THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No.: JR1086/21

In the matter between:

DEPARTMENT OF SPORTS, ARTS AND CULTURE AND RECREATION	**Applicant**
and	
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL	**First Respondent**
LUYANDA OLOTA N.O.	**Second Respondent**
ANDILE KOLANISI	**Third Respondent**

Heard: **28 June 2024**
Delivered: **30 September 2024**

JUDGMENT

LUTHULI, AJ

Introduction

[1] The Applicant seeks to review and set aside an arbitration award issued by the Second Respondent (the Arbitrator). In her award, the Arbitrator held that the dismissal of the Third Respondent (Mr Kolanisi) was substantively unfair and procedurally fair and ordered that Mr Kolanisi be reinstated in the same or similar position he occupied before the dismissal. The Arbitrator further ordered that Mr Kolanisi report for duty on 15 May 2021 and that the Applicant must pay him back pay in the amount of nine months which amounts to R822 980.43 which must be paid by no later than 15 May 2021.

[2] Mr Kolanisi has applied for a cross review of the arbitration award wherein he is challenging the order of nine months back pay on the grounds that the Arbitrator ought to have awarded full back pay as opposed to only nine months ordered.

[3] Both the review application and the cross-review application served before me for determination.

Background

[4] Mr Kolani was employed by the Applicant as a Chief Director: Human Resources.

[5] The Department of Public Service and Administration issued a Directive to all Heads of Department advising them of the need to comply with minimum entry requirements for senior public service employees (SMS) positions with effect from 1 April 2015.

[6] The effect of the Directive was that in order for an applicant to be considered for a position of a director an applicant must have an undergraduate

qualification (NQF7) as recognised by SAQA and 5 years' experience at a Middle/Senior Management level. In terms of the Directive, these were minimum entry requirements.[1]

[7] He was charged by the Applicant for his role in the appointment of Ms Nompumelelo Matsapola who the Applicant alleged that he did not meet the minimum requirements for appointment to the SMS position of Director: Audit and Risk Management.

[8] The charge was framed as follows:

> "It is alleged that he breached the Fiduciary duties attached to your position of Chief Director: Human Capacity Management in that:
> 1. The advert posted in the media for the post of the Director Audit and Risk Management dated 23 August 2016 does not comply with DPSA directive which states that the Minimum Education Qualification for a Director and Chief Director is an undergraduate qualification at NQF Level 7 (as recognised by SAQA) and 5 years' experience in managerial post.
> 2. He recommended the appointment of the applicant Ms Nombulelo Matsapola to the post.
> 3. Your action resulted in irregular and unlawful appointment of Nombulelo Matsapola

[9] The alternative charge to charge 1 was framed as follows:

> "It is alleged that he committed an act of misconduct in that he recommended the appointment of Ms Nombulelo Matsapola.
> The advert for the post of Director Audit and Risk Management as posted in the media is contrary to the DPSA directive which states that the minimum education Qualification for a Director and Chief Director is an undergraduate qualification at NQF level 7 and 5 years' experience in a managerial post.

[1] Index to Pleadings: Review Application, P9, Paras 8 - 9

1. The closing date for the post was 23 August 2016 and at the time of Matsapola applying for the post and being interviewed on 28 February 2017, Ms Matsapola had 4 years' experience and 2 months in a middle management position, meaning as per DPSA Directive Ms Matsapola did not qualify to be appointed in an SMS position.

2. The curriculum vitae of Ms Matsapola shows the highest qualification she possesses is a National Diploma, which according to the National Qualification Framework of the Higher Education is a level 6.

3. The directive further indicates that "should SMS post be evaluated with a higher requirement than the one stated above, then it must be advertised accordingly. However, should an SMS post be evaluated lower than the abovementioned requirement, the Directive takes precedence and the minimum requirements as stipulated above must be applied."

4. The job evaluation results of the post of the Director Audit and Risk Management also evaluated the post at level 13 with a degree qualification as a requirement needed for the incumbent."

[10] Charge 2

1. "It is alleged that you committed an act of misconduct in that you failed to attend on going pre-scheduled meetings through electronic meeting invites of the Head of Department dated 23, 29, 30 and 31 May 2018."

[11] Charge 3

1. "It is alleged that you committed an act of misconduct in that you compiled and recommended a submission to the HOD for moderation and implementation of 2016/2017 performance bonuses and pay progression for Directors and Chief Directors who did not qualify in terms of the incentive framework prescribed by the Minister of Public Service and Administration. His action resulted in an irregular expenditure."

Ms Marissa Rose	50443475	R43 168.50
Mr Sasabona Manganye	20556322	R33 702.86
Ms Sammy Ramaroka	22795537	R34 208.89

[12] Charge 4

1. "It is alleged that he committed an act of misconduct in that after he was rated a 3 by the Head of Department for the 2016-2017 performance cycle, he wrote a memo to the MEC Faith Mazibuko to review the scoring of his annual appraisal for his own personal gain.
2. He failed to execute his fiduciary duty in that he failed to advise the MEC who does not have powers to moderate and later scores.
3. SMS handbook chapter 15.7(10) states that the EA shall appoint a committee that can assist her/him to ensure that effective performance agreements that lay a basis for appraisal are developed and reviewed. In terms of 15(2) the committee should also moderate assessment results and make recommendations to the EA on the granting of performance rewards and progression.
4. The Committee should ensure that there is consistency across the department in the development of performance standards and measures.
5. SMS hand book chapter 15.7(4) states that Department Cooperate Services unit should support this committee, individual supervisors and jobholders in the process of developing PAS and reviewing/appraising performance. They should also be able to provide technical advice for the ongoing development and maintenance of the PMDS policy and system."[2]

[13] After a disciplinary enquiry, Mr Kolanisi was found guilty of all the charges brought against him and was dismissed. Aggrieved by his dismissal, Mr Kolanisi referred an unfair dismissal dispute to the First Respondent. The matter was not conciliated successfully and Mr Kolanisi referred the dispute for arbitration and

[2] Index Pleadings: Review Application, PP132 - 134

same served before the Second Respondent.

The Arbitration Proceedings

[14] In her Award dated 27 April 2021, the Arbitrator made the following pertinent findings regarding the charges levelled against Mr Kolanisi:

14.1 That Mr Kolanisi was not guilty of charge 1 as well as the alternative charge;
14.2 That Mr Kolanisi was not guilty of charge 3 and 4; and
14.3 That Mr Kolanisi was guilty of charge 2.

[15] The Arbitrator proceeded to order that Mr Kolanisi's dismissal was substantively unfair but procedurally fair. She then ordered reinstatement and that Mr Kolanisi should report for duty on 15 May 2021 and ordered nine months' salary.[3]

The Review Application

Grounds for review

[16] The Arbitrator's Award was challenged on the following grounds:

16.1 That the Arbitrator's Award falls to be reviewed and set aside because the decision reached by her is not one that a reasonable decision-maker could reach, and her Award does not withstand the test for the following reasons:
16.1.1. The Arbitrator committed a gross irregularity and misconducted herself when despite finding that the appointed candidate did not have the requisite requirements and that Mr Kolanisi supported her appointment, the Arbitrator found that Mr Kolanisi did not breach his fiduciary duties;

[3] Arbitration Award, P40

16.1.2. The Arbitrator misdirected herself by her failure to properly apply her mind to her own finding that when Mr Kolanisi signed and supported the appointment, he was in possession of all the documents regarding the qualifications and experience of the candidates and he could have intervened instead he supported the appointment of an unqualified candidate;

16.1.3. The Arbitrator asked herself the wrong question when she found that the question to be answered is whether Mr Kolanisi acted in bad faith. The evidence before the Arbitrator was that Mr Kolanisi signed and supported the appointment of a candidate which did not meet the requirements. There was no evidence of a mistake by Mr Kolanisi instead, Mr Kolanisi gave about four contradictory explanations for his gross misconduct;

16.1.4. The Arbitrator failed to apply her mind to the fact that the Directive is aimed at appointing qualified people in order to improve the quality of service-delivery. Had the Arbitrator applied her mind to this fact, she would have realized the seriousness of the misconduct that was committed by Mr Kolanisi;

16.1.5. The Arbitrator misconstrued the evidence by requiring the Applicant to prove the version of Mr Kolanisi. It was Mr Kolanisi who put the version that he signed the submission without reading it. In the same vein it was not the version of the Applicant that Mr Kolanisi knew the contents of the objection. On the contrary, the Applicant's version was that it was grossly negligent of Mr Kolanisi to sign and support the appointment without dealing with the objection. It is clear that the Arbitrator misunderstood the evidence before her and produced an Award that is so unreasonable that it ought not to be allowed to stand;

16.1.6. The Arbitrator found that there were two Chief Directors in the panel. Such evidence was not led during the arbitration proceedings. The Arbitrator found that on this alleged basis, Mr Kolanisi should not take any responsibility. The finding is not supported by any evidence. The evidence was that the most

senior person was Mr Gawe, and that Mr Gawe was in fact a Deputy Director;

16.1.7. The evidence before the Arbitrator was that Mr Kolanisi had previously instructed that a similar process be started afresh when no qualifying candidates were short listed. Inexplicably, in her Award, the Arbitrator found that Mr Kolanisi could not be expected to start the process afresh. That finding is not supported by any evidence that was before the Arbitrator;

16.1.8. Had the Arbitrator applied her mind to these facts, she would have found that instead of supporting a process that was in contravention of the provisions of the Directives on SMS appointments, Mr Kolanisi could as he had previously done, directed that a proper process be followed;

16.1.9. The Arbitrator failed to apply her mind to the seriousness of the offences committed by the Mr Kolanisi and in particular that the relationship of trust is destroyed by Mr Kolanisi's acts of gross misconduct for which dismissal is an appropriate sanction; and

16.1.10. The decision to which the Arbitrator came is one that no reasonable decision-maker could come to having regards to the evidence placed before her. Had the Arbitrator properly applied her mind to all the evidence, she would find that the Applicant discharged its onus in proving that the dismissal of Mr Kolanisi was substantively fair.[4]

The test for review

[17] Arbitration awards should not be lightly tampered with, they must pass through the eye of the proverbial needle. In the context of review applications, that needle is a stringent test ensures that awards are not easily interfered with.[5] The reviewing court, therefore, is enjoined to embark on an outcome-based enquiry

[4] Index to Pleadings: Pp 31 – 35, Paras 31 – 31.11

[5] *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 at para 13.

when determining a review application.[6]

[18] The fact that an arbitrator provided bad reasons for the award or committed an error or misdirection along the way will not in itself be sufficient to succeed with a review application based on the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[7] test.[8]

[19] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[9] O'Regan J held:

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected."

[20] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*[10] the Supreme Court of Appeal explained how a reviewing court should go about deciding a review based on the *Sidumo* test:

> "That test involves the reviewing court examining the merits of the case "in the round" by determining whether, in light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator

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[6] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 42.
[7] [2007] 12 BLLR 1097 (CC).
[8] *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at paras 12 and 25.
[9] 2004 (4) SA 490 (CC) at para 45.
[10] [2013] 11 BLLR 1074 (SCA) at para 12.

assumes less importance than it does on the SCA test[11], where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, the court must still consider whether, apart from these reasons, the result is one that a reasonable decision-maker could reach in light of the issues and the evidence."

[21] The Court further held:

"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 particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[12]

[22] It is against the abovementioned formulated test that this review application must be determined.

[23] I now turn to each ground of review.

Analysis

[24] The Arbitrator committed a gross irregularity and misconducted herself when despite finding that that the appointed candidate did not have the requisite requirements and that Mr Kolanisi supported her appointment, the Arbitrator found that Mr Kolanisi did not breach his fiduciary duties

[25] In dealing with the allegation of the breach of fiduciary duty, the Arbitrator considered the Oxford Dictionary of the breach of fiduciary duty. In her research,

[11] See: *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* [2006] 11 BLLR 1021 (SCA)
[12] *Herholdt v Nedbank (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 25.

she found that the breach of fiduciary duty takes place when a person behaves in a manner that contradicts their duty.

[26] She goes on to state that "*in my view, it is when a person failed to act in good faith. The question to be answered is how did the Applicant act in bad faith?"*[13]

[27] The Arbitrator found that Regulation 67(1) of the Public Service Regulations provide that an executive authority appoints a selection committee to make a recommendation on the appointment to a post and that Regulation 76(5) provides that the selection committee makes a recommendation on the suitability of a post.

[28] The Acting HOD wrote the internal memo with the subject matter that read "*recommendation for appointment in the post Director, Audit, Risk and Management"* and signed exactly the same way Mr Kolanisi signed. Nowhere does it state that he recommended the appointment of a candidate that does not meet the requirements.[14]

[29] The Arbitrator therefore based on the above reasoning, found that Mr Kolanisi did not act in bad faith and did not recommend the appointed candidate, Ms Nombulelo Matsapola.

[30] This finding falls within the bounds of reasonableness in my view. Mr Kolanisi does not have powers to recommend a candidate and such powers are vested with the selection committee. Mr Kolanisi was not part of the selection committee. Where gross irregularity is alleged, the applicant must establish that it in fact caused the result to be unreasonable.[15]

[31] It is my considered view that the Applicant failed to establish a gross irregularity on the part of the Arbitrator and the reasoning of the arbitrator on this

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[13] Arbitration Award, P29, Para 87
[14] Arbitration Award, Pp32 – 33, Paras 95 - 96
[15] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at para 21.

score is therefore unassailable.

[32] The Arbitrator misconducted herself by her failure to properly apply her mind to her own finding that when Mr Kolanisi signed and supported the appointment, he was in possession of all the documents regarding the qualifications and experience of the candidates and he could have intervened instead he supported the appointment of an unqualified candidate

[33] Again, the Arbitrator found that Mr Kolanisi was not part of the panel members and therefore he could not be held liable for recommending the appointed candidate.[16] Mr Kolanisi trusted the panel, which included members who held a position equivalent to him.

[34] The Arbitrator found that it would not be unreasonable for Mr Kolanisi to trust the panel members that they submitted correct information to him and she would not think that Mr Kolanisi would be expected to start afresh what was done by colleagues who held similar positions as him.

[35] If Mr Kolanisi was part of the panel and errors happened in his presence, then he would be blamed for such errors as it would be his duty to ensure legislative compliance whilst he was present in the shortlisting and interviewing process.

[36] It may well be that another Arbitrator could reach a different decision on this issue. The decision however, is not one that no other reasonable decision-maker could reach in light of the material presented before her.

[37] This finding therefore survives the reasonableness scrutiny as it falls within the band of reasonableness.

[38] The Arbitrator asked herself the wrong question when she found that the question to be answered is whether Mr Kolanisi acted in bad faith. The evidence

[16] Arbitration Award, P32, Para 94

before the Arbitrator was that Mr Kolanisi signed and supported the appointment of a candidate which did not meet the requirements. There was no evidence of a mistake by Mr Kolanisi instead, Mr Kolanisi gave about four contradictory explanations for his gross misconduct.

[39] For fiduciary duties to arise, there must, within the particular relationship concerned, be specific contractual obligations, which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations.[17]

[40] In *Helmut Integrated Systems v Tunnard*[18] the Court of Appeal stated that it is now commonplace to observe that not every employee owes obligations as a fiduciary to his employer.

[41] My brother, Moshoana J has held in *RFS Administrators (Pty) Ltd v Sean Lindo Samons and Others*[19] that:

> "The prevailing view therefore is that all employees do not necessarily or automatically owe fiduciary duties to the employers. Circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary. Whether an employee has placed himself or herself in a position where he must act in the interest of his employer will depend on the terms of employment and the nature and purpose of the employee's functions, duties, and responsibilities."

[42] In *casu*, the Applicant left it to the Arbitrator to interpret that fiduciary duty, if any, that Mr Kolanisi had and in fact, breached. Not much by way of evidence was led on this score except a bald averment for instance by one of the witnesses, Ms Elizabeth Newton, that Mr Kolanisi breached his fiduciary duties by signing the submission without paying attention to the details and Ms Phakamile Mahamba

[17] *University of Nottingham v Fishel (2000) ICR 1462*
[18] (2006) EWCSA Civ 1735 Para 37
[19] *Labour Court Case Number JS64/17 at Para 34*

who stated that Mr Kolanisi had breached his fiduciary duty as a Chief Director.

[43] The Arbitrator dealt with this issue by asking whether Mr Kolanisi had acted in bad faith. A breach of fiduciary duty entails one failing to act in the interest of another.

[44] Bad faith is but one of the considerations but not all of it. In the context of the entire Award, which is what this court must consider, the totality of the evidence, this finding is reasonable.

[45] The Arbitrator found that the advert for the post was wrong and did not comply with the Ministerial Directive. The entire process was flawed from the start, as the Arbitrator reasonably found.

[46] I have already made a finding above that the Arbitrator's finding that Mr Kolanisi did not recommend as he had no authority to do so falls within the band of reasonableness.

[47] Mr Kolanisi's evidence was that by appending his signature, he was supporting the appointment and he did add supported.[20]

[48] The Arbitrator misconstrued the evidence by requiring the Applicant to prove the version of Mr Kolanisi that he signed the submission without reading it. In the same vein it was not the version of the Applicant that Mr Kolanisi knew the contents of the objection. On the contrary, the Applicant's evidence was that it was grossly negligent of Mr Kolanisi to sign and support the appointment without dealing with the objection. It is clear that the Arbitrator misunderstood the evidence before her and produced an outcome that is so unreasonable that it ought not be allowed to stand.

[49] It was the Arbitrator's finding that the Applicant had a burden to prove that

[20] Records of the Transcribed Proceedings, P63, Vol 10

Mr Kolanisi acted grossly negligent or breached his fiduciary duty.[21] The Arbitrator gave a detailed explanation for her finding on this score which includes the following:

> 49.1 That Mr Kolanisi testified that he saw the comment about NEHAWU observation/complaint;
> 49.2 That Mr Kolanisi's version that he informed the Acting HOD about the comment was not refuted because she did not have the Acting HOD's version;
> 49.3 That the Acting HOD did not testify and no reason was given why he did not testify;
> 49.4 That the Applicant's witnesses gave the impression that the NEHAWU observation was received by the Acting HOD, but during Mr Kolanisi's cross examination correspondence was shown of the Acting HOD claiming he never received the NEHAWU complaint regardless of what appeared in NEHAWU complaint to the PSC claiming that the Acting HOD responded to their complaint and informed them that the appointment is the prerogative of management;
> 49.5 She also noted that the PSC Report revealed that the Acting HOD denied to have received NEHAWU observation; and
> 49.6 That she considered the issue of NEHAWU observations could not be true because Mr Gawe was sick when the memorandum was approved.

[50] The Arbitrator further found that the Applicant must prove the breach of the rule and that she was not satisfied that Mr Kolanisi knew what the content of the observation by NEHAWU was. She found it improbable that Mr Kolanisi would just sign.

[51] The Arbitrator further found that Mr Kolanisi saw the complaint from NEHAWU but did not get the actual report from Mr Gawe. The question is not whether the Arbitrator was wrong in making this finding. That a proper finding should have been that there was a duty for Mr Kolanisi to understand the nature of

[21] Arbitration Award, P29, Para 88

the complaints by NEHAWU is relevant in an appeal.

[52] The question in a review is whether this finding is so unreasonable that no reasonable arbitrator could reach. I am not persuaded that this finding falls outside the bounds of reasonableness.

[53] The Arbitrator accepted that Mr Kolanisi cannot recommend. This finding falls within the bounds of reasonableness. Another decision-maker could come to the conclusion that Mr Kolanisi relied on the panel members to have exercised their mind in the appointment.

[54] The entire Award must be considered. In the context of the entire Award, the Arbitrator found that Mr Kolanisi cannot recommend as he does not have powers to do so. The powers to recommend are derived from the Public Service Regulations and the selection committee is clothed with such powers.

[55] The Award has to be considered in totality as opposed to being considered in isolation, after all, this Court is seized with a review application and not an appeal, I repeat.

[56] The Arbitrator found that there were two Chief Directors on the panel. Such evidence was not led during the arbitration proceedings. The Arbitrator found that on this alleged basis, Mr Kolanisi should not take any responsibility. This finding is not supported by any evidence. The evidence was that the most senior person was Mr Gawe, and that Mr Gawe was in fact a Deputy Director

[57] The Arbitrator found that "*it became evident that the chairperson of the panel was at a level of a Chief Director and also the Chief Director for the component where the position came from was part of the panel member. Those two panel members hold the position equivalent to that of the Applicant."*[22]

[58] The difficulty faced by the Applicant in this review, and in particular, this

[22] Arbitration Award, P32, Para 94

ground for review, is that the Applicant did not quote from the record in its founding affidavit and did not file a supplementary affidavit, quoting from the record in this regard.

[59] I raised this issue with counsel for the Applicant, Mr Matyolo, and his response was that the Applicant did not have to quote from the record and that in any event, it did so in its heads of argument.

[60] With respect, I disagree with Mr Matyolo's argument in this regard. The applicant must allege and prove the defects in the Award and must do so in the pleadings.

[61] I understand the Heads of Argument to serve the purpose *inter alia,* to provide a guidance to counsel for oral submission and to further assist the court to familiarize itself with the parties' positions and better engage with legal issues during the proceedings.

[62] A case of review therefore, cannot be made out in heads of arguments by simply quoting from the record and pointing out the defects. At that stage, that ship has long sailed.

[63] This is why the rules of this Court allow for the filing of supplementary affidavit for a reviewing party, to be able to supplement its grounds and support same with the benefit of the full record.

[64] For what it's worth, I did consider the Applicant's Heads of Argument in this regard, there is nothing supporting this ground of review from the quotation of the record.

[65] The court is therefor left with a bald averment that there was no evidence of the panel members being in equivalent position with Mr Kolanisi. In light of this, I defer to the Arbitrator's finding and I find no basis for interference with this finding in this regard.

[66] The evidence before the Arbitrator was that Mr Kolanisi had previously instructed that a similar process be started afresh when no qualifying candidates were short listed. Inexplicably, in her award, the Arbitrator found that Mr Kolanisi could not be expected to start the process afresh. That finding is not supported by any evidence that was before the Arbitrator

[67] Again, the Arbitrator found that it was not expected of Mr Kolanisi to start the process afresh given his reliance on the panel members who were of similar experience as him.

[68] No case was made out by the Applicant on the papers on this score except that the Heads of Argument capture this point thus:

> "It is clear from the foregoing that the Commissioner ignored the evidence of Ms Mahamba and Ms Newton which was that the third respondent should have cancelled the process and insisted on compliance with the DPSA directive. The Commissioner does not indicate the basis of her thoughts when there was uncontested evidence that the third respondent, a Chief Director, was empowered to do exactly that which the Commissioner says she did not think could be done."[23]

[69] Arbitration Awards are administrative actions and cannot be interfered with lightly. To justify such interference, the defect must be properly identified and each averment pointed out from the record.

[70] It is simply not enough to pay lip service on the alleged defects, what the Applicant sought from this Court is for it to discern from itself the defects and the Court cannot be expected to perform such a role. He who alleges must prove.

[71] The reasoning of the Arbitrator, that Mr Kolanisi relied on the panel members and appended his signature in support falls within the bounds of

[23] Applicant's Heads of Arguments, P18, Para 21

reasonableness, I find.

[72] The Arbitrator failed to apply her mind to the seriousness of the offences committed by the Third Respondent and in particular that the trust relationship is destroyed by the Third Respondent's acts of gross misconduct for which, it is submitted, dismissal is an appropriate sanction

[73] The Arbitrator found Mr Kolanisi guilty of charge 2 in that he failed to comply with reasonable instruction by failing to attend the meetings.[24]

[74] The Arbitrator then embarked on the assessment of the effect of this misconduct on the employment relationship. She did so by quoting Grogan's work as follows:

> "The best measure of the gravity insubordination and or insolence is the effect it has on the employment relationship. Other things being equal, an isolated refusal to carry out an instruction is less likely to destroy the relationship between the employer and employee than sustained and deliberate defiance of authority. In Commercial Catering & Allied Workers Union of SA and another v Wooltru Ltd t/a Woolworth, the Court held that the offence of insubordination is constated by the following: when the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious when the employee's conduct poses a deliberate and serious challenge to the employer's authority."[25]

[75] The Arbitrator found that Mr Kolanisi did not question the authority but did not comply with the instruction as he kept on giving a reason why he could not meet Ms Newton. She found this refusal not to destroy the trust relationship.

[76] The Arbitrator then determined the appropriateness of the sanction by

[24] Arbitration Award, P34, Para 98
[25] Ibid

considering *Sidumo*[26] on the factors to be considered by a commissioner when determining the sanction.[27]

[77] The Arbitrator considered Mr Kolanisi's clean record and his years of service which she found to be fairly long. She further found that the rule that Mr Kolanisi breached does not destroy the trust relationship and that dismissal was harsh compared to the breach.[28]

[78] I find these findings by the Arbitrator to be reasonable and unassailable as she applied the relevant consideration to the appropriateness of the sanction.

[79] For the above reasons, the Award by the Arbitration falls within the band of reasonableness and therefore the review application is dismissed.

The Cross Review

[80] Mr Kolanisi took issue with the Arbitrator's order of backpay of which was limited to nine months.

[81] Section 193(1) of the Labour Relations Act[29] provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or arbitrator may –
> (a) Order the employer to reinstate the employee from any date not earlier than the date of dismissal;
> (b) Order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
> (c) Order the employer to pay compensation to the employee."

[26] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).
[27] Arbitration Award, P38, at para 109 .
[28] Ibid, p. 39, at para 110.
[29] No. 66 of 1995.

[82] In *Equity Aviation Services (Pty) Ltd v CCMA and Others*[30] the Constitutional Court held that "*it is trite law that the power to grant a remedy in section 193 is by its nature discretionary and that the discretion must be exercised judicially by a court that enjoys that unfettered discretion.*"

[83] The crisp legal question that this Court is seized with simply is whether an arbitrator has a discretion to limit the amount of backpay when an order of reinstatement with backpay has been awarded?

[84] In *Equity Aviation* Nkabinde J defined the meaning to 'reinstate' as:

> "The ordinary meaning of the word "reinstate" is to put the employee back into the job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It is safeguards worker's employment by restoring the employment contract. Differently put, if employees are reinstated they resume on the same terms and conditions that prevailed at the time of their dismissals."

[85] In *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others*[31] the Constitutional Court found that employees are not under a duty to mitigate their damages after dismissal by seeking alternative employment. But this does not mean that their earnings between the dismissal and arbitration are irrelevant for the purpose of determining the extent of the retrospectiveness of an order of reinstatement.

[86] The arbitrator, in my view, has an unfettered discretion when it comes to awarding backpay.

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[30] [2008] 12 BLLR 1129 (CC) at para 48.
[31] [2010] 5 BLLR 465 (CC) at paras 39 – 44.

[87] The Arbitrator, in *casu,* did consider that Mr Kolanisi was out of employment for a period of 25 months, but decided to limit the backpay due to the finding of guilt in charge 2.

[88] It is this finding that resulted in the Arbitrator, finding that in fairness, the backpay should be limited.

[89] The charge itself was not gross and was worthy of corrective and progressive discipline, according to the Arbitrator.

[90] I find therefore, the awarding of nine months of backpay a number of reasonable decision-makers could reach[32] and in considering this factor, the Arbitrator did not misdirect herself and exercised her discretion properly and fairly.

Conclusion

[91] In the premises, the cross review must fail as the Arbitrator properly exercised her discretion in determining the amount of backpay.

[92] In the premise the following order is made:

Order

1. The review application is dismissed.
2. The cross review is dismissed.
3. There is no order as to costs.

B. Luthuli

Acting Judge of the Labour Court of South Africa

Appearances:

[32] See: *NUMSA and Others v Fibre Flair CC t/a Kango Canopies* [2000] 6 BLLR (LAC) 633F-G.

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