



ARBITRATION AWARD

Commissioner: **Gail McEwan**

Case No: **PSHS27-25/26**

Date of award: **2 June 2025**

In the matter between:

PSA obo SASHIN MOODLEY

Employee

and

DEPARTMENT OF HEALTH & WELLNESS – WESTERN CAPE

Employer

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. Arbitration was held on 26 May 2025 at the Metro East Nursing College in Bellville. Present was Sashin Moodley (the employee) who was represented by Angelo Fisher (PSA). The Department of Health & Wellness (DOH) (the employer) was represented by Ayanda Mniki (assistant director labour relations). These proceedings were digitally recorded and both parties handed in bundles of documents.

THE ISSUE IN DISPUTE

2. I am required to determine on a balance of probabilities whether the dismissal of Moodley on the grounds of incapacity was fair. Moodley had a robbery in his home which resulted in him being arrested on charges in terms of schedule 1 and 5 of the Criminal Procedures Act 51 of 1977. Moodley confirmed that nineteen firearms had been stolen during the robbery. Moodley was incarcerated from 19 September 2024 until he was released on bail of R10 000.00 on 20 January 2025. The employer held that Moodley held a crucial position of administrative

officer in the finance department of EMS (Emergency Medical Services) based at Tygerberg Hospital. Due to his incarceration Moodley was unable to be at work for three months and twenty seven days and there had been a number of attempts to get bail which had been postponed. The employer could not replace Moodley easily as his position was not vacant and they felt Moodley had not been forthcoming in regards to any developments made regarding his bail applications. Fisher held that the dismissal was procedurally unfair as Moodley was not given the chance to prepare for the meeting after which his services had been deemed to be terminated based on operational incapacity. Fisher also held that the dismissal was substantively unfair as the employer was aware of the circumstances in which Moodley found himself and had proceeded with the meeting on 15 January 2025 which could have been postponed for more certainty regarding his bail application which had been granted on 20 January 2025. Moodley is seeking retrospective re-instatement.

3. I have considered all the evidence and argument, but because the LRA requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

THE BACKGROUND TO THE DISPUTE

4. Moodley started working for the employer on 5 June 2016; worked as an administrative officer in the finance department (a supervisory position); earned R31 000.00 per month and was dismissed on 16 January 2025 due to incapacity in that he was incarcerated for just under four months before being granted bail of R10 000.00 on 20 January 2025.

SUMMARY OF EVIDENCE AND ARGUMENT

The employer's version and testimony was as follows:

5. Nadine Boshoff (assistant director (finance and revenue)) testified that Moodley held a supervisory role in the department involving assets and liabilities. The job requires the incumbent to have matric with mathematics. Moodley was responsible for the collections of debt; damages; liaison with the Government Garage; attending meetings to write off losses and journal transfers between accounts. ER2 bundle lays out the job summary for Moodley which included the effective rendering of supervisory functions pertaining to the assets and liabilities designated staff; the management of all assets and liabilities related to transactions; authorization of assets and liabilities journals (the staff capture data for the journals) and Moodley authenticates such entries on the system which accounts need to be cleared as per SOP (Standard Operating Procedures); assures all damages and losses transactions are completed correctly, timeously and according to regulations; the same applies to debt

transactions; asset and liabilities relating reports; ensures correspondence, filing and safekeeping of documents and handling of queries are performed effectively. Boshoff explained that Moodley reported directly to her who in turn reported to the regional office, then the Department of Health after which it reported directly to Treasury. Moodley was incarcerated on 19 September 2024 and after three months and twenty seven days was dismissed on 16 January 2025 due to operational incapacity. During this period Moodley was initially paid his ten days annual leave due up to 4 October 2024 and thereafter the employer reverted to unpaid leave. Moodley was suspended by HR on the persal system with effect from 1 November 2024. Boshoff explained that her department could not employ a temporary person as the rules require the post to be vacant which at the time had still been held by Moodley on the system. Operations were impacted by the absence of Moodley; a clerk was acting in the post but was unable to authenticate journal entries made onto the system. Boshoff had been made aware that Moodley had been incarcerated on 19 September 2024 when she received a message from Moodley confirming that he was unable to be at work. The wife of Moodley had told Boshoff that Moodley had been arrested and would appear in court the next day. During the period of incarceration there had been eleven bail hearings which were all postponed and Boshoff needed to know when Moodley would be able to resume work. On 7 January 2025 Moodley was handed a notice to attend an incapacity hearing which (with special arrangements made with the prison authorities) would be held on 15 January 2025 at Pollsmoor prison. Boshoff had visited the prison to hand the notification to Moodley and it had been discussed that this may lead to the termination of his services. In that letter it states that it is noted that Moodley had not been found guilty in court and that his incarceration is outside of the control of Moodley. The Department had decided to hold a hearing at which Moodley would be granted an opportunity to provide reasons why his services should not be terminated based on his operational incapacity and his inability to fulfill his contractual obligation to provide his services. Boshoff needed to know when he would be able to resume work. At the time Moodley had said he would be representing himself at the hearing. The hearing took place on 15 January 2025 which then became a meeting and was held at Pollsmoor. The meeting was chaired by Heinrich Knoop (deputy director EMS); the presenter had been Boshoff; the scribe was Ronel Constable (senior administration officer) and Moodley was present. Moodley had said he could not access documentation due to his incarceration. Moodley had elaborated on the court processes and needed to know when he would be able to resume work. Boshoff stated that Moodley had not requested a postponement; had been unable to say when his bail hearing would take place and could not commit to a specific date. Boshoff explained that a bail hearing took place on 16 January 2025 when Moodley was not released on bail and the matter had again been postponed. Boshoff stated that Moodley had appeared in court eleven times according to his wife and she understood that his bail application kept being postponed. On 20 January 2025 Moodley appeared in court when he was granted bail on the payment of R10 000.00. Boshoff had only been aware of the bail hearing held on 16 January 2025 and was not informed of the hearing which took place on 20 January 2025. According to Boshoff Moodley had believed he would be granted bail on 16 January 2025 which matter had been postponed. Boshoff explained that Moodley had many court dates and it was felt that the Department could not

wait any longer with the uncertainty as to when Moodley would be able to resume work. Most communications had been done with Boshoff through the wife of Moodley.

6. In cross-examination it was put to Boshoff that she was aware on 16 January 2025 of the next court date as she had been so informed by his wife. This was denied by Boshoff. Boshoff was asked for a copy of the notes handed in by Moodley on 15 January 2025 which were part of his submissions. Copies were made of these notes for each party at arbitration. Boshoff denied that Moodley had read these notes in their entirety. It was put to Boshoff that Moodley had read from his handwritten notes in their entirety at the hearing which notes were then handed to the employer for their consideration. The hand written notes handed in by Moodley are marked EE2 bundle.

The heading of these notes are Re: Postponement of hearing. Moodley in summary had written that his right to representation had been violated. Since he received the notification Moodley wrote that he had made various requests to the wardens and prison authorities to assist in the process so that he could get certain documentation but no assistance had been forthcoming. Moodley stated that this could be verified with the wardens. Due to the above Moodley wrote that he was unable to provide any evidence or call any witnesses which this alone put him at a grave disadvantage. Moodley wrote that he had no evidence to present; no witness to call; no research on legislation and labour law could be accessed; no contact with work for information; no access to his employment contract and no access to union representation. Moodley wrote that for a hearing of this magnitude that would determine his termination from work he felt that he was not equipped with the tools to give an adequate response to this hearing. Moodley wrote that going forward with this hearing would be detrimental to him and his family. Moodley wrote that he was innocent and would not have done anything wrong which will be proven in a court of law. However, the process being followed is damaging his livelihood and his reputation. In ending Moodley wrote that he humbly requests that the committee postpones this matter until all his bail options have been exhausted.

Boshoff was referred to the outcome of the hearing EE1 bundle page 19 in a letter dated 16 January 2025 in which it is acknowledged that Moodley is being detained at Pollsmoor prison. It states that "Moodley had failed to provide the employer with compelling reasons as to why a further period should be afforded to you with any reasonable prospects of success. Furthermore Moodley had been provided with a reasonable period in excess of three months to meet the required standard and report for duty at your workplace." It was put to Boshoff that within one day the employer concluded it should terminate the services of Moodley despite the notes handed in by him the previous day. Boshoff stated she was unable to explain why that letter had been issued within one day from the hearing. Boshoff stated that she had been told that the bail hearing would be held on 16 January 2025 and it was put to her that she had been told that it was explained that she was aware that the bail hearing had been postponed until 20 January 2025. Boshoff stated that there had been numerous court appearances and that she was uncertain when this would stop. It was held that Moodley will say that the employer was informed of the bail hearing set for 20 January 2025. Boshoff agreed that Moodley was ill

prepared for the hearing but they had been told by Labour Relations to continue with the process. It was agreed that Moodley had previously taken annual leave when arrangements had been made for a stand-in whilst Moodley was away. Boshoff was unaware of whether or not this would be a period of temporary incapacity and they needed to take into account the operational requirements of his position. It was put to Boshoff that they had five days to wait to hear the results from the bail hearing. Boshoff reiterated that on that subject there had already been eleven postponements. It was put to Boshoff that five days is a small period of time to wait and Moodley had not been afforded a further opportunity to state his case. Boshoff confirmed that she had received documents from the attorneys of Moodley (Holmes Attorneys) in his criminal case but as they were not signed they were deemed to be invalid. Boshoff was unaware of further requests to meet with these attorneys. An additional page was handed in by Fisher which is an email dated 16 December 2024 addressed to Boshoff wherein a request for a meeting with Holmes Attorneys had been made to which Boshoff had responded that she had referred this matter onto the Labour Relations department. It was put to Boshoff that Holmes Attorneys had requested a meeting either on 17 December 2024 or the next day. Boshoff explained that this request was put into the hands of the Labour Relations department. Boshoff agreed that she had not received a response from that department. Fisher held the Moodley will say that as the employer never responded therefore no further updates were sent to them.

7. In re-examination Boshoff confirmed that there had been no indication of a final court appearance on 20 January 2025. Boshoff believed that although Holmes Attorneys had requested a meeting in December 2024 this would not have had any impact on the postponement and merits of the case. The employer had been dependent on the findings of the court. Boshoff referred to EE2 page 1 and confirmed that Moodley had said he would defend himself but had written that his rights to any representation had been violated as he had no control over what happens in the prison. Moodley also said he had no evidence to present. Boshoff had no certainty when Moodley would be released. Moodley had not requested a postponement although this had been written in his notes handed in that day. On 16 January 2025 that had not been the first unsuccessful bail application.
8. Heinrich Knoop (deputy director EMS) testified that he chaired the incapacity meeting on 15 January 2025 and that Moodley had been brought into the room allocated for this purpose at Pollsmoor. Moodley had said he would represent himself although he had no evidence to present and the employer would hear what Moodley had prepared to say/wanted to say. The employer had wanted to know when Moodley would be released and Moodley said he could not get hold of anyone. Knoop felt that Moodley had been given sufficient time to get assistance if that was required. Knoop confirmed that on 15 January 2025 Moodley had not requested a postponement. Boshoff was given the hand written notes from Moodley and if he had asked for a postponement then the meeting would have stopped. Knoop had been told not to go into the criminal charges against Moodley and to focus on when he could resume work. Moodley had made reference to his wife and children. The notes

handed to Boshoff had been addressed to advocate Willem Small who was not present at the meeting. Moodley had no evidence or witnesses to present and the employer could not get any certainty on when Moodley would be released. The employer had waited almost four months before they had handed Moodley a notification to attend the meeting.

9. In cross-examination Knoop explained that on 15 January 2025 he was the chair and not an observer which had not been a disciplinary hearing. It was the director of EMS who would make the final decision. Moodley told the meeting that his next bail hearing would be on 20 January 2025 although both he and Boshoff had heard these postponements many times before. The employer needed to make a decision as an operational imperative and he thought that the bail hearing held on 16 January 2025 had again been postponed. It was put to Knoop that Holmes Attorneys had indicated changes to the criminal charges which ultimately led to his bail application being successful on 20 January 2025. Knoop said he never gave Moodley extra days as he needed closure on this matter. Knoop felt that Moodley never trusted the employer enough to keep them informed on what was happening. It was put to Knoop that he had been told not to get involved in the criminal charges against Moodley and Knoop explained he had wanted a positive outcome from Moodley to change his life yet he had no closure coming to him. Knoop stated that the information gleaned by him was that Moodley had some technicalities in court which feedback was given to the director. Knoop confirmed that the employer was never interested in the criminal charges faced by Moodley. It was felt that Moodley never played open cards with the employer and he was unaware of the extent of things. Knoop was referred to the additional page handed in with the email dated 16 December 2024 in which Holmes Attorneys had requested a meeting with the employer. Boshoff mentioned this email and they were told not to get involved. No-one had said what the criminal charges were about and the full extent of the case had not been explained. It was put to Knoop that Boshoff had testified that the hand written notes of Moodley had been received at the meeting and that these notes had been handed to her by Moodley. It was put to Knoop that Moodley had presented all evidence and Knoop disagreed in that at arbitration it was the first time he had seen these notes made by Moodley. Knoop stated that the employer needed closure and hence had taken a decision. Knoop confirmed that on 15 January 2025 Boshoff had presented the case and the minutes from this meeting are on ER1 bundle pages 4 and 5. Knoop was referred to ER1 bundle page 5 which contains the response received from Moodley which states he had been unable to obtain supporting documents as he was denied access from the prison authorities. Knoop held that such documents related to his criminal charges which had no relevance to the incapacity process and when he would return to work. Knoop confirmed that Moodley had never referred back to Labour Relations and they could have met with Moodley and his attorneys. Knoop felt he had been fair and Moodley was given the opportunity to get back to work. Fisher stated that Moodley will say that he told them he had a strong chance of getting bail on 20 January 2025 which Knoop said he had heard before many times. Knoop agreed that the decision was taken a day after the meeting as Moodley had already been given almost four months and no information came about when he would be released. It was put to Knoop

that it had not been unreasonable to have postponed the meeting for a further five days and Knoop stated that this had been the same position Moodley had taken over the last almost four months. Knoop said the employer needed closure for operational needs. Knoop agreed that review applications in the Labour Court could take three years and that Moodley had no control regarding the postponements of his bail applications. Moodley had been out of prison since 20 January 2025 and Knoop stated that the employer would not change their minds as this was now a closed book. Knoop added that no-one had anticipated that bail would be granted on 20 January 2025 and Moodley had never approached the employer thereafter. Nothing was said in re-examination.

The employee's version and testimony was as follows:

10. Sashin Moodley testified that he had eight years' service with the employer and he was an administration officer in the finance department of EMS. Constable was the senior administration officer to whom Moodley reported directly. Moodley confirmed he was dismissed on 16 January 2025 and had received the notification of the hearing on 7 January 2025 issued to him at Pollsmoor prison by Boshoff. Moodley read EE1 bundle pages 17 and 18 into the record which letter is dated 16 January 2025 and is the notification to attend an incapacity hearing. It was noted that Moodley was an awaiting trial prisoner and his absence from work had been handled in terms of the DPSA (Directive on leave of absence in the Public Service dated August 2021). It confirmed that Moodley held a crucial position in the finance department and that the department could not keep his post open for a period of more than three months from the date of his incarceration. It is noted that Moodley had not been found guilty in court and that his incarceration was outside of his control. Moodley was requested to provide reasons his services should not be terminated based on operational incapacity to fulfill his contractual obligations. The rights of Moodley are listed and it is stated that the employer will be relying on oral plus documentary evidence. When later reading the notification Moodley was taken aback that the employer may terminate his services. Moodley confirmed he was placed on paid leave up to 20 September 2024 and thereafter on unpaid leave. It was an emotional period for Moodley as he had been away from home for three months and now he had to deal with his employer. There had been verbal communication with Boshoff. Moodley explained that his bail had been denied on 30 October 2024 and he had been given a date on which his matter would proceed to trial at the Strand Magistrates Court. Moodley confirmed that in the first week of November 2024 application had been made to overthrow the Rule of the magistrates Court and that this matter had been set down for 20 January 2025. During December 2024 new evidence came to light which added to his prospects of being successful in getting released on bail. The new evidence was taken to the High Court where bail was set at R10 000.00 which matter took place between the Judge and Holmes Attorneys. On 14 December 2024 Moodley had received a letter to give to the Court at his next appearance. Moodley had contacted Boshoff who said that the employer could not attend the Court hearings. The bail hearing had been postponed but bail was guaranteed to be given to him on 20 January 2025. Moodley said both his wife and Boshoff were aware of this fact. Moodley had two applications for

bail in the magistrates court postponed and this had been explained to the employer on 7 January 2025. Moodley was at the incapacity hearing held on 15 January 2025 although he had been unable to get paper from the wardens. At the hearing Knoop had introduced himself and told him that this was a meeting as opposed to a hearing. When handed the notification on 7 January 2025, Moodley had said he would represent himself but later read the letter again and it was not a meeting but rather about whether or not he could keep his job. At the hearing Moodley had read his notes into the record and Constable had taken them from Moodley for her records. The notification had come from Advocate Small which is why his notes were addressed directly to him (EE1 bundle page 17). The outcome from the incapacity hearing is dated 16 January 2025 and came from C. Wylie (director of EMS). On 16 January 2025 Moodley had been in court and was out by 08h00 after which he received the letter of termination of his services. On 20 January 2025 Moodley was released from Prison on bail and thereafter reached out to Boshoff and PSA. Boshoff told Moodley to follow the legal route. Moodley had been at home since 20 January 2025 and received some communication from Holmes Attorneys. Whilst in prison his wife could visit him but only twenty people per day were allowed access to visit anyone. In total Moodley had received two visits from his wife. Boshoff had sent an undated letter addressed to "whom it may concern" to Holmes Attorneys although Moodley only saw this letter when he appeared in Court in December 2024 (EE1 bundle page 16). Moodley confirmed the letter seemed accurate and dealt with his paid and unpaid leave situation which was after this had been requested from Holmes Attorneys. In December with the new evidence the one charge was dropped from schedule 5 to a schedule 1 offence. At the incapacity hearing Moodley had said he was not prepared as he could not get hold of the Court documents. At the hearing Moodley had wanted to show that the schedule of charges had been reduced to schedule 1 which increased the likelihood of him getting released on bail. The employer needed to know of this development as thereafter bail was guaranteed. However Moodley explained that the employer had thought that he wanted to keep just talking about his case. Moodley reiterated that he had no access to a telephone to arrange to get the documents from his attorneys. On 7 January 2025 the notification had been about his job which is why he made some notes which he read out at the hearing. At arbitration the notes had been produced by Boshoff which confirms that she had been given them to consider. Moodley had not received the minutes from the incapacity hearing and only saw them for the first time at arbitration (EE bundle page 19). The employer claimed that Moodley was given ample time to prepare a response as to why his services should not be terminated but believed that the employer was aware of his court date of 20 January 2025 and should have waited to give Moodley the benefit of the doubt. The employer, South African Police Services and Correctional Services are all part of the State. The wife of Moodley works as a cleaner at Tygerberg Hospital working twelve hour shifts. Moodley usually sat at the office continuing with his work and therefore had put in many hours of extra work. Moodley confirmed he was seeking retrospective re-instatement as he had made sacrifices for the employer. This matter had been costly and had impacted his life. Moodley pointed out that he could no longer work for the state due to his dismissal. Moodley explained he was a gun enthusiast who had even taken his entire department to the shooting range and club to which he belonged. The

employer was aware that the bail postponements were out of his control and was aware of what was guaranteed to happen on 20 January 2025. Moodley reported about a case at the department when Binase had been missing from work for a period of six months (Southern Division) and had been given back his work. Moodley pointed out that his father receives kidney dialysis and is finically dependent on his for his treatment.

11. In cross-examination Moodley confirmed he was released on bail on 20 January 2025 but never had any documents to present at the hearing on 15 January 2025 as he was in prison. Since his release Moodley confirmed he had not been given any documents to confirm the schedule under which his charges fell and that the employer only had his word in this regard. It was put to Moodley that the employer disputes the evidence he had given. Moodley explained he had been dismissed on 16 January 2025 and he felt that there had been no point in bringing such evidence to arbitration as the employer had been sent the full criminal charge sheet. It was put to Moodley that his version was not put to the witnesses of the employer. Moodley pointed out that Knoop said the employer wanted no involvement with the attorneys representing him in his criminal case. Moodley agreed he had no proof of all his claims. It was put to Moodley that he referred a dispute to the Council and wanted to get his job back but he had not been truthful as he had nothing to back up his version. It was disputed that Moodley had read out his notes at the incapacity meeting and Moodley insisted that he had read them out and then given them to Constable. It was put to Moodley that Knoop was present that day and yet today he testified that he had no knowledge of such notes. Moodley reiterated that those notes had come from the bundle of Boshoff and therefore they had been in the possession of the employer. Moodley was reminded that two witnesses of the employer had confirmed that Moodley had not read out in their entirety from the notes he had made. Furthermore that both Boshoff and Knoop had testified that they were unaware of the bail hearing scheduled for 20 January 2025 and Moodley had no evidence to back anything he had said happened. It was put to Moodley that he went through with the hearing/meeting but not due to what he had written in his notes.
12. In re-examination Moodley explained he had such documentary proof but not with him at arbitration. Moodley confirmed that he had not been granted a postponement, although requested, at his incapacity hearing held on 15 January 2025.
13. I was asked by Fisher to allow him to submit a bundle of documents, in the next few days, containing documentary evidence to back up the version as stated by Moodley. I explained the complications of having to re-open the entire arbitration as whatever was handed in still needed to be testified to and then cross-examined by the employer. Fisher and Moodley had both been aware that arbitration was scheduled for 26 May 2025 since the notice of set down was sent to them on 24 April 2025. It was implausible for neither of them to have realized that such documentary evidence would be required at arbitration. It had been the evidence of Moodley that when in prison he had no access to any documents, people from work or evidence to present. Yet now at arbitration he

was still in the same position despite have been released on bail on 20 January 2025. I pointed out that Moodley was out on bail with no idea when his case would finally proceed to trial and yet he is seeking retrospective reinstatement. Bail could at any time be revoked which would place the employer in an untenable situation. I ruled that this would not be permitted.

14. It was agreed by both parties that closing arguments would be submitted to me by no later than 17h00 on Friday 30 May 2025. Closing arguments were received from both parties, the contents of which have been noted.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

15. Whilst narrowing the issues in dispute Moodley had said he had a robbery at his home which ended up with nineteen firearms being stolen. There were no further details given during arbitration regarding his arrest as the employer had consistently said the criminal charges were of no relevance to their need to know when Moodley could resume work. Moodley was incarcerated from 19 September 2024 until he was released on bail of R10 000.00 on 20 January 2025. Moodley was dismissed on 16 January 2025 which makes his absence from work due to his incarceration a total of approximately one hundred and twenty (120) days. Both parties agreed that Boshoff was informed of his incarceration timeously after Moodley had been arrested. At this point in time Moodley had no idea as to how long his incarceration would endure.
16. The employer made a prima facie case that as an administration officer in the finance department the post he held was crucial to their operations. The staff in the department captured the data onto the system which would then be authenticated and released by Moodley. Moodley was responsible for the collections of debt; damages; liaison with the Government Garage; attending meetings to write off losses and journal transfers between accounts. Moodley was in a supervisory role for the staff who worked within the assets and liabilities section of the finance department. Moodley was responsible for all transactions and authorizations of assets and liabilities journals. He was required to authenticate data captured by his subordinates and to then authorize these entries and release them in terms of the SOP of the department. Moodley also had to ensure the timeous and correctly completed records of all damages; losses; debt transactions; asset and liabilities reporting; all correspondence created therein needed to be filed and kept safe. I therefore accept that the position held by Moodley was crucial to the smooth operations in the finance department. I further accept that it was not easy to find a person to stand in for Moodley as it would have taken time before any substitute person in the role would be competent to perform such duties and the post was not vacant on the Persel system.
17. During his incarceration there had been a number of attempts for Moodley to get released on bail yet this matter kept being postponed over which Moodley had no control. Boshoff was updated about the status of Moodley by

his wife and on the version of Boshoff there had been eleven postponements of his bail application. On the version of Moodley there seemed to have been only two on 24 October 2024 and 16 January 2025. Moodley testified that one charge had been reduced from a schedule 5 offence to a schedule 1 offence after new evidence had come to light during December 2024. The second charge remained a schedule 1 offence. Moodley had no evidence to corroborate this claim. This in his view guaranteed a successful bail application on 20 January 2025. Moodley insisted that Boshoff was aware of the bail application scheduled to be heard on 20 January 2025. This was disputed by Boshoff who equally insisted she had not been unaware of the bail hearing scheduled for 20 January 2025 or any details of the new evidence which came to light in December 2024. Again Moodley had no evidence whatsoever to support his claims regarding his bail application.

18. In my view, given the facts of this matter, it was not reasonable to expect the employer to have kept the position open and available to Moodley for an indefinite period of time, particularly in circumstances where he held a crucial position within the finance department. The potential indefinite length of the absence from work of a person holding a crucial position, which could not easily be filled by temporary employees, renders this case one of incapacity. Martin Brassey in his "Commentary on the Labour Relations Act" at para A8 – 76 submits, correctly that: *"Incapacity may be permanent or temporary and may have either a partial or a complete impact on the employee's ability to perform the job. The Code of Good Conduct: Dismissal conceives of incapacity as ill-health or injury but it can take other forms. Imprisonment and military call-up, for instance, incapacitate the employee in pursuance of a closed shop is for incapacity; so is one that results from a legal prohibition on employment."* It is confirmed then that due to his incarceration Moodley did not have the capacity to fulfil his job requirements – albeit though he had no control over the matter and had at the time of his dismissal not yet appeared in Court to conclude the criminal matter he faced.
19. It then became an operational imperative for the employer to establish on what date it was likely for Moodley to be free to resume his duties. Towards this end the employer arranged a visit on 7 January 2025 to Pollsmoor prison to hand over and explain the notification to attend an incapacity hearing for Moodley. It was explained that this hearing was being held to allow Moodley to state his reasons as to why his services should not be terminated based on operational incapacity or his inability to fulfil his contractual obligation to provide his services. The notification set out the rights of Moodley to representation by a union official; to give his own evidence, with witnesses, or any documents. Further that he had the right to cross-examine any witnesses of the employer and to request for an interpreter if so needed. It was agreed by both parties that Moodley off the cuff had stated that he would represent himself. It is acknowledged that Moodley had to prepare for his hearing within the confines of the rules of the prison. Moodley testified that he was unable to make any phone calls; his wife only managed to visit him twice due the prison only allowing a maximum of twenty visitors per day; could not get any documentary

proof and he had even struggled to get paper plus a pen from the wardens. Moodley's only evidence in this regard was that the employer should ask the wardens.

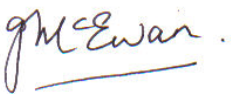
20. The incapacity hearing was held as scheduled on 15 January 2025 after this had been arranged with the prison authorities to be held at Pollsmoor prison. Boshoff explained that this did not relate to the criminal charges faced by Moodley which had no relevance to the employer's incapacity process. Moodley had again agreed that he would represent himself. It was the perspective of the employer that they had to determine when it was likely that Moodley would be able to resume his duties. The versions of the parties of what transpired at this meeting are mutually destructive which is what I will need to determine on the evidence presented. It is recorded in the minutes from that meeting that Moodley spoke about the legal process pertaining to his criminal case which had no relevance to his incapacity case. The version of Moodley, which to some extent was corroborated by the notes made which were handed in at arbitration by Boshoff, was that he had requested a postponement. Both Boshoff and Knoop disputed that Moodley had requested a postponement. Moodley argued that both were aware that his next probation hearing, with "guaranteed" success, would be held on 20 January 2025. This is not mentioned at all in his written notes for that meeting. Knoop testified that had he known about the bail application to be held on 20 January 2025 he would have stopped the meeting. It is probable that the employer was not aware of the date of 20 January 2025 as they had not been told of the new evidence produced in December 2024 which changed the classified schedule of the one offence from 5 to 1. However, even at arbitration Moodley had no proof at hand to corroborate this assertion.
21. The Labour Court in ***Network Field Marketing (Pty) Ltd v Mnglezana NO & others (2011) 32 ILJ 1705 (LC)*** pointed out that in resolving a dispute of fact, a commissioner should undertake a balanced assessment of the credibility, reliability and probability of the different versions given. At the incapacity meeting Moodley testified that he had had no access to documents, witnesses, representation and on his disputed version had asked for a postponement of that meeting. Yet having been granted bail on 20 January 2025 Moodley was not restrained in any way from getting the documents, witnesses and representation which he claimed he required. The notice of set down for arbitration was sent out on 24 April 2025 and the only thing that Moodley had managed to change was that he had representation by his union. Moodley had absolutely no documentary evidence or witnesses to corroborate what he had wanted to prove at the incapacity meeting. Moodley testified that he had not received the minutes from the incapacity hearing and only saw them for the first time at arbitration (EE bundle page 19) yet such minutes were in the EE1 (employee) bundle handed in at arbitration. I accept that Boshoff simply told Holmes attorneys that their request for a meeting in December 2024 had been forward to the Labour Relations department. That being the case Moodley explained that there had not been any further communication to the employer. Knoop felt that Moodley never trusted them enough to keep them informed of what was happening in his case notwithstanding the restrictions of being in prison. The only difference between the incapacity meeting

and arbitration was that he had representation. I therefore find that in assessing the probabilities and the reliability of the witnesses, that the version presented by the employer is more probable as they presented documents and two witnesses to state their version whilst Moodley relied predominately on his oral evidence.

22. It was held that the dismissal of Moodley was procedurally unfair as he was not given the chance to prepare for the incapacity meeting after which his services had been deemed to be terminated based on operational incapacity. Moodley had plenty of time prior to arbitration to get the evidence he needed to present and had wanted to present but inexplicably failed to get any documentary evidence to corroborate his version of the events which he said he had but were not at hand at arbitration. I therefore find on a balance of probabilities that the dismissal of Moodley aligns with the provisions of Schedule 8 – Code of Good Practice; Dismissals of the LRA and his dismissal is found to be procedurally fair.
23. It was held that the dismissal was substantively unfair as the employer was aware of the circumstances in which Moodley found himself and had proceeded with the meeting on 15 January 2025 which could have been postponed for more certainty regarding his bail application which had been granted on 20 January 2025. Moodley is seeking retrospective re-instatement. Knoop testified that had he been aware of the “guaranteed” bail hearing scheduled for 20 January 2025 he would have stopped the incapacity meeting. Both Boshoff and Knoop denied that Moodley had asked for a postponement on 16 January 2025 and had been unaware of the “new evidence” found in December 2024 which changed the schedule under which the criminal charges fell which then heightened the chances that Moodley would be successful in getting bail on 20 January 2025. There was no proof that the charges had then fallen under a different schedule of offence or that this would enhance his prospects of getting bail. Moodley remains out of prison on bail of R10 000.00 with no end in sight as to when his case may be concluded in the criminal courts. It cannot be expected for the employer to again wait for an indefinite period under these circumstances. I therefore find on a balance of probabilities that the dismissal of Moodley is found to be substantively fair.

AWARD

24. The dismissal of Sashin Moodley is found, on a balance of probabilities, to be fair on both substantive and procedural grounds. Consequently, this case is dismissed.



Gail McEwan