Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C477/2022

In the matter between:

ARGON ASSET MANAGEMENT (PTY) LTD	**Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER L. MARTIN *N.O.*	**Second Respondent**
LUYANDA JOXO	**Third Respondent**

Date of Hearing: 15 August 2024

Date of Judgment: 19 November 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to

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SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 19 November 2024.

Summary: (Application to review a CCMA award – dismissal for misconduct – commissioner's findings on substantive and procedural fairness reviewably unreasonable – award set aside and substituted with a finding that the dismissal was fair.)

JUDGMENT

LESLIE AJ

Introduction and background

[1] This is an opposed application, brought in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA"), to review and set aside an arbitration award ("the award") issued under the auspices of the first respondent ("the CCMA") by the second respondent ("the commissioner").

[2] The third respondent's opposing papers were delivered 81 days late. He has brought a substantive application for condonation, which is opposed. The explanation for the delay is essentially based on his poor financial circumstances following his dismissal, which left him unable to pay his legal representatives, coupled with the fact that ongoing settlement discussions were taking place. Although the delay is substantial, it has been adequately explained. On a conspectus of the relevant factors, I am satisfied that there is good cause to condone the late delivery of the answering papers.

[3] The applicant is Argon Asset Management (Pty) Ltd ("Argon"), an authorised financial services provider which operates an investment management business in South Africa. Its board comprises five directors – three non-executive directors and two executive directors, the latter being:

3.1 The third respondent, Luyanda Joxo ("Joxo") who, at the time of his dismissal was employed by Argon as its Deputy Chief Executive Officer and Head of Institutional Business; and

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3.2 Dr Manas Bapela ("Bapela"), Chief Executive Officer ("CEO") and Chief Investment Officer ("CIO") at Argon – to whom Joxo reported.

[4] At the time of Joxo's dismissal, on grounds of alleged misconduct, Argon's shareholding was as follows:

4.1 49% of the shares were owned by a staff empowerment trust; and

4.2 The balance of 51% was held, in approximately equal percentages, by Bapela, Joxo and Mr Sello Setai ("Setai") (Argon's Chief Operations Officer and a member, along with Bapela and Joxo, of Argon's executive committee.)

[5] On 11 May 2021, Joxo was issued with a notice to attend a disciplinary hearing to answer the following allegations of misconduct:

"1. You have acted in an inappropriate manner towards Dr Bapela, the CEO of the Company by:

1.1 adopting an abusive and/or disrespectful attitude towards the CEO in various telephone conversations with him;

1.2 failing and/or refusing to sign your KPA;

1.3 launching the new company website without obtaining any feedback from the CEO in this regard.

2 You have been grossly negligent, alternatively, acted in dereliction of your duties, by failing to:

2.1 hold the required quarterly number of Environmental and Social Governance ("ESG") committee meetings as required, despite you having committed to hold the meetings;

2.2 provide written reports to the CEO in respect of your division despite a number of undertakings to do so.

3 You have acted in conflict with the best interests of the Company by:

3.1 failing to inform the CEO of, or invite the CEO to, a due diligence meeting scheduled with a client, Momentum Investments, on 30 April 2021;

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3.2 failing to inform the CEO of, or invite the CEO to, a report-back meeting scheduled with the Company's largest client, the PIC, on 3 May 2021;

3.3 furthermore, failing to then attend the meeting without informing either the Company representatives present at the meeting or the client of your non-attendance;

3.4 threatening to unilaterally hold a staff meeting to disclose your apparent unhappiness when the other members of Exco required further time to consider your proposed new management structure;

3.5 deciding unilaterally that you will take a sabbatical without first raising this issue with the CEO and obtaining the required permission.

4 Placing the Company's good name at risk by conducting yourself in a manner that caused the SAPS to arrest you in Johannesburg.

5 Breaching the terms of your suspension in that you telephonically attempted to contact a staff member, Mark Ansley, after you were notified not to make contact with any members of staff."

[6] Following a disciplinary hearing, which was chaired by an external chairperson, Joxo was found guilty of the allegations against him. He was summarily dismissed with effect from 25 May 2021.

[7] Joxo thereafter referred an unfair dismissal dispute to the CCMA.

[8] The common cause facts, recorded in the pre-arbitration minute concluded by the parties, included the following:

8.1 Joxo signed his performance contract and rating sheet in May 2019, but did not sign these documents in May 2020.

8.2 On or about 9 April 2021, Argon received a request from Momentum Investments ("Momentum") to give a presentation regarding a product update on the equity and fixed income offering on 14 April 2021. The proposed meeting was brought to Bapela's attention on the same date. The meeting was entered into the electronic planner ("the Planner") that was compiled and administered by an employee of Argon, Mr

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Jeremy Jutzen ("Jutzen"), and which was accessible to Bapela and Joxo.

8.3 On 12 April 2021, the meeting with Momentum was postponed to 30 April 2021. The meeting was entered into the Planner.

8.4 Joxo attended the meeting with Momentum on 30 April 2021 – which meeting was not attended by Bapela. No meeting invitation was sent to Bapela.

8.5 The PIC is Argon's largest and most important client, which generates approximately 30% of Argon's annual revenue. The PIC invites Argon's equity team to provide them with feedback every quarter as the team manages a considerable amount of its capital. Argon's Portfolio Manager, Mr Mark Ansley ("Ansley") and Joxo, amongst others at Argon, attended most of these meetings.

8.6 During some of the meetings with the PIC, Joxo provided the PIC with updates on *inter alia* Argon's business. Ansley would provide the PIC with updates regarding the equity fund's performance.

8.7 When the PIC meetings were held in person, prior to the onset of the COVID-19 pandemic, Ansley (or another Equity Portfolio Manager) and Joxo travelled to Pretoria to attend these meetings. When these meetings were later held virtually, they followed the same format, and both Ansley and Joxo (and/or Bapela) attended.

8.8 A PIC meeting was scheduled on 3 May 2021, due to be attended by Joxo and Ansley. It was attended by Ansley, but not by Joxo. Bapela was not notified that Joxo was unavailable.

8.9 During April 2021, Joxo expressed an intention to Bapela and Setai to call a staff meeting to inform them of his impending decision to take a prolonged period of absence from the business. Joxo ultimately did not call the staff meeting, nor did he take a prolonged leave of absence from the business.

8.10 Joxo was arrested in March 2021 and he informed Bapela and Setai of this in March 2021.

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8.11 No prosecution against Joxo has been pursued by SAPS / the NPA after the complainant withdrew the complaint.

[9] The unfair dismissal dispute was arbitrated before the commissioner over 13 days. The commissioner issued the award on 13 September 2022.

[10] In the award, the commissioner held that Joxo's dismissal was both substantively and procedurally unfair. He ordered Argon to reinstate Joxo and to pay him backpay equal to 6 months' remuneration.

[11] The applicant seeks to review and set aside the award and substitute it with a finding that Joxo's dismissal was substantively and procedurally fair.

The test on review

[12] The principles applicable to the *Sidumo*-reasonableness test,[1] which are of application to this matter, were recently summarised by Anton Myburgh SC in his article *"Reasonableness Review – The Quest for Consistency"*,[2] as follows:[3]

> *"•* *In accordance with its ordinary dictionary meaning, 'reasonable' means in accordance with reason or within the limits of reason; it concerns the balance of reasons for and against a decision. Reasonableness in this context is not the standard of a reasonable person used in private law, but instead equates to the rule of reason.*
>
> • *Unreasonableness is a high (or stringent) standard. Where the balance of reasons is against a decision, it is wrong, but it takes more than this (wrongness) to make it unreasonable. As has been held in England, '[n]ot every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable'. Reasonableness allows for an area of legitimate diversity, a space within which various reasonable choices can be made.*

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[1] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC).

[2] (2024) ILJ 1377.

[3] For readability, footnotes have been omitted.

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- *The Sidumo test is the test for the substantive reasonableness of the outcome or result of an award – it is an outcome-based inquiry or an outcome standard. Were it not for reasonableness, there would be no way of attacking the substantive outcome of an award because the grounds listed in s 145 of the Labour Relations Act (LRA) are essentially of a procedural nature.*
- *The Sidumo test involves a reading down of the heightened formulation in s 6(2)(h) of the Promotion of Administrative Justice Act that the decision must be 'so unreasonable' that a reasonable decision-maker could not reach it; simple unreasonableness is the standard.*
- *Reasonableness is a higher standard than rationality. Rationality is a 'relatively deferential' standard; reasonableness calls for a more intensive scrutiny of administrative decisions.*
- *Reasonableness is context specific (or dependent) and thus what constitutes a reasonable decision will depend on the circumstances of each case. Factors relevant to deciding whether a decision is reasonable include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the affected parties.*
- *A decision will be unreasonable if it falls outside of the bounds (or range) of reasonableness. One can picture an 'elastic of reasonableness' that can be stretched but snaps at the point of unreasonableness.*
- *The applicant must establish that both the commissioner's reasons and the result of the award are unreasonable. If the reasons cannot be assailed, that is the end of the matter. But if the reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the commissioner.*

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- *Along similar lines, the fact that the commissioner may have committed some cognitive error or misdirection will not, in itself, give rise to a review for reasonableness. The applicant must go further and establish that this error or misdirection caused an unreasonable outcome; ie, that the 'distorting effect' was an unreasonable outcome.*
- *From an overall perspective, to establish that the result of the award is unreasonable, the applicant must show that, on the totality of the evidence before the commissioner and examining the merits 'in the round' (as opposed to on a piecemeal basis), the outcome reached by the commissioner was not one that could reasonably be reached.*
- *Although a review for reasonableness unavoidably involves the court entering into an assessment of the substantive merits of the decision, it does so not to determine whether the decision was correct (an appeal) but rather whether it falls within the bounds of reasonableness (a review)."*

[13] With these principles in mind, I turn to examine the commissioner's findings in the present matter.

Substantive fairness

[14] As the applicant readily conceded, not each instance of alleged misconduct would, on its own, necessarily justify dismissal. However, in my view the allegations in relation to the PIC meeting weigh heavily in the assessment of substantive fairness, for the reasons that follow.

[15] As set out above, it was common cause that the PIC was Argon's largest and most important client, that Joxo failed to attend the PIC meeting on 3 May 2021 and that Bapela was not notified that Joxo would not be present.

[16] There was a material dispute of fact between the parties on this issue.

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[17] Joxo's version at his disciplinary hearing was that:

17.1 He had submitted a fixed income tender to the PIC on 17 March 2020; and

17.2 At the PIC's briefing in relation to this tender *"we were given strict instructions to never contact any of the PIC employees up until the tender process is completed to ensure compliance with the non-contact requirement, the PIC stopped all physical or online report like presentations for managers …"* (my emphasis).

17.3 He stated that, in light of the PIC's prohibition on contact pending the outcome of the tender, he had made *"an executive decision"* not to attend PIC meetings.

[18] At the arbitration, Joxo contradicted his earlier version. He now conceded that the PIC had *not* instructed him not to attend meetings with it. Rather, his version was that he had gleaned this from his *"industry colleagues"*. The upshot was that, if senior executives such as himself attended PIC meetings, this would jeopardize Argon's prospects in the pending tender.

[19] Moreover, Joxo testified that, when he saw the PIC meeting invitation for 3 May 2021, he phoned Jutzen and informed him that he would not attend the meeting. He asked Jutzen to inform Mark Ansley of this fact and *"both of you must send my regards and apologies to the client."*

[20] Joxo's version was clearly fabricated. Apart from the inconsistency between the disciplinary hearing and the arbitration, Joxo had in fact attended two prior meetings with the PIC (since the submission of the tender). Both Ansley and Bapela expected Joxo to attend. This puts paid to his allegation that he was forbidden or precluded from attending PIC meetings.

[21] In his evidence, Jutzen emphatically denied that Joxo had informed him that he would not be attending the meeting. Jutzen testified that, given the importance of the client relationship with the PIC, if Joxo had informed him of this he would have immediately made arrangements for Bapela to attend on Joxo's behalf.

[22] Jutzen's version is inherently probable, given the importance of the PIC to Argon's business. When Jutzen spoke to Joxo, at some point after the 3

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May meeting, he testified that Joxo informed him that he would "spin" a story to explain why he had not attended. This was the genesis of Joxo's version that the PIC had forbidden contact pending the tender award.

[23] The commissioner was aware that he was required to resolve this material dispute of fact. Either Joxo or Jutzen was lying under oath.

[24] The commissioner rejected Jutzen's version. His reasoning was essentially that:

24.1 Jutzen's testimony was *"not acceptable because of his having most likely been exposed to the testimony of Bapela and accordingly that he had most likely adjusted his in accordance therewith in respect of this issue"*; and

24.2 The commissioner held that the lack of action by Ansley in trying to establish the whereabouts of Joxo *"belies the contention of the high profile accorded the PIC"*.

[25] Dealing with the second point first, the "high profile" of the PIC within the context of Argon's business was common cause – as has been recorded above.

[26] With regards to the first point above, there was no basis upon which the commissioner could reasonably conclude that Jutzen had been exposed to Bapela's evidence. This was rightly conceded by Joxo's counsel in argument of this review application.

[27] There can be no question that, all things being equal, the PIC would have expected Joxo to attend the meeting. Joxo conceded, under cross-examination, that the 3 May meeting would have been the first meeting since 2018 with the PIC that he did not attend.

[28] Properly assessed, having regard to the parties' respective versions, no reasonable decision-maker could have rejected Jutzen's version in favour of Joxo's.

[29] The commissioner was bound to accept that: (a) Joxo did not have any valid excuse for his failure to attend the PIC meeting; (b) that he had concocted

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a fabricated version after the event in an effort at self-preservation;[4] and (c) that, in so doing, Joxo had placed his interests above those of his employer.

[30] In my view, Joxo's deception is particularly serious because, far from accepting responsibility for his actions, he sought to lay the blame with his subordinate (Jutzen) for not informing Ansley or the PIC of his non-attendance. No employer could reasonably be expected to retain the services of a senior executive who conducts himself in this manner.

[31] Having regard to the PIC incident alone, it is difficult to see how a reasonable commissioner could not have concluded that dismissal was a fair outcome in the circumstances. However, when one considers the balance of the relevant facts surrounding Joxo's conduct, this conclusion becomes irresistible.

[32] In this regard, there can be no doubt that by April 2021 the relationship between Joxo and his superior, Bapela, had broken down, primarily on account of Joxo's conduct. The commissioner's failure to appreciate this is largely attributable to the blinkered or piecemeal approach he adopted to his assessment of the facts.

[33] Prior to March / April 2021, there was already a pattern of Joxo's failure to comply with instructions. For example, there is no serious dispute that Joxo:

33.1 Failed to submit quarterly written reports to Bapela;

33.2 Failed to convene quarterly ESG meetings;

33.3 Did not consult exco before launching the company's new website; and

33.4 Failed to finalise his 2020 KPA's.

[34] On their own, these infractions would not ordinarily warrant dismissal. However, they are indicative of an underlying disrespect for authority, specifically Bapela's authority, which came to the fore in March / April 2021.

[4] It is no answer, as suggested by Joxo's counsel, that he was not specifically charged with dishonesty. The fact remains that, in the course of denying the allegations against him, he raised a patently dishonest defence. The commissioner was duty-bound to consider the impact of this dishonesty on the necessary trust relationship between employer and employee.

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[35] Although it arguably forms the backdrop to the events that followed, I do not regard the facts surrounding Joxo's arrest on 16 March 2021 as evincing any workplace misconduct. It is common cause that the criminal charges were ultimately not pursued after the complainant withdrew his complaint. Nothing more need be said about this aspect.

[36] Bapela's evidence was that an abusive phone call precipitated his email to Joxo on 26 March 2021 (09h00). It appears that Joxo had been upset because Bapela had not returned one of his earlier phone calls. When they finally managed to speak over the phone, Bapela's version was that Joxo was abusive. Joxo accused Bapela of being incompetent and not managing his time properly. Overall, the tone was "heavy". Bapela testified that this was not the only occasion when Joxo had been abusive on the phone. It was a pattern of conduct.

[37] In his evidence at arbitration, Joxo denied that he had been abusive in any phone call with Bapela.

[38] The difficulty with Joxo's version is that it is impossible to reconcile with the contents of the (contemporaneous) email exchange that took place on 26 March 2021.

[39] In Bapela's 09h00 email, he took exception to Joxo's abusive tone and recorded that this was not one isolated incident. Bapela sought to address the problem by inviting Joxo to rectify his conduct. His email concluded on the following note:

> *"I sincerely believe something needs to be done about this before it causes damage to our firm. I want us to look forward to talking to each other without worrying about abusive tones, I currently can't even answer your call when I am with my family as I wouldn't want them to pick up the abusive tone from you.*
>
> *I look forward to hearing from you on this and how we can take this forward."*

[40] This is consistent with Bapela's version that there had been an abusive call. On the other hand, the contents of this email cannot be reconciled with Joxo's version – that this reprimand essentially came out of the blue.

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[41] This impression is reinforced when one considers Joxo's written response, at 11h06 on the same day. In his email, Joxo stated that Bapela had acknowledged that he was *"equally abusive, just in a different, passive way, hence I have tended to react in such a manner to you."* He also stated that *"we have both been wrong in many aspects in relation to how we relate to each other and the negative effects to the firm."*

[42] There is a clear acknowledgement of abusive conduct in this email, albeit coupled with allegations of "joint wrongdoing" on the part of Bapela.

[43] At that point, there may have been some slender chance that the two executives might be able to restore their relationship. Any such hopes were dashed the following day when Joxo addressed a further email in response to Bapela, in which he went on the offensive. In this email, *inter alia*:

43.1 Joxo accused Bapela of insulting his character in a manner that was intended to cause emotional harm to him. He accused Bapela of *crimen injuria*.

43.2 Joxo accused Bapela of "character assassination".

43.3 Joxo conjectured that Bapela was intent on "building a case" against him.

43.4 Joxo stated that the content of Bapela's email was "extremely painful" to him and that it had permanently damaged the relationship between them.

43.5 Contrary to his denials in the arbitration, Joxo impliedly conceded that *"he might have been disrespectful"* to Bapela and stated that *"The last time I yelled at you was on Sunday, 7th of March 2021"*, where he had criticised Bapela for *"the lack of oversight and situational management on your side"*.

[44] This email correspondence, on its own, establishes that Joxo had little or no respect for his superior. It was highly inappropriate and abusive of the CEO. Again, no employer could reasonably be expected to retain a senior employee who conducts himself in this manner.

[45] The situation only got worse at the special Exco meeting on 13 April 2021 and the events that followed it.

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[46] At the Exco meeting, Joxo presented a proposal for restructuring the company that would effectively see him reporting directly to the Board as CEO: Business Cluster (and no longer to Bapela). Setai, who previously reported to Bapela, would now report to Joxo, leaving the latter responsible for distribution and client services, finance and operations. The new post proposed for Bapela, nominally styled "CEO: Investments Cluster", was in reality a demotion. Neither Joxo nor Setai would report to Bapela in this proposed structure.

[47] This proposal, understandably, did not find favour with Exco. Within the context of the events described above, the inference that Joxo was seeking to undermine Bapela's authority at every turn is inescapable.

[48] The following day, Joxo addressed a WhatsApp message to Bapela and Setai, in which he stated the following:

> *"… it is my intention to call a meeting of the owners of the business, which is all staff, in a form of a staff meeting, to inform them of my impending decision to take a prolonged absence from the business, this I anticipate to be between 6 to 12 months. I will advance my reasons at such meeting and give everyone an opportunity to ask me in person. As I indicated yesterday, my working environment at EXCO is toxic and has been for a while due to a number of reasons that I have advanced to you."*

[49] In his award,[5] the commissioner regards this message as "insignificant", on the basis that Joxo did not have the ability to call a general staff meeting and, if he had attempted to do so, it could have been thwarted by Bapela.

[50] This misses the point. The question is not whether Joxo actually followed through on his threatened course of action but rather what it reveals about his attitude towards the Exco. The WhatsApp was clearly a threat to hold the business hostage.[6] It was a shot across the bow. Again, the insubordination and disrespect harboured towards Bapela was manifest.

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[5] Paragraph 227.

[6] The threat is: (1) that the second most senior employee in the business will be absent for 6 to 12 months, which would obviously prejudice the business; and (2) that Joxo would voice his disgruntlement with Bapela to all the company's employees in a general staff meeting.

[51] Finally, in his own words, Joxo's relationship with his superior and Exco had become "toxic". It beggars belief, under these circumstances, that the commissioner could conclude that the necessary trust relationship between the parties had not irretrievably broken down.[7]

[52] Finally, Joxo's conduct in failing to comply with the terms of his suspension, while not in itself a dismissible offence, reinforces the conclusion that Joxo did not consider himself bound by the instructions of his employer.

[53] On a proper conspectus of all the relevant facts,[8] it should have been apparent to any reasonable arbitrator that Joxo was indeed guilty of serious misconduct, as charged, and that the necessary trust relationship between employer and employee had irretrievably broken down as a result of that misconduct.

[54] Accordingly, the commissioner's conclusion that the dismissal was substantively unfair was reviewably unreasonable in the sense contemplated by the Constitutional Court in *Sidumo*.

Procedural fairness

[55] The commissioner's findings on procedural fairness are, with respect, not a model of clarity. In paragraph 324 of the award the commissioner holds as follows:

> *"The procedural fairness having arisen in particular on account of Joxo's having been denied legal representation at the disciplinary hearing. In these circumstances I believe that the matter warranted legal representation at the disciplinary hearing due to the complexity and the right of Joxo as an employee to be represented at the disciplinary hearing. Given the seniority of Joxo as an employee the only employee to able to represent him would have been Bapela."*

[56] It is trite that there is no absolute right to legal representation in internal disciplinary hearings. It is by far the exception rather than the norm. A disciplinary tribunal exercises a discretion in determining whether or not to

[7] This finding is, of course, implicit in his award of reinstatement.

[8] And viewed holistically, as opposed to the piecemeal exercise undertaken by the commissioner.

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permit legal representation. In exercising this discretion, the factors which may be taken into account include the following, as summarised in *MEC: Department of Finance, Northern Province v Mahumani* (2004) 25 ILJ 2311 (SCA) 2316B-C[9]:

> *"the nature of the charges brought; the degree of factual or legal complexity attendant upon considering the charges; potential seriousness of the consequences of an adverse finding and the nature of the prejudice to the employer in permitting legal representation."*

[57] In the present matter, the chairperson of the disciplinary enquiry considered Joxo's application for legal representation but refused it for the following reasons:

57.1 Although the allegations against Joxo were serious in nature,[10] they were not complex; and

57.2 There was no disparity in the ability of the representatives. Dr Bapela, a mathematician by training, represented the employer. Joxo, as a very senior executive, was capable of holding his own.

[58] The commissioner held that it was unfair to refuse legal representation on two grounds, namely (a) that the matter was complex; and (b) that Joxo could not obtain another representative within the organisation due to his seniority.

[59] Neither of these reasons are justifiable. The factual issues cannot be said to be particularly complex – certainly not to the extent that it would be unfair for Joxo to attend the hearing without a legal representative. The questions to resolve were whether Joxo had committed the misconduct alleged and, if so, whether dismissal was warranted as a sanction. The relevant facts fell within Joxo's knowledge and he was well-acquitted to deal with them. There were no legal issues or complexities arising for consideration.

[60] The fact that the consequence of failing to obtain legal representation was that Joxo would have to represent himself did not render the proceedings

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[9] With reference to *v Chairperson, Peninsula Technikon Internal Disciplinary Committee* (2002) 23 ILJ 1531 (SCA) paragraph 21.

[10] It must be said, as are any allegations that could result in an employee's dismissal.

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unfair. Joxo is a senior, highly educated employee who was more than capable of presenting his case in response to the allegations against him.

[61] In short, if it was unfair in this case to refuse legal representation then it is difficult to conceive of many cases where it would be fair to do so. The commissioner not only erred, but acted unreasonably, by essentially holding that legal representation was available as of right to the Joxo in this case. This approach is anathema to the informal and flexible approach to internal disciplinary proceedings espoused in Schedule 8 to the LRA.[11]

[62] In paragraphs 201 to 203 of the award, the commissioner finds that Argon's board ought to have given Joxo some kind of pre-hearing before it took a decision to institute the disciplinary proceedings. The commissioner does not make any explicit finding that this rendered the dismissal procedurally unfair. However, to the extent that such a finding is implicit in the award, it would amount to a reviewable irregularity. There is no requirement in our law that an employer afford an employee audi at the stage of deciding whether to hold a disciplinary hearing or not. To the extent that the commissioner held to the contrary, his finding was unsupported in law and unreasonable.

Relief

[63] In the premises, the commissioner's findings that Joxo's dismissal was procedurally and substantively unfair fall to be reviewed and set aside.

[64] The parties were ad idem that, in the event that the award was reviewed, it would be appropriate for the court to substitute it rather than remit the dispute to the CCMA. I agree. There is a full record before me and it would serve no purpose, and only delay matters, if the dispute was referred back to the CCMA.

[65] In light of my findings above, I have no compunction in finding that Joxo's dismissal was both procedurally and substantively fair.

[11] It has been held that the informal approach to disciplinary proceedings promoted by the 1995 LRA applies with even greater force in the case of senior managers. See *Nitrophoska (Pty) Ltd v CCMA* [2011] 8 BLLR 765 (LC) paras 16-19 and the authorities cited there.

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[66] Having regard to the principles that apply in the Labour Court, in my view there is no basis to depart from the ordinary rule that each party should bear its own costs.

Order

[1] The arbitration award issued by the second respondent under case number WECT 7237-21, dated 13 September 2022 ("the award") is reviewed and set aside.

[2] The award is substituted with a finding that the third respondent's dismissal was substantively and procedurally fair.

[3] There is no order as to costs.

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Leslie AJ
Acting Judge of the Labour Court of South Africa

Representatives –

For the applicant:	**S.C. Kirk-Cohen SC, instructed by Cliffe Dekker Hofmeyr Inc**
For the third respondent:	**T.N. Ngcukaitobi SC (with R Tulk and K Van Heerden), instructed by ENS Africa Inc**

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