THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1006 / 15

In the matter between:

CVO SCHOOL VIVO **Applicant**

and

CHRISTOFFEL DANIEL PRETORIUS **First Respondent**

JOSIAS SELLO MAAKE N.O. (AS ARBITRATOR) **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

AND:-

Case no: JR 1004 / 15

In the matter between:

CVO SCHOOL VIVO **Applicant**

and

ANTOINETTE PRETORIUS **First Respondent**

MATTHEWS RAMOTSHELA N.O. (AS ARBITRATOR) **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **21 September 2016**

Delivered: **6 April 2017**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA – application of review test set out**

Disciplinary proceedings – requirements of fair hearing considered – employee entitled to be heard on sanction – proceedings entirely unfair – no fair hearing took place – dismissal procedurally unfair – award upheld

Misconduct – nature of misconduct considered – conduct simply did not justify dismissal – dismissal for misconduct inappropriate and unfair – dismissal substantively unfair – award upheld

Dismissal – substantive fairness – gross procedural unfairness and complete failure of process impacting on substantive fairness of dismissal for misconduct – dismissal both substantively and procedurally unfair – award upheld

Retrenchment – procedural fairness considered – complete lack of procedural fairness and employee confronted by *fait accompli* – retrenchment procedurally unfair – award upheld

Compensation – principles considered – basis for interference with compensation awards of arbitrators considered – compensation properly awarded and no basis for interference exists – compensation awards upheld

Review applications – no review case made out by applicant – awards constituting reasonable outcome – review applications dismissed with costs

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter actually concerns two cases, concerning a husband and wife employed by the same employer and then simultaneously dismissed by this employer, but for different reasons. This led to two separate unfair dismissal disputes being pursued to the CCMA, which then came before two different arbitrators at the CCMA. Individual arbitration awards were handed down in favour of each of these employees, and this led to two separate review applications to the Labour Court by the employer, being the two review applications referred to above and which are now before me.

[2] I intend to deal with both review applications in one consolidated judgment. For this reason, and for ease of reference, I will refer to the applicant in both matters as "CVO School". I will refer to the first respondent in the application under case number JR 1006 / 15 as "Christoffel", and the first respondent in the application under case number JR 1004 / 15 matter as "Antoinette". The second respondent under case number JR 1006 / 15 will be referred to as "arbitrator Maake", and the second respondent under case number JR 1004 / 15 as "arbitrator Ramotshela". The third respondent in both applications will be referred to as "the CCMA".

[3] CVO School has sought to apply to review and set aside both arbitration awards, by arbitrator Maake and arbitrator Ramotshela, with these applications having been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[4] As touched on above, the two matters arose from the dismissal of Christoffel by CVO School for misconduct, and the dismissal of Antoinette based on retrenchment, and both dismissals were pursued as unfair dismissal disputes to the CCMA. The disputes respectively came before arbitrator Maake on 26 February and 7 May 2015, and Arbitrator Ramotshela on 26 February and 6 May 2015. Following completion of the arbitration proceedings, and in an arbitration award dated 17 May 2015, arbitrator Maake found in favour of Christoffel, and determined that his dismissal by CVO School was

[1] Act 66 of 1995.

substantively and procedurally unfair. Also, following the conclusion of the arbitration proceedings in respect of Antoinette, arbitrator Ramotshela found in favour of Antoinette, and in an award dated 13 May 2015, determined that her dismissal was procedurally unfair. As consequential relief pursuant to these two arbitration awards, Christoffel was awarded compensation of R72 000.00, being an amount equivalent to 12 months' salary, and Antoinette was awarded compensation of R46 400.00, being an amount equivalent to 8 months' salary.

[5] CVO School received the two arbitration awards respectively on 19 and 18 May 2015. The two review applications were then served and filed on 6 July 2015. These applications have thus been timeously brought and is properly before Court. I will now proceed deciding both these review applications, by setting out one consolidated factual matrix concerning both these matters.

The relevant facts

[6] CVO School is a rural school having approximately 200 students, of which 36 students reside in a hostel on the school grounds.

[7] An advertisement was placed by CVO School for a combined appointment of a *factotum* and a matron, who would reside together in accommodation provided on the school grounds. For this reason, a married couple was sought for appointment, and this was a pre-condition for appointment. The two persons so appointed would look after and maintain the school grounds and property, as well as take care of the students in the hostel.

[8] Christoffel and Antoinette were such a married couple that applied for these positions. Following an interview, they were appointed and commenced employment on 1 January 2014. Christoffel was the *factotum* (handyman) and Antoinette was the matron. Christoffel and Antoinette each served a probation period of six months to 30 June 2014, and their permanent appointment was then confirmed, effective 1 July 2014.

[9] On 24 October 2014, Christoffel was charged with three charges. These charges were that he failed to maintain the terrain lighting to standard, that he did not properly repair the drainage pipes at the hostel, and that the water tanks were not properly controlled. These charges seemed more akin to

performance complaints, than instances of misconduct. The hearing date was scheduled for 1 November 2014 at 09h00. Christoffel was placed on paid leave pending the hearing. The initiator of the disciplinary hearing was the school governing body chairperson, Stephanus Otto ('Otto'). The presiding officer of the disciplinary hearing was also a member of the school governing body, one Johan Van Wyk ('Van Wyk').

[10] Despite what is contained in the hearing notificatinon, the hearing was moved up to 31 October 2014. Christoffel asked for a postponement, which was refused by Otto out of hand.

[11] In the disciplinary hearing, which then convened on 31 October 2014, Otto presented the case for CVO School. The first charge, which Christoffel pleaded guilty to, concerned the fact that the hall lights were not fixed for the annual prize giving, and a contractor had to be obtained in haste to fix it. The second charge concerned an instruction given to Christoffel on 29 September 2014 to repair a leak to the drain pipe at the hostel, which he did, but the leak arose again a week after the school reopened. Christoffel tried to explain that he did his best to repair the leak, but the pipes were old and not properly maintained in the past, and he intended to attend to the pipe again, but he had a lot of other duties after the school opened, and it would take two days to repair the pipe. The third charge related to the interruption of water supply on 17 October 2014, coupled with the managing of the water tank levels. The interruption of water supply was reported to Christoffel at about 22h00, who investigated and found a water pipe had burst. Christoffel repaired the pipe the following morning.

[12] A conspectus of what happened in the disciplinary hearing shows that the hearing unfolded on the basis that Otto started by making a statement, and then he and the chairperson, Van Wyk, then proceeded to question Christoffel in a manner which can only be called cross examination, to get him to admit to the charges. Van Wyk did the bulk of this questioning. And then, at the conclusion of the hearing and before any finding was made, Otto told Christoffel that he must remember that he was employed in a combination post with Antoinette, and that should be he found guilty it could lead to the termination of her employment based on retrenchment. Otto stated that the

hearing outcome would be provided on or before 4 November 2014, and proceedings adjourned.

[13] On 3 November 2014, Van Wyk prepared a written finding. He found Christoffel guilty of all three charges. He then records in his finding that where it comes to an appropriate sanction to be imposed on Christoffel, the school governing body had to decide. He sent this finding to the school governing body, but not to Christoffel. The school governing body then decided, by vote, whether to dismiss Christoffel without any representation from him. Christoffel was not given any opportunity to address the school governing body, or Van Wyk as chairperson, on the issue of an appropriate sanction. All this is highly irregular, just on face value itself.

[14] On 4 November 2014, Van Wyk called Christoffel to a meeting. Van Wyk drafted a letter, on behalf of the school governing body, informing Christoffel that it had been decided to terminate his employment with immediate effect. Van Wyk handed this dismissal letter and his outcome of 3 November 2014 to Christoffel in the meeting on 4 November 2014. Van Wyk actually testified that he did not decide a sanction for Christoffel, but left this up the school governing body. This is the same governing body chaired by Otto, the initiator in the disciplinary hearing. Christoffel is then also told that because he occupied a combined post with Antoinette, her employment would now also be terminated based on retrenchment.

[15] Antoinette is then called to the meeting on 4 November 2014. She was told of the judgment against Christoffel and that he has been dismissed. She was then told that her contract would also be terminated, because of the combined appointment with Christoffel. She is also given a letter, erroneously dated 24 November 2014, stating that her employment terminated based on what CVO School called 'Kontrak aflegging (Retrenchment)'. The letter refers to her having been verbally told on 31 October 2014 that her contract would terminate. She was informed in the meeting that her contract would end on 30 November 2014 and her last working day would be 21 November 2014.

[16] Christoffel and Antoinette were then both instructed to vacate their accommodation by 15 December 2014, as an 'indulgence', instead of in 7 (seven) days, as would normally be the case.

[17] Both Christoffel and Antoinette referred unfair dismissal disputes to the CCMA on 5 November 2014. Otto reacted to these referrals by way of a letter to Christoffel, accusing him of having no integrity, that he will ensure that costs incurred in fighting the matter will be recouped from Christoffel, and that he felt personally insulted.

[18] As stated above, the unfair dismissal disputes pursued by Christoffel and Antoinette came before separate arbitrators, who each found in their favour, and awarded each of them compensation. It is these awards that now form the subject matter of CVO School's review applications. I will now proceed to decide these review applications, by first setting out the relevant test for review.

The test for review

[19] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution[3] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[4]

[20] Accordingly, in every instance where the constitutionally suffused Section 145(2)(a)(ii) pursuant to the judgment in *Sidumo* is sought to be applied to substantiate a review application, any failure or error of the arbitrator relied on must lead to an unreasonable outcome arrived at by the arbitrator, for this failure or error to be reviewable. In my view therefore, what the review applicant must show to exist in order to succeed with a review is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to

[2] (2007) 28 ILJ 2405 (CC).
[3] Constitution of the Republic of South Africa, 1996.
[4] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.

exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[5] the Court said:

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

[21] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[6] said:

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

[22] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[7] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by

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[5] (2013) 34 *ILJ* 2795 (SCA) at para 25.

[6] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[7] See *Fidelity Cash Management* (*supra*) at para 102.

the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[8] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[9] it was held:

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

[23] Against the above principles and test, I will now proceed to consider the applications by CVO School to review and set aside the arbitration awards by both arbitrator Maake and arbitrator Ramotshela, under separate headings hereunder.

Grounds of review

[24] In order to properly decide a review application, it is also important to identify the grounds of review upon which the application is founded. These grounds must be properly set out and identified in the founding affidavit. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[10]:

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

[25] However, and in the case of review applications, these grounds of review may be supplemented, after the filing of the record, by way of a supplementary affidavit.[11]

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[8] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[9] (2015) 36 ILJ 1453 (LAC) at para 12.
[10] (2010) 31 ILJ 713 (LC) at para 27.
[11] See *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

[26] In the case of the review application by CVO School in respect of the award of arbitrator Maake, a number of review grounds are made out in the founding affidavit, some of which are simply repetitive of one another. I will therefore summarize the gist of the review grounds made out in the founding affidavit, as follows: (1) The arbitrator committed a gross irregularity by attributing motives of bad faith and/or lack of independence to the witnesses testifying for the school; (2) The arbitrator failed to apply his mind and misconstrued the evidence by finding that no procedural fairness had been complied with by the school in dismissing Christoffel; (3) The credibility findings made by the arbitrator was irregular; (4) The arbitrator ignored documentary and oral evidence in support of the charges against Christoffel and in support of the prior sanctions meted out towards him; (6) The arbitrator misconstrued the evidence by deciding, based on the discrepancy in dismissal dates in the documentary evidence and other factors, that the dismissal of Christoffel in this case was a forgone conclusion; (7) The arbitrator committed misconduct in the execution of his duties by concluding that the procedural unfairness in this case was so gross that he did not need to separately decide the issue of substantive unfairness; (8) The arbitrator committed misconduct by concluding that thereferral by the hearing chairperson of the issue of a sanction to the school governing body meant that the chairperson did not consider the issue of a sanction and was too afraid to do so; (9) the arbitrator exceeded his powers and acted irrationally in respect of the *quantum* of compensation awarded to Christoffel.

[27] In the supplementary affidavit in respect of the review application of the award of arbitrator Maake, CVO School adds two further review grounds, being: (1) The arbitrator committed misconduct and misconstrued the evidence by finding that the conduct of the chairperson in the hearing showed he was biased; and (2) there was no impropriety in Otto and Van Wyk being members of the governing body whilst being involved in the same hearing, as the arbitrator had concluded.

[28] Turning next to the review grounds made out by CVO School in its founding affidavit, in respect of the arbitration award by arbitrator Ramotshela in favour of Antoinette, the following summary reflects the gist of these grounds: (1) the

arbitrator committed misconduct in relation to his duties by finding that the school had not complied with Section 189 of the LRA in dismissing Antoinette; (2) the arbitrator disregarded relevant and material evidence in failing to have proper regard to the nature of the joint appointment of Christoffel and Antoinette, and that her employment terminated accordingly; (3) The arbitrator disregarded material evidence in failing to consider that any non-compliance with Section 189 was permissible in the light of the exceptional circumstances of this matter; (4) the arbitrator exceeded his powers and acted irrationally in respect of the *quantum* of compensation awarded to Antoinette. The supplementary affidavit added nothing further to these review grounds.

[29] I will now proceed to consider the aforesaid review applications by CVO School, based on these principle grounds of review, summarized above, starting with the evaluation of the case of Christoffel and the award of arbitrator Maake.

Evaluation: the award of arbitrator Maake

[30] It is trite that any dismissal of an employee, in order to be fair, must satisfy a prescribed requirement of procedural fairness[12]. Whilst it is equally trite that a failure to comply with the prescribed procedure in bringing about the dismissal of an employee could render a dismissal procedurally unfair, the critical question in this instance is where the departure from what must be complied with in order to ensure the procedural fairness of the dismissal is gross and excessive, could this kind of violation competently spill over into the substantive fairness consideration as well, rendering the dismissal substantively unfair for this reason. This notion was recognized by the Labour Appeal Court in *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[13] where the Court said:

> 'It bears mention that, often, too much is made of the distinction between substantive and procedural unfairness. The distinction is a useful forensic tool, not a principle of law creating two separate concepts. The distinction ought not

[12] See Section 188(1)(b) of the LRA.
[13] (2016) 37 ILJ 655 (LAC) at para 33. It must be added that the Constitutional Court in *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97 (CC) did not deal with this issue, as the appeal on this question was abandoned. The Constitutional Court stated, at para 34 of the judgement, that it was only dealing with the consideration as to whether the relief of reinstatement was being appropriate relief.

> to be made to do work which distorts its usefulness. … Sometimes a defective and thus unfair procedure may taint an enquiry so as to prevent a fair decision on a substantive issue from being taken. Sometimes, an unfair procedure does not get in the way of discerning a substantively fair dismissal.'

[31] I am of the view that the manner in which the dismissal of an employee was brought about, even if it can later be said that the employee may have deserved dismissal, could still render that dismissal substantively unfair. The former Industrial Court in *De Villiers v Fisons Pharmaceuticals (Pty) Ltd*[14] held:

> '… Even assuming for a moment that the decision to dismiss itself was reasonable on its merits and that a hearing will not have had a different effect I am of the view that the manner in which the applicant was dismissed is so unreasonably inadequate as to render the decision itself unreasonable in the circumstances of the case. …'

I agree with these expressed sentiments. These sentiments as a matter of necessity entail conducting an enquiry of dimension, being to what extent and in what manner did the employer depart from what was required to be procedurally fair. The scope and extent of such departure from the norm is thus the critical consideration, in order to determine if the failure of procedural fairness also impacts on the substantive outcome. The Court in *Moodley v Fidelity Cleaning Services (Pty) Ltd t/a Fidelity Supercare Cleaning*[15] similarly decided, where it was said:

> '… Where the purpose and methodological prescriptions of the process envisioned by the statute are so evidently not understood, the distinction between process and substance becomes blurred to the degree that the dismissal cannot be held to have been for a fair reason as required by s 188(1)*(a)*. …'

[32] To argue that because arbitration in the CCMA is a hearing *de novo* and thus substantive fairness can be established and proven by way of the evidence led in that forum, any gross irregularities of failures in the process that gave rise to

[14] (1991) 12 ILJ 1087 (IC) at 1092G-I.
[15] (2005) 26 ILJ 889 (LC) at para 36.

dismissal in the first place cannot have an impact on substantive fairness, is in my view wrong. This would entirely negate why the requirement of procedural fairness exists in the first place, being to ensure that the employee is dealt with fairly prior to dismissal and that dismissal was always a fair outcome in the first instance. In Yichiho Plastics (Pty) Ltd v Muller[16] the Court said:

> '… Where that act is the dismissal of an employee, it would seem to follow that what is in issue is what the employer did, and not what he might have done in other circumstances. Any other approach would tend to divest the employer of the responsibility to act fairly, provided only that he can later satisfy a court that his decision was in any event the correct one …'

[33] It is trite that as a matter of general principle, gross procedural failures in the conduct of proceedings could in itself serve to vitiate the outcome of the proceedings, no matter what the merits of the matter may be.[17] As said in *Satani v Department of Education, Western Cape and Others*[18]:

> '… The rules of natural justice dictate that parties be afforded a fair and unbiased hearing, which consists of hearing both sides in an impartial manner. This rule finds expression in audi alteram partem which is concerned with affording parties an opportunity to participate in a decision that will affect them. The participation of parties in proceedings not only improves the quality and rationality of the decision but also enhances the legitimacy of the decision. The audi alteram partem rule implies equal participation of parties during the proceedings. He/she must hear both sides; act impartially and consistently to both parties irrespective of the approach adopted'

The same principle should in my view hold true where it comes to internal disciplinary proceedings in an employer. Otherwise, what would the point of requiring such proceedings to take place in the first instance, and prescribing standards of fair process to such proceedings?

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[16] (1994) 15 ILJ 593 (LAC) at 595G-H.
[17] See *Sasol Infrachem v Sefafe and Others* (2015) 36 ILJ 655 (LAC) at para 54; *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 1528 (LC) at para 20; *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 658 (LC) at para 38.
[18] (2016) 37 ILJ 2298 (LAC) at para 16.

[34] The importance of procedural fairness is especially evident where it comes to the issue of deciding a fair and appropriate sanction, in circumstances where it can be justifiably said or accepted that the employee indeed committed misconduct. Following the judgment in *Sidumo*, the decision whether the dismissal of an employee would be a fair sanction is a value judgment[19]. It is in my view obvious that such a value judgment can only be properly made with full participation of the employee in the course of arriving at such a judgment. Further, and in the exercise of this value judgment, the totality of circumstances must be considered, with specific reference to a number of pertinent factors, such as the importance of the rule that had been breached, the reason why the employer is seeking dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee, the employees' length of service and service record, the issue of the breakdown of the trust / employment relationship between the employer and employee, the existence of dishonesty, the possibility of progressive discipline, the existence or not of remorse, the job function and the employer's disciplinary code and procedure.[20]

[35] It follows in order to be fair, any disciplinary hearing process must allow the employee an opportunity to properly participate in the decision of arriving at a fair sanction, and the employee must be heard on this.[21] In particular, it is essential that the employee must be heard on the *Sidumo* considerations as

[19] *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others* (2010) 31 ILJ 2475 (LC) at para 19; *Vodacom (Pty) Ltd v Byrne NO and Others* (2012) 33 ILJ 2705 (LC) at para 9.

[20] *Sidumo* (*supra*) at para 78; *Fidelity Cash Management* (*supra*) at para 94; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at paras 29 – 30; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18;; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28.

[21] See *Yichiho Plastics* (*supra*) at 602G-H; *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 656 (LAC) 34; *Rennies Distribution Services (Pty) Ltd v Bierman NO and Others* (2008) 29 *ILJ* 3021 (LC) at para 24; *Opperman v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 242 (LC) at para 18; *Hillside Aluminium (Pty) Ltd v Mathuse and Others* (2016) 37 ILJ 2082 (LC) at paras 71 – 72.

set out above, and especially on issues such as the trust relationship, remorse, and the applicability of progressive discipline, by way of giving the employee the opportunity to make submissions and lead evidence in this regard. As was said in *Schwartz v Sasol Polymers and Others*[22]:

> 'A determination as to the substantive fairness of a dismissal for misconduct requires a decision maker to have regard to item 7 of the Code of Good Practice: Dismissal … and whether dismissal is an appropriate sanction to be imposed for breach of the rule. It is apparent that the Labour Court misconstrued the proper approach to such a determination when it considered the substantive fairness of the appellant's dismissal as one distinct from a determination of the appropriate sanction.'

[36] A failure to afford an employee such an opportunity where it comes to imposing a sanction would obviously constitute a procedural irregularity and thus be procedurally unfair, but in my view it is more than that. Such a failure could in fact have a direct and material impact on the decision to dismiss, could detrimentally influence the value judgment, and as such render dismissal to be an appropriate sanction, thus rendering it unfair. It is trite that a finding that dismissal is unfair because the sanction of dismissal is inappropriate, harsh or unfair is an issue of substantive fairness.[23]

[37] The basic tenets of what is needed for disciplinary hearings to be considered to be procedurally fair is set out in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration and Others*[24] as follows:

> 'When the code refers to an opportunity that must be given by the employer to the employee to state a case in response to any allegations made against that employee, which need not be a formal enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision

[22] (2017) 38 ILJ 915 (LAC) at para 16.
[23] For the most recent judgments in this respect see *Baloyi v Member of the Executive Committee for Health and Social Development, Limpopo and Others* (2016) 37 ILJ 549 (CC) at paras 24 – 25; *Woolworths (Pty) Ltd v Mabija and Others* (2016) 37 ILJ 1380 (LAC) at paras 14 – 15 and 28; *Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2277 (LAC); *Marthinussen v Metal and Engineering Industries Bargaining Council and Others* (2016) 37 ILJ 2292 (LAC); *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC); *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 (LAC).
[24] (2006) 27 *ILJ* 1644 (LC) at 1654. See also *Mathabathe v Nelson Mandela Bay Metropolitan Municipality and Another* (2017) 38 ILJ 391 (LC) at para 22.

> is taken to dismiss. In the absence of exceptional circumstances, the substantive content of this process as defined by item 4 of the code requires the conducting of an investigation, notification to the employee of any allegations that may flow from the investigation, and an opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee. The employer should then communicate the decision taken, and preferably communicate this in writing.'

[38] In the light of all of the above principles, the reasoning of arbitrator Maake must be considered. He reasoned firstly that the issue of procedural unfairness in this case would have what he called a 'major role' to play in deciding whether the dismissal of Christoffel is substantively unfair. Considering the legal principles I have set out above, this reasoning is in my view undoubtedly correct. Arbitrator Maake properly and rationally appreciated that a material deviation from what is required for the dismissal of an employee to be procedurally fair, could impact on a finding of substantive fairness. The point of departure of the arbitrator in deciding the case is thus beyond reproach, and certainly entirely reasonable.

[39] Having identified the requisite legal principle for consideration, arbitrator Maake then turned to the facts. He considered that Otto was the chairperson of and thus the most senior person of the school governing body and the complainant in the disciplinary hearing, whilst Van Wyk, the chairperson of the disciplinary hearing, was also a member of the governing body but more junior to Otto. Arbitrator Maake also considered the manner in which Van Wyk went about questioning Christoffel in the disciplinary hearing, which according to the arbitrator went beyond what could be considered appropriate. Accordingly, arbitrator Maake concluded that these issues created a reasonable perception of bias on the part of Van Wyk as chairperson.

[40] There is in my view much merit in the reasoning of the arbitrator where it came to his conclusion that a reasonable apprehension of bias existed in this case. As he correctly identified, it is about a reasonable apprehension of bias, or in other words the 'outward perception' of bias. The actual existence of bias need not be proven. The principal test for bias can be found in the judgment of *BTR*

Industries SA (Pty) Ltd and Others v Metal and Allied Workers Union and Another[25] where the Court said the following:

> '… the proper significance of the word- 'is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office'.

In *BTR Industries* the Court further determined that the kind of departure from the standard would exist where a party can show a reasonable suspicion of bias, and further said:[26]

> '…. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If a suspicion is reasonably apprehended, then that is the end of the matter'

[41] And in *SA Commercial Catering and Allied Workers Union and Others v President, Industrial Tribunal and Another*[27] the Court held that:

> 'It is, moreover, not only actual bias, but the outward appearance of bias that may vitiate the decision of a body such as the tribunal as justice must be seen to be done.'

[42] Arbitrator Maake appreciated the fact that because the complainant in the disciplinary enquiry was the chairperson of the school governing body whilst the chairperson of the disciplinary hearing was a member thereof, seen together with the manner in which the chairperson then questioned the employee in the disciplinary hearing, this would create such an outward reasonable apprehension of bias. This appreciation is in my view correct. I accept that the fact that disciplinary hearing chairperson is in essence junior to the complainant and the manner in which the questioning was conducted in the disciplinary hearing by the chairperson, would create a justified reasonable

[25] (1992) 13 ILJ 803 (A) at 817F-I.
[26] Id at 822A-B.
[27] (2001) 22 *ILJ* 1311 (SCA) at para 10. See also *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* (2000) 21 *ILJ* 1583 (CC) at paras 14 – 16.

apprehension on the part of Christoffel that he would not receive a hearing. The conclusions of arbitrator Maake in this respect are unassailable. I may add that even though not mentioned by arbitrator Maake in his award, the manner in which both Otto and Van Wyk were behaving in the disciplinary hearing seemed to indicate that they were a tag team each having a go at Christoffel, which can only add to this reasonable apprehension of bias.

[43] Much is made in the award of arbitrator Maake of the discrepancies where it comes to reflecting the date of the termination of employment of Christoffel, in some of the documents. The UI19 form reflects 31 October 2014, whilst the letter of termination shows 4 November 2014. There is also the termination documents of Antoinette, where the UI19 also shows 31 October 2014. CVO School sought to explain in the arbitration that this was simply an error. Despite these discrepancies being of some importance to arbitrator Maake in deciding that the dismissal of Christoffel was pre-determined, I do not believe much turns on this. What is after all true is that both Christoffel and Antoinette were called to a meeting on 4 November 2014 and told they were dismissed. Considering the haphazard manner in which the various CVO School functionaries dealt with the documents, as is apparent from their own evidence in the arbitration, it may well be that what is contained in these documents were simply errors. I do not intend to belabour this issue further, because even if arbitrator Maake should have accepted that the discrepancies were just mistakes, this change in finding simply has no impact on the ultimate outcome in this matter. So, and even if CVO School is correct in respect of this ground of review, it simply does not assist CVO School where it comes to the crux of the matter, which I will next deal with.

[44] Arbitrator Maake was specifically alive to the fact that when van Wyk found Christoffel guilty of the misconduct with which he had been charged, he made no finding on the issue of sanction. What Van Wyk did instead, and without even reverting to Christoffel about such an intention, was to simply defer the issue of a sanction to the school governing body to decide, which governing body, as stated, had Otto (the disciplinary hearing complainant) as chairperson. What I also find particularly disturbing is that Christoffel is blissfully unaware of all that is happening in this respect. The finding of Van Wyk dated 3 November 2014, finding Christoffel guilty of misconduct and

deferring the issue of sanction to the school governing body was not even given to Christoffel at the time it was made, but was only presented to him along with his letter of dismissal on 4 November 2014. This is unexplainable conduct, and downright unfair.

[45] So therefore, and in effect behind the back of Christoffel, the school governing body chaired by Otto decided to dismiss him. This is done without affording Christoffel any opportunity to even address the school governing body on an appropriate sanction and to in any way participate in the process in coming to such a decision. This kind of behaviour is manifestly unfair, and in my view actually a travesty. It violates the basic tenets of what can be considered to procedurally fair and proper. Justice cannot be seen to have been done in such circumstances. In line with all the legal principles I have set out above, this is a flagrant violation of fair process that has a direct impact on the issue of substantive fairness, where it comes to the determination of an appropriate and fair sanction. These failures had to mean that an appropriate and fair sanction could not have been arrived at, and that would make any dismissal substantively unfair.

[46] I feel compelled to highlight certain parts of the evidence of the chairperson of the disciplinary hearing, Van Wyk, so as to illustrate the gravity of the flawed process. In giving evidence in chief, Van Wyk conceded he did not recommend any sanction. Turning to testimony that came out in the course of cross examination, the following exchanges are pertinent:

> 'COMMISSIONER: … In other words, after you had found him guilty and you had submitted your report to the school governing body to consider a suitable sanction, before the school governing body could impose the dismissal sanctions, it did not invite him to put forward mitigating factors. …
>
> MR VAN WYK: I was under the instruction of the school governing body after I submitted the results, the verdict for dismissal. I was under that instruction. Yes it is true that I did not, I did not (inaudible) mitigating at that time on 4 November, specifically on 4 November when I gave him the outcome of the verdict and subsequent sanction. …
>
> MR STEMMET: … You said you were under an instruction of the school governing body to dismiss Mr Pretorius?
>
> MR VAN WYK: That was their sanction, yes.

> MR STEMMET: When did they instruct you?
> MR VAN WYK: On 3 November.'

As to how this instruction was conveyed to Van Wyk, the following exchanges are pertinent:

> 'MR STEMMET: Was there a meeting?
> MR VAN WYK: No, it was via email.
> MR STEMMET: But how do they deliberate on this?
> MR VAN WYK: (inaudible) as email correspondence. …
> MR VAN WYK: I sent the verdict, after then I said to them I want a response on that and then go on a vote, vote system to say yes, I agree to the dismissal or I do not agree to the dismissal …'

This entire exchange indicates that dismissal was actually a pre-decided option, which only needed to be approved by the school governing body following Christoffel being found guilty of misconduct. Who actually made the decision to dismiss remains unclear. Van Wyk concluded by saying that the vote to dismiss was unanimous. This kind of situation is completely unacceptable, especially considering Otto was one of those who voted, and most likely the one that drove the dismissal of Christoffel.

[47] Further to the legal principles I have set out above, I must mention the following *dicta* from the judgment in *SA Municipal Workers Union on behalf of Mahlangu v SA Local Government Bargaining Council and Others*[28] which is clearly directly apposite *in casu*, and where the Court found dismissal to be unfair:

> 'What happened in this case is that the chairperson of the enquiry did make a finding on Mahlangu's guilt on the charges but failed to complete his duties under the code by finalizing the sanction. Instead, he contented himself with only making a recommendation to the employer. …
>
> The employer also did not invite any representations from the applicants before it decided to take up the chairperson's invitation to determine the sanction itself. … In deciding to perform the function which was entrusted to

[28] (2011) 32 ILJ 2738 (LC) at paras 29 – 31.

> the chairperson, the employer acted in direct breach of the disciplinary procedure and exercised a power it was not entitled to exercise in terms of that procedure. …
>
> What the employer ought to have done was to point out to the chairperson that he was obliged to make a decision on the sanction as well in terms of the code, and to ask him to do so.'

[48] What makes what had happened in this case even more unpalatable is that one does not even know what had been considered in deciding to dismiss Christoffel. The high water mark of the evidence is that he had some or other past transgressions and warnings, but the particulars about this are sparse and lacking in particularity. There is no indication or evidence that any of the sanction principles I have set out above were even considered, and certainly the input of Christoffel was not obtained on the same. Not even at arbitration, and on the evidence presented by the witnesses, did CVO School make out a proper case why dismissal was appropriate. I must confess that considering what Christoffel is alleged to have done wrong, as it is reflected in the charge sheet and elaborated on by the witnesses for CVO School, I would have difficulty in accepting that this justified dismissal as a sanction. Otto in fact testified that he charged Christoffel because of poor performance, which scenario, even if it for the purposes of argument is considered to be misconduct[29], would require remedying discipline before dismissal. It seems to me that this was a situation where proper progressive disciplinary was not only appropriate, but essential. In *Timothy v Nampak Corrugated Containers (Pty) Ltd*[30] the Court said:

> '… Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a

[29] There is of course a distinct difference between poor performance and misconduct, and if the employee was 'charged' for poor performance, the disciplinary process was the wrong process to follow. Incapacity proceedings should have been instituted under Schedule 8 clause 8(2) to (4) and clause (9) of the LRA. The fact that the employer followed the wrong process may in itself be seen to be unfair – see *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at paras 75 and 78; *Transnet Freight Rail v Transnet Bargaining Council and Others* (2011) 32 *ILJ* 1766 (LC) at paras 56 – 57.

[30] (2010) 31 *ILJ* 1844 (LAC) at 1850A-C.

> progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer's organization, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. …'

[49] In all of the above circumstances, it must be beyond any doubt that the dismissal of Christoffel was at least procedurally unfair. The findings by arbitrator Maake to this effect are simply not open to successful challenge, on any ground. Turning to the issue of substantive fairness, I consider it necessary to quote directly from the arbitrator's award:

> 'I now turn to a consideration of the question I alluded to … which is … it can be concluded that the procedural irregularities were of such a gross and grave nature, as to have amounted to a vitiation of the substantive fairness of the dismissal, in particular, taking into account, the fact that such irregularities point to the fact that the dismissal was indeed a foregone conclusion. The answer is clearly in the affirmative ….'

I cannot agree more. This is exactly what happened. All considered, in the context of all the gross and material failures as set out above, it can only reasonably follow that the purported disciplinary proceedings were nothing more than a sham in which lip service was paid to the requirement of procedural fairness in circumstances where it had already been decided to dismiss Christoffel. This is about as fundamental a failure as one can get, rendering the dismissal substantively unfair as well.

[50] Considering what I have found above, there is no need to address the further grounds of review advanced by CVO School, as summarized above. The arbitration award of arbitrator Maake is capable of being sustained as a reasonable outcome on the above grounds alone, meaning that CVO School simply cannot satisfy the review test.

[51] In summary therefore, the finding arrived at by arbitrator Maake that the dismissal of Christoffel was both substantively and procedurally unfair is unassailable. This finding, based on the reasons advanced by the arbitrator, is actually correct. Added to this, and considering all that I have set out above,

such a finding would in any event resort well within the bounds of what can be considered to be a reasonable outcome. The award must be upheld.

Evaluation: the award of arbitrator Ramotshela

[52] As set out above, arbitrator Ramotshela dealt with the unfair dismissal case of Antoinette. In her case, CVO School seemed to be unclear on why she was actually dismissed. But in the end, it was confirmed in evidence that she was dismissed for operational requirements (retrenchment). In short, the basis for dismissal was that because her appointment was a combined (joint) appointment with Christoffel, his dismissal meant that it was no longer operationally possible for CVO School to keep her employed, and this meant she had to be retrenched.

[53] Arbitrator Ramotshela accepted that Antoinette was appointed on the basis of a combined appointment with Christoffel, and that in this context, the dismissal of Christoffel was a proper substantive reason for dismissing Antoinette based on operational requirements. The arbitrator thus accepted that the dismissal was for a proper substantive reason relating to operational requirements, and was accordingly substantively fair. There is no cross review in this case, and as a result this finding stands, and I need to say no more about it.

[54] But where it came to procedural unfairness, arbitrator Ramotshela sang a different tune. He considered what had happened in this case, and in effect concluded that there was a complete failure of process as contemplated by Section 189 of the LRA, for a number of reasons. He reasoned that CVO School sought to approach this matter as a 'contractual one' and deemed it unnecessary to apply any process in terms of Section 189, which approach the arbitrator considered to be wrong. He concluded that because Antoinette was retrenched, she needed to be consulted on how to deal with what he called the 'reality' of her husband losing his job, but was instead just called to a meeting and told she was dismissed. Arbitrator Ramotshela consequently held the dismissal of Antoinette to be procedurally unfair.

[55] As part of its review grounds, CVO School indeed still contended that the employment agreement of Antoinette, because it was a combined appointment with Christoffel, in some or other way contemplated an automatic termination

of employment scenario consequent upon the termination of employment of Christoffel, leading to the result that no process as contemplated by Section 189 needed to have been followed. This review ground can be swiftly disposed of, and comfortably rejected, for a number of reasons, which I will now elaborate on.

[56] At the time of effecting the dismissal, CVO School never relied on automatic termination of the employment contract of Antoinette, and specifically dealt with her termination of employment as one of retrenchment. This was evident from what Christoffel was told in his disciplinary proceedings, as well as the termination of employment documents given to Antoinette, including her letter of dismissal. Further, the testimony that came out in the arbitration was that Antoinette was indeed considered to have been retrenched. Otto was specifically asked when giving evidence in chief what the reason for the termination of employment of Antoinette was, and he answered: 'Yes we did retrench her …'.

[57] I also find it rather disingenuous for CVO School to rely on the award of arbitrator Ramotshela to the effect that the dismissal of Antoinette was substantively fair based on operational requirements on the one hand, but then in effect say in the same breath that the termination of employment was 'contractual' and no process needed to be applied. It is either one or the other. The fact that it stands in terms of the finding of the arbitrator that Antoinette was dismissed for operational requirements, a process as contemplated by Section 189 had to be followed.

[58] There is nothing in the actual employment contract of Antoinette that prescribes automatic termination in the event that Christoffel lost his job. However, and even if it can be contemplated that some or other agreement exists that Antoinette can be retrenched without following process as contemplated by Section 189 if Christoffel loses his job, such an agreement would have the objective of contravening and avoiding what is required by the LRA, and would be invalid. In *SA Post Office Ltd v Mampeule*[31] the Court said:

[31] (2010) 31 ILJ 2051 (LAC) at para 23. See also *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC) at paras 33 – 34.

'… I am in agreement with the submission made by Mampeule's counsel, supported by authorities, that parties to an employment contract cannot contract out of the protection against unfair dismissal afforded to an employee whether through the device of 'automatic termination' provisions or otherwise because the Act has been promulgated not only to cater for an individual's interest but the public's interest (see Brassey *Commentary on the Labour Relations Act* at A2-9 and A211; *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) at 49G-H; *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) para 10 and *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC); [2005] 9 BLLR 849 (LAC) at 24). The court a quo was thus correct when it held at para 46 that:

'Provisions of this sort, militating as they do against public policy by which statutory rights conferred on employees are for the benefit of all employees and not just an individual, are incapable of consensual validation between parties to a contract by way of waiver of the rights so conferred.'

[59] Next, CVO School in effect contends that following a process would not matter, as there is no manner in which the retrenchment of Antoinette could be avoided, and this constituted some of other exceptional circumstance justifying departure from the process required under Section 189. This kind of argument has no merit, and in essence falls back on the no difference principle, soundly rejected more than a decade ago.[32] It would always be required, in the context of a dismissal for operational requirements under Section 189, that proper process be instituted and then followed as contemplated by that Section, before any final decision to dismiss an employee is made. The application of the process under section 189 is an integral part of any fair dismissal for operational requirements. The failure on the part of CVO School to follow such a retrenchment process is inexcusable. In *Welch v Kulu Motors Kenilworth (Pty) Ltd and Others*[33] the Court held:

'To the extent that it was suggested by the respondents that barring a financial miracle the applicant was aware that the closure of the business was obvious

[32] See *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 29; *Monyakeni v Safety and Security Sectoral Bargaining Council and Others* [2015] JOL 33240 (LAC) at para 49; *Banking Insurance Finance and Allied Workers Union and Another v Mutual and Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC) at para 33; *National Union of Metalworkers of SA and Others v Atlantis Forge (Pty) Ltd* (2005) 26 ILJ 1984 (LC) at para 158.
[33] (2013) 34 ILJ 1804 (LC) at para 39.

> and inevitable, this did not serve to relieve KMK of its obligation to consult the applicant. Even if the outcome may have seemed unavoidable to some, the required process of consulting at the earliest opportunity and before closure has everything to do with at least giving those most affected an opportunity to make proposals when they may still have an impact and be implemented.'

The same consideration, as set out this *dictum*, would equally apply *in casu*.

[60] Insofar as CVO School may argue that the lack of vigorous protest from Antoinette about what was happening to her could be seen as some form of acquiescence on her part, one can do no better than refer to what happened in *Adams v DCD-Dorbyl Marine (Pty) Ltd*[34], where the Court dealt with a situation where the employer contended that the employee 'elected' to be 'released' from employment, before any meaningful consultation took place, and then held as follows:

> 'The employer chose to accept that Adams had elected to 'be released' from his employment before any meaningful consultation had taken place, despite all indications to the contrary. Its misplaced belief is not borne out by the objective facts.
>
> I find that the dismissal was procedurally unfair. …'

Similarly, and in *Hodges v Urban Task Force Investments CC and Others*[35] the Court said:

> **'**It was suggested on behalf of the first respondent, when the matter came before court, that the formalities to a retrenchment became unnecessary because the parties had reached a mutual agreement. I do not accept the submission. It is clear that the applicant had resigned himself to the fact that he was to be retrenched …'

The aforesaid circumstances are very similar to what happened in the current matter. CVO School clearly mistakenly believed it was entitled to act as it did.

[34] (2011) 32 ILJ 2472 (LC) at paras 71 – 72.
[35] [2014] JOL 32062 (LC) at para 39.

That rendered the dismissal procedurally unfair. All Antoinette could do was to resign herself to this reality. In fact, the complete lack of process of any kind rendered the procedural unfairness, in my view, to be gross.[36]

[61] The basic tenets of a fair process under Section 189 of the LRA are, at the very least, a proper notice as contemplated by Section 189(3) of the LRA being issued to the employee, the employee being given the opportunity to prepare for the consultations to come based on what is contained in the Section 189(3) notice, and then be given an opportunity to address the employer on these issues in a meaningful manner. In *Moodley*[37] the Court said:

> 'A critical, if not the most central, ingredient of the consultation process, is the requirement of written notice and the disclosure of information. Effective consultation requires employees to have an opportunity to prepare for consultation by being given sufficient advance notice, an agenda and adequate information. Without this, the joint consensus-seeking process mandated by the legislature is hardly likely to be 'meaningful'. To guide and assist the parties, s 189(3) spells out what normally should be included in the written notice and disclosure document. …'

[62] Where it comes to the consultation process itself, one of the most important reasons for having these kind of consultations is the protection of employment. In *Havemann v Secequip (Pty) Ltd*[38] the Court said:

> 'A key purpose behind consultation is the protection of employment, with security of employment being a core constitutional value protected through the LRA. In *Supergroup Trading (Pty) Ltd v Janse van Rensburg* this Court criticised the consultation undertaken by an employer as a "charade" and "purposeless insofar as it deprived the Respondent of a chance to save his post or avoid his being selected for retrenchment. His representations on that

[36] Compare *Magagane v MTN SA (Pty) Ltd and Another* (2013) 34 ILJ 3252 (LC); *Piggot v Silvercross Helicopter Charters (Pty) Ltd* (2011) 32 ILJ 972 (LC); *Airey and Others v GE Security (Africa)* (2009) 30 ILJ 1068 (LC) where it comes to procedural violations being considered as 'gross'.
[37] (*supra*) at para 34.
[38] (JA91/2014) [2016] ZALAC 53 (22 November 2016) at para 28. See also *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (*supra*) at para 32.

score were to be fruitless because restructuring was a *fait accompli*." It was emphasised that –

'…the purpose of consultation is to try and save a job or position. If this cannot be done the next aim is to avoid dismissal by placing the person, whose post has become redundant, elsewhere. And if avoidance is not possible consultation concerns the extent to which the consequences of the retrenchment can be mitigated.''

[63] The nature of the consultation process must be that of joint consensus seeking.[39] This means that the parties must engage one another in an open and honest manner, before any decision is taken, and then exchange their respective views and positions, on at least the consultation topics enshrined in Section 189(2)[40] of the LRA. An employer must listen to the proposals or suggestions made by the employee in the course of the consultations, and then deal with the same. If the proposals or suggestions are not considered by the employer to be sustainable, reasons must be provided why this is the case. This is the only manner in which the views of both parties can be fully ventilated with the objective of not only saving employment as a first prize, but also to, if employment must be terminated, leave an employee with a perception that he or she has been dealt with fairly. In *Vermeulen v Investgold CC and Another*[41] the Court held:

'Section 189 is clear. It requires an employer and employees faced with the prospect of retrenchment to engage in a joint consensus-seeking process. This requires an honest and open engagement in which both parties exchange views and proposals in relation to a contemplated retrenchment. It requires an employer party, in particular, to give serious consideration to proposals made

[39] See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) 27; *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (*supra*) at para 18. For more recent applications of this principle see *Super Group Supply Chain Partners v Dlamini and Another* (2013) 34 ILJ 108 (LAC) at para 24; *Communication Workers Union v Telkom SA SOC Ltd and Others* (2017) 38 ILJ 360 (LC) at para 38; *Banks and Another v Coca-Cola SA — A Division of Coca-Cola Africa (Pty) Ltd* (2007) 28 *ILJ* 2748 (LC) at para 15; *Association of Mineworkers and Construction Union and Others v Shanduka Coal (Pty) Ltd* (2013) 34 *ILJ* 1519 (LC) at para 27; *National Union of Mineworkers v Anglo American Platinum Ltd and Another* (2014) 35 *ILJ* 1024 (LC) at para 25; *Van Rooyen and Others v Blue Financial Services (SA) (Pty) Ltd* (2010) 31 *ILJ* 2735 (LC) at para 19.

[40] The Section reads: 'The employer and the other consulting parties must in the consultation … engage in a meaningful joint consensus-seeking process and attempt to reach consensus on- (a) appropriate measures- (i) to avoid the dismissals; (ii) to minimise the number of dismissals; (iii) to change the timing of the dismissals; and (iv) to mitigate the adverse effects of the dismissals; (b)the method for selecting the employees to be dismissed; and (c) the severance pay for dismissed employees.'

[41] [2015] 4 BLLR 447 (LC) at para 14.

> by employees and their representatives and to allow the fullest possible exchange of views. It requires an employee party to participate actively in the process and to seek mutually agreed outcomes. …'

[64] All of the above objectives of Section 189 of the LRA, as well as the consultation process envisaged by it, are entirely defeated if an employee is confronted in the consultation process with dismissal as a *fait accompli*. What is the point of consulting where it can do nothing to avoid possible job loss and where the mind of the employer is not only completely closed to any proposals or suggestions forthcoming from the employee, but the employee is not even given an opportunity to make proposals to the employer in this respect. This is exactly what happened to Antoinette *in casu*, for the reasons now set out.

[65] Antoinette was never given any notification as contemplated by Section 189(3). This is a material failure of process. In *Moodley*[42] the Court dealt a failure to provide any Section 189(3) notice to an employee as follows:

> '… Nothing approximating a joint consensus-seeking process occurred in this case. Firstly, the employer does not appear to have invited any employee representation in the consultation process as required by s 189(1). Secondly, at no stage prior to the selection of the employees for retrenchment did the respondent give written notice or disclose in writing the reasons for retrenchment , the alternatives considered and rejected, the number affected and the categories, regions, areas or departments in which they were employed. Added to that, no fair objective selection criteria were ever agreed, identified, communicated or applied. And no severance pay was proposed, discussed or disclosed …'

[66] What happened *in casu* is as far from a fair consultation process as one can get. There was no attempt of any kind by CVO School to initiate or conduct a joint consensus seeking process with Antoinette. She was confronted with a *fait accompli* in the true sense of the word. On the facts, Christoffel was called to a meeting and told he was dismissed. Having so informed Christoffel, Antoinette is called to the same meeting and told that because Christoffel had been dismissed, she must be retrenched. And that was that. Antoinette was

[42] (*supra*) at para 35. See also *Mthombeni v Air Traffic and Navigation Services Ltd* (2008) 29 ILJ 188 (LC) at paras 50 – 51.

not even informed that she could make proposals if she wanted to do so. Of direct application is the following dictum from the judgment in *Robinson and Others v PriceWaterhouseCoopers*[43] where the Court said the following in finding the retrenchment of the employees to be procedurally unfair:

> '… The applicants were not advised that they could, in terms of s 189, negotiate on the need to retrench them, or on alternatives, severance pay and selection criteria. They were never made aware of, or could have been aware of how to negotiate themselves out of the fait accompli.'

[67] It is clear that by the time Antoinette was called into the meeting of 4 November 2014, the decision had already been made to retrench her. There was nothing she could say or do, or was even allowed to say or do, to change this state of affairs. The only indulgence she received was a reprieve where it came to her eviction from the accommodation on the CVO School property. In *Mthombeni*[44] the Court held:

> '… the so-called consultation was nothing but a sham. A decision had already been taken to restructure the position of the applicant by the time the so-called consultation commenced. Thus any consultation that would follow after that decision of the board could not be said to be in compliance with the provisions of s 189 of the LRA. An interesting aspect relating to the approval of the structure which highlights the underlying motive of the whole process is that Ms Stander invited the applicant to a consultation process on 21 November 2005 whereas the board approved the structure on 24 November 2005. …'

Similar considerations apply *in casu*.

[68] Comparable examples where the Court considered the retrenchment of an employee to be procedurally unfair can be found in *Solidarity on behalf of Van Emmenis v Sirius Risk Management (Pty) Ltd*[45] where the employer only considered the dismissal of the employee in a management discussion on 9 February 2012, and then, without consultation meetings, presented the employee with a letter of dismissal on 15 February 2012. Similarly, and in

[43] (2006) 27 ILJ 836 (LC) at para 18.
[44] (*supra*) at para 49
[45] (2015) 36 ILJ 3175 (LC) at paras 30 – 31.

Vermeulen[46] the consultation process was commenced and concluded in less than two hours, which the Court considered to be manifestly unfair. What happened to Antoinette is the same as has been aptly described in *Hodges*[47] as follows:

> '… At no point, on the evidence before the Commissioner, did the first respondent deal with the issues that should form the subject-matter of consultation when a retrenchment is contemplated. Whatever consultation took place was woefully deficient as to be non-existent: the applicant was confronted with a *fait accompli*.'

[69] In the light of the aforesaid, the conclusions of arbitrator Ramotshela are thus unassailable. These conclusions of the arbitrator are actually correct, both on the facts, and on application of the relevant principles of law, and can thus be comfortably be considered to be a reasonable outcome. There is no doubt that the dismissal of Antoinette was presented to her as a *fait accompli*, and was not preceded by any notice as contemplated by Section 189(3) nor any form of consultation. There can be no justification for this failure. The dismissal by Antoinette by CVO School was thus procedurally unfair, and the determination by arbitrator Ramotshela to this effect must be upheld.

The issue of relief

[70] Considering that the dismissal of Christoffel was thus substantively and procedurally unfair, and the dismissal of Antoinette was procedurally unfair, they would both be entitled to relief. Christoffel did not seek reinstatement and the dismissal of Antoinette was only procedurally unfair, and thus compensation is the only appropriate relief.[48]

[71] Arbitrator Maake awarded Christoffel R72 000.00 (12 months' salary), and arbitrator Ramotshela awarded Antoinette R46 400.00 (8 months' salary), as stated above. CVO School has specifically raised, as a ground of review, that both these arbitrators had acted irregularly in determining the quantum of

[46] (*supra*) at para 14.
[47] (*supra*) at para 38.
[48] See Section 193(2)(a) and (d) of the LRA. Section 194 prescribes maximum compensation of up to 12(twelve) months' salary.

compensation awarded to Christoffel and Antoinette. The final question to be answered in this judgment is whether there is any substance in this ground of review.

[72] Considering the applicable legal principles first, when deciding on the quantum of compensation to be awarded, a CCMA commissioner would exercise a judicial discretion. In *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[49] the Court said:

> 'To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of s 194(1) of the LRA …'

[73] The normal basis upon which this discretion is to be exercised is enunciated in *Le Monde Luggage CC t/a Pakwells Petje v Dunn NO and Others*[50]*,* as thus:

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

[74] But central to any compensation award would be what is overall just and equitable in all circumstances of the facts of that particular matter. As said in *Kemp t/a Centralmed v Rawlins*[51]:

> '… The court has to consider all the relevant circumstances and make such order as it deems fair to both parties in the light of everything ...'

Further, the concept of 'considering everything' as referred to in *Rawlins* must mean a consideration also of the scope and extent of the loss suffered by the employee, the nature and extent of the deviation from what would normally be

[49] (2017) 38 ILJ 97 (CC) at para 50.
[50] (2007) 28 *ILJ* 2238 (LAC) at para 30.
[51] (2009) 30 *ILJ* 2677 (LAC) at para 27. The SCA in *Rawlins v Kemp t/a Centralmed* (2010) 31 *ILJ* 2325 (SCA) upheld the findings of the LAC.

considered to be fair, whether there may exist any justification for the conduct of any of the parties, any *mala fides* on the part of the employer, and the impact of the sum awarded, on the employer or its business.[52] Also, compensation for substantive unfairness would normally attract a larger amount of compensation that would the case with a dismissal that is only procedurally unfair. A pertinent example of where a maximum compensation award was justified can be found in *Dunwell Property Services CC v Sibande and Others*[53], case where on the facts a proper basis for the dismissal of the employee could not be made out, no proper process was followed and the employee not given opportunity to be heard. The Court said:[54]

> 'To my mind, the circumstances surrounding Sibande's dismissal were such as to have violated any fair treatment to which an employee is entitled. Accordingly, I am of the view that the payment to Sibande of the maximum compensation prescribed by the LRA would be just and equitable …'

I mention this matter specifically because of the similarities to the cases now before me *in casu*.

[75] It must also be remembered that an award of compensation in the case of a finding of procedural unfairness includes a *solatium* as a result of the infringement of the employee's right to procedural fairness. In *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union*[55] the Court held:

> 'The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a *solatium* for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss.'

[52] See *Rawlins* (*supra*) at para 20; *SA Revenue Service* (*supra*) at para 52; *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 *ILJ* 974 (LAC).
[53] (2011) 32 ILJ 2652 (LAC).
[54] Id at para 35.
[55] (1999) 20 ILJ 89 (LAC) at para 41.

[76] More recently, and in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*[56] the Court considered the objective of compensatory relief under the LRA, and said:

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

[77] Finally, and because an arbitrator when awarding compensation exercises a discretion, this discretion should not be too readily or easily interfered with by this Court on review. In *Rawlins,*[57] the Court specifically said the following where it comes to what must be considered when deciding whether such a discretion should be interfered with:

> 'From the above it is clear that in the case of a narrow discretion - that is a situation where the tribunal or court has available to it a number of courses from which to choose - its decision can only be interfered with by a court of appeal on very limited grounds such as where the tribunal or court-
>
> (a) did not exercise a judicial discretion; or
>
> (b) exercised its discretion capriciously; or
>
> (c) exercised its discretion upon a wrong principle; or
>
> (d) has not brought its unbiased judgment to bear on the question; or
>
> (e) has not acted for substantial reason (see *Ex parte Neethling and others* 1951 (4) SA 331 (A) at 335); or
>
> (f) has misconducted itself on the facts (Constitutional Court judgment in the *National Coalition for Gay and Lesbian Equality* case at para 11); or

[56] (2015) 36 ILJ 2989 (LAC) at para 23.
[57] (*supra*) at para 21; see also *Media Workers Association of SA and Others v Press Corporation of SA Ltd* (1992) 13 ILJ 1391 (A) at 1397I-1398B.

(g) reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles (Constitutional Court judgment in *National Coalition for Gay & Lesbian Equality* at para 11).'

[78] In specifically dealing with the discretion exercised by an arbitrator in awarding compensation, the Court in *Kukard v GKD Delkor (Pty) Ltd*[58] held:

> '… the court's power to interfere with the quantum of compensation awarded by an arbitrator under s 194(1) of the LRA is circumscribed and can only be interfered with on the narrow grounds that the arbitrator exercised his or her discretion capriciously, or upon the wrong principle, or with bias, or without reason or that she adopted a wrong approach. In the absence of one of these grounds, this court has no power to interfere with the quantum of compensation awarded by the commissioner. … It is, therefore, for Delkor to persuade this court that the quantum of compensation awarded by the commissioner may be impugned on one of the narrow grounds referred to above. …'

[79] Considering the principles as set out above, it is clear that where it comes to the issue of procedural fairness, there was a significant departure on the part of CVO School from what was required for the dismissal of Christoffel and Antoinette to be procedurally fair. As stated above, and in the case of Christoffel, the disciplinary process was materially defective and he was given no opportunity to address the issue of an appropriate sanction. In the case of Antoinette, there was no compliance with Section 189 at all and her dismissal was presented to her with a *fait accompli*. Such a material failure of process, and considering the issue of a *solatium* for the infringement of such a right, justifies a higher compensation award. The same considerations as considered in *Dunwell Property Services*[59] equally apply in this instance.

[80] Also, the *bona fides* of CVO School are in question where it comes to the dismissal of Christoffel. The complete lack of consideration of progressive discipline also detracts from the existence of such *bona fides*. I also consider the statement by Otto in the disciplinary hearing of Christoffel, and before any

[58] (2015) 36 ILJ 640 (LAC) at para 35. See also *Coates Brothers Ltd v Shanker and Others* (2003) 24 ILJ 2284 (LAC) at para 5.
[59] (*supra*).

finding was even made, that Antoinette would also lose her employment if he is dismissed, as illustrating a lack of *bona fides*. All these factors smack of a pre-empted outcome and decision being made behind the back of Christoffel, so to speak, which materially affected his continued employment. This equally justifies a higher compensation award.

[81] The personal circumstances of Christoffel and Antoinette must also be considered. They have passed what can be described as a readily employable age. When this matter was heard, they were residing in a caravan in the back yard of Christoffel's sister. They have lost everything. Christoffel had no gainful employment, and Antoinette was employed as a nursery school teacher, with both of them living off her income. There was also evidence of other financial hardship they suffered as a result of the dismissals. It is also a consideration that they had less than a year's service with CVO School.

[82] There was no evidence that the compensation awarded could have such a prejudicial impact on CVO School so as to constitute irreparable harm. Further, and considering the scope of the wrongful conduct of CVO School, compensation cannot be seen to be only a token amount. It must be more substantial than that.

[83] Arbitrator Maake, in awarding maximum of 12 months' salary, considered in his award that the dismissal of Christoffel was both substantively and procedurally unfair and that the irregularities in this case were 'gross'. These are indeed proper considerations to be taken into account. Even though the reasoning in this regard on the part of the arbitrator may be somewhat lacking considering all the principles that require consideration, it is my view that an award of maximum compensation, all considered, is certainly justified, for the reasons I have already set out above. The fact that Christoffel may have short service cannot mitigate against all these considerations. Overall, there is simply no basis on the facts to interfere with the discretion exercised by the arbitrator where it comes to the compensation awarded to Christoffel, and the award by arbitrator Maake to this effect must thus be upheld.

[84] Turning then to the compensation awarded by arbitrator Ramotshela to Antoinette, he considered that she suffered some financial hardship, and that she was dismissed in what the arbitrator called a 'brazen' manner. Again,

these are valid considerations. But in the case of Antoinette, I do have some difficulty with the quantum of compensation awarded. Whilst I accept that the procedural unfairness of her dismissal was gross, the fact remains that the finding that her dismissal was substantively fair stands. Antoinette found suitable alternative employment at a comparable salary in January 2015, and was paid to end December 2014. And finally in the case of Antoinette, I cannot find the same lack of *bona fides* as in the case of Christoffel. I accept that CVO school genuinely thought that because of the combined appointment, they entitled to deal with Antoinette as it did, and even though this turned out to wrong, it was not *mala fide*.

[85] I must also mention that in the arbitration, when Antoinette was specifically asked as to what she wanted as relief, she said 6(six) months' salary. Overall, I do not believe that arbitrator Ramotshela exercised a proper judicial discretion where is comes to his award of compensation equivalent to 8(eight) months' salary. This compensation award is excessive, and unduly punitive to the CVO School. Considering all the circumstances I have set out above, I believe that a fair and equitable compensation award to Antoinette would be 4(four) months' salary, and the compensation awarded by arbitrator Ramotshela must thus be reviewed and set aside and replaced with such an award.

Conclusion

[86] In conclusion, and based on all the reasons set out above, I find that that the arbitration awards of arbitrators Maake and Ramotshela where it comes to the merits of the respective cases, are simply not reviewable. I am satisfied that these arbitrators conducted the arbitration proceedings properly, and there is nothing untoward or irregular in their evaluation and determination of the evidence as well as the relevant principles of law. Insofar as the issue of the outcome arrived at by these arbitrators may be considered on the basis of it being reasonable or unreasonable, there is in my view no doubt that the awards would comfortably rest within the bands of reasonableness as required, in order to be sustainable on review. And where it comes to the compensation awarded to Christoffel, there has been simply no sustainable

basis made out to interfere with the discretion exercised by arbitrator Maake where it came to the determination of the quantum of compensation awarded.

[87] In the case of the compensation awarded to Antoinette by arbitrator Ramotshela, I find that the arbitrator did not exercise a proper judicial discretion in awarding 8 (eight) months' salary as compensation, and this part of his award thus falls to be reviewed and set aside. I intend to substitute this part of the award of the arbitrator with a determination that 4(four) months' salary be awarded to Antoinette as compensation, amounting to R23 200.00.

[88] This then only leaves the question of costs. In terms of Section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. When deciding the issue of costs, I have to consider that these applications never had much merit. It should have been patently obvious to CVO School, at the very least, that there was a complete failure of process. The attempts to justify this failure were in my view simply unreasonable. I also consider that CVO School was legally assisted in the arbitration and then throughout these proceedings, and should have been better advised. I do however also consider that in the case of the review application relating to Antoinette, CVO School was at least partly successful in halving the compensation awarded.

[89] Considerations of justice and fairness where it comes to Christoffel, justifies that he should be entitled to his costs. In the case of Antoinette, the same considerations justify that she should be entitled to 50% of her costs. Overall, this was an instance where CVO School, and pardon the pun, should have considered the awards to be school fees for its conduct and complied, and should not have pursued the matter further. I shall therefore award costs against the applicant in both applications, on the basis set out above.

<u>Order</u>

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

1. The arbitration award of arbitrator Josias Sello Maake dated 17 May 2015 under case number LP 8051 – 14, is upheld, and the applicant's application under case number JR 1006 / 15 is dismissed with costs.

2. The arbitration award of arbitrator Matthews Ramotshela dated 13 May 2015 under case number LP 8055 – 14, to the effect that the dismissal of Antoinette Pretorius was procedurally unfair, is upheld, and the applicant's application under case number JR 1004 / 15 in this respect is dismissed.

3. The arbitration award of arbitrator Matthews Ramotshela dated 13 May 2015 under case number LP 8055 – 14, to the effect that Antoinette Pretorius was awarded 8(eight) months' salary in compensation, amounting to R46 400.00, is reviewed and set aside, and substituted with determination that Antoinette Pretorius be awarded 4(four) months' salary in compensation, amounting to R23 200.00.

4. The applicant is ordered to pay 50% of the first respondent's taxed costs under case number JR 1004 / 15.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate M Meyer
Instructed by:	N C Gey Van Pitteus Attorney
For both First Respondents:	Mr J Stemmet of Stemmet & Osman Inc