REPUBLIC OF SOUTH AFRICA

Of interest to other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 2656/13

In the matter between:

MR MARQUARD DIRK PIENAAR **Applicant**

and

CCMA GAUTENG-TSHWANE (PRETORIA) **First Respondent**

MR JODEPH TSABADI **Second Respondent**

UNIVERSITY OF SOUTH AFRICA **Third Respondent**

Heard: 4 March 2015

Delivered: 13 March 2015

Summary: (Review - unfair dismissal for misconduct – finding of substantive fairness reviewed and set aside – arbitrator acting irregularly in not giving the applicant an opportunity to ventilate his reasons for saying his dismissal automatically unfair – despite procedural irregularity evidence properly before the arbitrator including documents he would not admit failing to support applicant's claim that the real reason for his dismissal was probably an impermissible one in terms of s 187 of the LRA – reinstatement not appropriate – compensation awarded)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is a review application of an arbitration award finding the applicant's dismissal for misconduct by the third respondent ('UNISA') was substantively and procedurally fair

Chronology

[2] Some milestones in the chronology of events are outlined below.

[3] The applicant was employed as a senior lecturer in the Department of Management Accounting of the University on 1 April 2009.

[4] On 20 March 2012 he had a meeting with his senior, Professor AJ Pienaar, in which he made a statement that led to a charge of assault being brought against him in October the same year.

[5] On 26 April 2012, over a month later, the applicant attended a 'suspension meeting' presided over by Prof D Singh

[6] On 30 April 2012, the applicant was allowed to work at home pending investigations into allegations of misconduct against him. This arrangement did not amount to a suspension as he was still performing work related duties at home.

[7] The applicant lodged a voluminous grievance about his alleged victimisation on 13 July 2012. The victimisation he claims to have suffered allegedly went back as far as 2009, but it was only after he was already working at home, by agreement, that he lodged this grievance

[8] On 26 October 2012, the applicant was charged with two charges.

> *"Charge 1: Assault*
>
> *It is alleged that on 20 March 2012, you made a threat of immediate violence towards your colleagues in the Department of*

Accounting by stating to one Prof A Pienaar that you have the urge to kill some of your colleagues, alternatively yourself."

Charge 2: Breach of Trust

You are charged with a breach of trust in due to your alleged misconduct, the trust relationship between yourself and the employer has irreparably broken down, thereby rendering a continued working relationship intolerable."

[9] On 10 December 2012 the applicant wrote a letter to Prof M Makhanya and the disciplinary hearing panel giving his reasons for not going to the hearing. The principal reasons listed there were:

9.1 A lack of information relating to the allegations against him despite his request for same in late November and early December 2012.

9.2 The fact that he viewed the disciplinary enquiry would be a waste of time in the absence of his grievance having been properly investigated first.

9.3 He regarded the hearing as a continuation of his victimisation by the University.

[10] The applicant was dismissed on 12 December 2012, after failing to attend a disciplinary enquiry scheduled for that day.

[11] Although the applicant lodged an appeal against his dismissal he referred his unfair dismissal dispute to the CCMA on 19 December 2012, and accordingly the university decided it was pointless dealing with the appeal. The matter could not be resolved through conciliation on 8 February 2013.

[12] In his referral to the CCMA, he had characterised the dispute as an unfair dismissal and victimisation/harassment and had indicated in the tick boxes on the referral form that also concerned an unfair 'labour practice (probation)' and 'disclosure of information'. At that stage he made no mention of a claim of automatically unfair dismissal, which he said he only became aware of later.

[13] On 20 March 2013, the applicant's application to the director of the CCMA to refer his dispute to court was dismissed. The reasons given by the director was that he had failed to make out a proper case in terms of the requirements listed in section 191 (6) of the LRA, but merely attached an email communication to various people which was not chronological and did not set out his case. The director could not determine on the application itself what the reasons leading to his dismissal were or what the charges levelled against him were.

[14] The applicant immediately responded by email to the CCMA, rejecting the decision in the following terms:

> *"The decision is automatically nullified because paragraph 191(7) was not applied by the director. The decision was also not signed by the director of the CCMA. Or it can be delegated but responsibility as signified by signatures cannot be delegated. There are also materially false statements in the decision for example that the case is not complicated. The application documents clearly stated that legal principles of non-pathological criminal incapacity (NPCI) and the ethical principle of "duties to warn". These two principles are very complicated matters, which the relevance of cannot be disputed because they are the main defensive points of Mr M. D. Pienaar. Further, the 160 pages of the application documents stated the charges clearly"*

[15] After an extensive arbitration hearing lasting a number of days, the arbitrator found that the applicant's dismissal had been substantively and procedurally fair. The applicant has applied to set aside the arbitration award, which was issued on 10 November 2013.

[16] On 22 January 2014, the applicant applied to review and set aside the arbitration award. The review application was late and the applicant was required to apply for condonation for the late filing thereof. He had not done so by the time the matter was heard, but the University graciously agreed he could still do so and it would not oppose the application. The Court also agreed to indulge in the late filing thereof. Shortly after the review application was argued, the applicant filed his condonation

application and after considering his reasons for the lateness and given the time of year when the delay occurred as well as the obvious lack of material prejudice to the University and its willingness not to oppose the application, I am of the view that the late filing of the review application should be condoned having regard also to the merits thereof which are dealt with below.

The arbitrator's award

[17] The arbitrator concluded that on the evidence the probabilities were overwhelmingly against the applicant. Moreover, testimony of the University's witnesses was even corroborated by his own version of events. In this regard, the arbitrator remarked that:

> *"The respondent's testimony before me, which I accept and is also corroborated by the applicant's own version of events is that the applicant clearly indicated to Prof. Pienaar in his office and even during these arbitration proceedings that he had the urge to kill someone; referring to his colleagues or alternatively committing suicide himself allegedly due to the harassment he was subjected to the Department."*

[18] The arbitrator also found that the applicant had failed to challenge the respondent's testimony in material respects and accordingly it stood unchallenged. In particular, the arbitrator's evaluation focused on the following:

18.1 The applicant did not deny the violent thoughts he conveyed to his senior, Prof. A Pienaar ('Prof Pienaar')[1], and the arbitrator found his explanation that he was thinking about the Afrikaans surname "Moor" when he referred to "moord" was unconvincing especially as the applicant had not relied on this explanation consistently throughout the arbitration proceedings.

[1] Although Prof Pienaar had left the university by the time he testified in the arbitration, I have used his erstwhile professorial title to distinguish him from the applicant.

18.2 On the question of the harassment which allegedly prompted the applicant to make the statement he made to Prof. Pienaar, the arbitrator found that the applicant had presented nothing concrete to the tribunal to demonstrate the harassment he suffered except his claim that he was told to mark scripts for a Professor, which did not amount to harassment but was to be expected in his job as a senior lecturer.

18.3 Given that the applicant was a senior lecturer who ought to be mentoring other lecturers, the arbitrator found it was unacceptable for him to think or talk about murdering his colleagues. In an academic environment and one in which his colleagues did not want to work with him, it was understandable that the University could no longer trust him.

18.4 On the applicant's failure to attend his disciplinary enquiry, the arbitrator felt that he should have been aware of the fact that grievances were dealt with by a different section and he should have followed that up with the responsible persons instead of using that as a reason for not attending the enquiry, which was a separate process. If he felt he did not have sufficient information to defend himself he should have raised that at the disciplinary hearing. He also could have raised with management his complaint about being escorted to the hearing rather than simply using that as another reason for not attending the hearing. In any event, the University had a duty to protect its employees from someone who had violent thoughts like the applicant and University had little choice but to adopt some precautionary measures. In this regard, the arbitrator was mindful of the applicant's own version of events, namely that he had reached a point where he could 'snap'.

[19] In relation to the claim that the matter concerned an automatically unfair dismissal the arbitrator stated the following in the introduction to his award:

> *"The dispute was referred to the Commission in terms of section 187 (1) (f) of the labour relations act 66/199. However, during initial deliberations it came out that the dispute should have been*

referred to the Commission in terms of section 191 91) [(191 (5) (a] of the Labour Relations Act 66 of 1995. It is on this basis that I will deal with the dispute."

(*sic*)

Evidence during the arbitration proceedings

[20] For the sake of evaluating the merits of the review application, some of the testimony during the arbitration proceedings is mentioned in summary below.

Matters pertaining to the unfair dismissal dispute for misconduct

[21] At the arbitration hearing, former Professor, AJ Pienaar, who had been the applicant's supervisor, testified amongst other things that:

21.1

There had been complaints from other staff members about the applicant's behaviour and requests were made to the head of Department, Professor Van Heerden ('Prof Van Heerden'), to send him for counselling. Prof Pienaar was concerned that this would have placed unnecessary pressure on the applicant and driven him to extremes. On 19 March 2012 he wrote a lengthy letter to Prof Van Heerden' arguing in favour of retaining the applicant, despite what he referred to as the applicant's 'behavioural problems' and 'antisocial' conduct in his evidence. In the letter Prof Pienaar acknowledged that: it appeared that the applicant was suffering from serious psychological problems; Prof Van Heerden was under pressure to send the applicant to counselling, and the applicant was of the view he did not need it. However, in Prof Pienaar's opinion he felt that it would be counter-productive to pressurise the applicant to undergo counselling because he would probably refuse to and it would bring matters to a head, forcing matters to a point where he might resign or be dismissed. He noted that he had hoped the applicant would be a worthy successor to another lecturer who had left. Lastly, he asked Prof Van Heerden in the letter to try and ensure the continuity of the applicant's

employment by, amongst other things, allowing the applicant to work directly under himself and by asking his colleagues to be sensitive about him and not to take personal offence when he made irrational comments about them. On the same day Prof. Pienaar wrote this letter the applicant had taken a day's leave.

21.2 The following day, 20 March 2012, the applicant went to see Prof. Pienaar, and asked him why he was being harassed by the Department. Prof. Pienaar, made the applicant sit down and they spoke for an hour, or possibly two. He had suggested to the applicant that perhaps he was too sensitive about things people did, but the applicant was insistent that he was being harassed. The applicant mentioned an incident which occurred in a Krugersdorp School where a pupil had attacked and killed other pupils with a sword and other examples in America which he said were illustrations of what people who were harassed and did not know how to respond did. He said that after taking and taking it, people in those situations would just 'snap', but he had not reached that stage himself. Prof Pienaar said that:

> *"I experienced it as a plead from his side to prevent the situation. To stop. To see that my colleagues in the Department stops the harassment, so that it does not reach that point."*

21.3 The applicant himself said he felt like committing suicide, murder or killing someone (Ek voel om te moor of selfmoord).

21.4 The applicant had also said that if he killed someone he would not go to jail but would be sent overseas and would receive a new identity document. It was this further comment which made Prof. Pienaar think that the applicant's comment about feeling he could murder someone was not merely a way of saying that he is seriously annoyed.

21.5 Prof. Pienaar was disturbed by what the applicant had said and felt threatened. This led him to ask if the applicant had a firearm and the applicant told him he was not allowed to have one after he had been

diagnosed with depression in 2008. He had asked about the firearm out of concern for his own safety and that of the other staff.

21.6 When he was asked how he felt about working with the applicant after the conversation on 20 March 2012 he said the following:

> *"I was okay but I was concerned because there something which I did not know, maybe there was some conduct, which I was uncertain of, whether someone in the department could say something wrong and you know just get the guy aggressive or do something."*

Prof Pienaar said that the applicant had used a strong word suggesting thathe could actually 'donder' (or some similar word), a particular colleague, but he did not think he would actually do it. What did concern him was that it could happen in the weeks or months afterwards. He had always had a good working relationship with the applicant and his work ethic was good, but the things he said that day extremely concerned him and he felt it would be irresponsible of them to keep silent about it and let it go by. The conversation changed his view about the applicant undergoing counselling and getting professional help. He did not feel that it was him alone who was in danger but so was the rest of the Department because he could walk into the offices and hurt people.

21.7 What did happen after this encounter was that there were one or two meetings involving the applicant and a staff member responsible for the University's wellness program. However, after that the applicant refused to participate further in the program and said that it was not him who had a problem but other people.

21.8 Much of the applicant's cross-examination of Prof. Pienaar focussed on whether the applicant's utterances about his violent thoughts and being at a breaking point were intended as a threat or a warning.

21.9 In addition, the applicant challenged the notion that his comments could really have been construed as a serious and imminent threat given that he was only asked to work off campus some about six

weeks later at the end of April 2012. In this regard, Prof. Pienaar's response to this line of questioning was equivocal and the only explanation he could offer for UNISA's slow reaction was that the university followed its own process and he could not answer on behalf of the UNISA authorities. However he personally thought it was urgent enough to report it on the same day.

21.10 Prof. Pienaar did concede that he would not have had subsequent meetings with the applicant if he had thought he was in serious danger and agreed that there was no physical assault or imminent threat of physical assault: it was only in the wider sense of the threat which was made that the applicant's utterances amounted to an assault.

21.11 After extensive debate with the applicant, he also agreed that it was possible to see the applicant's utterances as a warning rather than a threat.

[22] The university's second witness was Professor W J Coetzee, who was the acting head of the Department at the time. Salient aspects of his evidence were that:

22.1 The applicant had initially been assigned to work with Mr L Crawford and was later moved to another course because they encountered difficulties working together. The applicant also did not want to work with female employees and they had complained that he made threats towards them. Although the applicant's work standards were high, nobody else wanted to work with him.

[23] The University's Manager: Disciplinary & Incapacity Enforcement (Labour Law Section), Mr J M Labuschagne, testified that:

23.1 The applicant's disciplinary enquiry was postponed at his request from 13 November 2012 to 12 December 2012 as the applicant was writing an exam.

23.2 The applicant did not attend the enquiry and the matter was heard *in absentia*. After his dismissal, the applicant did lodge an appeal butthe

appeal hearing did not take place because the matter had already been referred to the CCMA by the applicant.

[24] When the applicant testified in his defence, he stated amongst other things that:

24.1 He had gone to speak to Prof. Pienaar because of prior events in which he had expected by others to be dishonest. This was against his faith and he felt victimised because he would not act dishonestly.

24.2 He agreed that he did have violent suicidal thoughts because of the way in which he believed he had been harassed or victimised, but he saw that as normal behaviour for someone in his situation. Although he did not see his behaviour as threatening, he felt it was his duty to warn Prof. Pienaar because he was motivated by an urge to protect other staff members and himself. He warned that there was a possibility of him acting with non-pathological criminal incapacity ('NPCI') due to the ongoing victimisation he had suffered, though he did not specifically use the term NPCI in his conversation with Prof Pienaar. There was also no reason for other staff members to be afraid of him because he did not know where they lived.

24.3 After the conversation on 20 March, the victimisation stopped and his violent thoughts also ceased.

24.4 He did not attend the hearing on 12 December 2012 because his grievance had not been attended to and he had not received information he had requested pertaining in particular to a document which led to the suspension meeting being held. He also found it completely unacceptable that he should have to be accompanied to the hearing by a security official.

[25] The applicant believes that he had been dismissed for expressing his thoughts. In explaining his conduct, he sought to explain that he had used the word 'moor' rather than the word 'moord'. The word 'moor' was not the same as the word 'moord'. He also made much of the issue of whether he said he could 'crack' or 'snap' because of the victimisation, though it is unclear why anything should turn on which word he used.

Matters pertaining to the applicant's claim that his dismissal was automatically unfair and should be determined by the labour court

[26] At the start of the record of proceedings, the university's representative, Mr M Ramotlou, commenced by introducing the dispute as one relating to the applicant's dismissal for assault. The following then appears in the transcript:

> *"COMMISSIONER JOSEPH TSABADI: Allright I will be then in agreement that it is an unfair dismissal dispute and not a um an automatically unfair dismissal dispute related to discrimination.*
>
> *MR. MARQUARD DIRK PIENAAR: No, I say that it is an automatic unfair dismissal and I because of that have referred it to the Labour Court.*
>
> *COMMISSIONER JOSEPH TSABADI: You have referred to the Labour Court.*
>
> *MR MARQUARD DIRK PIENAAR: No well I asked the CCMA to refer it to the Labour Court, with this document and um then the CCMA decided that um they will not referred to the Labour Court, so according to the Labour Relations Act as I understand it I have to go along with the arbitration and if I do not agree with the decision of the arbitration then I can um referred myself to the Labour Court after that. So I still contend that it was an unfair automatically unfair dismissal and um the outcome of this arbitration. It can be favourable, so it can halt the procedures, but if its not favourable, then it will go forward, most probably. I cannot say that it shall go forward, but I think it definitely it will go forward if I do not get a favourable decision. The unfair, the automatic unfair dismissal was explained in this document. There was quite a lot of issues in the Labour Relations Act, that was not complied to and broken by UNISA and the union."*

(*emphasis added*)

[27] At this point, the debate with the Commissioner diverted briefly into a discussion of the role of the union in the matter because the applicant had

a complaint about the way his union had represented him in the suspension meeting. Thereafter there was a debate and exchange of documents. During the course of that exchange, it appears that the applicant submitted the document which he had provided initially in support of his request for the matter to be referred by the Director of the CCMA to the Labour Court. The Commissioner queried the use of the document because it related to the Labour Court referral, which the CCMA Director had turned down. The applicant agreed but pointed out that he could still use it as evidence "…because the unfair dismissal is explained in here and everybody has the documents…"

[28] The arbitrator then pointed out that the certificate of outcome described the dismissal as one for misconduct, to which the applicant responded that during the conciliation he did not even have time to explain himself before the Commissioner issued the certificate. The arbitrator pointed out that the purpose of the conciliation was not to listen to the merits of the dispute, but nevertheless said *"…as the matter stands before me know in terms of the certificate of outcome, this is a dismissal relate to a misconduct*." In reply, the applicant said:

> *"No, it is a very complicated long case and this document that I submitted to the CCMA states here, it is a case relating to an unfair dismissal, disclosure of information, unfair labour practice (probation) and harassment (victimisation). So there is one, two, three. There is 4 things that are applicable here. And then, I mean, after I wrote this document a lot of additional things came to light. I did not know those things about the Labour Relations Act that was broken. When I wrote this document, but did not even know what an unfair, automatic unfair dismissal was."*

[29] Later on in the course of further preliminary discussions and before any evidence was led, the arbitrator outlined the distinction between the procedural and substantive fairness of a dismissal. The applicant confirmed he was contesting both. Both parties were then invited to make opening statements. The applicant made a very extensive opening statement. In the course of that presentation, the central features of his

case which he identified and emphasised were the following: he was victimised because he wanted to do research instead of pursuing private work; the extent and degree of victimisation or harassment over a significant period of time which he believed he had been subjected to; the development of violent and suicidal thoughts caused by what he perceived to be the relentless nature of the victimisation; how he had tried to warn Prof. Pienaar that as a result of the stress caused by the alleged victimisation he feared it was possible he might end up in a state of non-pathological criminal incapacity and that he could snap if provoked; even when the victimisation ceased after his discussion on 20 March 2012 with Prof. Pienaar, his tormentors still wanted to get rid of him so they initiated proceedings to suspend him; the disciplinary proceedings initiated against him were not *bona fide* because the University refused to investigate his complaint about the victimisation which had led to his discussion on 20 March 2012 and ultimately to his dismissal; that the charge of assault and the alleged imminent threat posed by him was non-existent, and the absence of any breach of trust committed by him in relation to the University.

[30] In the course of this lengthy address, the applicant did make some reference to factors which might have made his dismissal automatically unfair. Thus, in his introductory comments he said that: "*There were many laws, many of the LRA sections broken that made it an automatic unfair dismissal. Then there are the UNISA rules. And all the employees of UNISA must comply to those rules…*" The only occasion during his opening statement that he referred to a particular ground on which he might claim that his dismissal was automatically unfair was when he stated the following:

> *"And then there is another very important issue. It relates to Sociology of Knowledge. This Prof Coetzee says that I think I'm Jesus. So there is a serious, a very serious Sociology of Knowledge problem in this case. And that that um, he said it during the hearing. That is so much against the Labour Relations Act. The Labour Relations Act says religion cannot be held against anyone in a work situation that makes me think it an an?,*

that's one of the things that make it automatic unfair dismissal. And it is not only him. There were many people, there were other people that I mentioned in that in this document, and who made references like that, that think I am quite. Jesus. The I hope that gives you a good background of the case and that puts you in perspective of what happened and um to understand the testimony that will come out. They are lying in the testimony. During the hearing there were many lies, which I have on record, and I can prove it…"

[31] When the applicant cross-examined Prof. Pienaar, the thrust of his attack on Prof. Pienaar's evidence in chief was focused on whether the applicant's utterances about his violent thoughts constituted an immediate threat of assault or simply reflected an attempt by him to alert Prof. Pienaar to the possibility of what could happen if he reached a breaking point. He also attacked Prof. Pienaar's neutrality as a witness because he owned a Spar outlet which meant that he would also be hostile to the applicant' s attitude that staff should not be involved in outside businesses. Lastly, the applicant asked Prof. Pienaar if he thought that he was insane. Prof. Pienaar said that he felt that some of the things the applicant said were completely irrational in his view. However, the thought the applicant had some 'problems' though he found the term 'insane' too strong a word to describe the applicant. Prof Pienaar then gave some examples of instances of issues raised by the applicant which he regarded as illustrative of what he perceived to be the applicant's irrationality. The applicant then sought to curtail Prof. Pienaar raising further examples and the following exchange took place:

"MR MARQUARD DIRK PIENAAR: Is it important Mr Commissioner, to go on with this discussion?

COMMISSIONER JOSEPH TSABADI: No.

MR MARQUARD DIRK PIENAAR: <u>Because according to me, it is, the whole charge, everything relates to 20 March and anything outside of that is irrelevant actually</u>. And the thing is there is now already documents about 400 pages, where I have to just defend

all the time, and things that he does not understand I have to explain to him. I have to explain Non-Pathological Criminal Incapacity. I have to defend all the time and the documents build up and build up and build up, but actually there is only one thing that is relevant. The 20th of March.

MR. BRAM JOHANNES PIENAAR: I will tell you why it is important. Yes, because, you said that people are harassing you and that if they do not stop harassing you, you could snap, and in my view there was nothing that I could do about the so-called harassing and I want to illustrate why I feel that I cannot address that sort of harassing, harassment, because to me it is completely illogical that you could call it harassment."

(emphasis added)

[32] The applicant then attempted to get Prof. Pienaar to concede that the harassment had stopped after they had spoken on 20th of March 2012. Although Prof. Pienaar conceded that he had communicated to others that they should not 'harass' the applicant, he said he was only referring to harassment in the sense that the applicant understood it. Personally, he did not agree that the applicant's complaints could really be truly characterised as harassment at all. The applicant also pursued a further line of questioning with Prof. Pienaar relating to whether the University had dealt with him properly by treating the matter as a disciplinary one rather than an incapacity issue.

Evaluation of the review application

[33] The applicant raised numerous and disparate grounds of review and clearly tried to find one or other basis for setting aside the award under every provision of section 145 of the LRA. Many of these grounds relate to alleged failures in the reasoning of the commissioner. A couple of others relate to procedural matters. Another substantive ground of review concerns whether or not the arbitrator ought to have realised that he was dealing with an automatically unfair dismissal case which should have been referred to the Labour Court. This latter argument is only set out in

any material detail in the applicant's heads of argument. As in the case of his identification of grounds of review under s 145, it appears that he sought to canvass almost every possible ground of discrimination contemplated in section 187(1), except subsection (e). By contrast, in his founding affidavit he merely stated that the CCMA arbitrator had to decide a case about an automatically unfair dismissal over which the CCMA had no jurisdiction. As best as I can, I have attempted to group the various grounds set out in the founding affidavit.

[34] Firstly, the applicant claims that the arbitrator ought not to have accepted jurisdiction over the dispute because it amounted to an automatically unfair dismissal. Secondly, in any event, the arbitrator could not have reasonably found that he was guilty of assault or that there had been a breakdown of trust justifying his dismissal. He also raises a number of alleged irregularities or acts of misconduct committed by the arbitrator in the course of the proceedings. Although the applicant clearly has a difficulty in prioritising and identifying the most important aspects of his claim, his main complaints in relation to the conduct of the arbitration proceedings appear to be that:

34.1 The arbitrator prevented him from leading evidence about the details of his alleged victimisation or evidence relating to his claim that the dismissal was automatically unfair;

34.2 The arbitrator also failed to assist him in obtaining evidence which the University had hitherto failed to provide. This consisted of a report compiled in terms of clause 4.1 of the UNISA's disciplinary code, which prompted the suspension meeting with Prof Singh.

34.3 The arbitrator acted in a biased and prejudicial manner by falsely representing that he had agreed to file heads of argument by a certain date, whereas he had explained to the arbitrator could not do so because that date coincided with an exam he was writing.

34.4 The arbitrator also improperly refused to consider the heads of argument which the applicant did file before the award was issued. A further criticism is that the arbitrator should have allowed the parties to simply present oral argument at the end of the hearing rather than

attempting to secure an agreement on the submission of written argument.

34.5 The fact that the arbitration proceedings took place over a whole year was also a gross irregularity for which he blamed the arbitrator and, or alternatively, the CCMA.

[35] In the course of the evaluation which follows, I do not intend to address every ground of review, but only those that can be construed as grounds of review that materially affect the outcome of this application.

Claim of automatically unfair dismissal and the arbitrator's failure to consider documents in support of that claim

[36] As mentioned, in his founding affidavit the applicant merely refers to the arbitrator mistakenly deciding his unfair dismissal claim as an ordinary dismissal dispute when he ought to have realised it concerned an automatically unfair dismissal. The first point that needs to be made is that a detailed factual basis for this claim is only set out for the first time in the applicant's heads of argumentfiled in these proceedings on 16 February 2015. In his founding affidavit, the applicant gave no inkling of the *factual* basis on which he claimed the arbitrator had misconstrued the nature of the dispute before him. All that appears in his founding papers, in what the applicant referred to as his '4th affidavit', is the following on page 9:

> "- *The CCMA was asked to refer the case to the Labour Court due to the complicated matter, which has, according to Mnr. M D Pienaar's knowledge, no precedent to learn from, and because it was an automatic unfair dismissal. The CCMA then did not allow Mnr. M D Pienaar to motivate his request verbally and did not refer the case to the Labour Court, as the CCMA should have done, according to section 191 (6) and 191 (7) of the Labour Relations Act and according to jurisdiction issues. Therefore, because of the other problems, <u>the case is now before the court for review according to section 191 (10) of the Labour Relations Act.</u>*

- *Mnr. M D Pienaar understands that the CCMA has not jurisdiction over automatic unfair dismissal cases. During the CCMA arbitration proceedings, evidence, which proves discrimination, and facts was required to victimisation, were not allowed by the Commissioner. Those matters were matters, which the court would have addressed, if the case was referred to the Labour Court as requested by Mnr. M D Pienaar."*

(*sic* – emphasis added)

[37] The first point that needs to be made is that the applicant appeared to be under a misconception that his review application in these proceedings included a review of the decision of the director of the CCMA under section 191 (6). During the course of the application hearing it was pointed out that the relief set out in his notice of motion only refers to the arbitrator's award in which his dismissal was found to be procedurally and substantively unfair: it does not make mention of the director's ruling under section 191(6) refusing to refer his case to the Labour Court. Consequently, the court is not seized with a review of the Director's ruling.

[38] Section 191(6), properly contextualised with reference to sections 191(5) and 191 (5A) to which it refers, was not intended to be an indirect method for referring an alleged automatically unfair dismissal dispute to the Labour Court. The provision was clearly intended only for disputes which do fall within the arbitral jurisdiction of the CCMA, but in which one or more of the factors in the section made it desirable for a matter to be heard by the Labour Court. Whatever the ruling of the Director under s191, that ruling cannot cloak a Commissioner with authority to hear a matter falling outside the CCMA's arbitral jurisdiction.

[39] Consequently, an issue which still arises is whether the arbitrator ought to have stopped the arbitration proceedings on the basis that the real nature of the dispute before him did not fall within the jurisdiction of the CCMA to determine. A related criticism is that the arbitrator improperly failed to allow the applicant to lead evidence to demonstrate the real nature of his claim. I will consider this criticism first.

[40] From the record it appears that the applicant wanted to introduce his motivation to the CCMA Director for the referral of his matter to the Labour Court under section 191(6) as part of the material the arbitrator ought to consider. In that document, the applicant made two express references to an automatically unfair dismissal, namely under section 187(1)(d) and (f). In relation to subsection 187(1)(d) the applicant claimed that he had indicated the possibility of taking legal action in two emails to the Head of the School of Accounting and the Head of Department of Management Accounting respectively on 20 January 2012 and 28 March 2012 respectively. He claimed he further mentioned it in a meeting with the legal Department on 26 April 2012.

[41] where the applicant refers to section 187(1)(f) in his written motivation to the CCMA Director to refer the matter to the Labour Court there is footnote in which , he mentions that in the outcome of the disciplinary enquiry it was said that he prioritised his Christian faith above reason. The footnote also states that other circumstances relevant to his claim of automatically unfair dismissal under s187(1)(f) were to be found in his 'victimisation document' of 13 July 2012. The applicant went on to suggest that he was identified as being homosexual on the basis that there was some connection made by some of his colleagues between people who were honest, such as himself, and people who were homosexual.

[42] In a section of the victimisation document, which was the basis of his grievance, the applicant deals with what he described as 'Possible Motives for Victimisation and Other Proof'. The only issues that can be discerned in this somewhat rambling section of the document are: a reference to "God thoughts" on the part of his colleagues which he believed played a role in his victimisation, and a perception of the part of the applicant, based on remarks by colleagues, that he was being victimised because they thought, according to his perception, that he was homosexual. On the face of it, it seems 'God thoughts' also refers to the applicant's complaint that someone said he thinks he is Jesus and similar comments.

[43] Having regard to these documents, which the applicant was prevented from referring to by the arbitrator, and given his protestations at the

arbitration that his case concerned an automatically unfair dismissal, in the course of which he again identified religion as a specific factor making his dismissal automatically unfair, I believe that the Commissioner was unduly brusque in dealing with the applicant's representations that his dismissal was automatically unfair. Once the applicant had raised these issues, the arbitrator ought at least to have interrogated his reasoning to clarify if there was any substantial basis for making that claim. In that respect, the arbitrator committed a reviewable irregularity. However, in this instance, I do not believe the award should be set aside for that reason in the light of the analysis below.

[44] Having said that, it is also very clear from the applicant's own representations both in the arbitration proceedings and in the review application that he also contended that his dismissal on grounds of misconduct was procedurally and substantively unfair. That dispute is clearly one falling within the arbitral jurisdiction of the CCMA and was before the arbitrator. When it was plain that the arbitrator was not going to stop the proceedings but was going to determine the substantive and procedural fairness of the applicant's dismissal for misconduct, the applicant did not formally abandon his claim of automatically unfair dismissal, but during the remainder of the proceedings he vigorously prosecuted his claim that his dismissal for misconduct was unfair on both the procedural and substantive grounds.

[45] Although the arbitrator might have failed to permit the admission of documents relevant to the applicant's other claim that his dismissal was automatically unfair, it does not necessarily mean that the outcome would have been different if he had dealt more thoroughly with 'the substantial merits of the dispute' in deciding that the basis that the real reason for the dismissal was misconduct in the sense meant by the Constitutional Court in the judgement in ***Commercial Workers Union of SA v Tao Ying Metal Industries & Others***[2]. That judgment affirmed the correctness of the approach initially adopted in ***Wardlaw v Supreme Moulding (Pty) Ltd*** [3],

[2] (2008) 29 ILJ 2461 (CC) at 2482-3,paras [65] – [66].

[3] (2007) 28 ILJ 1042 (LAC)

in which the LAC held that when deciding whether a dismissal dispute before the Labour Court fell within its jurisdiction, the Court ought to adopt a substantive approach rather than relying on the formal characterisation of the dispute by the employee in the referral of the dismissal to the Labour Court. [4] In ***National Union of Metalworkers of SA on behalf of Sinuko v Powertech Transformers (DPM) & others*** [5], the LAC recently confirmed that the principal equally applies to determination of the real nature of the dismissal dispute by an arbitrator.[6]

[46] Even if it is accepted that the arbitrator ought to have considered the documents presented by the applicant and that failure constituted an irregularity, I am still not persuaded that his decision to treat the real nature of the dispute as an alleged unfair dismissal for misconduct could be construed as a jurisdictional error even if the evidence of the documents which the applicant wished to tender in support of his claim that his dismissal was automatically unfair are taken into account.

[47] If one has regard to the applicant's motivation for the matter being referred to the Labour Court which he placed before the Director of the CCMA under section 191 and if one has regard to the supporting documents he cited therein, which he also intended to rely on in persuading the arbitrator that his case concerned an automatically unfair dismissal, at best for the applicant they are confined to three issues namely:

47.1 dismissal for a reason relating to religion;

47.2 dismissal for a reason relating to his perceived sexual orientation, and

47.3 dismissal because he expressed his intention to exercise his rights by taking legal action on three different occasions.

[48] In regard to the first two possible grounds on which his dismissal might be construed as automatically unfair it must be said that the applicant's case in that regard appears to be based on his interpretation of comments by

[4] At 1051, para [21].

[5] (2014) 35 ILJ 954 (LAC)

[6] At 961, para [21].

his colleagues which, objectively speaking, are far from unambiguous expressions of hostility towards him on an unfairly discriminatory grounds. On the contrary, they are open to various interpretations and not necessarily those which the applicant favours. In addition, the applicant provides no explanation why the bigoted attitudes he attributes to his colleagues were also shared by and informed the reasoning of the chairperson of the disciplinary enquiry.

[49] In relation to his allegation that his dismissal was retaliation for him threatening to exercise his rights, the first intimation that he might take action to exercise his rights took place on 20 January 2012. The incident with Prof. Pienaar took place on 20 March 2012 and appears to have been the most obvious reason for convening the suspension meeting convened 26 April 2012. It was in the course of this meeting that he mentions his intention to take action to protect his rights for the third time. The first time he actually took such a step was when he filed his grievance of 13 July 2012, but it was only some months later in filed his grievance on 13 July 2012.The University's response to his grievance appears to have been one of inaction. What the University did do after 20 March 2012 was to arrange counselling for the applicant, which he decided to discontinue. Prof. Pienaar's evidence that the applicant had discontinued it because he did not see himself as having a problem but that the problem lay with his colleagues was not disputed by the applicant. Considering the sequence of events leading to the disciplinary action, it is far from readily apparent that the applicant's stated intention of taking action to protect his rights on the occasions mentioned featured as a more probable proximate reason for his dismissal than the incident on 20 March 2012 and its aftermath, especially as the university at least initially tried to deal with the issue in a non-punitive way.

[50] Furthermore, it is apparent from the applicant's own opening statement in the arbitration proceedings that the thrust of his case was directed at the substantive and procedural unfairness of his dismissal for assault. Essentially, the relevance of victimisation in that narrative was that, he believed that if he could lead evidence of his victimisation he would be able to show why he had nearly reached a mental breaking point when he

met with Prof. Pienaar on 20 March 2012, which in turn would show that others had driven him to that situation. The evidence of victimisation or harassment was not seen as primarily important because it revealed why his dismissal was unfair for a prohibited reason under s 187..

[51] Considering the applicant's motivation based on the documents which the applicant wished to introduce and in the light of his own representations at the arbitration, I do not believe that they demonstrate that it was probable that the real reason for his dismissal related to one of those prohibited grounds than simply the stated ground of misconduct, even if that ground was an ill-conceived basis for dismissing the applicant. Consequently, the arbitrator's decision that the real dispute he was dealing with was an unfair dismissal for misconduct rather than an automatically unfair dismissal was ultimately correct on the evidence that was properly before him, notwithstanding the shortcomings in his own handling of the evidence, and he did have jurisdiction to determine the dispute.

Were the arbitrator's findings relating to the substantive and procedural fairness of the dispute ones that no reasonable arbitrator could have reached?

The approach to set aside an arbitrator's findings on the merits

[52] I accept that a lay person may not fully appreciate the distinction between the test of review and an appeal. It is a distinction that lawyers also grapple with. With that in mind, where the applicant has expressed criticism of the arbitrator's findings as if he were engaged in an appeal, I have treated these as attacks on the reasonableness of the arbitrator's findings rather than simply dismissing them because they are not phrased in the form of grounds of review. Nevertheless, those criticisms can only be evaluated on the review standard which is more onerous than the test for a successful appeal. When evaluating a Commissioner's assessment of evidence and the logic of his reasoning, the applicable test on review is not whether the arbitrator was right but whether the findings which the arbitrator reached are ones that could have been reached by a reasonable arbitrator. The test does not concern the coherence of the arbitrator's own

reasoning, but whether no reasonable arbitrator could have arrived at the conclusions he did. This implies that more than one interpretation of the evidence can be found to be acceptable, provided that interpretation can be justified on the evidence as a plausible one.

[53] It is important to stress that it is not necessary for the Court on review to consider if the arbitrator reached the right conclusions, but simply to decide if the conclusion reached is insupportable on the evidence that was before the arbitrator. At this point, it is also important to mention that it is only the evidence that was placed before the arbitrator in the course of oral testimony being led that the arbitrator was obliged to consider. The mere fact that documents were handed up as part of a bundle does not make them part of the evidence until they are referred to by a witness in the course of their evidence or unless the parties agree that the documents may form part of the evidence without having to be introduced in the course of examining a witness. Practically speaking, this means that evidence led at the disciplinary enquiry does not become part of the record before the arbitrator unless referred to by the parties in the course of leading evidence at the arbitration hearing.

[54] For the sake of completeness, the approach to reviewing an arbitration award on the grounds of reasonableness has been expressed in the following way in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***[7]:

> *"… the award was one that a reasonable decision maker could not reach. That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result.*

[7] (2013) 34 *ILJ* 2795 (SCA) at 2801, para [11]

> *That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."* [8]

In evaluating the review application therefore, the issue is not whether or not the arbitrator did not mention or appear to consider certain evidence, but whether his findings were nonetheless competent in the sense that a reasonable arbitrator could have arrived at the same findings on the available evidence, even if other reasonable arbitrators might have concluded otherwise on the same evidence.

Procedural fairness

[55] Essentially, the arbitrator's finding that the applicant's dismissal was procedurally unfair was based on the fact that the applicant was given a reasonable opportunity to defend himself against the charge, which he declined to use.

[56] The applicant complained that the arbitrator acted contrary to the LRA in deciding that the principles of natural justice had been met in the conduct of his disciplinary proceedings. In the applicant's view, the correct standard to comply with, was not the principles of natural justice but the LRA. He further believes that the Commissioner's reference to the principles of natural justice was somehow a reference to human sacrifice. I appreciate that the applicant although well-educated may not understand common legal terminology. It is plain that these criticisms of the arbitrator's reasoning on procedural fairness stemmed from the applicant's misunderstanding of the term natural justice in the context of an inquiry. In the context of an inquiry, it refers to the basic requirements of a fair hearing, which are expressed succinctly in item 4(1) of Schedule 8 of the LRA, namely:

> *"(1) Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not*

[8] At 2802, para [12].(emphasis added)

need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision."

[57] The fundamental problem the applicant has in relation to his claim of procedural unfairness, is that the enquiry was reconvened at his convenience and yet he still failed to attend for reasons relating to his unresolved grievance and for lack of information, instead of attending and raising those points with the chairperson. I cannot find fault with the arbitrator's reasoning on the procedural fairness of the applicant's dismissal.

Substantive fairness

[58] I can find nothing unreasonable about the arbitrator's conclusion that the University had a responsibility to take action after the applicant had conveyed his violent thoughts to Prof. Pienaar. Undoubtedly, it would have been negligent in its duty of care towards other staff to provide a safe working environment if it had done nothing after Prof Pienaar reported his conversation on 20 March 2012 with the applicant. What is more difficult to understand is how the arbitrator could have concluded that the applicant was conveying an intentional threat of imminent physical harm to one or more of his colleagues, or that his utterances were actually or reasonably understood to mean that.

[59] The arbitrator did not address himself to the absence of any plausible justification why the supposed threat of violence was addressed in such a dilatory fashion by the University authorities. Prof Pienaar could only speculate about the University's delay in addressing the matter. No other witness on behalf of UNISA provided an explanation why Prof. Pienaar's report of the incident did not compel it to deal with the situation promptly

as one might expect a reasonable employer to address an assault, in the sense of a threat of imminent violence. Prof. Pienaar himself conceded that he interpreted the applicant's utterances as a plea rather than a threat. He also agreed that he would not have had subsequent meetings with the applicant if he had believed there was an imminent threat of assault. In his cross-examination of Prof. Pienaar, the applicant also queried why the issue of his mental state became an issue in the enquiry if his dismissal related to misconduct and why the University had not dealt with the matter as one of incapacity if he was considered irrational or insane. The arbitrator evaluated the evidence of the alleged assault on a narrow basis and without regard to Prof Pienaar's own evidence under cross-examination and without considering the implications of the University's lackadaisical response to the supposed threat. He also failed to consider why the University saw fit to ask the applicant to undergo counselling if indeed it believed what he had done was an act of assault constituting serious misconduct warranting dismissal.

[60] On the evidence, I do not believe that it was reasonable of the arbitrator to conclude that this was a simple matter of the applicant committing misconduct in the form of an assault in the sense of conveying an immediate and malevolent intent to cause physical harm to his colleagues. It should have been obvious that the risk of the applicant becoming violent was raised by him as a plea for help because he could not cope with what he perceived to be the hostile conduct of his colleagues towards him. The only reasonable conclusion to draw from the University not taking immediate steps to remove him from the presence of his colleagues but to ask him to undergo counselling was that it also recognised those utterances did not constitute misconduct, even if they were indicative of a serious issue which needed to be resolved. Undoubtedly, the University was faced with a problem when its chosen approach to dealing with it was undermined by the applicant withdrawing from the counselling process. Instead of escalating the matter by initiating an inquiry into the applicant's capacity to continue working in the Department, the University clumsily and belatedly decided to deal with it simply as a matter of misconduct.

[61] In the light of all the evidence before him, the arbitrator's conclusion that the applicant was guilty of assault and ought to be dismissed for that reason is not one that a reasonable arbitrator could have reached in my view.

Determination of appropriate relief

[62] The effect of the finding on the unreasonableness of the Commissioner's conclusion that the applicant was guilty of assault is that his dismissal for that reason was substantively unfair. The question the Court must then consider is what an appropriate relief should be. Ordinarily a finding of substantive unfairness would give rise to an order of reinstatement. However, on the facts of this case I believe the circumstances are such that a continued employment relationship would be intolerable for the following reasons. The applicant's utterances did require the University to take action. The remedial action it initially took was to initiate counselling for the applicant. He, of his own accord, abandoned that process apparently because he did not perceive himself as the one having problems, but that the problems lay with his other colleagues. He did not challenge the evidence of Prof. Pienaar to this effect. The applicant approached Prof. Pienaar on the basis that he might not be able to control his actions if he continued to be harassed by his colleagues, as he perceived it. He claims that after he had spoken to Prof Pienaar the harassment did stop and by implication the possibility of him 'cracking' diminished. It should also be mentioned that he reached this critical potentially dangerous state before he had even filed a grievance about the harassment.

[63] Under these circumstances, if the Court were to reinstate the applicant, who on the one hand felt he might involuntarily do something dangerous but on the other was not prepared to undergo counselling in an effort to address the problem, the Court would be as irresponsible as an employer that did nothing when an employee declined to cooperate further with remedial measures it had set in place. I am aware that the applicant is of the firm belief that his problems lay entirely with his colleagues and not with him and that the University failed to address his grievances about

victimisation. I also note his claim that he believed the harassment stopped after he had spoken to Prof Pienaar and that he believes that Prof. Pienaar acknowledged the existence of harassment by saying that it should stop. However, Prof. Pienaar made it abundantly clear that in his view it was merely the applicant's perception that he was being harassed and that objectively speaking there was no basis for saying that. Indeed, if one has regard to some of the examples he gave as evidence, it is not unreasonable to conclude that the applicant construed remarks by, and social interaction with, his colleagues negatively, even if that conduct could be interpreted quite differently. There was also evidence that colleagues had complained that they found him difficult to work with. In these circumstances, where the applicant believes no remedial action is required on his part to minimise the possibility of a recurrence of the situation which had arisen by20 March 2012, reinstatement would be intolerable and at the very least not reasonably practicable.

[64] Consequently, the alternative remedy of compensation must be considered. The applicant was employed by the University for over three and a half years at the time of his dismissal. Even though the applicant's dismissal for misconduct was misguided and incorrect, the applicant's abandonment of counselling as one constructive approach to dealing with the underlying issues is also a factor affecting the appropriate level of compensation. In the circumstances, I believe that compensation in the amount of five months remuneration is reasonable and fair.

[65] In light of the above, it is ordered that:

65.1 The applicant's late referral of this review application is condoned.

65.2 The finding of the second respondent in his award dated 10 November 2013 issued under case number GAJB 33496-12 that the applicant's dismissal for misconduct was substantively fair is reviewed and set aside, and is substituted with a finding that the applicant's dismissal for misconduct was substantively unfair.

65.3 The third respondent must pay the applicant compensation equivalent to five months' of his remuneration calculated at the rate

he was earning in December 2012 within 15 days of the date of this judgement.

65.4 No order is made as to costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: In person

For the First Respondent: J P Swanepoel instructed by Verster-Roos Inc.