

SOUTH AFRICA / JUDGMENT

Bokoni Platinum Mines (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JR241/14) [2016] ZALCJHB 524 (6 October 2016)

[2016] ZALCJHB 524

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR241/14

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JR 241/14

In the matter between BOKONI PLATINUM MINES (PTY) LTD Applicant And COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent P SHAI N.O. Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

MDAKA, P.S.

Fourth Respondent

Heard: 17 March 2016

Delivered: 6 October 2016

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 3 February 2014. In his award, the arbitrator found that the fourth respondent (the employee) had been unfairly dismissed by the applicant. He awarded her compensation in an amount equivalent to 10 months' remuneration (about R191 000). The application is opposed by the third and fourth respondents.
- [2] The employee had been dismissed on 9 April 2013 after a disciplinary hearing into charges relating to various acts of misconduct allegedly committed during late September/early October 2012. Specifically, the employee was charged with incitement of violence, acting against her employer's best interests, conduct unbecoming an official, and a conflict of interest.

The proceedings under review and the arbitrator's award

- [3] The parties held a pre-arbitration conference during which a number of issues were agreed. In particular, it appears from the minutes that the procedural fairness of the employee's dismissal was not placed in dispute and that the arbitrator was therefore required only to consider the substantive fairness of her dismissal. In this regard, the issues that the arbitrator was required specifically to decide included the following:
- whether the employee spoke during the NUM mass meeting on 26 September 2012 and if she did, what was said by her;
 - whether she called or attended a subsequent meeting;
 - whether she participated in singing any songs at the time of the second meeting;
 - whether she attended at the training centre on 21 or 22 September 2012;
 - whether she participated in the unprotected strike, being an issue which the applicant but not the respondent required the arbitrator to decide. (As will appear from the analysis below, the allegations of participation in an unprotected strike were later abandoned); and
 - whether the applicant's dismissal was substantively unfair, i.e. whether she was guilty of one or more charges and with the sanction of dismissal is appropriate
- [4] These issues ought necessarily to be viewed in the context of the agreed facts. These are recorded in the papers, and I do not intend to traverse them in any detail. For present purposes, it is sufficient to say that the incidents that form the basis of these proceedings appear to have their origins in intra-union rivalry and factionalism. The employee was alleged to have addressed employees at the training centre on 22 September 2012 and to have advised employees that the applicant's management had offered a transport allowance of R1500, but that the third respondent, the NUM, wished to accept a lesser amount and retain the balance for themselves. The employee was also alleged to have addressed a NUM mass meeting on 26 September 2012 when she is alleged to have stated that unless

employees were offered R16 500 per month, employees should embark on an illegal strike on 1 October 2012. She is further alleged to have again incited employees, after the mass meeting, to embark on the strike, and then to have led a group of employees singing and chanting, using the words ‘mpimpi siya chisa’ (burn the spy) while pointing at the chair of the mass meeting and deputy chair of the NUM’s Bokoni branch. Finally, the employee was alleged to have worn a NUM hard hat and t-shirt, which the applicant considered inappropriate given the employee’s functions as communications officer. It was not disputed that an unprotected strike commenced on 1 October 2012. The strike lasted until 7 December 2012 and was marred by intimidation, violence and damage to property.

- [5] The evidence led at the hearing is contained in the record and summarised by the arbitrator. The recordal of the evidence is

disputed. Seven witnesses testified on behalf of the applicant. These were Mr Maditsi, the chairperson of the Bokoni branch of the NUM and at the time of their meeting on 26 September 2012, the deputy chairperson; Mr Lebea, the branch secretary of the NUM’s Bokoni branch; Mr Lusufi, a member of the NUM; Mr Sekgobela, a member of the NUM, Mr Crafford, the applicant’s employee relations manager; Mr Mathipa, the employee relations officer; and Mr Sepuru, the principal of the Flora Park Comprehensive High School, who appeared under subpoena. For the third and fourth respondents, a Mr Sebola, previously employed as an underground training facilitator and a Mr Makofane, employed as head of investigations gave evidence, in addition to the employee herself. It warrants mention at this stage that the employee’s representative sought unsuccessfully to have Makofane declared a hostile witness, before he had given any evidence and before any indication that he was indeed a hostile witness.

The award

- [6] The arbitrator addressed under separate headings the specific issues which he identified as being in dispute. First, he considered whether the employee spoke at a NUM mass meeting held on 26 September 2012 (the heading in the award incorrectly refers to 26 October 2012); secondly, whether she called or attended a subsequent meeting outside the hall on the same date; thirdly, whether the employee attended at the training centre; and fourthly, whether she participated in the strike.
- [7] In short, the arbitrator made the following factual findings. He found that the employee did not speak at the NUM mass meeting held on 26 September 2012, that she did not call a second meeting held after the mass meeting on the same date, and that she did not participate in the singing of songs. He also found that the employee did not attend at the training centre on 22 September 2012 and that she did not participate in the illegal strike that commenced at the applicant’s mine on 1 October 2012.
- [8] The arbitrator’s reasoning in respect of the first factual dispute that he identified is perhaps best incorporated in the paragraph 161 of the award where he says the following:

The other concern regarding their evidence is that in their statements and evidence in chief they testified that the three speakers

including the employee used the words 'illegal strike' although there is a contradiction on Mr Sebola as Mr Lebea said he used the words 're ya striking' meaning we are going to strike, therefore not using the words 'illegal strike'.

However, in their cross-examination they did not use the words illegal strike. I also take into account the fact that it is indeed

unusual for one to say 'I am going on illegal strike' as the argument by the employees representative seems to suggest.

[9] At paragraph 162, the arbitrator concludes as follows:

When the two versions are weighed against each other, I find that the version of the employee is more probable. The witnesses of the employer contradicted each other, and seem not to give full account of what transpired at the meeting. It is therefore my conclusion that it is more probable that the employee did not speak at the said official meeting.

[10] In regard to the second issue (the second meeting on 26 September 2012), the arbitrator similarly concluded that in the employee's

version was the more probable. At paragraph 165 of the award, he concludes the following:

When one weighs the evidence of the employer with its contradictions I pointed out against that of the employee, the version of the latter is more probable. I therefore come to the conclusion that the employee probably did not call the second meeting which presumably took ten minutes nor did she participate in singing the songs as alleged.

[11] In regard to the employee's attendance at the training centre, the arbitrator considered that the evidence of Moloto had been secured in circumstances 'that are less than dignified' and that his evidence was therefore compromised and unreliable. In the absence of any corroboration, he rejected the evidence and concluded that in all probability, the employee did not attend to the training centre.

[12] Finally, in regard to the employee's participation in the strike, the arbitrator came to the conclusion that she did not participate in the illegal strike, on the basis that the applicant's witnesses had admitted that the employee did nothing to demonstrate that she had in fact participated in the strike. The arbitrator's reasoning is captured in paragraph 167 of his award where he says the following:

Did the employee participate in the strike?

- [167] This should not detain us long. This is so because the employer's witnesses admitted that they suspected that the employee supported the strike and by virtue of her attire on that day she had 'intended' to participate in the strike. Other than the suspicion, they admitted that the employee did nothing that showed that the (sic) she participated in the strike. Suspicion cannot be elevated to prove on preponderance of probabilities.... And therefore do not hesitate to conclude that she did not participate in the illegal strike.
- [13] The arbitrator concluded that for these reasons, the employee was not guilty of any of the charges brought against her and that her dismissal was accordingly substantively unfair. In regard to remedy, the arbitrator held that the trust relationship between the parties had broken down and on that basis, he made an award of compensation. The arbitrator's reasoning appears to be that there was a degree of hostility between the applicant's officials and the employee and that the relationship between her and the applicant had broken down. He also appeared to take into account the prevailing economic situation, the manner of the employee's dismissal and the period for which she had worked for the applicant.

The grounds for review

- [14] The applicant contends that the arbitrator came to a decision to which no reasonable decision-maker could have come on the available evidence since on a holistic analysis of that evidence, the award is not capable of reasonable justification. Further, the applicant contends that the arbitrator failed to apply his mind to the material facts before him and came to a conclusion that was objectively wrong and unreasonable; that he failed to apply his mind to the evidence before him and failed to engage in a proper analysis of the evidence resulting in credibility findings that were grossly unreasonable and which resulted in the unreasonable rejection of the testimony of the applicant's witnesses. In particular, the applicant contends that the testimony of all of the applicant's witnesses was consistent, truthful, reliable and credible; that their evidence of each of its witnesses corroborated the others and that on a balance of probabilities, the employee was indeed guilty of the misconduct with which she was charged. In particular, the applicant contends that there was no basis for the arbitrator to have rejected the evidence he did and to have relied on evidence proffered by the employee which amounted to no more than a mere denial of the facts and which constituted evasive, improbable and unreliable testimony. In short, what the applicant submits is that the arbitrator's findings are entirely disconnected with the evidence that served before him, with the result that the decision to which he came falls outside of the band of decisions to which reasonable decision-makers could come on the available material.
- [15] The answering affidavit deposed to by the employee does not deal with the contentions raised in the founding papers regarding the credibility of the employee's evidence. The heads of argument filed on the employee's behalf contain little more than a denial of the grounds for review and a defence, expressed in the broadest of terms, of the merits of arbitrator's decision. Both the answering affidavit and the heads simply fail to deal with the detailed averments made by the applicant regarding the credibility findings made by the

arbitrator.

[16] Shortly prior to the hearing of this application, the respondents filed some 36 pages entitled ‘Third and Fourth Respondents’

note on argument’. This document amounts to a complete revision of the third and fourth respondents’ heads of argument. This in turn prompted the applicant to file supplementary heads of argument. The Rules of this court make provision for the filing of a single set of heads by each party to the dispute. It is not open to parties to file what are euphemistically referred to as ‘notes’ to plug the gaps left by a less than comprehensive set of heads of argument or indeed, to make out a case not foreshadowed by the answering affidavit or the heads of argument. This is a practice that inevitably adds to the already considerable burden of the opposed motion courts and ought to be discouraged, in appropriate instances, with an adverse order for costs. The Rules provide parties with the opportunity to make their submissions at the appropriate stage – the fact that counsel is briefed only shortly prior to the hearing or that there is a late change in representatives is not a licence to reformulate the case by way of notes or other instruments not recognised by the Rules.

Applicable legal principles

[17] This court is entitled to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The applicant contends for the latter, on the basis reflected above. The courts have been clear that the failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)).

[18] The Labour Appeal Court recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in

the light of the issues and the evidence. However, when an arbitrator fails to have regard material facts it is likely that he or she will fail to arrive at a reasonable conclusion (see *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*

[2014] 1 BLLR 197 (LAC).

[19] In *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2016) 37 ILJ 923 (LC), Myburgh AJ undertook a comprehensive review of the application of these principles. He noted that where an arbitrator is required to resolve a factual dispute, the arbitrator is required to undertake a balanced assessment of the credibility, reliability and probabilities associated with the evidence (see *Sasol Mining (Pty) Ltd v Ngqeleni NO & others* (2011) 32 ILJ 723 (LC)). Arbitrators are obliged to weigh all of the relevant evidence and probabilities before drawing inferences and making findings (see paragraph [65] of the judgment, and the reference to *Minister of Safety and Security & another v Madikane & others* (2015) 36 ILJ 1224 (LAC)). As Myburgh AJ notes, consistent with the authorities referred to above, a failure properly to determine a factual dispute or to draw inferences or make factual findings does not in itself constitute a basis for review – the decision to which the arbitrator comes must be substantively unreasonable.

Analysis

[20] I deal first with the arbitrator's finding that the applicant had failed to establish that the employee participated in the strike that commenced on 1 October 2012 (i.e. the fourth issue dealt with above). It will be recalled that the arbitrator found that other than 'suspicion', the applicant's witnesses had failed to produce any evidence that the employee participated in the strike and that 'suspicion cannot be elevated to prove on preponderance of probabilities'.

[21] The difficulty with this finding, of course, is that it was made clear to the arbitrator at the outset of the arbitration proceedings

that the employee was not charged with participation in the illegal strike, and that he consequently would not be required to make a decision on this issue. This much was confirmed by the employee's representative at the hearing when he recorded in as many words that any alleged misconduct related to participation in an unprotected strike had never been the subject of any charge against the employee and that this was specifically not an issue in respect of which the arbitrator was required to make a determination.

[20] The fact that the arbitrator considered this issue and went so far as to make a specific factual finding on whether the employee

participated in the unprotected strike is indicative of a complete failure by him to apply his mind to the issues that he was required

to decide. It is also indicative of the unreasonableness of his award.

[21] I turn next to the charge relating to events at the training centre on Saturday 22 September 2012. It will be recalled that the employee had been dismissed for advising employees that the applicant's management had offered R 1500 in respect of a transport allowance, but that the NUM wished to change the offer and appropriate the difference for themselves.

- [22] The evidence of the applicant's witness Sekgobela was that he had attended the training centre on that date and that the employee had addressed him and other employees present in the training centre. The employee, who was wearing a red NUM T-shirt at the time, had stated that the applicant's management had offered employees R 1500 but that the NUM wanted to change the offer to R 1050 and keep the difference for themselves.
- [23] The employee's evidence in relation to the events of 22 September 2012 was one of a denial and a statement that she had not been 'booked' to do duty at the training centre on the day in question, but that she was working in her office.
- [24] The employee's version was never put to any of the applicant's witnesses during cross examination. The record discloses that the employee confirmed that she understood what was meant by putting a version to a witness and further, that she confirmed that her version had been put to the applicant's witnesses. This notwithstanding, the employee could not provide an explanation as to why her version that she did not attend the training centre on 22 September 2012 was never put to any of the applicant's witnesses, especially Sekgobela. Despite this, the arbitrator curiously went on to find that Sekgobela was a 'single witness' and that his evidence should accordingly be approached with caution. He further held that Sekgobela's evidence had been 'procured in circumstances that are this then dignified' and that it was thus compromised and unreliable.
- [25] To the extent that the arbitrator rejected Sekgobela's evidence because it was the evidence of a single witness, he misunderstood the test to be applied. The test is one that requires the evidence of a single witness to be weighed by an arbitrator, and the merits and demerits of the evidence to be considered. Only once this is done should an arbitrator decide whether he or she is satisfied that the truth has been told, despite any shortcomings or defects or contradictions in the evidence. What the arbitrator did was to unduly limit the scope of the enquiry and thus deprive the applicant of its right to have its case fully and fairly determined.
- [26] To the extent that the arbitrator rejected Sekgobela's evidence on the basis that he had been afforded some incentive to testify against the employee in the form of an agreement that he would not be disciplined for participation in the unprotected strike, what Sekgobela said under cross-examination when that proposition was put to him is that he had not been threatened with dismissal and had not been called to a disciplinary hearing. He specifically stated that his willingness to participate in the proceedings was 'because she (the employee) almost destroyed my future and my family's future'. It was for the employee to prove that Sekgobela provided false testimony in exchange for an undertaking by the applicant they would be no disciplinary action taken against him – it was not for the applicant to present evidence or proffer any explanation as to why Sekgobela was not disciplined.

[27] In short, there was simply no basis on the evidence for the arbitrator to make the assumption that he did. Sekgobela's

evidence was in all respects consistent, truthful, reliable and probable and ought to have been accepted. The employee's

version ought never to have been accepted in circumstances where it had never been put to Sekgobela or any other witness. The clear

probabilities are that the employee attended the training centre on 22 September 2012, incited employees and mislead them with false information. The manner in which the arbitrator dealt with the evidence and purportedly assessed that evidence resulted in the applicant being deprived of its right to have the dispute fairly determined. That shortcoming had the consequence of an unreasonable

result.

[28] In regard to the events of 26 September 2012 (the mass meeting and the second meeting thereafter), Maditsi and Lebea were both present at the meeting. Their evidence was consistent and clear – that Malatjie, Sebola and the employee spoke at the meeting. Malatjie stated that unless employees were offered R 16,500, they would embark on an illegal strike. The employee then stated that unless employees were offered R 16,500 they should embark on an illegal strike that would commence on 1 October 2012, the reason being that employees would be paid by the end of the week on 28 September 2012 and could thus budget for the strike.

[29] Maditsi and Lesufi, who was also present at the mass meeting on 26 September 2012, testified that after the initial mass meeting was closed by Maditsi, a second meeting was held outside the hostel hall when the employee addressed employees. This was confirmed by Lebea. The evidence was that after the second meeting, the employee led a group of singing and chanting employees who sang 'mpimpi siya chisa' while pointing at Maditsi. There was no real challenge to this evidence.

[30] The evidence of Maditsi, Lebea and Lusufi was consistent and clear; there was no reason for any of them to give false evidence against the employee. On the contrary, both Maditsi and Lebea testified as to how difficult it was within to give evidence against a fellow union member.

[31] This notwithstanding, the arbitrator went on to hold that in respect of the mass meeting of 26 September 2012, the evidence that the employee did not speak at the meeting because she had a case pending against was not 'effectively challenged', that if the versions of Maditsi and Lebea were true, the meeting would have taken a lot less time than it did, and that they did not use the term 'illegal striking' in cross examination because it is 'indeed unusual for one to say I'm going on illegal strike' (see paragraph 161 of the award). On the basis of these factual findings, the arbitrator went on to hold that Maditsi and Lebea had contradicted one another and that the employee and that Sebola's version was the more probable.

- [32] The record discloses that under cross-examination, Maditsi and Lebea used the words 'illegal strike' on numerous occasions. The arbitrator's finding to the contrary is simply not correct, and is demonstrative of his failure to have regard to the evidence before him. Further, the arbitrator's conclusion in regard to the employee's version that she had a pending case against her and that this evidence 'was not effectively challenged' is simply wrong. The employee was extensively cross-examined in regard to her version. She was unable to explain what complaint against existed prior to the mass meeting and what it had to do with her not speaking at the mass meeting on 26 September 2012. The version proffered by the employee (that some 10 people were asked to speak, that Neo (the branch treasurer) spoke out against illegal strike, that Malepe also spoke out against the strike and that she did not speak at the meeting because she had a case pending against her and because she was in mourning) was never put to any of the applicant's witnesses. In short, there was no basis for the arbitrator to have rejected Maditsi's and Lebea's consistent and reliable versions and have accepted the obviously fabricated evidence of the employee, itself contradicted by her own witness Sebola in a number of material respects. On the contrary, the evidence of the applicant's witnesses was credible, consistent and reliable but rejected on a basis that clearly demonstrates the failure by the arbitrator to apply his mind or have regard to the evidence before him.
- [33] In regard to the second meeting that took place on 26 September 2012, the arbitrator made the factual finding that he did (that the employee probably did not call the second meeting, nor did she participate in singing the songs) on the basis of his finding that the evidence of the applicant's witnesses (especially Maditsi and Lebea) was contradictory, especially as to where the meeting took place. An examination of the record discloses no contradictions in the witnesses' evidence and no basis for the rejection of their evidence in favour of the employee is highly improbable version. The employee's version, that she did not call the second meeting and that she went to the parking lot where she spoke to Sebola and left for a meeting at a high school in Polokwane, was never put to any of the applicant's witnesses. Had the arbitrator considered the evidence and tested the probabilities of the competing versions, he would have concluded that the employee had in fact called the second meeting, that she had led a group from the hall singing and chanting 'impimpi siya ishisa' while pointing at Maditsi.
- [34] In general terms, what the arbitrator was faced with was the applicant's version of events, sustained by the consistent

evidence of all of its witnesses, and put to the employee and her witnesses for their comment. He also had before him the employee's

version which, as I have indicated, was scarcely put to the applicant's witnesses in cross-examination, with much of it emerging only as a result of the cross examination of the employee on specific issues. What the arbitrator did was to accept the employee's evidence and in doing so, he rejected the evidence of all five of the applicant's witnesses and the employee's own witness Makofane in circumstances where the employee had simply denied the version of events to

which the applicant's witnesses testified, and where for the first time in cross-examination, the employee asserted that all of the applicant's witnesses had lied but which she herself could not provide any explanation whatsoever for the new version that all of the applicant's witnesses had fabricated their evidence. The arbitrator to have lost sight of the test to determine the credibility of witnesses. The apparent contradictions in the evidence of Maditsi, Lebea and Lesufi are minor contradictions, typical of witnesses who give honest and corroborative evidence. The contradictions, such as they were, did not warrant a rejection of the evidence of each of the applicant's witnesses and the rejection of its version as a whole.

[35] I am acutely aware of the caution expressed by the LAC in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 197 (LAC) where Waglay JP held that a piecemeal approach to a review application was improper, and emphasised that the court ought to adopt a holistic approach to the evidence, ultimately to decide

whether the decision made by the arbitrator is one that a reasonable decision-maker could make. However, where an arbitrator makes a decision (as the arbitrator did in this instance) on the basis of untested evidence, in my view, that constitutes a misdirection and in terms of *Mofokeng*, has the consequence of a result that is *prima facie* unreasonable.

[36] In the present case, what is clear from the award is that the arbitrator made findings in favour of versions that had never been put to the applicant's witnesses during the proceedings under review. In other words, he preferred an untested version over one that had been tested under cross-examination. In *Absa Brokers (Pty) Ltd v Moshwana No & others* (2005) 26 ILJ 1652, the Labour Appeal Court emphasised the importance of the institution of cross-examination and the importance of the obligation on a representative to put a contrary version to a witness:

It is apposite to refer to what the Constitutional Court had to say in this regard in *President of the Republic of South Africa v SA Rugby Football Union 2000* (1) SA 1 (CC) at para 61-63. There the court said:

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule, it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character...

[63] The precise nature of the imputation should be made to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged, but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be

placed.

- [37] It is obviously not necessary to put the minutiae of every competing version to a witness under cross-examination. The question must always be one of degree, but where there is a material dispute of fact (as there was in the proceedings under review) it is incumbent on the representative to put any competing version with sufficient particularity so as to meet the objectives referred to by the Constitutional Court.
- [38] There is no basis on which to rescue the award, i.e. to find that notwithstanding the arbitrator's shortcomings, the result of the proceedings under review can nonetheless be sustained. On a proper assessment of the available evidence (including the evidence of Makofane, which was destructive of the employee's version and not objected to at the time as hearsay and which in my view, tips the scales against the employee's version), the employee committed the misconduct with which she had been charged, and her dismissal was justified. It cannot be said on the available material that despite the arbitrator's misdirections, the outcome of the arbitration proceedings was nonetheless reasonable. The award accordingly stands to be reviewed and set aside.

Remedy

- [39] There is little point in referring this matter back to the first respondent for a rehearing before a different commissioner. The record is complete and this court is in as good a position to make the decision itself. I intend therefore to substitute the arbitrator's award with an award to the effect that the applicant's dismissal was substantively fair.

Costs

- [40] Finally, in relation to costs, it seems to me for the purposes of s162 of the Labour Relations Act that the interests of the law and fairness are best served by there being no order as to costs.

I make the following order:

1. The arbitration award issued by the first respondent under case number LP 3226-13 issued by the second respondent on 3 February 2014 is reviewed and set aside.
2. The award is substituted by the following:

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

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. L Hollander, instructed by Webber Wentzel

For the third and fourth respondents: Adv. R Itzkin, instructed by Moseamo Papola Inc.

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