Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 1524/2015

In the matter between:

EXARRO COAL (PTY) LTD T/A	**Applicant**
GROOTGELUK COAL MINE	
and	
ESSAU MADUMA	**First Respondent**
COMMISSIONER MELLO *N.O.*	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**Third Respondent**

Heard: 07 September 2017

Delivered: 29 September 2017

Summary: (Review – incapacity – ill health – cause and nature of lung disease undetermined at time of dismissal – failure to determine same affected substantive and procedural fairness of dismissal despite employee's inability to perform his current occupation at the time - relief of reinstatement not justifiable on evidence – substituted with compensation)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application of an arbitration award. The arbitrator had decided that the dismissal of Mr E Maduma ('Maduma'), a process controller, on 4 July 2014 on account of medical incapacity was procedurally and substantively unfair. He ordered the retrospective reinstatement of Maduma into another post of team leader. Subsequently, he varied his award by substituting the post of team assistant for team leader.

Background

[2] At the time of his dismissal, Maduma suffered from a lung disease which the employer maintained prevented him from performing his duties because he worked in a dusty area and no suitable alternative post was available.

[3] After a prolonged absence from work starting in March 2014, a medical incapacity process commenced in June 2014.

[4] According to the evidence of a report from Maduma's own specialist, Dr Abdullah (a pulmonologist) he was suffering from a non-specific interstitial lung disease with emphysema. According to the same specialist, further tests were necessary to determine the cause of the disease, such as a lung biopsy but these were never performed. The other specialist who examined Maduma was a physician, Dr Khan, who concurred with Dr Abdullah's diagnosis and mention that "as a result of his diagnosis he [Maduma] remains symptomatic with persistent dyspenea [shortness of breath] even at rest. His diagnosis would limit his ability to be gainfully employed as results in excessive absenteeism. He may be considered for light duties."

[5] In early June 2014, Maduma was assisted in applying for disability insurance benefits from the Provident fund and the fund's medical assessors ultimately determined that his disability ranged from 40 to 59%, but that his status might change if new information became available. Dr

Emslie, the Occupational Medical Practitioner of the applicant testified that he wanted to report Maduma's case to the Mine Bureau for Occupational Diseases (MBOD) but that he needed the final report from the pulmonologist to determine the cause of the lung disease, which in turn would dictate whether it was reportable or not. He was also aware that the applicant's medical aid would not pay for the biopsy. He further testified that they had tried to get Maduma to participate in the occupational health investigation which they were bound to conduct whenever any occupational disease was suspected, but he refused to cooperate. Dr Emslie claimed that he explained to Maduma that it was possible that if Maduma cooperated with the investigation that, the MBOD might offer to pay for the biopsy as had happened in the past with other cases. Dr Emslie had also arranged for Maduma to be admitted to hospital for evaluation of his shortness of breath by a cardiologist, but nothing wrong could be found with the condition of his heart.

[6] Dr Emslie had concluded on the basis of his own assessment that Maduma could not continue to perform his own work and the decision that he was medically incapacitated was based on the report obtained from the Provident fund, which rated his disability ranged between 40 and 59%. He had encouraged Maduma to obtain a biopsy report and to appeal against the disability rating to try and increase it. The biopsy report would have helped to determine if the cause of the illness was treatable. At the time the applicant was dismissed, Dr Emslie said Maduma could barely walk a short distance without having to sit but he appeared to be much better at the time of the arbitration, which he attributed to him having received treatment for an unrelated illness which might have affected his lungs. Dr Emslie pointed out that a number of other causes might have resulted in Maduma's lung condition but without further analysis, it was not possible to determine the cause or prognosis for recovery.

[7] On 4 July 2014 a medical panel board concluded that Maduma was permanently medically unfit for work and he was dismissed for incapacity with effect from 7 July.

[8] Prior to Maduma's dismissal, two incapacity meetings have been held with him and his trade union on 3 June and 25 June 2014. Evidence was provided that none of the vacant posts which existed at the time were suitable for Maduma either because he did not have the minimum qualification for the post or the vacancies were also in dusty areas. In particular, a post of a team assistant was unsuitable because he would still have to work in a warehouse where there was dust and further did not have the minimum qualifications for that post, namely a Grade 12 certificate and two to three years' experience in the supply chain field, contract administration or finance. Two possible alternative clerical positions existed, one of which was at a different location in another business unit, Ferro Alloys. Ferro Alloys was part of the same group of companies as the applicant but was an independent operational entity. Ms S Otto ('Otto'), an HR practitioner, agreed that Maduma had previously been transferred to the applicant following the normal transfer procedures from another mine, but that when it came to medical redeployment, the applicant could not impose that "across businesses". The individual would have to apply vacancies in other business units himself. The Ferro-Alloys post of a receiving clerk, could have been offered to the applicant if the post had been a vacant post on the applicant's establishment, though it was a post at a lower rate of pay.

[9] The other potential position was that of a supply chain clerk at the applicant's own premises. However, that was also deemed unsuitable post because it was on a higher grade and also because it would have involved work in the warehouse which was a dusty area. Otto testified that, according to the Department of Mineral Resources (DMR), the whole mine was classified as a dusty area and therefore the disability report of 22 June compiled for the applicant's insurer (Santam), which indicated that Maduma "cannot work in a dusty area but should still be possible to do office bound work like access control, refreshment officer, filing storeman", did not support Maduma's claim at the arbitration. There would have been no problem in employing him to work in the supply chain clerk position. Dr Emslie testified that he had not been specifically asked to investigate the suitability of particular positions, but in the incapacity hearing meetings they have discussed areas in which Maduma might be utilised. His own view at

that stage was that Maduma could perform office work, but as a team assistant or procurement clerk he would be required to move around, climb steps and work in the warehouse itself. At that stage, Maduma's shortness of breath was such that he would not have been able to walk from the gates to an office in the warehouse. If there was a post where he could sit in an office in a dust free area without having to move around that might have been a feasible job. In his own testimony, Maduma volunteered that a team assistant would sometimes be required to drive the forklift or help receive or issue items in the stores.

[10] The employer conceded that dust levels in the office workshop, stores and other areas of the mine were not the same, but contended that work in any dusty area was untenable for Maduma.

The arbitrator's reasoning

[11] The arbitrator found that the employer had conceded in the arbitration that even though a post of a buyer was at a higher level (Maduma was employed at level P4 and the position of a buyer was level A3 which was one level higher), Maduma had previously acted in such a position (when he was working for another associated business unit) Maduma contended that he had never been made aware of vacancies available at the employer during the incapacity meetings. However, he believed he could perform the duties of a team assistant (a clerical post situated in the warehouse on the same post level occupied by Maduma at the time) or those of a receiving clerk. He saw no reason why an arrangement could not have been made to transfer him to an associated business unit of the Exarro Company in the same way that he had previously been transferred from another associated company to the applicant.

[12] Maduma contended that his dismissal was substantively and procedurally unfair because the employer had failed to conduct a proper medical investigation to determine the extent of his incapacity and had failed to offer him a suitable alternative post which was available at the time of his dismissal.

[13] The arbitrator found the duty to investigate the first respondent's medical condition lay with the employer and the employer did not conduct any medical investigation of its own prior to the dismissal, but based its decision on reports obtained from Maduma's own doctors. Maduma's own specialist had rendered an incomplete diagnosis because further tests were required to determine the cause of the illness and the extent to which it was treatable. The arbitrator also found that Maduma had been unable to obtain a final report from his specialist because he had exhausted his medical aid and his salary had been stopped, owing to his sick leave being exhausted. Consequently, the arbitrator concluded that at the time of Maduma's dismissal, it had not been determined whether or not his capacity was temporary or permanent and therefore no conclusion could be reached on the nature and degree of his ill health. His dismissal had been based on inconclusive reports.

[14] The arbitrator also accepted Maduma's evidence that the offices where team assistants worked, were dust free areas and were already functioning before he was dismissed. In addition, the arbitrator found that his evidence that he was qualified for the post of a team assistant having performed the job for 11 years prior to 1996 when he was still working for another company, and that he had acted in the position of plant foreman whilst working for the applicant was unchallenged. Moreover, the arbitrator held that the applicant's own witnesses had conceded that Maduma had acted in the position of a buyer which was more senior to that of a team assistant.

[15] The arbitrator concluded that Maduma ought to have been given the position of a team assistant, which was on the same level as his own position and the fact that he did not have a grade 12 certificate was not material because his own position also required that, yet he had been employed in that post. Of particular importance was the fact that Maduma had performed work in more senior positions than that of a team assistant and consequently, there was no convincing reason why he could not have been appointed to that position.

[16] In dealing with the procedural fairness of the dismissal the arbitrator found, in the absence of obtaining a final medical report,that the incapacity

meetings convened by the employer were meaningless and it was merely going through the motions of conducting a proper procedure. As such, the employer had not complied with the code on incapacity hearings which provides that the employee's prognosis and the extent to which the employee is capable of performing work should be discussed before dismissal is considered. Consequently, the arbitrator found the dismissal was also procedurally unfair.

[17] The arbitrator decided to reinstate Maduma not in his former position as a process controller but in the position of a team assistant taking into account Maduma's contentions that the post was at same level he previously occupied, entailed clerical work, did not involve any heavy duty work and was situated in a dust free area. The arbitrator awarded Maduma 13 months' remuneration as compensation, which he offset against incapacity benefits already received by Maduma.

Grounds of review

[18] The main thrust of the review is to attack the reasonableness of the arbitrator's findings based on the lack of evidence to support them or that he misconstrued the evidence before him. In summary, the employer claims:

18.1 First Ground: The arbitrator failed to appreciate that at the time of Maduma's dismissal, the team assistant post was still performed in a dusty area and the situation had only changed by the time the arbitration took place. The applicant contends that the arbitrator simply ignored lengthy testimony from Ms Otto and Dr Emslie and that Maduma himself had conceded that the team assistant post had only been relocated to the dust free area towards the end of 2014.

18.2 Second Ground: The arbitrator misconstrued the fact that Maduma's evidence that he had previously held the position of a team assistant was not contested, because this version was never put to the applicants' witnesses to rebut, even though Maduma was represented by an attorney in the arbitration proceedings.

18.3 Third Ground: In deciding that the employer had failed to conduct a medical investigation into Maduma's illness, the arbitrator ignored the evidence that Maduma had failed to cooperate with the employer when it had attempted to do so. It was for that reason that the employer had no alternative but to rely on the medical reports of Maduma's own doctors, which he had filed. Moreover, those reports had confirmed that Maduma was permanently unfit to perform his existing duties as a process controller.

18.4 Fourth Ground: In determining that the company had merely been going through the motions of the procedure in order to dismiss Maduma, the arbitrator had simply ignored that it was Maduma's union which had requested the company to initiate the incapacity proceedings.

18.5 Fifth Ground: Lastly, there was no basis for the arbitrator reinstating Maduma in the position of a team assistant because there was no evidence before the arbitrator that such a vacancy existed and the employer could not even comply with that part of the order. Moreover, it claimed that the arbitrator ignored the fact that Maduma had not disputed that he lacked the qualification of a grade 12 certificate to perform that work. There had also been evidence that the position required previous experience in the supply chain field, contract administration or finance.

[19] Maduma denies that Miss Otto lacked the expertise to testify on the dust conditions applicable to the team assistant's post. The applicant retorts that, Dr Emslie also testified about the conditions. Maduma also maintained that he "did participate and cooperate with medical requirements lodged by the applicant", but never cross-examined Dr Ensley on this issue.

[20] In his own evidence in chief, Maduma cited a number of reasons why he believed Dr Emslie said he was un-co-operative, because Dr Emslie would not agree to give him a letter undertaking that he would be taken back at work if he agreed to return to Dr Abdullah and undergo a biopsy nor would they give him the Provident fund medical report. However, he also agreed that he would not assist in completing the DMR report because Dr Emslie

said he was doubtful that he could have got the disease from mine dust when he had only worked for the applicant for five years. In his answering affidavit, Maduma did not mention any of these claims, or state in what respect he had complied with the applicant's attempts to investigate his illness save to say that he never refused to do so.

[21] The medical reports the applicant had been provided with indicated only that he should be placed on light duty, which did not imply that he was medically unfit, but rather implied that reasonable accommodations should have been made. The decision to dismiss him was based on inconclusive medical reports and the applicant had failed to establish whether his incapacity was temporary or permanent in nature, or the nature of his illness and its gravity. Another strand in Maduma's response was to tackle the applicant for failing to make reasonable accommodations so that he could continue working rather than being dismissed.

Evaluation

[22] The grounds of review are evaluated below, but not in the same order they were raised. Before embarking on the analysis, it is worth reiterating the guidelines for dismissals for incapacity on account of ill-health. Items 10 and 11 of LRA Schedule 8: Code of Good Practice : Dismissal dealing with dismissals for incapacity on account of ill health or injury state:

> "10. Incapacity: Ill health or injury
>
> (1)
>
> Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of

securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

(2)

In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3)

The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4)

Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11.Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work."

[23] In *General Motors (Pty) Ltd v National Union of Metalworkers of SA on behalf of Ruiters*[1], the late Ndlovu AJ reaffirmed a view previously expressed by the LAC thus:

[1] (2015) 36 ILJ 1493 (LAC)

"[34]... In *IMATU obo Strydom v Witzenberg Municipality & others*, this court (per Molemela AJA, as she then was) stated:

'[7] I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognized as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.

[8] The aforementioned obligations of the employer as set out in items 10 and 11 of schedule 8 to the LRA are interrelated with similar obligations in the Employment Equity Act 55 of 1998. In their work Employment Equity Law (2001) 7-3 to 7-4, J L Pretorius et al submit that the duty of reasonable accommodation of employees by employers is not confined to the Employment Equity Act but "is a duty that is implied in the concept of unfair discrimination in a general sense" and "is one of the judicial and legislative tools for realising substantive equality". I agree with this submission. Surely non-compliance with such an important constitutional imperative would not only impact on procedural fairness but on the substantive fairness of the dismissal as well?

[9] I am of the view that the provisions of items 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair.' "[2]

(emphasis added)

First and Second grounds

[24] The record shows that the team assistant post, which was a clerical post performed in the warehouse had previously been located in the old warehouse which was in a dusty location. It was only at the end of 2014 that the warehouse relocated to a less dusty area. The arbitrator appears to have ignored the evidence that at the time of Maduma's dismissal, the position would have entailed him working in the old warehouse environment.

[2] At 1503-4

In any event, the new warehouse was still situated in a dusty area. Otto also testified that the determination of the medical requirements of a post in terms of the Mine Health and Safety Act 29 of 1996 (MHSA) was linked to the post though the location of the post might affect that determination. However, she conceded she was not qualified to comment on that.

[25] I agree that the arbitrator's finding that the applicant ought to have placed Maduma in a team assistant post could not be reconciled with the evidence that at the time of his dismissal, the new warehouse was not operational. Insofar as he simply chose to believe Maduma, he ought to have set out the basis for finding him a more credible witness than Dr Emslie and Otto. The transcript of Maduma's evidence, his changing versions on why the company construed that he refused to co-operate, and his failure to put versions to the applicant's witnesses ought to have raised severe doubts in the arbitrator's mind about the reliability of his testimony. It is important in this regard that he never directly challenged the applicant's witnesses on their evidence that the old warehouse and new warehouse were both dusty work environments even if the degree of dust differed. He also did not dispute Emslie's testimony that he could barely move a short distance without having to sit down and that his duties as a team assistant were not all desk bound. The arbitrator also without justification ignored that Maduma had not raised his alleged previous experience as a team assistant with the applicant's witnesses, and instead accorded it the status of uncontested evidence.

[26] The arbitrator's effective conclusion that placing Maduma in a team assistant position was a suitable alternative to dismissal could not reasonably be sustained on the evidence before him.

Fifth ground

[27] In ordering that Maduma be reinstated in a post of a team assistant, the arbitrator ought at least to have been satisfied that Maduma met the requirements of the post. The arbitrator's reasoning in ignoring the minimum educational qualifications was that Maduma did not meet the minimum educational qualifications for the post of process controller which he had occupied and which was on the same level. I do not understand how it

follows that because he might be able to perform the job of a process controller without the minimum educational qualification, he necessarily also would have been able to perform the job of a team assistant, without further evidence why the grade 12 certificate was really unnecessary. In any event, there was no evidence even from Maduma that he had the "essential/minimum" two to three year experience in the supply chain field or in contract administration or finance. Lastly, with a question mark still hanging over whether Maduma ought to work in a dust free area and whether he could perform the other warehouse tasks of a team assistant which were not deskbound, the arbitrator's appointment of Maduma to the position of team assistant was based more on speculation about his suitability than the evidence before him could support.

[28] Consequently, even if the arbitrator had been correct that the employer had failed to establish that Maduma's incapacity warranted his dismissal, the remedy chosen by the arbitrator could not be reasonably justified on the evidence.

Third Ground

[29] The investigation which Maduma failed to cooperate with was the Occupational Disease Investigation into whether he was suffering from a suspected occupational disease. It is true that the applicant did request Maduma to obtain a final report from the pulmonologist, which would necessarily have entailed him undergoing a lung biopsy. Dr Emslie also advised Maduma that if he co-operated with the investigation, that the MBOD *might* fund a lung biopsy. This evidence was not disputed. However, there was no evidence that the applicant offered to pay for that examination in order to ascertain the cause and nature of the lung disease. Clause 14.1 of the applicant's disability policy states that it is entitled to request a disabled employee to be tested to determine his ability or disability in order to accommodate him. In so far as the applicant gave effect to this, it did so by placing the onus on Maduma to do so without offering to pay for it, whereas it knew that he could not afford such a test at that stage. It appears to be common cause that without the biopsy, the permanent nature of his disability could not be determined. The applicant then relied on Maduma's

failure to co-operate with the occupational disease investigation as ending its obligations to make any further attempt to determine the cause of his illness and consequently the nature and extent of his incapacity, in particular whether it was of a permanent or temporary nature.

[30] Thus as things stood, in the absence of the medical diagnosis being finalised, Maduma was unable to perform his existing occupation and it would have been irresponsible for the employer to have placed him in another occupation where he would still have been exposed to dust. The only vacancies available at its operations entailed a risk of dust exposure. Moreover, none of the jobs were entirely desk bound. Maduma did not dispute Dr Emslie's evidence that he could not walk any distance without sitting down, owing to his shortness of breath.

[31] As it turned out, by the time Maduma appeared at the arbitration Dr Emslie readily volunteered that Maduma's condition appeared much improved. This tends to suggest, with the benefit of hindsight, that Maduma's condition was treatable and possibly not permanent. Had Maduma undergone a biopsy, it is possible that this prognosis might have been made at the time and, instead of dismissing him, an appropriate accommodation such as leave of absence with an undertaking to review his position after treatment might have been reached.

[32] Was the arbitrator unreasonable in holding the applicant responsible for not concluding the medical investigation? The arbitrator accepted that Maduma was incapacitated, but rightly held that the temporary or permanent nature of his incapacity was unknown and that the dismissal was based on the inconclusive medical reports of Dr's Khan and Abdullah. The applicant criticises the arbitrator because he failed to ask whether the failure to complete the medical investigation was due to the employer or the employee. It might be that he considered this an irrelevant issue and that the sole question was whether the medical investigation had been concluded.

[33] However, the implication of such an approach would mean that if an employee thwarted an employer's reasonable attempt to investigate the cause of his incapacity, the employee could make a fair dismissal

impossible. It stands to reason that where the employer is thwarted in its efforts to conduct an investigation into the cause of an employee's incapacity on account of illness, the employer cannot be held responsible for not ascertaining it.

[34] It is self-evident Maduma did not have the means to fund a complete diagnosis. It is also evident he did not co-operate with the Occupational Disease investigation, which might have, but not necessarily would have, entailed the MBOD paying for a lung biopsy. The applicant claims that it could not conclude the medical examination once Maduma he declined to co-operate with the OD investigation. But that investigation was never raised as an avenue to explore in the medical evaluation meetings, where it ought to have been discussed. On the available record, it appears this possibility only arose when the process was all but finalised. The form to initiate the OD investigation was only completed on 4 July 2014, the same day that Maduma was informed of his dismissal. In the medical evaluation meetings, the applicant had always sought to place the onus on Maduma to obtain the necessary final reports and there was never any suggestion from the applicant's side that it was willing to assist in finalising the diagnosis.

[35] In view of the inconclusive result of the available medical reports and given that it was common cause the lung biopsy was needed to finalise the diagnosis, this was a matter which the applicant ought to have sought to have sought to finalise at an early stage if it was serious about obtaining that information. To have merely offered the prospect of the OD investigation as an alternative route to possibly obtaining a final diagnosis at the point of dismissal does not suggest the applicant seriously considered the need to finalise the preliminary diagnosis of Drs Khan and Abdullah.

[36] Accordingly, on the evidence, the arbitrator's decision that the applicant had failed to conduct a medical investigation before taking the decision to dismiss Maduma was not an implausible inference to draw given that the prospect of the OD investigation arose only at the time of dismissal. There was also no evidence that the applicant would not proceed with the dismissal if Maduma had agreed to co-operate with the OD investigation and until that investigation was finalised. Consequently, there is no reason

to believe that any potential medical investigation arising from the OD investigation, was regarded by the applicant as a relevant issue in deciding whether or not to dismiss Maduma.

[37] That is not to say that the arbitrator was reasonable in concluding that at the time of his dismissal Maduma was fit to work in an alternative position at the applicant, as the medical reports coupled with the dust conditions made that untenable at the time. But he was not unreasonable in finding that more should have been done to ascertain the permanent or temporary nature of the illness before continuing with the incapacity meetings. The enquiry into incapacity is not solely concerned with an employee's inability to perform their present duties but also with evaluating the prospect of their being feasible alternatives to dismissal which in turn may depend on the medical prognosis.

Fourth ground

[38] The basis of the arbitrator concluding that the applicant had merely gone through the motions of the incapacity proceedings was because it had proceeded with the procedure without obtaining a clear prognosis of Maduma's condition. This may appear to have been a somewhat sweeping conclusion. However taking into account that the final medical prognosis was made Maduma's responsibility, that alternative work was hardly discussed except in the most general terms and that, there was no evidence of engagement between the parties in those meetings over any specific alternative positions that might be considered, it is not unreasonable to conclude that the process was not as thorough as it should have been. Merely because the union had suggested that the applicant embark on the process did not mean a thorough procedure was embarked upon. Consequently, I am satisfied there was enough evidence to at least sustain a finding that Maduma's dismissal was procedurally unfair.

[39] In conclusion, even though the reasoning of the arbitrator was unreasonable and tendentious in relation to his findings that Maduma ought to have been placed in a team assistant position and his implicit finding that Maduma had not been incapacitated at the time of his dismissal, his findings that the dismissal was substantively and procedurally unfair are not ones that no

reasonable arbitrator could have arrived at on the evidence before him. Nonetheless, even though his findings in that respect should stand, it is necessary to substitute the relief he awarded to Maduma with an award of compensation in view of the materially flawed parts of his reaoning.

Alternative relief

[40] in determining an appropriate award of compensation, I have considered the following factors:

40.1 At the time of his dismissal there was no dispute that Maduma was incapacitated for the time being in relation to his existing occupation, and that incapacity proceedings were warranted;

40.2 Other alternative occupations within the business unit of the applicant were not feasible alternatives given the dust environment and that none of them were exclusively deskbound jobs and in all likelihood there would not have been a position he could have safely occupied until he recovered;

40.3 The incapacity proceedings were less than thorough and appeared to be premised on the assumption that once it was established that Maduma could not perform his own duties, no further enquiry to his incapacity was essential.

40.4 There was no evidence of direct engagement with the union and Maduma during the incapacity proceedings about alternative positions he might have filled.

40.5 The applicant's length of service of approximately six years.

40.6 The applicant made no apparent effort to explore possible vacancies within the Exarro group. The fact that it might not have been the group policy to look at alternatives outside a particular business unit, does not absolve the applicant from at least exploring the possibility of him being placed in vacancies in other units which were office-based and would not have involved him working in a dusty environment.

40.7 The applicant proceeded to dismiss him without taking steps to determine the nature of his lung disease and whether he would be

permanently disabled, in circumstances where it was fully aware that the diagnosis was incomplete and that Maduma was not in a position to finalise it himself.

40.8 The applicant did make some suggestions to mitigate the effects of Maduma's dismissal, such as appealing the disability rating determined by the Provident fund's medical assessors.

Order

[1] The arbitration award of the second respondent issued under case number LP 5578-14 dated 2 August 2015 as varied by his variation ruling of 15 August 2015 is reviewed and set aside only to the extent set out in paragraph [2] below.

[2] Paragraphs [62] to [65] of the award as amended by the variation ruling of 15 August 2015 are amended as follows:

2.1 Paragraph [62] shall read:

"The respondent must pay the applicant nine months' remuneration calculated at the rate of his remuneration at the time of dismissal (R 14,169-00 per month) amounting to R 127,521-00."

2.2 Paragraph [64] is deleted.

2.3 Paragraph [65] is renumbered as paragraph [64].

[3] The applicant must comply with the substituted relief in paragraph [2] above within 15 days of the date of this judgment.

[4] The applicant must pay the first respondent's costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	M G Maeso of Shepstone & Wylie
FIRST RESPONDENT:	G Grové of Smit & Grové Attorneys