REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

CASE NO:JR2014/11

In the matter between:-

JUNIUS KOBE AND 1 OTHER **Applicants**

and

COMMISSIONER FOR CONCILITIAN MEDIATION AND ARBITRATION **First Respondent**

FRANCIS MAAKE KGANYAGO N.O **Second Respondent**

POTGIETERSRUS PLATINUM MINE **Third Respondent**

Heard: **3 February 2014**

Delivered: **10 March 2014**

Summary: Employees and co workers lodged a complaint against their manager. Management not responding- matter escalated to CCMA as grievance- Employees victimized- Employees then found guilty and dismissed in their absence- Not notified of date of hearing- Non compliance with Code of Good Practice: Dismissals- Employer not complying with Health and Safety Act for blasting certificates- Employer not complying with procedural fairness no separation of powers in management.

JUDGMENT

FOUCHÉ AJ

Introduction

[1] This is an application in terms of Section 145 of the Labour Relations Act (LRA) 66 of 1995, for the review and setting aside of an award LP 7752-10, where the Second Respondent (Commissioner Kanyago) found that the dismissal of the Applicants were procedurally fair.

[2] The award was issued on 20 June 2011. The Applicants were represented during the arbitration hearing by Mr. Ngobeni, an union representative. After receiving the outcome of the Arbitration hearing, the Applicants, on 4 July 2011, erroneously noted the application for review at the CCMA (Polokwane). Subsequent to the erroneous noting, the Applicants received a CCMA notification and filed the application for review at the Labour Court on 23 August 2011.

[3] The Third Respondent opposed the matter on 10 October 2011 but filed their Answering Affidavit on 17 January 2014.

[4] The Applicants sought condonation for the late noting of the application for review at this Court. After hearing argument, condonation was granted.

Relief sought

[5] In the Applicant's Founding Affidavit, the following relief is sought:

> 'That the arbitration award under case number LP 775210 dated 20 June 2011 be reviewed and set aside;
>
> That costs of this application be paid by the Respondents who opposes this application'.

[6] In the Answering Affidavit, the Third Respondent prayed that the Application for review be dismissed with costs.

Facts

[7] The Applicants had no legal representation during the drafting of the present Founding Affidavit before this Court. The affidavit was written by laypersons and is unusual in format as it contains a summarized version of the evidence, called "survey of evidence".

[8] The survey of evidence contains the versions of all the witnesses who testified during the arbitration hearing. It states that Mr. Ramaku, the assistant employee relations officer, notified both of the Applicants to appear at a disciplinary hearing on 25 August 2010. On even date the Applicants requested a postponed in writing. In their absence, the matter was postponed to 31 August 2010 to enable the Applicants to obtain union assistance. On 31 August 2010, the Applicants attended the hearing together with a union representative from FEDCRAW (Federal Council of Retail and Allied Workers). Mr. Mdingi, the chairperson of the hearing postponed the matter *sine die* and held that the Applicants were not entitled to be represented by a non recognised union.

[9] The First and Second Applicants were employed by the Third Respondent as Road Stone crusher foremen. They state in their affidavits that the charges proffered by the Third Respondent against the Applicants was a direct retaliation act following the written grievances lodged by the Applicants and co-workers against their immediate supervisor, Mr. Maade. The Applicants alleged that Mr.Maade threatened to demote them to lower ranking positions and had allegedly abused his powers.

[10] It is clear from the facts presented to the Court that Third Respondent was restructuring certain jobs. Mr. Maade held various staff meetings aimed at

moving the Applicants from the position of foremen working on the crushers to the pit.

[11] The disciplinary hearing of 31 August 2010 was re-scheduled to 3 September 2010. Neither of the Applicants was present at the new hearing date. The Third Respondent argued before this Court that the Applicants refused to sign notifications to appear at this hearing. In juxtaposition, the Applicants stated they were not notified of this date. The hearing of 3 September 2010 proceeded in the absence of the Applicants. As a result thereof, Mr. Maade signed the Applicant's suspensions. The Respondent's Procedure Manual contains the formal procedure hearings rules. It stipulates who may suspend and authorise suspensions of employees. Clause 2.4 states that:

> '2.4 In the event that, after considering the issues set out in 2.1-2.3 above, the manager decides that the employee should be suspended then that manager must ensure that:-
>
> 2.5 The notification of the suspension is issued to the employee in writing utlising the appropriate form;
>
> 2.6 The notification of suspension must specify the time period of a suspension;
>
> 2.7 The notification of suspension must specify that the employee will not be required to work during the period of suspension unless the suspension was lifted prior to the expiry of the time period;
>
> 2.8 The notification of suspension must state that the employee may be required to report to his/her place of work in the event that the employee be required to assist and/or participate in investigations related to his/her misconduct or the misconduct of other employees. Failure by an employee to report when instructed to do so by management could result in further disciplinary action being taken against the employee in question.

2.9 All suspensions must be authorised by the General Manager or his/her nominated representative if he/she is not on site.'

[12 Mr. Maade was in terms of Clause 2.9 above, the Business Unit Manager's nominated representative. He was thus the person who suspended employees and thereafter authorised it. Bundle D, page 33, records that in the arbitration award between the present Applicants under case number LP4581-10 of 9 December 2010, Mr. Maade indeed held both the position of supervisor and nominated Business Unit Manager. The Applicants' suspension was accordingly not properly authorised and was substantially unfair.

[13] During the arbitration proceedings of 20 June 2011, the Commissioner's focus was solely on the question whether the Applicants had notification that 3 September 2010 was the disciplinary hearing date.

[14] The Third Respondent charged the Applicants with the following counts:-

'(1) insubordination,

(2) insolence,

(3) refusal to obey lawful instructions.'

[15] The Applicants on 20 August 2010, at the receipt of the notice to appear at the disciplinary inquiry, send a written request to the Chairperson for postponement in order to find representation. The postponement was granted and a subsequent notification was served on them to appear on 31 August 2010. On even date, the Applicant appeared at the hearing together with FEDCRAW. As FEDCRAW is not a union recognised by the Third Respondent, the hearing was postponed *sine die.*

[16] The Applicants in June 2010 lodged a written grievance against their supervisor, Mr. Maade. They aggrieved the following actions of Mr. Maade:

'(a) Abuse of power

(b) Forced, intimidation and threatened

(c) Malicious words.'

[17] The Applicants received no response from management in respect to these charges. This culminated in their receipt of suspension letters on 28 July 2010. At the time of receipt of the notice to appear at the August 2010 disciplinary hearing, the Applicants were still awaiting the CCMA's response to their grievance against Mr. Maake.

Submissions of the Parties

[18] The Applicants stated that they arrived together to appear at the hearing of 31 August 2010. The chairperson did not hear evidence as the only point of discussion was their request to be represented by FEDCRAW. The Third Respondent refused to allow FEDCRAW to represent the Applicants as the Third Respondent did not recognise the union. The Third Respondent submitted the representation by FEDCRAW was against company policy.

[19] Pursuant to the exclusion of FEDCRAW as representative union of the Applicants, Mr. Ramafola of the Third Respondent handed Annexure "JK7", being the Procedure Manual, to the Applicants wherein it is recorded that a non recognised union may not appear at disciplinary hearings. The Applicants left the meeting together after receipt of Annexure "JK7".

[20] The Applicants referred the Court to the Procedure Manual, to substantiate their submission that the Third Respondent applied the incorrect procedure. Mr. Maade firstly, in the capacity as their supervisor, and secondly, in the capacity as the Business Unit Manager's representative signed and authorised their suspension. Their suspensions were not properly authorised and thus unfair.

[21] The Applicants were restricted from entering the premises of the Third Respondent and neither of the Applicants entered the premises for a disciplinary hearing, but for 31 August 2010, together with FEDCRAW.

[22] The Respondent argued that the disciplinary hearing of 31 August 2010 could not continue, and it was postponed by the Chairperson, Mr. Mdingi to 3 September 2010. As neither of the Applicants was present on 3 September 2010, the disciplinary hearing was held in their absence. The Third Respondent on advice of Mr. Mdingi, a chief geologist, continued with the hearing in the Applicants' absence.

[23] The Applicants averred that they never received notification of the disciplinary hearing of 3 September 2010 and accordingly was not wilful or reckless by non attending.

[23] The Third Respondent argued that Mr. Ramafola postponed the matter to 25 August 2010 in the Applicants' presence to 3 September 2010. It is clear that this is factually incorrect as the postponement of 25 August 2010, occurred in their absence following a written request of the Applicants.

[24] The Applicants argued that their suspension and subsequent dismissal flow from the grievance which they and their co-workers lodged with the management against Mr. Maade. As the management failed to deal with the matter, they approached the CCMA for an intervention. Resultant was the disciplinary proceedings Mr. Maade started against the two Applicants.

[25] The Applicants argued that their suspension was confirmed by Mr. Maade sitting in two roles, as their line supervisor, and the nominated representative of the Business Unit Manager, which invalidates it.

[26] Applicants furthermore argued that they are not correctly qualified to be transferred to work on the pit as neither of the Applicants holds blasting certificates. Neither the First nor the Second Applicant can thus legally be

employed to work on the pit, as they are from the perspective of safety and operational requirements not adequately trained.

[27] The Third Respondent argued that corroboration of the wilfulness and disobedience of the Applicants to attend the hearing of 3 September 2010 is found in the fact that the Applicants refused to sign the disciplinary notifications. The Court was referred to the Annexures "JK1", Bundle A on page 78, being the Notification/Summons to attend the hearing. Third Respondent argued that the chairperson followed the correct procedure to continue the disciplinary hearing in the absence of the Applicants. After perusing Annexures "JK1", the Court is satisfied that it refers only to the dates 25 August 2010 and 31 August 2010 and not 3 September 2010.

Evaluation of the parties submissions

[28] Annexure "JK1" the Notification/Summons to attend the hearing indeed reflects that it was personally signed by the First Applicant. During the arbitration hearing, Mr. Ngobeni on behalf of the Applicants cross-examined Mr. Ramafola on the notification. In Bundle C pages 75 the following statement is found:-

> 'Ms. Ramafola: What are they referring to, to the notification or to the rep because I refuse to I am the ER in the matter and I refuse to communicate with FEDCRAW at all times so I never send them any letter so I don't know what you are talking about.'

[29] Ms. Ramafola's above statement corroborates the Applicants' version that they were not present at the disciplinary hearing of 3 September 2010 as they were not notified of the hearing date.

[30] Mr. Ngobeni, of the union, who represented the Applicants during the arbitration hearing of 13 April 2011, conducted the defence of the Applicants in English. From the commencement of the proceedings, it was clear that Mr. Ngobeni did

not understand the procedure and processes. On page 2 of Bundle C of the Arbitration record, the following is recorded:-

> 'Commissioner: Is dismissal in dispute or was the employee not dismissed?
>
> Mr. Ngobeni: Yes.
>
> Commissioner: Yes, what?
>
> Mr. Ngobeni: That the Applicant was dismissed.'

[31] During the Arbitration hearing, Mr. Ngobeni did not confirm with the Applicants. Neither did the Commissioner confirm with the Applicants if they agreed with the statement on behalf of their union representative. On page 3 of Bundle C of the Arbitration record, the following is recorded:-

> 'Commissioner: Is that all, the opening statement, Mr. Ngobeni.
>
> Mr. Ngobeni: Thank you Mr. Commissioner as far as we know in this matter the applicant is going to contest procedure substance will not be in dispute.'

Relevant requirements pertaining to dismissals

[32] In accordance with Section 192(1) of the LRA,[1] the Applicant bears the *onus* to prove on a balance of probabilities that a dismissal occurred. Once it has been proven, the *onus* shifts to the employer to prove that the dismissal was fair. The Applicants were both dismissed after being found guilty at the disciplinary hearing in their absence. Mr. Maade testified that the Applicants repeatedly refused to obey lawful instructions. According to Mr. Maade, their refusal to work in the open pit serves as an example.

[1] Section 192 of the LRA reads as follows:
"192. Onus in dismissal disputes
(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair."

[33] Grogan[2] in dealing with the Code of Good Practice: Dismissals, states that consistency should be applied when dismissing employees, specifically, employees participating in the same set of conduct. Paragraph 6 of the Code of good Practices reads as follows:-

> '(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently, as between two or more employees who participate in the misconduct under consideration.'

[34] It is trite law that the disciplinary hearings must be procedurally and substantially fair. Procedural fairness requires compliance with natural justice, the *audi alteram partem* rule[3] and company policies and procedures[4].

[35] Adverse evidence available to the disciplinary officer must be disclosed to the employee and/or his representative for challenge.[5]. Enabling the representing party to challenge evidence impacts on two aspects in this case. Firstly, that another employee has successfully challenged the illegality of a suspension performed and authorised by the same person (Mr. Maade) and not by two separate and distinct persons as required in the Third Respondent's procedure Manual. Mr. Maade was thus the player and referee at the same time, wearing different hats to serve the relevant step or occasion. Secondly, the right of fair proceedings before the arbitrator.

[36] It is trite law that fair reasons must exist to terminate the employment contract legitimately. Reasons for the termination must exist such as: the conduct of the employee, the capacity of the employee and, operational requirements of the employer's business. The Act prescribes that a dismissal is automatically unfair if the reason for the dismissal amounted to an infringement of the fundamental rights of the employees and trade unions, or if the reason is one of the listed

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[2] Grogan *Workplace Law* 9th edition Schedule 8, Code of Good Practice: Dismissal, Page 461 at 463.
[3] See *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986)7 ILJ 346 (LC).
[4] See *NUM and Others v Zinc Corporation of South Africa Ltd* (unreported LAC case No 11/2/11462). See also *Sibiya v NUM* [1996] 6 BLLR 794 (LC) at 801.
[5] See *Yichiho Plastics (Pty) Ltd v Muller* (1994) 15 ILJ 593 (LAC).

grounds in Section 187 of the Labour Relations Act. Section 187 reads as follows:

> "Section 187. Automatically unfair dismissals
>
> (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is-
>
> (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
>
> (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
>
> (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;
>
> (d) that the employee took action, or indicated an intention to take action, against the employer by-
>
> (i) exercising any right conferred by this Act; or
>
> (ii) participating in any proceedings in terms of this Act."

[37] In cases where a dismissal is not automatically unfair, the employer must show that the reasons for dismissal related to the employee's conduct or capacity or is based on the operational requirements of the business. Where the employer fails to do that or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.[6]

[6] See Grogan at 462.

[38] Grogan[7] opines that five guidelines determine the fairness of a dismissal for misconduct, being:-

> 'Any person who is determining whether a dismissal for misconduct is unfair should consider-
>
> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace, and
>
> (b) if a rule or standard was contravened, whether or not-
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard
>
> (iii) the rule or standard has been consistently applied by the employer, and
>
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.'

Relevant principles pertaining to employees absence during proceedings

[39] Employees must be present at the hearing to challenge the facts adduced.[8] It is only in exceptional circumstances that the employer may proceed in the absence of the employee.[9]

[40] It was held in *OTK Operating Company Ltd v Mahlangu*[10] that the employee should be allowed in his defence or in mitigation to call a witness or to cross-

[7] See page 464.
[8] *Van Zyl v O'Kiep Copper Co* (1983) 4 ILJ 125 (LC); *National Union of Metalworkers of SA and Another v Barlow Tractors Co* (1992) 13 ILJ 1281(LC).
[9] See *Ntsibande v Union Carriage and Wagon Co (Pty) Ltd* (1993)14 ILJ 1566 (LC), where it was held that the employee must be given access to use an interpreter when necessary.
[10] [1998] 6 BLLR 556 (LAC).

examine the employer's witnesses. Similarly, the employer has the right to cross-examine the employee's witnesses.[11]

[41] It was held in *Leonard Dingler (Pty) Ltd v Mgwenya*[12] that the consequence of procedural unfairness in accordance with Section 193 of the LRA is to grant reinstatement, where the dismissal is proved unfair and the employee so desires.

[42] Grogan[13] opines thatwhere the employer merely failed to comply with fair procedure, compensation should be awarded, except in case of a trifling procedural irregularity where the Courts may exercise their discretion not to award compensation.

[43] In *Jabhari v Telkom SA (Pty) Ltd,*[14] an employee was dismissed after the chairperson on the disciplinary inquiry found that the employment relationship had irretrievably broken down as the employee was incompatible with the "corporate culture". The employee claimed he was unfairly dismissed due to the initiated grievance and legal proceedings against management. The Court found that the employee was victimised and that the dismissal was automatically unfair.[15].

Grounds of review

[44] The Third Respondent in his heads of argument records that the Applicants raised three grounds of review:

[44.1] Firstly, that the Commissioner committed a gross irregularity during the arbitration proceedings by failing to provide reasons for his conclusion.

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[11] *Hartlief Continental Meat Products (Pty) Ltd v Mutotua and Others* (2000) 21 ILJ 1421 (LCN). See also *Magic Company v CCMA and Others* (2005) 26 IJ 1271 (LC).
[12] (1999) 20 ILJ 2531 (LAC).
[13] *Workplace Law* 208.
[14] (2006) 27 ILJ 1854 (LC).
[15] In *NUMSA obo Joseph v Hill Side Aluminium* (2004) 25 ILJ 2264 (BCA) it was held that the making of frivolous allegations is automatically unfair as the dismissal prejudiced the finding of the Court in the pending matter.

[44.2] Secondly, that the Commissioner committed a gross irregularity by failing to act inquisitorially during the arbitration proceedings.

[44.3] Thirdly, the Commissioner failed to accurately record and reflect the evidence presented during the arbitration in his award.

The award

[45] The Commissioner's award is as follows:-

> '6.1. That the respondent had discharged their onus of proof and therefore the dismissal of the applicants was procedurally fair.
>
> 6.2 There is no order as to costs.'

Evaluation of the award

[46] The grounds for review set out in Section 145 of the Labour Relations Act are:-

> '(1) any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
>
> (a) within six weeks of the date that the award was served on the applicant
>
> (2) a defect referred to in subsection (1) means-
>
> (a) that the commissioner-
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award had been improperly obtained'.

[47] The Applicants had no legal assistance in the drafting of the application for review. In their Founding Affidavit, the Applicants avers that the commissioner in arriving at his factual and legal conclusions reached a conclusion which a reasonable decision-maker would not have reached. In paragraph 1.6.1 of the Founding Affidavit, the following is stated

> 'It is therefore submitted that if the commissioner had given regard to the contex of the manual together with the first respondent concession that they were supposed to give the applicant an opportunity to challenge both alleged charges in both substantive fairness commissioner would not have concluded that the.(Applicant's Founding Affidavit contains this incomplete sentence)

[48] During argument in Court, the Court was referred to clauses 2.4 to 2.9. of the Third Respondent's Procedure Manual on Formal Hearings. It was stated that Clause 2.4 empowers the line manager to suspend employees after due consideration. Thereafter Clause 2.9 empowers the Business Unit Manager or the duly appointed representative to authorise the suspension. Applicants argued that due process rights, equity and fairness require the Third Respondent to appoint two separate persons to comply with these two distinct functions.

[49] In the case of the Applicants, Mr. Maade, their line supervisor and manager, was the duly appointed Business Unit Manager representative. The separate functions required in clause 2.4, being the consideration function and in clause 2.9 the authorisation function, were thus performed by Mr. Maade.

[50] The Third Respondent did not offer any explanation or another interpretation to clauses 2.4 and 2.9 of the Third Respondent's Procedure Manual. The matter is thus not contended and thus *caedit questio*.

[51] Applicants in their Founding Affidavit under the paragraph "Relief Sought" stated that the Commissioner failed to record the full arbitration proceedings. They state

that the arguments on substantive fairness were not recorded. In paragraph 1.6.0 of the Founding Affidavit, the Applicants state that the Commissioner ignored their statements based on substantive fairness and only recorded the aspects dealing with procedural fairness. Similarly in paragraph 5.2 of the Founding Affidavit, it is stated that:

> '5.2 On the date of the arbitration the two applicants wanted to challenging both substantive and procedural fairness but the applicants challenge to this was not taken.'

[52] The Third Respondent in the Answering Affidavit responds to these allegations by stating firstly that the contents is noted, then that the Applicants only challenged procedural fairness and not substantive fairness.

[53] The record does reflect that prior conversations occurred between the Commissioner and the Third Respondent, which was not recorded. On page 6, bundle D Lines 8-15 the following is found:

> 'Commissioner: I hope you are not going to call the people that will deal with the substance.
>
> Ms. Ramafola: I told you I have got two witnesses to talk to the procedure and two witnesses to talk to the substantive part.'

[54] It must be noted that the union representative of the Applicants did not respond to the above passage. It appears that one of the Applicants heard this conversation and responds as follows:

> 'Mr. Kobe: Before you go on I should go to some other documents.'

[55] Neither of the parties before me illuminated on this statement by Mr. Kobe (First Applicant). It was not denied by the Third Respondent that the First Applicant intervened in the process, neither that the record might be defective.

[56] To exasperate the matter, the record reflects that the request to peruse documents was ignored. In Bundle D page 7 lines 7-15 the following is found:

> 'Commissioner: Bundle B and for the respondent, bundle A. You may proceed.
>
> Mr. Ngobeni: I am just going to make a last request, to have five minutes to check these documents before we proceed
>
> Commissioner: Maybe in the meantime you know that you are challenging procedure; to make a statement will not be possible, if the parties can consider.'

[57] The *crux* of the Applicants' grounds of review is thus that the Commissioner acted irregularly by not allowing the Applicants the opportunity to state their case. This was argued resulted in an unfair trial and non-compliance with their fundamental rights and rules of natural justice.

[58] The Applicants stated in the Founding Affidavit that the discrepancies between the Third Respondent's witnesses were ignored. Mr. Rakumaku testified that the Applicants appeared in person at the hearing of the 25 August 2010, whilst Mr. Mdingi testified they requested a postponement by a written letter *in absentia*. This resulted in the Applicants not having a fair trial.

[59] In *Carephone (Pty) Ltd v Marcus NO and Others,*[16] which was decided before the advent of PAJA, the Court enunciated the test for Section 145 of the Labour Court reviews as:

> '...is there a rational objective basis for justifying the connection made by the administrative decision maker between the material property available to him and the conclusion he or she eventually arrived at?'

[60] In *Nampack Corrugated Wadeville v Khoza,*[17] the Labour Appeal Court held that:

> '....this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable'.

[16] 1999 (3) SA 304 LAC; (1998)19 ILJ 1425 LAC; [1998] 11 BLLR 1093 (LAC).
[17] (1999) 20 ILJ 578 (LAC); 1999 2 BLLR 108 LAC at paragraph 33.

[61] In *Rustenburg Platinum Mines Ltd (Rustenburg section) v Commissioner for Conciliation, Mediation & Arbitration and Others,*[18] the Labour Appeal Court stated that Section 33 of the Constitution extended the scope of review and introduced a requirement of rationality in the outcome of decisions. Section 33 of the Constitution states that:-

> '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

[62] An objective inquiry must take place during the arbitration proceedings and must be reflected in the Arbitrator's award.[19] The award must be rationally connected to the information before the arbitrator and the reasons entered on the record. It must be established if the arbitrator properly exercised the powers given to him in compliance with Section 3 of the Labour Relations Act and the Constitution. The rational objective test set out in *Carephone infra*, must thus be applied.

[63] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[20] Navsa AJ held that a Commissioner conducting a CCMA arbitration performs an administrative function and that the Promotion of Administrative Justice Act does not apply to arbitration matters in terms of the Labour Relations Act.

[64] In *Heroldt v Nedbank Ltd,*[21], the Court found that the test applicable to Section 145 LRA reviews recognises that dialectical and substantive reasonableness is intrinsically interlinked and that latent process irregularities carry the inherent risk of causing a possible unreasonable outcome. The Court must scrutinize the Commissioner's reasons to determine whether a latent irregularity occurred, being an irregularity in the mind of the Commissioner, which is only ascertainable from the Commissioner's reasons. On page 1802, Murphy AJA in paragraph 39 states:-

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[18] (2007) 28 ILJ 1107 (LC).
[19] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); [2004] (7) BCLR 687 (CC) at paragraph 25.
[20] 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC).
[21] (2012) 33 ILJ 1789 (LAC).

> 'There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the inquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different.'

[65] The Applicant argued before the Court, that the Commissioner in making the award overlooked certain material facts, being:-

65.1. The Applicants challenged both the procedural and substantive unfairness of their dismissal.

65.2. The Third Respondent presented two mutually destructive versions in respect of the attendance of the Applicants at the hearing of 25 August 2010.

65.3. That the Applicants were by law not permitted to work on the pit as they do not hold blasting certificates.

65.4. Their dismissal flowed from the grievance lodged by the Applicants against their line supervisor, Mr. Maake.

65.5 The evidence of the witnesses on behalf of the Third Respondent was inconsistent and untruthful, which was not put to the Third Respondent for clarification.

[66] It is trite law that a disciplinary hearing must be fair. Points of non-compliance with natural justice, substantial unfairness were raised by the Applicants in the Founding Affidavit.[22] As a result of points raised of substantial unfairness during the arbitration, the Applicants brought this review.[23]

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[22] See *Hotellica and Another v Armed Responses* [1997] 1 BLLR 80 (IC).
[23] See Nasionale Parkeraad v Terblanche 1999 20 ILJ 1520 LAC; See also Grogan *Workplace Law* 205.

[67] The Applicants submitted that the proceedings were not properly recorded. In *NUMSA v John Thompson Africa (Pty) (Ltd),*[24] it was held that to refuse the person arraigned to refute allegations constitutes unfairness *per se*, which vitiates any reliance on prior statements as these were not tested under cross-examination. Accordingly, these proceedings were nullified by virtue of lack of proper and complete recording. In *Klaasen v CCMA and Others,*[25] Murphy AJ, in the context of an employee not testifying in a misconduct case, held as follows:-

> '[27] Commissioners acting under the auspices of the CCMA in terms of the LRA are expected to act inquisitorially or investigatively. Section 138(1) of the LRA provides that a commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with a minimum of legal formalities. This includes stepping into the arena to direct the proceedings in the interests of justice.
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> In Consolidated Wire Industries (Pty) Ltd v CCMA [1999] 10 BLLR 1025 (LC) the Labour Court stated:
>
> "The parties were laymen unrepresented by legal practitioners and without the benefit of pleadings to tie the parties to a version.
>
> When a version is charged [sic:changed] or a new version is suddenly presented the arbitrator must take charge of proceedings. He cannot rely on the parties to realise what it expected of them unaided."
>
> [28] By the same token, and perhaps even more so, one might expect the commissioner to take charge by instructing a party to put a version (of which he is aware) under oath or risk the consequence of an adverse inference or his acceptance of the uncontradicted testimony. The failure to give that warning, in the light of a commissioner's inquisitorial function and duties, in my assessment, constitutes a reviewable irregularity'.

[24] [1997] 7 BLLR 932 CCMA.
[25] [2005] 10 BLLR 964 (LC) at paragraphs [26]- [28].

[68] The award placed before this Court, does not muster the recording requirements. The recording reflects defects. It does not indicate, if the recording devices was switched on or off at intervals or arguments or deliberations. It does reflect that Mr. Kolbe (the First Applicant) made interjecting statements into the record, without recourse. There is uncertainty whether all issues, more specifically the issues highlighted by the Applicants were ventilated during the arbitration proceedings. The record before the Court does not reflect that the parties were warned of the consequences of the drawing of an adverse inference or the acceptance of uncontested evidence or not attacking the substantiveness of their dismissal.

[69] According to the Applicants, the Commissioner ignored all the material evidence relating to the conduct of the Third Respondent and Mr. Maade. The Applicants allege that the Commissioner failed to ensure that the cross-examiner understood their right to cross-examine and to put their version to each of the witnesses in order that issues be ventilated. There is no record that all issues were ventilated. Neither that the Commissioner stepped into the area to direct the proceedings. The Record does not reflect that witnesses were given the opportunity to provide explanations on issues in dispute.[26] It is clear that not all issues were ventilated and that the required warnings were not given by the Commissioner to the parties. In President of the *Republic v SA Rugby Football Union,*[27] the following was said with regard to the cross-examination process:

> 'It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, or to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.'

[26] See: *ABSA Brokers (Pty) Ltd v Moshoana NO and Others* [2005] 10 BLLR 939 LAC.
[27] 2000 (1) SA 1 (CC).

[70] The inquisitorial functions and duties of the Commissioner during arbitration proceedings are as follows[28]:-

70.1 The Commissioner has a duty to point out to the parties that a new version was put by a witness;

70.2 The Commissioner has to instruct the parties to put a version of which he/she is aware under oath;

70.3 The Commissioner has to warn the parties that an adverse inference could be drawn of his acceptance of uncontested testimony.

[71] The possibility exists that the learned Commissioner could have given these three warnings to the parties and indeed as required by the Commissioner's inquisitorial role. As the full record was not recorded, these cannot be excluded. It is clear that the Commissioner did not descend to the arena when necessary. However, without the proper and comprehensive mechanical recordings, the possibility that the parties were given the above three warnings, cannot be negated or excluded. The Court perused the Review application, Bundles B, C and D. The mechanical recording is in Bundle D, which is incomplete. Conversations took place which was not recorded. Bundle C contains a copy of the Third Respondent's Procedure Manual, which is relevant for determining substantive fairness and procedure.

[72] The arbitrator made the following final finding during the award:

> 'The two applicants were not happy with the fact that their union representative was not allowed to represent them during the internal hearing and also the fact that the respondent wanted to proceed with the disciplinary hearing before the pending arbitration was finalized. As a sign of displeasure, they stayed away from the disciplinary hearing of the 03/09/10. By intentionally failing to attend the

[28] See: *Klaasen v CCMA and Others* [2005] 10 BLLR 964 (LC) at paragraphs [26]- [28]. See also *Republic v SA Rugby Football Union* 2000 (1) SA 1 (CC).

> disciplinary hearing on the 03/09/10 they were the creator of their own demise, the respondent has been generous with them and by proceeding with the disciplinary hearing on 03/09/10 in their absence had acted in a fair manner. There was nothing more the respondent could do in order to accommodate them.'

[73] I reject the final finding made by the Commissioner during the hearing as nonsensical. There is no factual basis to substantiate the above finding. I find in favour of the Applicants that they were not adequately trained to work on the pit. They have not completed the blasting certificate, which was the pre-requisite in terms of the Health and Safety Act for working on the pit.[29] This together with the grievance the Applicants and co-workers lodged against their immediate supervisor, Mr. Maade, convincingly sways the matter in favour of the Applicants.[30]

[74] Accordingly, it is the Court's finding that an irregularity occurred due to the incompleteness of the record, the incorrect recording of the matter, the discussions between the Commissioners and Representatives, which was not recorded, the failure to give the required warnings to the Applicants, the failure to address the issues raised by the First Applicant as an interjection appearing on the typed record, the failure to apply the Third Respondent's Procedure Manual to the dispute. The matter must be remitted for a hearing *de novo.*

[75] Both parties asked the Court to award costs in their favour. As a result of the fact that neither of the parties was the direct cause of referring the matter back to the CCMA, no party should be penalised with a costs order.

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[29] See Bundle D page 113.
[30] See *Jabhari v Telkom SA (Pty) Ltd* (2006) 27 ILJ 1854 (LC).

Order

[76] For these reasons, my order is as follows:-

i) the application for Review is upheld

ii) the matter is remitted back to the CCMA for a hearing *de novo*;

iii) The CCMA is directed to send the matter to a senior Commissioner for hearing with the instructions to:-

a) warn the parties of their fundamental rights;

b) to alert the parties if a witness put a new version;

c) to instruct the parties to put a version under oath of which he is aware;

d) to warn the parties that an adverse inference can be drawn of the parties' acceptance of uncontested testimony put before the Commissioner

e) to record the above warnings in the record

iv) The Commissioner is directed to hear the Applicants' version on both the substantive fairness and the procedure applied during the dismissal;

v) No order as to costs.

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C. Fouché

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT	Edward Nathan Sonnenbergs
FOR THE THIRD RESPONDENT:	TP Phahla Attorneys