want of jurisdiction, because dismissal had not been proven. It follows that the arbitration award against RTT was in error, and falls to be reviewed and set aside.

[67] I am satisfied that on the evidence, it was clear that at the time of termination of employment of the first respondent, he was employed by CMC and that CMC had dismissed him for operational requirements on 8 September 2021. That dismissal was substantively and procedurally unfair, and the second respondent's finding to this effect was rational and reasonable based on the evidence before her, and must be upheld on review. The only proviso is that this finding applies against CMC, and not RTT.

[68] Finally, I do not consider the second respondent to have exercised a judicial discretion where it comes to the quantum of the compensation award she had made. That award is to be reviewed and set aside, and be substituted with an award that just and equitable in all circumstances, which in my view is an amount equivalent to 6(six) months' salary, giving a sum of R90 000.00.

Costs

[69] This then only leaves the issue of costs. In terms of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. The applicants were partially successful, however the finding that the first respondent was unfairly dismissed was still sustained. This was certainly an arguable case which had some novelty attached to it. I do not think any of the parties acted unreasonably in seeking to pursue this matter to finality, and in any event, it is an issue that called for final determination by this Court. I also consider the *dictum* of the Constitutional Court with regard to costs in employment disputes as expressed in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[56]. The same Court recently re-affirmed the principle set in *Zungu supra* and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'[57] In my view, there certainly exists no reason in this case to depart from the principle set out above. Therefore, I consider it to be in the interest of fairness that no costs order should be made.

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

Order

1. The applicants' review application is upheld in part and dismissed in part.

[56] (2018) 39 ILJ 523 (CC) at para 25.

[57] *Long v South African Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at para 30.

2. The arbitration award of the second respondent, arbitrator Nomusa Mbhele, dated 13 February 2022, and issued under case number GAEK 7867 – 21, is reviewed and set aside.

3. The arbitration award is substituted with the following determinations:

3.1 The first respondent was not dismissed by the second applicant and consequently the third respondent has no jurisdiction to entertain the dispute as against the second respondent.

3.2 The first respondent was dismissed by the first applicant, CMC Global Outsourcing Projects (Pty) Ltd, which dismissal was both substantively and procedurally unfair.

3.3 The first applicant is directed to pay compensation to the first respondent in an amount equivalent to 6(six) months' salary, amounting to R90 000.00 (ninety thousand Rand).

3.4 The amount as contemplated by paragraph 3.3 of this order shall be paid within 14(fourteen) days of date of this order, failing which the amount shall accrue interest at the legally prescribed rate from due date to date of actual payment.

4. There is no order as to costs.

S Snyman
Acting Judge of the Labour Court of South Africa

Appearances:

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| For the Applicants: | Advocate G Van Der Westhuizen |
| Instructed by: | Du Pre Le Roux Attorneys |
| For the First Respondent: | Advocate C Britz |
| Instructed by: | Sassenberg Attorneys |