IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Reportable

Case No: C138/16

In the matter between:

VINCENT NKULULEKO MAYISELA Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION First Respondent

ANTONY OSLER Second Respondent

LEGAL AID SOUTH AFRICA Third Respondent

Heard: 15 September 2016

Delivered: 19 April 2017

Summary: Review of award with multiple charges – reasonableness of instruction by supervisor – Commissioner not entitled to assumed instruction to be reasonable – misconduct – racism - racist conduct requires a very firm and unapologetic response from the courts – review partly successful – dismissal unfair – reinstatement ordered.

JUDGMENT

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CELE J

Introduction

[1] This application seeks to review and set aside an arbitration award with multiple charges handed down under case number NC1084/14, dated 14 February 2016 and issued by the second respondent. It is an application in terms of section 145 of the Labour Relations Act.[1] The arbitration related to the applicant's dismissal by the Third Respondent based on allegations that he committed various acts of misconduct. The application is on the basis that the arbitrator failed to conduct a proper enquiry and reached a decision that no reasonable arbitrator could reach on the evidence tendered. The third respondent opposed this application on the basis that the outlined grounds of review are not sustainable when evidence tendered is considered.

Factual Background

[2] Most of the facts in this matter were common cause between the parties from inception of the dismissal dispute. I shall defer to that outline of those facts as was given by the Commissioner as confirmed by the Applicant in his founding affidavit. In his award, the Commissioner described the background facts thus:

> "4. The employer is a state-funded provider of legal services to the indigent, with offices – known as Justice Centres – nationally. At the time during which this dispute arose, the employee was employed as the Justice Centre Executive ('JCE'), managing the Kimberley Justice Centre. Operationally, he reported to the Regional Operations Executive ('ROE') for the Western and Northern Cape, Ms C Robertson. After an investigation into various complaints about the conduct of

[1] Act Number 66 of 1995 hereafter referred to as the LRA.

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the employee, he was suspended on 22 October 2013. On 6 November 2013 he was served with a number of charges falling under the headings of gross insubordination, gross insolence; attacking the honour, dignity or good name of the ROE; threats and intimidation toward the ROE; disruption of the employer's operations and activities; professional negligence; conduct bringing the employer into disrepute; and absence without leave - all with alternatives of failing to observe the rules and regulations of the employer.

5. A disciplinary inquiry was held into the above charges between 21 November and 29 April 2014, in which the presiding officer was the ROE for KwaZulu-Natal, Ms V Mdaka. On 11 April 2014 the employee was found guilty of seventeen charges and not guilty on eight of the charges against him. After hearing mitigation and aggravation, the presiding officer recommended the dismissal of the employee and this was implemented by the employer on 14 May 2014.

6. The present dispute was referred to the CCMA in May 2014. After the dispute remained unresolved at conciliation, an arbitration hearing was held in October 2014. An arbitration award was issued by commissioner T Potgieter on 8 October 2014, in which it was found that the employee's dismissal was substantively and procedurally fair. The employee then launched review proceedings in the Labour Court, which resulted in the award being set aside on 5 August 2015 and the matter being referred back to the CCMA for arbitration before a different commissioner.

7. The present arbitration was set down accordingly and the parties held a pre-arbitration conference prior to the hearing, of which a minute was submitted at the start of proceedings. In the pre-arbitration conference the employer indicated that it would only proceed against the employee on four of the charges for which he had been dismissed, namely gross insubordination (charges 1.1-1.4); gross insolence (charges 2.1-2.3); attack on the honour, good name or dignity of the ROE (charges 3.1-3.2); as well as threats and intimidation via email to the ROE (charges 4.1-4.2), together with the alternatives.

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[3] From this factual background it is clear that this matter has a long history and is back at this Court for the second time round. The Second Respondent found that the Third Respondent had proved the guilt of the Applicant in respect of each of the nine charges and therefore that his dismissal was both substantively and procedurally fair. The Applicant initiated the present application. Five grounds of review were identified by the Applicant. The first ground is covering all the nine counts. To obviate being repetitive and after the grounds of review are outlined, it is rather prudent to approach this matter by first embarking on the enquiry count by count at which instance more facts will become clearer. The remaining four grounds of review will thereafter be dealt with.

Grounds for review

[4] Five grounds for review outlined by the Applicant are:

1. The Second Respondent committed serious misconduct in that he had absolutely no regard to material facts and evidence elicited in cross examination by the Applicant as apparent from the award. Secondly, the Second Respondent deliberately ignored and had no regard to Applicant's written submissions and only appears to have had regard to the Third Respondent's submissions as apparent from the award.

2. Delay to institute disciplinary action and failure to apply progressive disciplinary measures. The Second Respondent is alleged to have not decided the issue at all and made a ruling on evidence that was not before him and or presented by Ms Robertson. Applicant said that there was no evidence that the application of corrective discipline through a final written warning could not have been sufficient to rectify any alleged misconduct as per the Third Respondent's Policy on progressive discipline.

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3. Duplication of charges - The Second Respondent is said to have refused to arbitrate and make a ruling on the basis of evidence placed before him to the effect that a variety of e mails or same source was used for different species of misconduct in terms of his own definition of heaping of charges.

4. Breakdown in employment relationship – Applicant submitted that the Second Respondent failed to arbitrate and to decide on this issue at all in his award. Applicant contended that Ms Robertson's evidence of a breakdown in the trust relationship between Applicant and the Third Respondent, and what she purported to be the breakdown in the meeting of 1 October 2013 was a blatant untruth and a fabrication in response to the Applicant Labour Court application in 2015. After dismissal – Applicant submitted that writing e mails "internally" as a dismissed employee as he usually did could not constitute a breakdown in the trust relationship and simply amounted to prohibition of speech.

5. Credibility and untruthfulness of Ms Robertson's evidence - Applicant submitted that the Second Respondent failed to have regard to Ms Robertson's credibility and untruthful nature of her evidence as appears from the record and pleadings other than having paid lip service to having considered both witnesses credibility. Applicant said that Ms Robertson evidence was wholly untruthful, perilous and motivated by an ulterior and personal motive and was intended to ensure that his return to third Respondent was not possible.

[5] The fifth ground is necessarily part and parcel of the enquiry whether the Applicant is guilty of any charges and if guilty of any, what the appropriate and fair sanction is. It will accordingly not be treated as a standalone ground in line with the principles governing a review test. Effectively therefore there are four grounds of review to consider.

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[6] The opposition to this application is premised on the simple ground that the applicant is seeking to appeal the arbitrator's decision by demonstrating that the award was incorrect and he does so by assessing the award in a piecemeal fashion. Such an approach was said to be impermissible in review proceedings such as these. It is submitted that the award is an admirable one as it contains a comprehensive yet succinct summary of the evidence and the various issues in dispute. The Commissioner's reasoning is said to be clear and compelling. None of the defects referred to in the judgments alluded to above is said to be apparent from the award. Even if such defects were present they are said to be insufficient to render the award unreasonable.

Test for review

[7] The law has become trite that in considering whether the arbitration award of a Commissioner is reviewable, this Court has to consider whether the decision reached by the Commissioner is one that a reasonable Commissioner could not reach[2]. In respect of the reasonableness test it is worth recalling that awards are not meant to be perfect or satisfactory in all respects. The mere fact that an award is unsatisfactory in one or more respects does not mean that it is unreasonable.[3] The ultimate principle upon which a review is based is justification for the decision as opposed to it being considered correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always

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[2] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC) and *Herholdt v v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae*) [2013] 11 BLLR 1074 (SCA).
[3] *NUM and another v Rustenburg Platinum Mine (Mogalakwena Section) and others* [2015] 1 BLLR 77 (LAC) at para 26

maintain, is respected[4]. An additional consequence of the distinction between appeals and reviews is that reviews are:

> " .. considered on the totality of the evidence not a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process."[5]

The charges and the first review ground

[8] To the extent that the facts of this matter relate to one aspect, charges about such facts shall be dealt with jointly.

Charges 1.1 and 1.2

[9] The Applicant was alleged to have committed gross insubordination in the following respects;-

1.1 A refusal and/or failure by the employee to arrange a teleconference call to discuss his supervisory assessment, despite being asked to do so by his manager on more than one occasion;

1.2 A refusal and/or failure by the employee to attend a meeting with his manager to discuss various issues which he raised with his manager and her manager (NOE),

[4] See *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) at para 18.
[5] See *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* [2014] 1 BLLR 20 (LAC) at para 21. See also *Potgieter v Tubatse Ferrochrome & others* (2014) 35 ILJ 2419 (LAC) at para 36.

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[10] These charges find their genesis in the scoring of 54% awarded by Ms Robertson to work performance of the Applicant in her capacity as his Supervisor of the Applicant. Upon receipt of the scoring the Applicant requested Ms Robertson to furnish him with information and documents on the basis of which the scoring was done. He intimated that he was considering lodging a grievance. Thus far, this is a reasonable request by an employee who sought the verification of an assessment that was already done by his supervisor. He was entitled to this information as the supervisor, acting on behalf of the employer, had made a decision. It must be noted that he did not ask for a review of the assessment. Ms Robertson had the opportunity to demonstrate that her assessment was not visited by any irrationality, arbitrariness, vindictiveness and the likes. Her response was the beginning of complications in this matter. She called for a meeting with the Applicant, asserting that it was how she dealt with such matters. Nowhere in her evidence did she refer to any regulation or policy entitling her to act as she proposed. Her employer is a creature of statute and therefore she had to back her approach with some authority so that it could be said that her instructions were reasonable and lawful. Her reaction to a simple request frustrated the course which the Applicant wanted to pursue, namely the lodging of a grievance.

[11] The approach adopted by the Second Respondent was to assume, wrongly in my view, that the instruction by Ms Robertson to the Applicant was reasonable as he said nothing about its reasonableness.[6] The challenge by the Applicant left no room for such an assumption. The exchanges by the Applicant were nothing but complaints that his supervisor was sidestepping his request. There really was no need for any meeting between the Applicant and Ms Robertson on this issue as she had completed her assessment. The two charges were ill founded and conviction on them was premised on misdirection in failing to conduct a proper enquiry, leading to an unreasonable result.

[6] See clause 7 of Schedule 8 – Code of Good Practice : Dismissals.

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Charges 1.3 and 1.4

[12] Here, the Applicant was alleged to have committed gross insubordination in the following respects;-

1.3 The refusal and/or failure by the employee to attend with the Regional Control Prosecutor about part-heard matters of Mr Hole, despite being advised to do so; and thereafter agreeing with the ROE to attend the meeting but then failing to do so when advised that the employer would not be taking the same stance as the NPA.

1.4 A refusal and/or failure by the employee to give his manager information about the practitioners who were on record in the part-heard matters in Mr Hole's court.

[13] There had been problems between Mr Hole, a Regional Magistrate, and the President of the Regional Court, Mr Nqadala, leading to Mr Hole being stopped from presiding as a Regional Magistrate. An arrangement was made for his return to come and complete his partly-heard criminal matters. The Third Respondent had to be involved in the arrangements for further evidence to be led as its practitioners represented some of the accused. Two meetings were then scheduled for 11 and 26 July 2013 *inter alia*, to make arrangements for the hearing of further evidence.

[14] When she was cross-examined the evidence of Ms Robertson about whether or not she gave an instruction on the Applicant to attend the meeting of 11 July

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2013 is clearly that she did not directly give such instruction.[7] Some of this evidence reads:

> "All right Cordelia, you are not really helping us. Okay, then I will start again. Right let's deal with the meeting of the 11th July. Did you give me an instruction to attend the meeting? Yes or no ---- Not directly, no
>
> Not, Am I correct that in the morning of 11th I had a discussion with you where I actually mentioned to you that I had a conflict in attending the meeting? ------- We had a telephonic discussion, you may have mentioned to me that you had a conflict. I don't specifically recall that. Suffice to say Mr Ligaraba, the NPA also had a conflict, yet that meeting was attended by them."[8]
>
> ---
>
> "Yes, And put the views of the DPP in respect of the conflict. Now in that conversation, Cordelia, did you give me an instruction to say Mr Mayisela, despite the conflict that you are referring to, I am telling you to attend the meeting? Oh was it your response that I should tell Mr Nqadala that Legal Aid will not be attending? ----- My Response was as per the email, that Legal Aid will not be attending because I think you mentioned Metyosinyane is not available."[9]

[15] In respect of the meeting of 26 July 2013, the Applicant informed Ms Robertson that he would attend the meeting. Later, he delegated Messrs Mabaso and Bergh to attend and they attended the meeting. The evidence of Ms Robertson is that the Applicant had the power to delegate in the instance. What she raised as a query was that she was not kept informed of such change. The Applicant's ground of review is that the Second Respondent failed to consider cross-

[7] See pages 179 to 181 of the transcript.
[8] See page 178 of transcript lines 3 to 13.
[9] See page 180 of transcript lines 18 to 25.

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examination evidence. The reading of the transcript shows clearly that the Applicant elicited evidence favourable to his version through cross-examination but that the Second Respondent failed to consider such evidence. It is clear that had such evidence been considered properly a verdict of not guilty would have been returned on this charge. The evidence led did not support the preferred charge. This issue did not even appear in the list of matters which the Applicant and Ms Robertson were instructed By Mr Nair to discuss and resolve later in that year. The Commissioner thus failed to apply his mind to evidence led and consequently issued an unreasonable decision pertaining to this count.

[16] I now consider the charge of a refusal and/or failure by the employee to give his manager information about the practitioners who were on record in the part-heard matters in Mr Hole's court. The submission by the Applicant is that the Second Respondent failed to arbitrate and make a ruling on the issue he was required to arbitrate and rather opted to make a finding on the wrong premises in as far as it relates to his finding that matters were deeply confrontational. Secondly, the Second Respondent is said to have completely failed to arbitrate and deal with the content and nature of the two e mail statements "purported" to be insubordinate as required including Ms Robertson's failure to report the incident in the meeting of the 1st October 2013.

[17] The background facts to this charge are essentially that in the preparatory meeting also referred as the pre-trial conference, held to organise how partly heard matters were to be finalised, the names of Messrs Mabaso and Bergh were given as legal representatives who would appear for the accused. A report to that effect was then compiled for submission to the Secretary of the Magistrates' Commission. Before the report was sent off an amendment was effected on it where Mr Bergh was substituted by the Applicant. When Mr Nqadala sent the report he then expressed some concerns about the substitution of Mr Bergh by the Applicant. He said that the change was not only curious but

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had not been communicated to other stakeholders and that his readiness to deal with the outstanding matters had not been confirmed. Those remarks were made in an email correspondence which was copied to Ms Robertson.

[18] On 10 September 2013 at 14h15 Ms Robertson sent an email to the Applicant seeking confirmation that he was taking over and that he was prepared and ready for such appearance. She referred the Applicant to the concerns raised by Mr Nqadala contained in her email trail. The Applicant's response of being prepared and ready was noted on the body of the email he had received from Ms Robertson. Then at 15h22 of the same day Ms Robertson sent an email asking the Applicant to urgently advise her of the names of two legal practitioners that were at that time involved in those partly-heard matters. The response from the Applicant was given on the next day, 11 September 2013 at 08h28. It reads: "I am not sure what the issue is now. Is Mr Nqadala going to tell me how to run the Kimberly JC. Tks." On the same day at 08h49 Ms Robertson wrote: "Please advise urgently who the current practitioners are on these matters." At 08h55 of the same day the Applicant wrote: "Is there any reason why I should provide you with those details!" At 08h58 of the same day Ms Robertson wrote: "Please provide me with these details as requested." Only at 09h00 did the Applicant finally give required information of Messrs Bergh and Mabaso.

[19] The second Respondent in dealing with this charge had the following, *inter alia*, to say:

> "After the meeting of 26 July 2013 Ms Robertson was given conflicting information as to who would be appearing in the Hole court and sought to clarify it with the employee. The employee declined to give the required information at first and, instead, queried the status of persons who were commenting on the matter and asked (again rhetorically) whether there was any reason why he should provide her with the requested details, before giving the names in question to Ms Robertson.

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55. Both parties argued for the reasonableness of their conduct in respect of this charge. But that is not really the point; the point is whether the actions and words of the employee constituted a challenge to the authority of the employer. It is also apparent that by this stage matters were deeply confrontational; when this happens, even normally insignificant aspects - like a delay of thirty minutes in answering, or the tone in which something is stated or asked – acquire significance. In the context of the ongoing relationship between the two protagonists, it constitutes insubordination on the part of the subordinate and the challenge to Ms Robertson's authority is palpable throughout. I find the employee guilty of both these charges."

[20] During cross–examination the Applicant unsuccessfully sought a concession from Ms Robertson that in the internal disciplinary hearing and at the first arbitration hearing she had agreed that by his question in response to her request, it was a clarity seeking question. Ms Robertson explained successfully why she had erred in her answers at the time. The Applicant's challenge to this finding must clearly fail. He was on the provocative mission and as the trail shows Ms Robertson kept her cool. As the Third Respondent correctly argued, the Commissioner understood very well what the issues were here and he applied his mind appropriately to them and the conclusion he reached is indeed one that a reasonable decision maker could reach.

Charges 2.1 and 2.3

[21] These are charges of gross insolence where it was alleged that the Applicant:

2.1 accused his manager of going on a witch hunt without any evidence and/or facts in support of his allegation.

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2.3 screamed and shouted at his manager over the telephone on 13 September 2013 that he wanted to be suspended and that he would be contacting the CEO and chairperson of the employer to suspend him.

[22] The first charge finds its existence from email correspondence of 26 March 2013. The Applicant's work performance was assessed for the relevant period and Ms Robertson then communicated the results to the Applicant in March 2013 to be 54%. At 09h07 the Applicant issued an email to Ms Robertson copied to Mr Nair in the following terms: "I must state it to you that I am now demoralized! I live for this organization and now that is how I am evaluated. Tks" At 09h21 Ms Robertson responded in an email which reads: "I will call you to discuss this. I am also not sure why you copied the NOE on this email as you report to me and should discuss issues with me. Tx and regards" At 13h31 the Applicant wrote back and said: "I copied Brian because this is part of the witch-hunt process. I am sure you are angry now that I could not provide you with comments on the newspaper article as you requested and not because I refused, but because I have no comment on a document leaked to the press. Tks."

[23] The submission by the Applicant is essentially that the Second Respondent failed to arbitrate and make a finding to the fact that the word "witch hunt" was used in an insolently and/or that the word was insulting as per Ms Robertson's evidence and rather opted to rephrase the issue in dispute in his award. Applicant submitted that the Second Respondent made no finding that the word was used in an insolent manner and appears to have found Applicant guilty of merely using the word which usage is insolent. He said that the charge was false and a fabrication.

[24] The Second Respondent's finding on this charge is that:

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> "It is common cause that the employee, in his email of 26 March 2013, told Ms Robertson that he had copied Mr Nair on his emails expressing his dissatisfaction with his assessment because what she was doing was part of the witch hunt process. This allegation was clearly an accusation that Robertson was orchestrating some kind of campaign against him. The employee's defence was that the words used were true; however, there is certainly nothing in the evidence, apart from his own opinion, to justify the employee's allegation of a campaign against him. The conduct is grossly insolent and the employee is guilty of this charge."

[25] At arbitration the Applicant conceded to the making of the statement complained of. Ms Robertson testified that she felt intimidated by the utterance made by the Applicant. She said that she did not take disciplinary action willy nilly against her staff and so wanted to give the Applicant an opportunity to explain himself. She regarded the utterance by the Applicant to be serious misconduct. Insolent conduct is one which is:

> "offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous."[10]

[26] The context in which the utterance was made is significant. The Applicant was aggrieved by the scoring he had received from Ms Robertson. He was so angry that he felt he had to communicate his displeasure to Mr Nair who was Ms Robertson's supervisor. Looking at the scores that the Applicant awarded to those reporting to him of 92% and 97%, a score of 54% was certainly disheartening to any diligent and purpose driven worker. Such low score should rather elicit a deep introspection and a desire to be furnished with details for such assessment. The Applicant indeed wanted such details but he became offensive and went on the attack long before such details could be given to him. Telling his

[10] *Palluci Home Depot (Pty) Ltd v Herskowitz and others* [2015] 5 BLLR 484 (LAC) at para 20

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supervisor that she was on a witch hunt was certainly derogatory, disrespectful and cheeky.

[27] The Applicant sought but could not successfully find support for the defence he raised even as he relied on those charges of misconduct for which he was found not guilty. The allegations forming the basis for the other charges had not even surfaced to any degree of concern as this incident took place very early in the confrontation he had with Ms Robertson. In his cross-examination of Ms Roberts the Applicant conceded that he could not remember the circumstances prevailing at the time of the email in question. He said that he would not be able to show that there was any witch hunt as a result of the 25 charges.[11] When Ms Robertson was asked in the disciplinary hearing by the Chairperson and the Initiator as to whether she asked the Applicant what he meant by the word "witch hunt" her response was*: "I d'nt think to that one*". The Applicant submitted then that the charge was an afterthought eight months later. Assuming in his favour that it is an afterthought, it does not derogate from the fact that the utterances were derogatory, disrespectful and cheeky. It might talk to the appropriateness of the sanction. The Second Respondent has accordingly not been shown to have misconceived the nature of the enquiry he was called upon to conduct. Nor has he been shown to have reached a decision which a reasonable decision maker could not reach on this charge.

[28] I now turn to the enquiry whether the Applicant screamed and shouted at his manager over the telephone on 13 September 2013 that he wanted to be suspended and that he would be contacting the CEO and chairperson of the employer to suspend him. Three emails of Friday, 13 September 2013, and a subsequent telephone communication between the Applicant and Ms Robertson form the background to this charge. It should be noted that the partly-heard matter of Mr Hole were to resume on the following Monday, 16 September 2013.

[11] See pages 483 to 484 of the transcript.

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So, on 13 September 2013 at 14h51 Ms Robertson wrote to the Applicant saying: "I refer to our telephonic discussion now. Please ensure that the part-heard matters are completed by the practitioners who commenced with these part-heards. At 15h01 Ms Robertson again wrote: "Please note that the following are instructions:

> That the practitioners (Bergh and Mabaso) complete all their part-heards with Mr Hole.
>
> That preference be given to these matters by the practitioners Bergh and Mabaso.
>
> That a temporary practitioner is appointed to assist in Bergh's and Mabaso's courts.
>
> That Advocate Fourie be approached about the temporary practitioner position.
>
> That should you be unable to find a temporary practitioner, that I am contacted immediately so that I can assist in finding a temporary practitioner." At 15h04 the Applicant responded by saying: "May I please be suspended because I am unable to make decisions on behalf of my JC and I am also been given instructions I cannot execute."

[29] Still on 13 September 2013 the Applicant then telephoned Ms Robertson. It is the exchanges the two had and the nature thereof which form the subject of this charge. Ms Robertson described the manner of speech by the Applicant as in a raised voice that was unacceptable as he was screaming at her. The Applicant denied the allegations. The Second Respondent made the following finding on the charge:

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> "Ms Robertson testified that the employee did what is stated in this charge. The employee denied it. In light of the surrounding evidence about the relationship between Robertson and the employee, in the fact that the employee did indeed ask to be suspended and that he was unhappy about Robertson's decision that he was not to appear in the Hole matters, the probabilities lie in favour of the employer. This constitutes serious insolence and the employee is guilty of the charge."

[30] The applicant submitted that the Second Respondent failed to have regard to the blatantly false evidence by Ms Robertson in cross examination regarding the nature and content of the conversation on 13 Sept 2013 as set out in applicant's founding and supplementary affidavits and opted to decide the matter wrongly based on inferences which inferences drawn by the Second Respondent were not consistent with the proven facts. He submitted that Ms Robertson description of the content of the conversation in the second CCMA hearing was seriously at odds with her previous descriptions of the same conversations, pointing out such disparities in the evidence. He contended that Ms Robertson, in her opposing affidavit did not deny or at the very least explain the many contradictory versions which the Second Respondent failed to arbitrate.

[31] As can be seen from the award the Second Respondent chose to decide this issue only on the probabilities of the matter than to single out the disparities. I believe the submissions by Mr Bosch appearing for the Third Respondent are spot on in this respect where the attack on the award is premised on contradictory evidence of a witness. Courts have made it clear that it is not necessary for a commissioner to engage in an inquiry into the credibility of witnesses to resolve conflicting versions if he or she is able to resolve the conflicting versions with reference to the probabilities. In *First Garment Rental (Pty) Ltd v CCMA and others*[12] the Court summarised the approach to mutually destructive versions as being that the court has to weigh the evidence tendered by the parties and apply the probability test and if necessary take into account

[12] [2015] 11 BLLR 1094 (LAC)

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the credibility of the witnesses. In *National Employers' General Insurance Co Ltd v Jagers*[13] the Court held that:

> "It does not seem to me to be desirable for a court first to consider the question of credibility of the witnesses as the trial judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities."

[32] The arbitrator preferred the employer's version in respect of this charge based on the probabilities. He was perfectly entitled to do so. It is only where a consideration of the probabilities fails to indicate where the truth probably lies that recourse may be had to an estimate of relative credibility apart from the probabilities. It remained common cause that the telephonic exchange between the two took place. Ms Roberts had just issued a firm and written instruction stopping the Applicant from appearing in the partly-heard matters where he had chosen to appear. She directed him what to do henceforth. The Applicant wasted no time as he responded in a space of about three minutes, asking to be suspended and indicating that he had been given instructions which he said he could not execute. Their conversation had to be about this issue and more. Ms Robertson's evidence at the various fora was that:" He said to me words to the effect that …." She was not quoting verbatim what she believed the Applicant to have said. The email sent to Ms Robertson by the Applicant shows that he was upset at the time. Therefore the attack on the award in this respect lacks merits as a proper enquiry was conducted producing a reasonable decision.

<u>Charges 3.1 and 3.2</u>

[13] 1984 (4) SA 437 (E) at 440I-441A

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[33] These two charges are about an attack on the honour, dignity and/or good name of the manager (ROE), in that:

3.1 during the period March 2013 until his suspension on 22 October 2013 the employee made tacit accusations of racism against his manager and in so doing attacked her honour and integrity.

3.2 the employee made unfounded accusations of harassment and in that his responses to his manager's reasonable requests that he attend meetings on 4, 10 or 12 June 2013 (as the dates were changed), were unacceptable, insolent, rude and disrespectful.

[34] The allegation that the employee made tacit accusations of racism against his manager and in so doing attacked her honour and integrity has its origin in the email of 10 April 2013 at 09h22 from the Applicant relating to his dissatisfaction that he was assessed and given 54% for his work performance at the time. He wrote:

> "I will appreciate if I can have the explanation in writing as requested. I am unhappy about the assessment and I intend using your explanation as reasons for my grievance. I think I am vilified and this has been coming on for a very long time now.
>
> I just don't feel safe in my work anymore as an African Manager in this region and I intend taking matter up with Management and the Portfolio Committee.
>
> I honestly think that Africans are being vilified in the region under the coded name of poor performance and it's also clear in the non-appointment of African managers in the region."

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[35] The Second Respondent made a finding on this charge by saying:

> "… Ms Robertson testified that this was a tacit accusation of racism against her. The employee stated that there was racism in the region and I will assume that his defence to this charge is based on his belief that these statements are true and hence justified. It was noted on the record at arbitration that, in terms of South African racial categories, the employee is 'African' and Ms Robertson 'Coloured'. Objectively, the statements are clearly an allegation that in the region managed by Ms Robertson, Africans have a particular problem and that Ms Robertson is by implication racist. The allegation is obviously tacit. While the employee holds the view that his allegation of racism is justified, there is no evidence to support this - only allegations and denials that came thick and fast, on which I will make no finding; and even if the statistics quoted by the employee are correct, there are any number of interpretations of this. More importantly, my task is not to decide what constitutes racism in the organization or to dissect the politics of the employer's region, but to ask whether it was appropriate for the employee to make the accusation to his superior. I find that it was not and that this conduct constitutes an unjustified personal attack on the dignity, honour and good name of his manager. To put it differently, if this was the considered opinion of the employee, it would be entirely appropriate - indeed, important - for him to raise the issue in a different way in a different forum. I find the employee guilty on this charge.

[36] When stated in brief the submissions of the Applicant are essentially that the second Respondent failed to arbitrate over the issue he was requested to arbitrate on and opted to find the Applicant guilty on a charge of which he was already found not guilty as apparent from the award. Secondly, the Second Respondent made no finding that the allegations were unfounded or untrue as required. Ms Robertson never testified that the Applicant's statement was unfounded or false other than to say that the statement was insulting, unprofessional and rude, a charge that was not proved under the insolence charge. It is this statement which appears to be the reasons for the Second

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Respondent's findings in respect of a charge of which the Applicant had already been found not guilty. He said that Ms Robertson evidence of the attack on her honour, good name and dignity was based on the unfounded allegations and yet there was no evidence that his statement was unfounded or false. He referred to an incident when the initiator asked Ms Robertson to explain why she was of the view that her honour and dignity were attacked and Ms Robertson said it was because the statement was completely unfounded. He said that he was charged and dismissed for one e mail dated 10 April 2013 and not for other subsequent emails and that therefore other e mails were irrelevant to these proceedings. He said that the Third Respondent's case was that the allegations he made were unfounded and yet the Third Respondent did not present evidence in support thereof and chose not to even provide the performance scores of the managers on poor performance as requested.

[37] The Applicant said that the charge was a mere means to deny him freedom of expression, saying it was not the Third Respondent's case that he should not have made the allegation, but should have done so through a grievance. Yet he was not charged for having failed to lodge a grievance. To him, it did not seem that it was the Third Respondent's case that he should not have made the allegation, but that he should have substantiated it. He contended that the allegations were sufficiently substantiated and if there was any confusion, same should have been cleared with him seven months earlier in April 2013 and instead Ms Robertson testified that she did not respond but reserved her rights. Therefore Ms Robertson was to be taken as having clearly understood the content of the statement and needed no further substantiation. Finally, he said that the Third Respondent had to prove that the Applicant breached a rule in terms of the Third Respondent's policy but failed.

[38] The Applicant clearly regarded 54% given to him by Ms Robertson to mean that he exhibited poor performance at the time. He believed that he was vilified

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thereby. To that extent he said that he was no longer feeling safe in his work anymore as an African Manager in his region. The Applicant was directing these comments to Ms Robertson and was blaming her for a differential treatment of Africans in that region on the basis of their racial composition. Essentially, the Applicant was complaining about the practice of racism in his region. He further indicated the steps he intended to take by reporting the matter to management and to the (Justice) Portfolio Committee. The Applicant was perfectly entitled to take these steps, provided he would be able to substantiate his allegations when the matter was investigated, as it had to be. It then begs the question whether announcing a complaint that one has and the steps he wants to take could amount to any act of misconduct charged. I do not think so. To hold that the Applicant misconducted himself has the consequence of protecting instead of unearthing an allegation of racism, which, if true, is itself a very serious misconduct that must not be glossed over, accommodated or excused.

[39] I am very much alive to the approach adopted by this Court that it is not acceptable to simply accuse a person of being racist.[14] The sentiments expressed in the SACWU judgment[15] were recently endorsed by the Labour Appeal Court in *City of Cape Town v Freddie and others.*[16] The Applicant referred issues between him and Ms Robertson to Mr Nair, being part of management as he indicated he would. It behoved management to investigate all allegations made by the Applicant so as to establish veracity thereof. I am not sure if the route taken by Mr Nair was a correct approach in the circumstances. I have the benefit of a recent warning issued by the Constitutional Court on issues pertaining to racism in South African Revenue Services v Commission for Conciliation Mediation and Arbitration[17] where the following, *inter alia*, was said:

[14] See *SACWU and Another v NCP Chlorchem (Pty) Ltd and Others* (2007) 28 *ILJ* 1308 (LC) at paras 12 and 13.
[15] (2007) 28 ILJ 1303 (LC).
[16] [2016] 6 BLLR 568 (LAC) at para 51
[17] [2017] 1 BLLR 8 (CC)

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"[8] South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations. After all racism was the very foundation and essence of the apartheid system. But this would have to be approached with maturity and great wisdom, obviously without playing down the horrendous nature of the slur. For, the most counter-productive approach to its highly sensitive, emotive and hurtful effects would be an equally emotional and retaliatory reaction. But why is it that racism is still so openly practised by some despite its obviously unconstitutional and illegal character? How can racism persist notwithstanding so much profession of support for or commitment to the values enshrined in our progressive Constitution and so many active pro-Constitution non-governmental organisations? (Sic)

[9] Are we perhaps too soft on racism and the use of the word kaffir in particular? Should it not be of great concern that kaffir is the embodiment of racial supremacy and hatred all wrapped up in one? My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies.

[10] **Another factor that could undermine the possibility to address racism squarely would be a tendency to shift attention from racism to technicalities, even where unmitigated racism is unavoidably central to the dispute or engagement. The tendency is, according to my experience, to begin by unreservedly acknowledging the gravity and repugnance of racism which is immediately followed by a de-emphasis and over-technicalisation of its effect in the particular setting. At times a firm response attracts a patronising caution against being emotional and an authoritative appeal for rationality or thoughtfulness that is made out to be sorely missing**. (My Emphasis)

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[11] That in my view is a nuanced way of insensitively insinuating that targets of racism lack understanding and that they tend to overreact. That mitigating approach would create a comfort zone for racism practitioners or apologists and is the most effective enabling environment or fertile ground for racism and its tendencies. And the logical consequence of all this gingerly or "reasonable" approach to racism, coupled with the neutralising reference to the word kaffir as the "k word", is the entrenchment and embodiment of racism that we now have to contend with so many years into our constitutional democracy. Imagine if the same approach or attitude were to be adopted in relation to homophobia, xenophobia, arrogance of power, all facets of impunity, corruption and similar societal ills. That somewhat exculpatory or sympathetic attitude would, in my view, ensure that racism or any gross injustice similarly handled, becomes openly normalised again. Those who should help to eradicate racism or gross injustice could, with that approach, become its unintending, unconscious or indifferent helpers.

[12] The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy-related issues, it behoves our courts to embrace that judgment call as dispassionately as the judicial affirmation or oath of office enjoins them to and unflinchingly bring an impartial mind to bear on those issues, as in all other cases.

[13] Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a Judicial Officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office.

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> [14] Bekker CJ, Mohamed CJ and Zondo JP observed in essence that racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred and the lowest form of contempt for African people or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack.

[40] It needs to be emphasised then that racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. The Commissioner's findings that his task was to ask whether it was appropriate for the employee to make the accusation to his superior, that it was not, and that this conduct constituted an unjustified personal attack on the dignity, honour and good name of his manager were failures on his part to conduct a proper enquiry and it produced an unreasonable result that the Applicant was guilty of misconduct. He was not. In passing, I observe that if the dismissal of the Applicant was allegedly based on him being discriminated as envisaged in section 187 (1) (f) of the Act, the First Respondent would lack jurisdiction to arbitrate this issue. The Applicant should not have been charged with this misconduct in the first place, whether one relies on the email of 10 April 2013 as the evidence of Ms Robertson suggested or on subsequent emails as the charge suggested but was not supported by such evidence.[18] The review application succeeds on this ground.

[41] The allegation that the employee made unfounded accusations of harassment and in that his responses to his manager's reasonable requests that he attend

[18] See transcript pages 401 to 406.

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meetings on 4, 10 or 12 June 2013 (as the dates were changed), were unacceptable, insolent, rude and disrespectful must now be considered. The Applicant made a number of allegations that he was harassed by Ms Robertson who denied same, averring that the situation was aggravated by copying those allegations to her seniors. Further, the Third Respondent referred to an email of 29 May 2013 about the June meetings, in which the Applicant said if they met, he would tell Ms Robertson things she did not want to hear, that he would tell her what she needed to do as a person in order for her to change for the better. He then requested her not to hug him when they met because her hugs were not genuine and she was not to travel with him or go shopping with him in Kimberley, and that they were to treat each other formally with no unnecessary jokes.

[42] Applicant submitted that the Second Respondent failed to arbitrate over the dispute he was requested to arbitrate and opted to make a finding on a charge that the Applicant was already found not guilty of. That was a charge of gross insolence under count 2.2 where he was found not guilty of gross insolence by accusing his Manager of racism and threatening to report her to the Port Folio Committee. He said that the Second Respondent made no findings that the accusation was unfounded as a basis for the third Respondent's case. He said that Ms Robertson own evidence confirmed that the allegations were not proved by the Third Respondent to be false and merely amounted to a prohibition of freedom of speech or expression and relied on the following evidence elicited during cross-examination:

> "Mr Mayisela: Ms Robertson, I'm going to put it to you, based on your own evidence, that the word harassment was taken from my email and constituted as a charge. --- That is possible, yes.

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> And on that basis, and you've confirmed that there was no investigation that proved that the allegation was false, or true. --- That is correct, there was no investigation.
>
> Whereto you further that it cannot be that an employee can be found guilty and dismissed for having have made an allegation that has not proven to be false. MR BOSCH: It's an argument, Mr. Commissioner."[19] (Sic)

[43] The Applicant said that it is not misconduct to use the word harassment in that Ms Robertson herself used the word when she accused the Applicant of harassment based on e mails that she did not even read relating to how the Third Respondent was supposed to be run. He said that it was not misconduct to complain of harassment when no grievance had been lodged as purported by Ms Robertson and referred to her evidence while being cross-examined where she said that:

> "Mayisela: Were these investigated and actually found to be false or true? ----- As far as I know no investigation had been done. Irrespective of whether these were found to be false or true there it still does not excuse your behaviour. There was a grievance, if you felt you were being harassed by me in any way whatsoever, you could have filed a grievance at the time and dealt with the matter, with your issues on that basis. You never did that".
>
> And I am not charged for failing to follow the grievance procedure, am I right? --- Mr Commissioner, it's not misconduct not to follow the grievance procedure."[20]

[44] In relation to this charge the Second Respondent had the following to say:

[19] See page 418 lines 15 to 25 of transcript.
[20] See page 416 lines 16 to 25 and page 417 line 1.

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> "Ms Robertson testified that she found these remarks inappropriate and hurtful. As for the employee, he said the allegation of harassment was true so he was justified in making it. Once again, nothing in the evidence indicates that there was any objective justification for the employee's belief that he was being harassed. More importantly, even if he had such a belief, it was inappropriate and insolent to raise them in this particular way. With regard to the second aspect of this charge (the June meetings), the employee had nothing much to say and he certainly failed to either explain his remarks or the need to state them to Robertson in this way. Indeed, while this charge is not formally one of insubordination or insolence, it could well have been precisely that. I find the employee guilty of this charge."

[45] There are two parts to this charge. The first related to the accusations of harassment and the second to the applicant's responses to the meeting requests. Various e-mails were canvassed with the applicant in relation to this allegation in cross examination. However, the employer relied only on those dealt with below in support of this allegation. The accusations of harassment came from both sides as has been shown by evidence where Ms Robertson also accused the Applicant of it. Accusations of harassment once made by an employee need to be investigated by an employer and depending on the outcome thereof action may then be taken to protect the complainant if prima facie evidence justifies it or action may be taken again the complainant if it is established prima facie that he or she knowingly or recklessly made false accusations. No such investigation was conducted leaving room for conjecture. Ms Robertson's evidence on this aspect was not convincing. She referred to emails of the Applicant made just before the hearing but when that issue was pursued her evidence remained vague. She even referred to an email she never read. She referred to one sent to the Chief Executive Officer with no clear indication of its relevance to the issue. It was never made clear what was harassing in being told how the business on the Third Respondent was to be run, even if the advice was misguided.

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[46] The second part of the charge touches on the reasonableness of Ms Robertson's instruction on meeting attendance and I found the instruction to lack a foundation. To the extent that the charge touches on count 2.2, the Applicant was acquitted of it. The email of the Applicant in issue here reveals Ms Robertson as a very amicable person who associates and socialises well with her colleagues, even when they were junior to her. She does not come across as puffed up or high and mighty. If anything, this email shows that the Applicant would be deceiving himself with fatal consequences to think that her friendliness meant that she would be condescending when it came to work performance. No evidence of the impugning of honour good name and dignity was shown to exist, even if it be conceded that there was no need for such utterances to have been made. As such the conclusion reached by the Second Respondent has been shown to be one that a reasonable could not reach.

Count 4.1

[47] This charge refers to threats and intimidation made via e-mail by the employee to his manager (ROE) in that during the period of April 2013 to November 2013 he made a number of threats via e-mail to his manager and to the HRM with the intention of intimidating his manager. Reliance was based on emails in which the employee threatens to report Ms Robertson to various internal and external influential persons and bodies if she continues acting as she is. That included reporting Ms Robertson to the CEO, the Board, the Parliamentary Portfolio Committee and the Minister. It remained common cause that the Applicant in fact reported Ms Robertson to Mr Nair and to the Chairperson of the Board, Judge President Mlambo. On this charge the Second Respondent had the following to say:

> "The employee's case is simply that it is not intimidation to tell someone what you are going to do. In one sense, I agree; the employee is certainly entitled to take

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whatever steps he may. However, the real thrust of this charge is that, while the action (the reporting) may appear benign or even high-minded, it is actually not, because the purpose of the threat is to undermine his superior into simply doing what the employee thinks she should do, presumably relying on her fear of being put in a bad light with those higher up to get his way. In this sense it is a playground tactic that is actually yet another manifestation of insubordination. The employee is guilty of this charge."

[48] The submissions by the Applicant are that the Second Respondent failed to arbitrate and make a finding on the issue in dispute before him in that he failed to rule whether Ms Robertson definition of intimidation constitutes misconduct in terms of the Third Respondent's rules and whether the said rule found application in the e mail correspondence to Ms Robertson by the Applicant. Secondly, the Second Respondent made a finding that Ms Robertson was freighted by the Applicant's emails, evidence which was not before the Second Respondent. He said that Ms Robertson failed to deal with this averment in her responding affidavit. The Applicant contended that Ms Robertson definition was not a definition or rule recognized by the Third Respondent's policy and if it does, Ms Robertson definition was a nullity because according to her own evidence the Applicant reported her conduct. The Applicant said that he was entitled to report any real or perceived harassment by Ms Robertson because it was misconduct. Lastly, Ms Robertson evidence in the disciplinary hearing that the e mails made her uncomfortable was a far cry from being intimidated particularly because the alleged intimidations took place over a period of seven months. Secondly, Ms Robertson evidence to the effect that the emails constituted propensity to violence verbal or physical was a blatant untruth because she testified that Applicant was not charged for having had propensity to violence.

[49] This charge is linked to the reasonableness of the instruction for the Applicant to meet Ms Robertson to discuss the 54% issue. On the basis of the finding already made this charge ought not to have been sustained. Further the Applicant did not

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just make empty threats, he carried them through by the reports he made. There is no suggestion by the Third Respondent that the Applicant did not believe in the truthfulness of the allegations he made against Ms Robertson and therefore that he was somewhat mischievous. On the contrary there is evidence which suggests that the Applicant, rightly or wrongly, believed that his supervisor was issuing incorrect instructions. The circumstances of the reporting here may be compared to the making of a protected disclosure by an employee which should be encouraged rather than discouraged so as to discover any wrong doing in the workplace. Evidence of the Third Respondent failed, in my view, to disclose misconduct in support of the allegations for this charged. The Second Respondent thus failed to conduct a proper enquiry for this charge with the result that he reached a conclusion which no reasonable decision maker could reach.

The second and third grounds of review

[50] These two grounds of review have now a limited scope for their consideration in the light of the findings made in respect of each count. Put differently, these grounds may only be considered for the three charges that have been sustained.

The delay to institute disciplinary action

[51] The policy of the Third Respondent is that, disciplinary steps, if any to be taken, should be initiated within a reasonable period of time. As a background to this aspect, it needs to be considered that the Applicant and Ms Robertson were not occupying the same workplace proximity. They were stationed in different provinces or regions of the Republic of South Africa. Ms Robertson was therefore not daily exposed to what the Applicant was doing. Her assessment of the situation depended much on correspondence. Similarly with Mr Nair, he was positioned at a different workplace to that of the two. Secondly, the facts of this matter depended on the development of other related issue, such as

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development in the matter involving Mr Hole. Of importance in this matter is the fact that once Mr Nair was apprised of the working challenges between the Applicant and Ms Roberts, he took a position that attempts were to be made to try and find an amicable solution. That was perfectly understandable in the circumstances lest he be accused of being vindictive. Once he realized that the matter could not be amicably resolved, he left it to the parties to take what each considered to be proper steps. He was dealing with a matter involving legally qualified senior personnel. The chief finding of the Second Respondent is that:

> "While the employer may have instituted formal proceedings earlier, the delay does not indicate a waiver of this right to take action nor does it give rise to an inference that the employment relationship is tolerable, as the employee claims. I find no unfairness in respect of this issue."

[52] The submission by the Applicant that the Second Respondent did not decide the issue at all and made a ruling on evidence that was not before him and or presented by Ms Robertson is nothing but a bold unsubstantiated allegation. The Second Respondent briefly dealt with the issue and did not rely on any irrelevant considerations. This ground must accordingly fail.

Duplication of charges

[53] In the light of the findings made on each charge this ground cannot be sustained. After all, a set of facts may give rise to separate and distinct causes of action[21].

Breakdown in the trust relationship

[21] See also *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA).

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[54] At the onset, it must be noted that the Applicant has been successful in many a ground of review in this application. Even more charges fell on the way from the time he was charged and found guilty. Ms Robertson adduced evidence of the breakdown in her trust of the Applicant. In her evidence Ms Robertson had, inter alia, the following to say about the Applicant:

> "Well I certainly want nothing to do with him any longer. I mean a meeting he didn't want to come to meetings, he was rude, he was insolent, he was disrespectful, unprofessional. He also as far as I'm concerned, did not treat our stakeholders professionally, which is the way they should be treated. And that, as I say goes against the complete grain of Legal Aid South Africa, the organisation I work for as well as my own personal feelings."[22]

[55] This evidence of Ms Robertson must be seen against the findings made in this application. That the Applicant did not treat stakeholders professionally, which is the way they should be treated, is not a feature of the charges remaining against the Applicant. While it has been shown that the Applicant and Ms Robertson are not likely to amicably work together, Mr Nair had no reported problems with the Applicant and there may be other Regional Operations Executives who might work amicably with him. The third Respondent is an organ of state which operates in the whole of South Africa. While the Applicant does need to mend his ways, I am not of the view that the remaining charges are of such serious magnitude as to render dismissal a fair sanction. I am of the view that had the Second Respondent been faced with the three remaining charges, he would probably have found dismissal in the circumstances to be an unfair sanction. In terms of section 193 (1) of the LRA the Applicant is entitled to reinstatement.

[56[] Accordingly, I issue an order and a finding in the following terms:

[22] See page 135 of the transcript, lines 4 to 11.

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1. The application to review and set aside the arbitration award in this matter in relation to charges: 1.1; 1.2; 1.3; 3.1; 3.2 and 4.1 is granted;

2. The Application to review and set aside the arbitration award in this matter in respect of charged: 1.4; 2.1 and 2.3 is dismissed;

3. It is found that the dismissal of the Applicant by the Third Respondent in this matter was substantively unfair;

4. The third Respondent is ordered to reinstate the Applicant to its employment to the position with a salary rank of or one equivalent to a Justice Centre Executive, with effect from the date of his dismissal;

5. In the event Ms Robertson is still the Regional Operations Executive for the Western and Northern Cape and is still at odds in working with the Applicant, the Third Respondent is not to place the Applicant in the Western and Northern Cape but is to engage the Applicant in finding an alternative position for his placement in any other region in the Republic of South Africa.

6. The engagement in paragraph 5 hereof is to take place immediately upon receipt of this order but is to be finalized on or before 26 May 2017. In the event an impasse is reached by the parties within the 20 court days of this order, the first Respondent is to be approached to appoint a senior Commissioner to facilitate the process and his or her decision shall be an award with a final effect.

7. The Applicant is to report for duty within 5 court days of this order at the Kimberly office where he used to work. He shall continue so reporting until

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paragraphs 5 and 6 hereof are complied with. Soon after reporting on duty, the Third Respondent is then to serve him with a final written warning effective from the date of its service to expire at the end of twelve calendar months thereafter.

8. No costs order is made.

Cele J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: In person

For the Respondent: Adv.C.Bosch instructed by Everinghams Attorneys

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