THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1372 / 14

In the matter between:

ESKOM HOLDINGS SOC LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**First Respondent**
H MALOKA N.O. (AS ARBITRATOR)	**Second Respondent**
NUMSA obo RANATO DENNIS	**Third Respondent**
RANATO DENNIS	**Fourth Respondent**

Heard: **21 June 2017**

Delivered: **13 March 2018**

Summary: CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out – determinations of arbitrator compared with evidence on record – commissioner's decision irregular and unsustainable

Misconduct – breach of safety regulations – nature of misconduct considered –

zero tolerance approach considered – dismissal for breach of safety regulations justified – zero tolerance approach justified – serious misconduct proven

Misconduct – inconsistency – principles considered – application of principles – no like for like comparison shown – no indication that employer applied discipline in mala fide or capricious manner – inconsistency not shown to exist – arbitrator's finding of inconsistency unsustainable

Review application – ground of review relating to misconduct by arbitrator – no evidence of misconduct apparent from record – arbitrator conducting proceedings properly – no misconduct by arbitrator shown to exist – no merit in this ground of review

Review application – award of arbitrator finding dismissal to be substantively unfair irregular and not a reasonable outcome – proper case for review made out – review application upheld and award set aside

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment is given pursuant to an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the Commission for Conciliation Mediation and Arbitration ('the first respondent'). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] This matter arose from the dismissal of the fourth respondent by the applicant, following disciplinary proceedings against the fourth respondent for misconduct. The fourth respondent was at all relevant times a member of the third respondent, which is a representative trade union in the applicant. The

[1] Act 66 of 1995.

third and fourth respondents then pursued the dismissal of the fourth respondent as an unfair dismissal dispute, to the first respondent, and this dispute came before the second respondent for arbitration.

[3] The parties filed a pre-arbitration minute, from which it is apparent that there were three principal issues the second respondent was called on to decide where it came to the issue of substantive unfairness, the first being whether the fourth respondent contravened a rule, the second being the issue of inconsistency, and the third being whether dismissal was an appropriate sanction even if the fourth respondent did commit misconduct. Also in terms of this minute, procedural fairness was not in dispute in the arbitration.

[4] The arbitration before the second respondent commenced on 20 March 2014, continued on 23 April and 13 and 14 May 2014, and concluded with written closing argument on 19 May 2014. In an arbitration awarded dated 21 May 2014, which was handed down on 22 May 2014, the second respondent held that the dismissal of the fourth respondent was substantively unfair, and determined that the fourth respondent be reinstated by the applicant, with retrospective effect to the date of her dismissal on 18 October 2013 together with back pay. It is this arbitration award that now forms the subject matter of the review application brought to the Labour Court by the applicant.

[5] The applicant's review application was filed on 3 July 2014, which was within the 6 (six) weeks' time limit under Section 145[2] within which to bring a review application. The applicant's review application is therefore properly before this Court for determination. I will commence deciding this review by first setting out the applicable factual matrix.

The relevant background

[6] The fourth respondent was employed by the applicant as a technical official, commencing employment on 1 September 2010. Part of the duties of the fourth respondent is to attend to faults on the applicant's electricity supply infrastructure, when tasked to do so. It was also emphasized that the fourth

[2] Section 145(1)(a) reads: 'Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award - (a) within six weeks of the date that the award was served on the applicant …'

respondent is only authorized to attend to a certain level of fault finding and repair, being up to a 1 000 volt electrical network, called low voltage authorization. The fourth respondent's certificate of authorization issued to her specifically recorded that 'no work to be carried out on or in close proximity of high voltage equipment and structures.' It was also never in dispute that the fourth respondent was properly trained, and aware of all the relevant safety requirements.

[7] The incident giving rise to this matter occurred on 23 July 2013. On that day, the fourth respondent received a work order to attend to an electricity supply fault on a pole. She attended to the fault with an apprentice, one Sibonakaliso Maseko ('Maseko').

[8] Upon arrival on site, the fourth respondent proceeded to conduct a fault finding exercise on the first pole. In terms of the prescribed process, a proper risk assessment must first be done on a pole before actual fault finding is done. The fourth respondent did this on the first pole. In the end, she found no fault on that pole.

[9] Thereafter, the fourth respondent proceeded to a second pole, where a transformer was located. She did not do a risk assessment on the pole. Part of what is called 'life saving rule no 1' in the applicant, is a rule that prescribes: 'Always do a proper risk assessment before you commence with work'.

[10] The fourth respondent then used a step ladder to climb up the pole to open the Morsdorfer fuses (part of the transformer) located on the pole. Also part of what is called 'life saving rule no 1' in the applicant, is a rule that reads: 'Only people who are authorised as competent to do the task may perform it'.

[11] According to the applicant, the abovementioned conduct of the fourth respondent resulted in a number of safety violations. Firstly, the electricity supply on the transformer was 22 000 volt and the fourth respondent was not authorized to conduct fault finding on such a high voltage of electricity supply. She should have called an authorized person to do this work. Secondly, it is not permissible to use a step ladder to climb up the pole to open the Morsdorfer fuses. The operating policy prescribes that Morsdorfer fuses could only be opened from ground level using an approved operating stick and

attachments. The fourth respondent was not issued with an operating stick, because she was not authorized to do any work on the Morsdorfer fuses. And finally, she did not do any risk assessment on the second pole.

[12] As fate would have it, there was then a flash short circuit on this pole right next to the fourth respondent. She suffered burns on her arms and to her face, and she had to be hospitalized as a result.

[13] The nature of the burns suffered by the fourth respondent convinced the applicant of another safety violation. All of the technicians are issued with safety equipment that must be used when attending to fault finding on the applicant's electricity network, called 'PPE'. In the case of the fourth respondent, this included a pair of insulated protective gloves extending to the elbow, and a full face shield. The burns suffered by the fourth respondent indicated that when the flash occurred, she was not wearing the face shield or protective gloves.

[14] It the course of the investigation carried out as a result of the incident, it was also discovered that the fourth respondent instructed Maseko to climb up a ladder to test voltage on a structure, something that Maseko was not authorized to do. This placed Maseko in danger, and was another safety violation.

[15] According to the applicant, it has a zero tolerance where it comes to the violation of safety rules and requirements. Employees are consistently dismissed for these violations. Strict compliance with these safety rules are essential to the applicant's obligation to provide a safe working environment, considering all the risks and dangers associated with servicing a high voltage and live electricity network. Clause 2.1 of the life-saving rules policy of the applicant provides that:

> 'Life-saving rules are safety rules that, if not adhered to, have the potential to cause serious harm to people. The consequences of a person knowingly and wilfully violating these rules will result in a disciplinary hearing … where the act of misconduct could warrant dismissal.

> The objective of this standard is to clarify Eskom's intention to enforce "ZERO TOLERANCE" with respect to behaviour resulting in serious risk to an individual at the workplace.'

It may be added that this provision is repeated several times in this policy, in particular in clauses 3.3.4, and 3.6. Clause 3.6 does however go further and provides that the applicant will recommend dismissal as a sanction for such violations.

[16] In fact, the applicant conducts regular safety seminars to impress safety concerns on employees. There are daily safety meetings, held every morning. Employees are specifically appraised of the fact that they are entitled to refuse to carry out instructions that they considered to be in violation of safety rules, with the operating procedure actually recording that: 'The workers retain the right to refuse to work on grounds of health, safety and environmental concerns …'.

[17] The operating procedure (clause 4.3.1 thereof) also specifically prescribes that the operator 'shall at all times wear the normal PPE'. As stated above, the PPE is defined in this same clause as the full face shield and insulated rubber gloves. Because the fourth respondent did not wear this prescribed PPE, she contravened this policy.

[18] Because of all these safety violations, the applicant decided to take disciplinary action against the fourth respondent. She was charged on 20 September 2013 with two charges of misconduct relating to a failure to comply with procedures, directives and statutory requirements. The first charge had two counts. The first count related to the fact that the fourth respondent climbed up the pole without her safety equipment, being her gloves and face shield. The second count concerned the fourth respondent failing to carry out a risk assessment and doing unauthorised work. Then, the second charge concerned the fourth respondent allowing the apprentice to do unauthorised work.

[19] The disciplinary hearing was scheduled for 3 October 2013. The disciplinary hearing then indeed took place on that date, and in a written finding on 8 October 2013, the chairperson found the fourth respondent guilty of all the

charges against her. The fourth respondent was then afforded the opportunity to present mitigating circumstances.

[20] When deciding the issue of an appropriate sanction, the chairperson relied on a number of factors. These were the fourth respondent's complete lack of remorse, the fact that she sought to mislead him with regard to the issuing of safety equipment to her, and the seriousness of the misconduct. He remarked: 'You are lucky to be alive and able to see'. He further held:

> 'I must further emphasize that the number of fatalities within Eskom are significantly high and therefore all employees must take every effort to contribute positively towards the reduction of these fatalities.'

In his final outcome, dated 18 October 2013, the chairperson recommended the summary dismissal of the fourth respondent. She was then dismissed.

[21] The fourth respondent pursued an internal appeal on 22 October 2013. In this appeal, it was contended that the PPE was only issued on 6 September 2013, which was after the incident. The fourth respondent also took issue with the sanction of dismissal, contending it was too harsh. In this appeal, it was then raised for the first time that the applicant acted inconsistently in dismissing the fourth respondent, based on the following contention:

> '… a similar incident happen in kaNyamazane CNC but employees who were involve were never dismissed then that incident happen on the 26th of March 2013 the involved employee were given a sanction of 14 day …' (sic)

This appeal was however not successful, and in a written finding dated 28 October 2013, the dismissal of the fourth respondent was upheld.

[22] The third and fourth respondents then challenged the dismissal of the fourth respondent as an unfair dismissal dispute, by way of a referral to the first respondent, on 7 November 2013, and, as stated above, this dispute ultimately came before the second respondent for arbitration. Following the conclusion of the arbitration proceedings, and in the arbitration award referred to above, the second respondent held that the dismissal of the fourth

respondent was indeed substantively unfair, and he reinstated her. This is the conclusion that is challenged by the applicant on review.

The test for review

[23] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] the Court held that the standards as contemplated by Section 33 of the Constitution[4] are in essence to be blended into the review grounds in Section 145(2) of the LRA, saying that 'the reasonableness standard should now suffuse s 145 of the LRA'. Where it comes to the threshold test for the reasonableness of an award, the Court said that the question to be asked was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'.[5]

[24] This means, in short, that even if it can be said that an arbitrator acted irregularly, erred, or failed in making his or her award, these shortcomings would only lead to a successful review if it can also be said that an unreasonable outcome resulted. In *Herholdt v Nedbank Ltd and Another*[6] the Court said:

> '…. 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.'

[25] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[7] said:

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[3] (2007) 28 ILJ 2405 (CC).
[4] Constitution of the Republic of South Africa, 1996.
[5] 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.
[6] (2013) 34 *ILJ* 2795 (SCA) at para 25.
[7] (2014) 35 ILJ 943 (LAC) at para 14. The *ratio* in *Gold Fields* was followed by the LAC itself in *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

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[26] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[8] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, the review application would succeed.[9] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[10] it was held:

> '…. 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.'

[27] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

(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.
[8] See *Fidelity Cash Management* (*supra*) at para 102.
[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[10] (2015) 36 ILJ 1453 (LAC) at para 12.

[28] The applicant's case and grounds for review must be made out in the founding affidavit, and supplementary affidavit.[11] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[12]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[29] In general terms, the applicant in the founding affidavit contends that the outcome the second respondent arrived at was unreasonable because he failed to have regard to material evidence that was placed before him, he failed to have regard to or had inadequate regard to a number of critical considerations concerning safety at the applicant, and he did not consider the fourth respondent's own admissions.

[30] The review grounds based on safety considerations are firstly that the second respondent failed to have proper regard to the seriousness of the safety violations and the possible prejudicial consequence it could have to the applicant and its business. Secondly, the second respondent ignored that the fourth respondent was properly trained and knowledgeable of the required safety rules. Thirdly, the second respondent failed to consider that the fourth respondent was entitled to refuse to do work that was not in full compliance with safety regulations.

[31] As to the review grounds relating to the fourth respondent's admissions, the applicant complains that the second respondent had inadequate regard to the fourth respondent's own admission that she never did a risk assessment on the second pole, and allowed her apprentice to work on the pole. Also in this context, the applicant has raised a complaint that the second respondent did have adequate regard to the fourth respondent's dishonest explanation for not doing a risk assessment on the second pole, to the effect that she did not know she had to do so.

[11] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.
[12] (2010) 31 ILJ 713 (LC) at para 27.

[32] In the supplementary affidavit,[13] the applicant in essence repeats most of the same grounds of review as set out above. The applicant did however add a ground of review based on an allegation of misconduct on the part of the second respondent, contending that the second respondent proceeded with the arbitration on a day it was not set down, in effect showed bias against the applicant, prevented a witness from being called, and prevented proper cross examination being conducted by the applicant's representative.

[33] I will now consider the applicant's review application based on these grounds of review.

Analysis: misconduct of the commissioner

[34] I will firstly deal with the grounds of review of the applicant relating to the alleged misconduct of the second respondent. In my view, and for the reasons to follow, these grounds have no merit. I will start with the proposition that the second respondent proceeded with the arbitration on a date it was not set down for. There is no substantiation for this proposition. The matter was specifically postponed on 23 April 2014, to 13 and 14 May 2014 by agreement between all the parties, because a witness for the applicant was unavailable. The parties actually signed an agreement to this effect, and the second respondent issued a ruling. I think it is rather opportunistic for the applicant to come and suggest that because the first respondent's set down notice only referred to 13 May 2014, it was only set down for one day. This kind of contrived point taking does not serve justice and should be discouraged. I am satisfied that the second respondent was quite entitled to proceed with the matter on 14 May 2014.

[35] Next, I will consider the contention that the second respondent prevented the applicant from calling a witness. Again, proper context and facts for consideration appears to be absent from the applicant's complaint in this respect. The witness concerned was not available on 23 April 2014 because he allegedly had to attend to load shedding problems. The matter was specifically postponed to 13 and 14 May 2014 so this witness could be called.

[13] Filed in terms of Rule 7A(8) on 2 July 2015.

On 13 May 2014, this witness was again not available, allegedly because he was ill. The second respondent on 13 May 2014 then in fact made a proposal that the third and fourth respondents start presenting their case so long, and the witness could be interposed the next day. The applicant's representative did not want to agree to this. The third respondent's representative insisted on a sick note to substantiate the allegation that the witness was ill, and the second respondent stood the matter down to 12h00 for the applicant to procure it. The applicant's representative could not produce it when proceedings reconvened. The second respondent still accommodated the applicant by not proceeding, and standing the matter down to 09h00 on 14 May 2014.

[36] When the proceedings reconvened on 14 May 2014, the witness was still not in attendance. The applicant's representative conveyed that he would be fit to attend only the next day, and presented a medical certificate to substantiate this. However, the certificate concerned did not reflect the name of the patient. The second respondent indicated that he would be inclined to postpone the matter if he received a proper medical certificate with the name of the patient, and he afforded the applicant an opportunity to get it. What then followed was a lot of argument and confusion about the sick note, with the applicant even conceding it was the 'wrong' sick note. The second respondent again afforded the applicant the opportunity to get a proper sick note, and it is clear from the record that the second respondent waited for some time for it to arrive, but nothing was forthcoming. The second respondent then ruled that the matter proceed.

[37] I can find no fault with the second respondent's approach. If anything, he accommodated the applicant as far as he could. The undeniable truth is that the parties agreed to conduct the arbitration on 13 and 14 May 2014. It was the applicant that sought an indulgence of another postponement, despite this agreement. It was then up to the applicant to make out a proper case for such an indulgence, and at least should have provided a proper sick note to justify the non-attendance of the witness. The applicant's conduct where it came to this is certainly deserving of some censure. I consider it unacceptable that the applicant seeks to justify the indulgence it seeks by first not having a sick note, then presenting a sick note without a name, next conceding it was the wrong

sick note, and finally not producing the 'right' sick note. The second respondent was entirely justified in ruling that the arbitration proceed. His conduct is in line with Section 138(1) of the LRA, which reads:

> 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.

[38] This only leaves the complaint about the alleged bias of the second respondent and the contention of him inhibiting cross examination. I can find nothing in the record to substantiate any of this. Overall considered, I believe the second respondent conducted the arbitration proceedings in a fair and proper manner. Where he intervened in the proceedings, it was simply for the purposes of clarity and to steer the process. There is nothing untoward in this. In *CUSA v Tao Ying Metal Industries and Others*[14] the Court held as follows:

> '… the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

The aforesaid *dictum* in *Tao Ying Metal Industries* was applied in *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[15] as follows:

> **'**I also appreciate that in terms of the aforesaid three objectives as defined by the Constitutional Court in a commissioner would be permitted to conduct the proceedings in what may be described as an inquisitorial manner, and not just leave it up to the parties to place the relevant material, evidence and issues before the CCMA. This being said, there is a fine line between conducting arbitration proceedings in an inquisitorial fashion and becoming involved in the proceedings to such an extent so as to constitute a descent into the arena by the commissioner. To descend into the area means that the commissioner becomes

[14] (2008) 29 *ILJ* 2461 (CC) at para 65.
[15] (2013) 34 ILJ 2347 (LC) at para 41.

> an active participant in the conduct of the case by one of the parties, and that is simply not fair play and completely negates the imperative of the conduct of fair arbitration proceedings as contemplated by law …'

[39] I am satisfied that it cannot be legitimately contended that the second respondent did anything that could be seen to constitute a descent into the arena of the arbitration. There is accordingly no substance in the applicant's complaint concerning the alleged misconduct of the second respondent, as his conduct in my view resorts well within the parameters of what can reasonably be expected of him as an arbitrator in fairly conducting the proceedings.

[40] In conclusion, there is thus no substance in the applicant's grounds of review where it comes to misconduct allegedly committed by the second respondent. These grounds of review all fall to be rejected.

Analysis: the merits of the award

[41] From the outset, I have some concerns with the award of the second respondent. On the one hand, the second respondent, as will be further discussed below, finds that the fourth respondent committed no misconduct, and that she was not guilty of both counts 1 and 2 of the charge 1 and charge 2. The second respondent finds that '… at this point I find the respondent reason for dismissal to be unfair' (sic). But then, and having so found, the second respondent turns to the issue of inconsistency so as to establish whether the sanction of dismissal was fair. This kind of reasoning is contradictory. If an employee committed no misconduct, then that must be the end of it, and no enquiry into the fairness or not of the sanction of dismissal is competent. The enquiry into whether dismissal is a fair sanction only arises if the employee is indeed found to have committed the misconduct with which the employee has been charged. As said in *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[16]:

> '… a typical arbitration comprises essentially two phases. The first is the receipt and evaluation of evidence in order to make factual findings. That phase is governed by the ordinary rules of evidence and procedure and no

[16] (2010) 31 ILJ 2475 (LC) at para 19.

> value judgment is involved. If the employee's guilt is established, the second phase arises, being the identification and weighing of the factors relevant to the determination of sanction. …'

[42] Therefore, and considering his own findings, there was simply no reason for the second respondent to enquire into the issue of inconsistency where it comes to deciding whether dismissal was a fair sanction. But the fact that he did leaves one in a quandary. Does this mean that the second respondent erred when he decided that the fourth respondent committed no misconduct because he considered whether dismissal was an appropriate sanction? Or did he err by enquiring into the issue of dismissal as an appropriate sanction, because he found there was no misconduct? This kind of contradictory reasoning in my view causes unnecessary confusion with the parties to the arbitration, and renders it uncertain whether the arbitrator actually applied his mind properly to the issues he was called on to decide.

[43] The above being said, I will next turn to the second respondent's findings relating to the misconduct with which the fourth respondent had been charged. The second respondent decided that the fourth respondent was not guilty of the misconduct formulated in count 1 of charge 1 against her, which is that part of the charge relating to the failure to wear the required PPE when climbing up the pole. This conclusion of the second respondent is based on one single factual determination, being that the fourth respondent was never issued with the PPE at the time, as it was only issued to her on 6 September 2013.

[44] I must confess that I have considerable difficulty with this finding of the second respondent. It shows, in my view, a complete lack of appreciation what the evidence actually before him was. In seems that the second respondent simply completely disregarded *viva voce* evidence, and became confused with the documentary evidence.

[45] On the facts, properly considered, the fourth respondent had been issued with PPE when this incident occurred. The first and most obvious consideration supporting this is the fourth respondent's own version relating to the full face shield. She never disputed that she was issued with one. Her version was

actually that she decided not to wear it, because it was uncomfortable / difficult to wear if she was also wearing a hard hat. The point is that she was issued with it, and decided not to wear it. No matter what the reason may be for her decision not to wear it, this is in itself a safety violation. Next, there were photographs taken of the incident scene at the time, and this showed insulated safety gloves found in the fourth respondent's vehicle, and a full face shield on site.

[46] The first respondent's finding that the PPE was only issued on 6 September 2013 (thus after the incident) is as a result of him misconstruing the documentary evidence. What the second respondent simply failed to comprehend is that the document showing the issuing of PPE on 6 September 2013 was a re-issue of PPE. Obviously, regularly used PPE becomes worn, and new PPE is issued from time to time. The second respondent failed to consider that the previous issuing of PPE was on 27 June 2013, established by an issuing document of that date.

[47] It also simply cannot be ignored that the fourth respondent was fully trained in safety requirements and knew she was entitled to refuse to do the work if she was not issued with PPE. Therefore, even if it can be accepted that the fourth respondent at the time had not been issued with PPE, the fact that she elected to do the work and not insist on compliance with her right to safety as she was entitled to do, must mean that this cannot serve as an excuse or defence to the charge.

[48] The second respondent's finding in favour of the fourth respondent on count 1 of charge 1 thus simply had no proper foundation in fact. The second respondent misconstrued the documentary evidence and ignored pertinent facts. He failed to consider material issues in this regard. It is thus my view that the second respondent's finding where it came to this charge cannot be sustained, and falls to be set aside on review.

[49] With regard to count 2 of charge 1, the second respondent concluded that the fourth respondent did conduct a risk assessment on the second pole she climbed up on with the step ladder. This conclusion is entirely at odds with the evidence. The fourth respondent herself conceded she did not do a risk assessment on the pole. The documentary evidence shows only one risk

assessment was done on the first pole. Further, the fourth respondent even tried to explain herself for not doing a risk assessment by saying that she did not know she was required to do one on that pole as well, which explanation was clearly false.

[50] The second respondent also ignored a number of other crucial safety failures which was apparent from the evidence. One that jumps to the fore is that the fourth respondent sought to open the fuses by climbing up a step ladder, when the prescribed process for this was opening the fuses from the ground using the operating stick referred to above. This situation then brings one directly to the second failure, being that the fourth respondent was not issued with an operating stick for the simple reason that she was not authorized to work on that high voltage of electricity equipment. The fourth respondent had no business climbing up on the second pole and conducting fault finding on the transformer and fuses.

[51] Therefore, and just as was the case with count 1, the second respondent's finding in favour of the fourth respondent on count 2 of charge 1 simply had no proper foundation in fact. The second respondent's conclusions were at odds with what actual evidence was. Again, the fourth respondent failed to consider material issues in this regard. I similarly conclude that the second respondent's finding relating to count 2 of charge 1 is unsustainable, and thus reviewable.

[52] Turning next to charge 2, the second respondent also found that the fourth respondent committed no misconduct where it came to this charge which related to Maseko (the apprentice referred to) being permitted by the fourth respondent to climb up the step ladder and conduct a voltage check on the top box on the pole, which work she was not authorized to do. The reason for this this finding of the second respondent was that that Maseko was authorized to do that work. This finding is once again at odds with the evidence. It is undeniable that Maseko did this work. The further evidence was that Maseko was not authorized to carry out this work. The only basis on which Maseko would have done this work is if the fourth respondent tasked her to do it. All this makes the second respondent's conclusion difficult to comprehend, as

there are simply no facts to support it. It is clearly an unreasonable conclusion based on the evidence.

[53] Overall, it is my conclusion that the second respondent's finding that the fourth respondent did not commit misconduct as contemplated by charges 1 and 2 is unsustainable. These findings do not correlate with the evidence. It is clear that the fourth respondent was issued with the required PPE which she elected not to use. She also embarked upon work she was never authorized to do, did not conduct a proper risk assessment and allowed her apprentice to do unauthorized work. This is a direct and flagrant violation of the applicant's safety rules, which serve, as the facts of this case illustrate, a critical purpose in ensuring the safety of employees in what is no doubt dangerous working circumstances. Accordingly, it simply cannot be said that the second respondent's finding that the fourth respondent committed no misconduct constitutes a reasonable outcome based on the evidence properly before him as a whole. His findings in this regard are clearly reviewable.

[54] Something must be said about the nature of the misconduct in this case, especially considering that it is about contravention of workplace safety rules. In *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others*[17] the Court said:

> 'In my view, having regard to the material before the commissioner and his reasoning with regard to the fairness of the sanction, it cannot be said that his conclusion was one that a reasonable decision maker could not reach. It is evident from the evidence that there are considerable risks associated with the appellant's operations at the smeltery. It carries a high risk of potential danger to the safety of its employees which in turn may hold serious consequences for the appellant as the employer. The issue of safety and the rules pertaining thereto are accordingly of considerable importance to both the appellant and its employees. At the arbitration hearing, the appellant's representative explained that: '[A]t Samancor eighty percent of the fatalities of people who die at work is related to (inaudible) or mobile machinery. In other words this is one of the areas where most of the people who die at work (inaudible) and as a company we just cannot tolerate any [breach] of our rules which is designed to save peoples lives.' Accordingly, in the context of the present matter, the

[17] (2011) 32 ILJ 1057 (LAC) at para 35.

> importance of the safety rules concerned, the reasons for their existence, and the seriousness and potentially life threatening consequences of a breach of such rules are important considerations that must be accorded due weight.'

[55] Similar to the case in *Samancor*, the applicant *in casu* led undisputed evidence about the importance of its safety rules. Also, there can be no doubt that fault finding in a high voltage electricity network is inherently a dangerous occupation, and that safety rules are there to save lives. The applicant also led undisputed testimony that there was a zero tolerance in the applicant for violation of safety rules, and in my view, for good reason. Workplace safety and strict compliance with safety rules is of fundamental importance not only to protect employees, but also serves to protect the employer against possible civil and criminal liability that may arise in allowing employees to render services in an unsafe working environment.

[56] There is equally no doubt that the fourth respondent was properly trained in, and aware of, all the necessary safety rules applicable to her. She knew what she was required to do, and what she was permitted and not permitted to do. She ought to have contemplated that a violation of these rules could result in serious injury or even fatalities. But worse still, she endangered her apprentice (Maseko). In *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[18] the Court held as follows:

> 'In the present instance, the fourth respondent does not deny knowledge of the safety rules and standard, neither is there evidence to dispute that he was trained in the application of that policy. He also does not deny having received instruction from Mr Loots regarding securing the workplace for the purpose of drilling in terms of the safety standard. The testimony of Mr Willemse that if there was a fall of ground as a result of failure to comply with the safety standard there was a high risk of fatal injuries occurring. In this respect, the testimony of Mr Loots that the conduct of fourth respondent had placed other employees in danger was not challenged.
>
> Similar to the *Samancor* case, it has not been denied that the risk created by the fourth respondent in failing to comply with the safety rules was high

[18] (2013) 34 ILJ 912 (LC) at paras 24 – 26.

> enough to pose a potential danger to the applicant and other employees and pose serious consequences for the applicant as the employer.
>
> In my view the commissioner in the present instance failed to attach sufficient weight to the evidence led by the applicant's witnesses concerning all charges that were brought against the fourth respondent and in particular that contravention of a safety rule and procedure amounts to very serious misconduct which could lead to loss of life and thus warrant dismissal.'

In view, the same considerations apply *in casu*. The second respondent paid scant regard to the fact that the fourth respondent was properly trained in the safety rules and that she carried an equal responsibility to ensure it was complied with. There can be no doubt that the misconduct of the fourth respondent placed her at serious risk, which in turn, if materialised, could have highly prejudicial consequences to the applicant.

[57] Overall considered, it is my view that the fourth respondent indeed committed misconduct as contemplated by courts 1 and 2 of the charge against her. The second respondent's finding to the contrary has no proper foundation in the evidence before him, and is simply not a reasonable outcome. The second respondent failed to consider the importance of the safety regulations the fourth respondent was subject to, and what it entailed. He failed to appreciate that the fourth respondent put her own life and that of her apprentice at risk. I consider the following *dictum* from the judgment in *Sasol Mining (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[19] supportive of my conclusions in this respect:

> '… Safety of employees at the workplace is paramount. It cannot be compromised. An employer cannot be expected to wait until an employee is maimed or has lost his or her life, before taking decisive action against an employee who has exposed fellow employees to danger. Procedures which are intended to prevent injury and fatality particularly in the mining industry need to be complied with properly because a lapse has disastrous consequences. In exercising his power to determine the fairness of the third respondent's dismissal, the commissioner had to decide the appropriateness

[19] (2015) 36 ILJ 2359 (LC) at para 6.

> of the sanction of dismissal. His decision that dismissal was inappropriate disregards the value of the lives and safety of the employees the third respondent had the responsibility of protecting. It is not supported by the evidence before him. It constitutes a decision a reasonable decision maker could not reach on the facts before him and stands to be reviewed and set aside.'

[58] Considering that the fourth respondent in fact committed the misconduct with which she had been charged, it is thus necessary to consider the second respondent's inconsistency findings, because this is a relevant consideration when deciding whether dismissal was an appropriate sanction. In *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[20] the Court had the following to say:

> 'This court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. …'

And in *Absa Bank Ltd v Naidu and Others*[21] in the Court held:

> 'However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:
> '[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.''

[59] The Code of Good Practice in the LRA also provides for consistency as a consideration in deciding the issue of the fairness of the sanction of

[20] (2017) 38 ILJ 860 (LAC) at para 31.
[21] (2015) 36 ILJ 602 (LAC) at para 36.

dismissal.[22] This consideration applies where the employee was charged with misconduct, and was properly found guilty of the same, but in deciding whether dismissal for this would be appropriate the issue would be that dismissing the employee for such misconduct would be inconsistent with the sanction imposed by the employer for similar and related misconduct, in the past, in respect of other employees.[23] Where instances of inconsistency are raised as a defence to dismissal as an appropriate sanction, this would form part of the value judgment that must be exercised in deciding whether dismissal is fair.[24]

[60] The Court in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd,*[25] aptly determined the principles applicable to inconsistency, as follows:

> '… Consistency is simply an element of disciplinary fairness …. Every employee must be measured by the same standards …. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercses his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy.... Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the

[22] See Schedule 8 Item 3(6) which reads: 'The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'
[23] See *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para 10.
[24] *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd* (1999) 20 ILJ 2302 (LAC) at para 29; *Absa Bank* (*supra*) at paras 36 – 37; *Consani Engineering (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 1707 (LC) at para 19.
[25] (1999) 20 ILJ 2302 (LAC) at para 29.

> employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. …'

[61] In my view, the *ratio* in the judgment in *Irvin and Johnson* indicates that the following considerations apply to the determination of the issue of inconsistency: (1) Employees must be measured against the same standards (like for like comparison); (2) Did the chairperson of the disciplinary enquiry conscientiously and honestly determine the misconduct; (3) The decision by the employer not to dismiss other employees involved in the same misconduct must not be capricious, or induced by improper motives or by a discriminating management policy (in other words this conduct must be bona fide); and (4) A value judgment must always be exercised[26].

[62] In general, inconsistency as a consideration is intended to protect employees against arbitrary conduct by the employer. Objective difference in circumstances is thus an important consideration. In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[27] it was said:

> '… An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors …'

[63] Finally, inconsistency must be properly raised and dealt with in the arbitration proceedings, in such a manner so as to identify the other employee(s) who may have been treated differently, as well as the basis for the contention that the dismissed employee should not have been treated differently. As described by the Court in *Bidserv*[28]:

> '… A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently and the

[26] See *SRV Mill Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2004) 25 ILJ 135 (LC) at para 23.
[27] (2010) 31 ILJ 452 (LC) at para 10.
[28] (*supra*) at para 31. See also *Grindrod Logistics (Pty) Ltd v SA Transport and Allied Workers Union on behalf of Kgwele and Others* (2018) 39 ILJ 144 (LAC) at para 47; *Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 ILJ 2406 (LAC) at para 39.

> basis upon which they ought not to have been treated differently or that no distinction should have been made must be set out clearly.'

The employee has the evidentiary burden to establish this. In *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*[29] the Court said:

> 'It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. …'

[64] Applying all the above principles to the facts, it is clear that only one issue of inconsistency was raised in the internal disciplinary proceedings pertaining to the fourth respondent, albeit only at appeal stage. It concerned, as set out above, an employee allegedly committing similar misconduct on 26 March 2013 but he was not dismissed. This inconsistency case was then elaborated on in evidence, in the arbitration. It became apparent that it concerned one Cain Mashego ('Mashego'). He was called to a disciplinary hearing on 29 April 2013, and was charged with two misconduct charges. The first charge was a failure to comply with procedures in that he failed to ensure that minisub was made safe before employees working on it. The second charge was that he endangered the safety of a fellow employee in that he allowed the employee to perform work without supervision.

[65] The disciplinary hearing outcome of Mashego was presented in evidence. He was found guilty of these charges on 21 May 2013. It appears that there are similarities between the misconduct of Mashego and that of the fourth respondent. I may mention that Mashego also admitted to not wearing his PPE and a junior employee was allowed to do unsupervised work. But what the disciplinary hearing finding does show is that the chairperson simply opted,

[29] (2012) 33 ILJ 623 (LC) at para 10. See also *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (*supra*) at para 39; *Banda v General Public Service Sectoral Bargaining Council and Others* [2014] JOL 31486 (LC) at para 49; *SA Municipal Workers Union on behalf of Abrahams and Others v City Of Cape Town and Others* (2011) 32 ILJ 3018 (LC) para 50.

without reason or motivation, for a 14 (fourteen) day unpaid suspension as a sanction, based on this suggestion being made by the employee's representative. In evidence, it came out that Mashego actually pleaded guilty to the misconduct charges against him.

[66] In terms of the principles as set out above, what must be done in this case when considering inconsistency is firstly a like for like comparison between the case of the fourth respondent and that of Mashego. In my view, and although there are similarities, no proper like for like comparison exists. An important distinguishing factor is that Mashego admitted his misconduct and never sought to provide a false defence, whilst in the case of the fourth respondent, she disputed that she committed any misconduct and even sought to present a false defence where it came to the issuing of PPE and doing a risk assessment. Secondly, Mashego himself did not do work he was never even authorized to do in the first place, which is what the fourth respondent did. Thirdly, the charge relating to Mashego's junior was not that of him being allowed to do work he was unauthorized to do, but it was about him doing work he needed to be supervised on, which Mashego failed to do. It is not the same as the case of the fourth respondent where she actually required the apprentice to do unauthorized work.

[67] The above being said, further considerations are that there was no evidence that the findings relating to Mashego was even before the chairperson in the disciplinary hearing, and in terms of the documentary evidence, it was only raised on appeal. It was in fact conceded by Calvin Shekoa, the representative of the fourth respondent in the disciplinary proceedings, that the evidence relating to inconsistency was never placed before the chairperson of the disciplinary hearing. There is equally no evidence about what was placed before the appeal chairperson in this regard, other than Shekoa simply saying that cases were 'mentioned' to the appeal chairperson. There is no indication that any functionary of the applicant deciding on the dismissal of the fourth respondent was even alive to the disciplinary hearing finding relating to Mashego, and despite this, came to another conclusion.

[68] Therefore, and where it came to the 26 March 2013 incident relating to Mashego, there was simply no proper like for like comparison. There was

similarly no case made out that the applicant differentiated between employees on the basis of some or other *mala fide* basis or capricious behaviour. There is no indication that the applicant did not conscientiously and *bona fide* apply discipline. Even if the applicant may have erred in dismissing the fourth respondent and not Mashego, it does not mean that the fourth respondent must be automatically exonerated as a result.[30] It must be remembered that inconsistency is not a rule unto itself. It is simply an element of disciplinary fairness. In this instance, there is simply no case made out that dismissing the fourth respondent, but not Mashego, was unfair, as contemplated by the inconsistency principles discussed above.

[69] Therefore, the second respondent's inconsistency findings are unsustainable. If his award is considered, he determined that the fourth respondent and Mashego committed the same misconduct. As discussed above, that is simply not so. Whilst it may be similar, it is in the end not the same. The second respondent also held that the applicant failed to advance a fair and objective basis for the differentiation. Again, this is not so. The applicant was at pains to point out the factual differences between the offences, Mashego's service in excess of 20 years, and the fact that he showed remorse as proper basis for the differentiation.

[70] The second respondent also dealt with the guilty plea of Mashego, as opposed to the fourth respondent disputing the misconduct, finding that 'on its own' it cannot justify a different sanction. This approach is inconsistent with the legal principles relating to inconsistency – no pun intended. What it illustrates is that there cannot be a like for like scenario, because this is a significant difference. It also shows that the basis for differentiation is objective and *bona fide*. It follows that inconsistency could not save the fourth respondent, something the second respondent completely failed to grasp.

[71] Finally, the second respondent held that the applicant was aware of the Mashego incident, because it was raised in the appeal. Whilst this may be true, what the second respondent does not appreciate is that merely raising this issue in such a fashion is insufficient. A proper case must be made out in the disciplinary proceedings so that the chairperson can apply his or her mind

[30] Compare *Southern Sun* (*supra*) at para 29.

to the issue of inconsistency. As dealt with above, the issue of inconsistency was not properly raised in the internal disciplinary proceedings

[72] It is thus clear from the second respondent's reasoning relating to inconsistency that he failed to consider what the proper evidence concerning inconsistency before him was, and what needed to be proved to establish inconsistency. The second respondent never applied the requisite legal principles that must be considered when deciding any inconsistency case. The consequence of these failures to the outcome the second respondent arrived at was succinctly summarized in *Solari v Nedbank Ltd and Others*[31] as follows:

> '… it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach'

[73] In the end, there can be no doubt that the misconduct of the fourth respondent is very serious. She violated a number of safety rules and sought to perform unauthorized work. She allowed an unauthorized apprentice to do work she was not allowed to do, putting her in danger. It is undeniable that a violation of these rules leads straight down the path of dismissal. The situation is exacerbated by the fact that the fourth respondent never acknowledged her wrongdoing, showed no remorse for what happened and never undertook to rehabilitate herself if given a chance by the applicant to do so.[32] It must also be considered that the fourth respondent had the right to refuse to do any work she considered unsafe, so therefore on her own version if she was not issued with PPE, she should have refused to work.

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[31] (2014) 35 ILJ 3349 (LAC) at para 29.

[32] See *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC) at para 25; *Greater Letaba Local Municipality v Mankgabe No and Others* (2008) 29 ILJ 1167 (LC) para 34; *Tiger Brands Field Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2017] JOL 37306 (LC) at para 54.

[74] I accept that from a safety perspective, the applicant cannot be seen to be soft on the violation of safety rules. The applicant has a proper operational objective relating to risk management that it seeks to achieve in adopting a zero tolerance approach where it comes to this.[33] The Court in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[34] held:

> '… As the code of good practice enjoins, commissioners will accept a zero tolerance approach if the circumstances of the case warrant the employer adopting such an approach.'

No doubt, the circumstances in the applicant's business and the purpose behind the safety rules, warrant the approach *in casu*. In the end, and as said in *De Beers*[35]:

> 'A dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. …'

Conclusion

[75] For all the reasons as set out above, it is my view that the second respondent's determination in his award that the dismissal of the fourth respondent was substantively unfair is grossly irregular, and resorts well outside the bands of what may be considered to be a reasonable outcome.[36] The second respondent in effect ignored pertinent evidence, failed to apply requisite legal principles, to the extent having a direct impact on the outcome of the matter, rendering it unreasonable. As such, the award of the second respondent falls to be reviewed and set aside.

[76] Having reviewed and set aside the award of the second respondent, I see no reason to remit this matter back to the first respondent again for determination *de novo* before another arbitrator. All the required evidence has been led, and

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[33] Compare *Anglo Platinum* (*supra*) at para 18; *Afrox Healthcare Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1381 (LAC) at para 23; *Miyambo v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 2031 (LAC) at para 21.
[34] (2015) 36 ILJ 2273 (LAC) at para 17.
[35] Id at para 22.
[36] See *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30.

is on record. All this evidence has been properly transcribed. All the documentary evidence is in reality uncontested and is part of the record.

[77] Overall considered, I thus have sufficient evidentiary material before me to finally determine this matter.[37] Because it is clear from the evidence, and the applicable principles *in casu*, that the fourth respondent indeed committed the misconduct with which she had been charged, and that no inconsistency has been shown to exist so as mitigate against the sanction of dismissal imposed by the applicant, the dismissal of the fourth respondent must be held to be substantively fair. I shall therefore substitute the award of the second respondent with an award that the dismissal of the fourth respondent by the applicant was substantively fair.

[78] This then only leaves the question of costs. In terms of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. The third and fourth respondents did oppose the matter, but I do not think the opposition was unreasonable. I am also mindful of the fact that there is a continuing relationship between the applicant and the third respondent, which may be prejudiced by a costs order. I also consider that the fourth respondent had suffered injuries and should not be unduly punished. Finally, I also take into account that the applicant raised a number of unjustified review grounds relating to misconduct on the part of the second respondent. In all these circumstances, the appropriate order where it comes to costs, is to make no order as to costs, and I exercise my discretion accordingly.

<u>Order</u>

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

1. The applicant's review application is granted.

[37] Section 145(4) of the LRA gives this Court the power to finally determine the matter. See *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2016) 37 ILJ 2831 (LAC) at paras 28 – 29; *SA Custodial Management (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 1255 (LC) at para 28; *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 77; *Member of the Executive Council, Department of Health, Eastern Cape v Public Health and Social Development Sectoral Bargaining Council and Others* (2016) 37 ILJ 1429 (LC) at paras 54 – 55.

2. The arbitration award of the second respondent dated 21 May 2014 and issued under case number MP 8960 – 13 is reviewed and set aside.

3. The arbitration award of the second respondent dated 21 May 2014 and issued under case number MP 8960 – 13, is substituted with an award that the dismissal of the fourth respondent by the applicant is substantively fair.

4. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv X Matjolo
Instructed by:	Selebogo Inc Attorneys
For the Third and Fourth Respondents:	Mr C N Phukubje of Finger Phukubje Inc Attorneys