Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no:C153/2019

In the matter between:

THE PUBLIC SERVICE ASSOCIATION OF SOUTH AFRICA obo P MACKAY & 29 OTHERS	Applicant

and

DEPARTMENT OF THE PREMIER (WESTERN CAPE)	First Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Second Respondent
JACQUES BUITENDAG *N.O.*	Third Respondent

Date of Hearing: 27 June 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 15 September 2022

Summary: (Application to review an award based on a jurisdictional issue (the existence of a dismissal under s 186(1)(b)(ii) of the LRA) - Applicable test on review is correctness not reasonableness – However, it is overly-technical and wrong to require "correctness" to be expressly pleaded – On the facts, the review application was partially upheld in respect of two applicants)

JUDGMENT

LESLIE AJ

Introduction

[1] The applicant seeks to review and set aside an arbitration award issued by the third respondent ("the arbitrator") under the auspices of the second respondent on 22 January 2019.

[2] The applicant union represents 30 members who allege that they were dismissed by the first respondent with effect from 30 April 2018.

[3] The majority[1] of the applicant's members were formerly employed by the first respondent as Trainee Network Technologists ("TNT's") on written fixed term contracts (for convenience these 25 applicants will collectively be referred to as **"the applicants"** below). Their contracts of employment terminated on 30 April 2018.

[4] The primary question before the arbitrator was whether the applicants had been dismissed within the meaning of section 186(1)(b)(ii) of the Labour Relations Act 66 of 1995 ("the LRA"), that is, whether they had a reasonable expectation that their employer would retain them *"on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer … did not offer to retain* [them]*"*.

[1] The circumstances of five of the applicants are distinguishable and will be addressed separately below, namely, MacKay, Naidoo, Kamalie, Citto and Felaar.

[5] The arbitrator answered this question in the negative.

***In limine:* the review grounds relied on by the applicant**

[6] The first respondent has raised a preliminary objection regarding the pleaded grounds of review relied upon by the applicant. The first respondent's complaint is that the applicant has challenged the reasonableness, as opposed to the correctness, of the award, in circumstances where correctness is the applicable standard. The first respondent submits that the review application should be dismissed on this ground alone.

[7] It is well-established that the question of whether or not a dismissal has taken place within the meaning of section 186 of the LRA is a jurisdictional fact which is subject to review on objectively justiciable grounds.[2] If an arbitrator incorrectly holds that a dismissal did or did not take place, that is a sufficient basis for this court to set aside the award. An applicant need not satisfy the more stringent "reasonableness" threshold as set out in *Sidumo*,[3] namely, that the decision is one that could not have been reached by a reasonable decision-maker.[4]

[8] As it was expressed by the LAC in *De Milander v MEC for the Department of Finance: Eastern Cape*[5]:

> *"The question whether, on the facts of the case, a dismissal had taken place within the ambit of s 186(1)(b) involves the determination of the jurisdictional facts. A jurisdictional ruling is subject to review by the Labour Court on objectively justiciable grounds and not on the reasonableness test approach as enunciated in Sidumo."* (emphasis added)

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[2] *SA Rugby Players Association v SA Rugby (Pty) Ltd; SA Rugby (Pty) Ltd v SA Rugby Players Union* (2008) 29 ILJ 2218 (LAC) para 39 (*"SA Rugby"*).

[3] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) (*"Sidumo"*).

[4] *Sidumo* para 109.

[5] (2013) 34 ILJ 1427 (LAC) para 24 (*"De Milander"*).

[9] In *Enforce Security Group v Fikile*[6] the Labour Court had reviewed a CCMA commissioner's finding, that a group of employees had not been dismissed, on grounds of unreasonableness. The LAC upheld an appeal against this finding on the following basis:[7]

> *"The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties' dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding, as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court a quo found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner."* (emphasis added, footnote omitted)[8]

[10] Similarly, in *Jonsson Uniform Services v Brown*[9] the LAC held that the Labour Court had erred by applying the wrong test (reasonableness) in relation to an arbitrator's finding that no dismissal had taken place. After pointing out that *"we have a bifurcated review standard viz reasonableness and correctness"*,[10] and that the issues in dispute *"will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute"*[11] the LAC held that:[12]

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[6] (2017) 38 ILJ 1041 (LAC) (*"Enforce Security"*).

[7] Para 16.

[8] See also *Ukweza Holdings (Pty) Ltd v Nyondo NO* (2020) 41 ILJ 1354 (LAC) para 4, where the LAC upheld an appeal on the basis that the Labour Court had unduly deferred to a CCMA commissioner's decision regarding the existence of a dismissal. It held that *"When it comes to the issue of jurisdiction, the decision of the arbitrator would be reviewable on objectively justiciable grounds. The test is that of correctness and not one of reasonableness."*

[9] Unreported judgment of the LAC dated 13 February 2014, case number DA10/2012 (*"Jonnsson Uniform Services"*).

[10] Para 33.

[11] Para 34.

[12] Para 36.

> *"It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court a quo, as both parties agreed, applied the wrong standard."* (emphasis added)

[11] The effect of these authorities is that the "correctness" and "reasonableness" grounds of review are mutually exclusive, and that it is not open to an applicant to seek to review a jurisdictional finding (such as the existence of a dismissal) on grounds of unreasonableness.

[12] Although I accept that I am bound by the principle set out immediately above, I have reservations as to its correctness.

[13] An arbitration award issued by a CCMA commissioner or a bargaining council arbitrator amounts to administrative action.[13] As such, all things being equal, it is subject to the full suite of review grounds available under section 145 of the LRA, including reasonableness.

[14] There is no reason why an administrative act should not be open to challenge, on grounds of unreasonableness (or any other competent ground for that matter), simply because it involves a finding of a jurisdictional nature. If a jurisdictional finding should be found to be unreasonable in the *Sidumo* sense, it would fall to be set aside on that ground.

[15] Having said that, in most cases one would think that this would be purely academic[14] because the reasonableness standard is more stringent than the correctness standard.[15] A decision that is so unreasonable that no

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[13] *Sidumo* para 88.

[14] Subject to what is set out below.

[15] The stringency of the reasonableness test, as opposed to the correctness standard, was highlighted by the Constitutional Court in *Sidumo* para 109. See also *Thebe Ya Bophelo*

reasonable decision-maker could make it will invariably also be a wrong decision.

[16] The point is that, in my respectful view, the available grounds on which administrative action may be potentially reviewed do not fall away simply because of the nature of the decision under review. Where a decision involves a jurisdictional ruling, it may be reviewed on objectively justiciable grounds (correctness) or on the ground that it is unreasonable.

[17] Regrettably, as the facts of this case illustrate, these considerations have not proved to be purely academic. This is because, following the reasoning of the LAC's judgments referred to above, the Labour Court has on more than one occasion dismissed applications to review awards involving jurisdictional decisions on the basis that the "wrong" review ground (i.e. reasonableness and not correctness) was pleaded.

[18] For example, in *NUMSA obo Zahela v Volkswagen SA (Pty) Ltd*[16] the applicant sought to review an arbitrator's finding, that no dismissal had taken place, on grounds of unreasonableness. The application was dismissed for this reason alone. After citing the *SA Rugby* case (supra), the court went on to hold as follows:[17]

> *"[6] In other words, reasonableness ordinarily has no place in a review where the enquiry is whether or not the CCMA has jurisdiction. This is an assessment that must be made objectively, having regard to the facts placed before the commissioner. It amounts to a determination of whether the commissioner's decision was correct.*
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> *[7] It follows that in a matter such as the present, where the proper right of review is one based on correctness, that is the case that*

Healthcare Administrators (Pty) Ltd v National Bargaining Council for the Road Freight Industry 2009 (3) SA 187 (W) 201D-E, where the following was said:

"As the famous saying goes, "Quot homines, tot sententiae". Opinions, even among reasonable men and women, may differ and, at times, quite markedly. If the test in a challenge to an administrative decision is whether the decision was one that no reasonable decision maker could reach, it will, in practice, be very difficult to succeed."

[16] Unreported judgment of the Labour Court, case number PR137/13, reasons dated 18 November 2016 (*"Zahela"*).

[17] Paras 6 – 7.

must necessarily be pleaded. The applicant, mistakenly, has pleaded on the basis of an attack on the reasonableness of the arbitrator's decision." (emphasis added)

[19] Similarly, in *SA Post Office SOC Ltd v CCMA*[18] the Labour Court dismissed a review application (where the primary question was whether a dismissal had taken place in terms of section 186(1)(b) of the LRA) because the applicant's pleaded grounds of review amounted to an attack on the reasonableness, as opposed to the correctness, of the impugned award.[19]

[20] With respect, in my view these decisions[20] are plainly wrong and, as such, are not binding on this court. I say this for the following reasons:

20.1 In each case, an applicant for review has been non-suited solely on account of the fact that it has not expressly pleaded that a jurisdictional ruling is wrong. This appears to be an overly technical approach which is out of kilter with the primary objects of the LRA, particularly the promotion of effective resolution of labour disputes.[21]

20.2 By instituting a review of the jurisdictional ruling, the applicant has made it clear that it considers the award to be wrong. There cannot be any doubt about this. It flows ineluctably from the very act of challenging the award on review.

20.3 At the very least, it is necessarily implicit in an allegation of unreasonableness that the applicant considers the award to be wrong. As set out above, how can an award that no reasonable decision-maker could have made be correct? In any event, reasonableness entails a far more stringent threshold than the correctness test.

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[18] (2018) 39 ILJ 1350 (LC) (*"SA Post Office"*).

[19] Paras 23-31.

[20] *Zahela* and *SA Post Office*.

[21] Section 1(d)(iv) – particularly bearing in mind that in many cases litigants in the Labour Court are unrepresented lay persons.

20.4 In short, when an applicant pleads that an award is reviewably unreasonable there can be no doubt whatsoever that he or she also considers it to be incorrect.

20.5 Although these sentiments were not expressed by the LAC, in the cases referred to above,[22] they appear to have been accepted as axiomatic.

20.6 In *Enforce Security*, the applicant's pleaded challenge to the award was based on reasonableness, not correctness.[23] On the Labour Court's approach in *Zahela* and *SA Post Office*, this would have been the end of the matter. Yet the LAC, after pointing out that the applicable test was correctness and not reasonableness, proceeded to determine the appeal. It did so with reference to the correctness threshold.[24]

20.7 Similarly, in *Jonnsson Uniform Solutions*, after pointing out that the correct test was correctness and not reasonableness (on which the pleaded case for review had been based)[25] it proceeded to apply the correctness standard.[26] This outcome, again, is irreconcilable with the principles set out in *Zahela* and *SA Post Office*.

20.8 The LAC in each case was not concerned with the technicality that the applicant had relied on the wrong standard in its pleadings. The LAC had no compunction in applying the correct standard. This is, with respect, an eminently sensible approach which is in keeping with the LRA's goal of effective dispute resolution.

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[22] *Enforce Security* and *Jonnsson Uniform Solutions*.

[23] Para 9.

[24] See generally paras 17ff and paragraph 22 in particular.

[25] Para 24.

[26] This is evident *inter alia* from paras 43-44 of the judgment.

[21] In the present matter, the applicant's pleaded grounds of review amount to a reasonableness, as opposed to a correctness, challenge. In line with what I have set out above:

21.1 I accept that, in line with the relevant LAC authorities, the applicant is precluded from seeking to review the award on the ground of reasonableness; however

21.2 It is necessarily implicit in the pleaded grounds of review that the applicant considers the award to be wrong.

[22] I therefore proceed to determine the review application by applying the "correctness" standard of review.

Is the arbitrator's finding that the applicants were not dismissed wrong?

[23] Whether or not an employee had a reasonable expectation of permanent employment on the same or similar terms as his or her fixed term contract is essentially a question of fact to be decided in light of the peculiar circumstances of each case. There is no closed list of factors that should be taken into consideration. The onus is on the applicants to establish whether reasonable employees would, in the circumstances prevailing at the time, have expected the employer to appoint them permanently on the same or similar terms and conditions of employment.[27]

[24] The applicants were employed by the first respondent ("the Department") in or around 2011. They were employed as TNT's on written fixed term contracts.

[25] The written contracts make it clear that the applicants did not occupy posts on the fixed establishment,[28] but were employed on a fixed-term basis in positions that were "additional to the establishment".

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[27] See *De Milander* (supra) paras 24-27 and the authorities cited there.

[28] Employment in the public service is closely regulated by the Public Service Act, 1994 ("the PSA"), read with the Public Service Regulations, 1996 ("the PSR"). The "fixed establishment" is defined in section 1(xiii) of the PSA to mean *"the posts which have been created for the normal and regular requirements of a department"*. The applicants were appointed under section 8(c)(ii) of the PSA, which makes it clear that, rather than occupying posts on the fixed establishment,

[26] The applicants were originally appointed to assist with the implementation of specific IT projects within the Department's Centre for E-Innovation ("the CEI").[29] Their salary levels ranged from 6 to 8 and, at the time of their termination, the applicants earned between R183558 and R303168 per annum.

[27] By 2018, the Department was engaged in a restructuring process known as the "Modernisation Process". Following a consultation process with organised labour, the structure of a new fixed establishment for the CEI had been finalised on 18 October 2017. Of relevance, the new structure did not contain any TNT posts.[30] It did, however, include a number of Chief Network Technologist posts ("CNT's").

[28] According to the relevant job advertisement, the CNT posts:

28.1 Were graded at salary level 9;

28.2 Were attached to a salary of R334 545 per annum; and

28.3 Required a relevant 3-year tertiary qualification in information technology or a related field (inter alia).

[29] The procedure for appointing employees into posts in the new structure was governed chiefly by two documents, namely: the Modernisation: Human Resource Principles ("the Principles") and the "Personnel Plan 2014" ("the Personnel Plan"). These will be addressed in more detail below. Suffice it to say that the process involved matching and placing employees, where possible, in the same posts as before. There is no doubt that the matching and placement process was not intended to place employees into higher level posts. In clause 5 of the Principles (under the heading "Matching and Placement Principles"), the following was stated:

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they were *"employed temporarily or under a special contract in a department, whether in a full-time or part-time capacity, additional to the fixed establishment …"*. Section 57(2) of the PSR also governs the appointment of persons employed additional to the establishment.

[29] The "Fuduka" project and subsequently the "Broadband" project – although the evidence suggested that these projects were no longer ongoing by 2018 and the applicants were performing various operational duties by that stage. At the same time, a new fixed establishment was being finalised within the Department.

[30] Nor did it contain any Network Technologist posts.

> *"The matching and placement of an employee <u>can only take place against a post of similar occupation and on the same salary level as the one in which the staff member finds himself/herself</u> … no matching and placement may take place <u>against a higher position/salary level</u>, as such an action would constitute a promotion and thereby undermine the principles of career progression."* (emphasis added)

[30] At an information session that took place between 31 January and 1 February 2018, the applicants were informed *inter alia* that:

30.1 *"All staff will be matched and placed in the same posts, in the same functions and at the same offices as they are currently. Therefore the status quo remains for all current staff as the move to the new structure"*; and

30.2 *"All vacant or newly created posts will be advertised and the normal recruitment processes will be followed. This provides the opportunity for the upward mobility of staff and the recruitment of additional staff."*

[31] On 23 February 2018, each of the applicants was informed that they had not been matched and placed into permanent posts in the new structure. They were informed that they would *"be placed additional to the approved establishment with the retention of your current salary for the duration of your contract"*.

[32] On 27 February 2018, the applicants were notified in writing that their existing fixed-term contracts of employment would terminate (by effluxion of time) on 30 April 2018.

[33] The applicants applied for the CNT vacancies in the new structure, but were unsuccessful because they did not meet the minimum qualifications for the post, specifically, the 3-year tertiary qualification requirement set out in the job advertisement for that post.

[34] It is not entirely clear from the record precisely what relief the applicants sought. The request for arbitration form and the pre-arbitration minute simply refer to "reinstatement". Section 186(1)(b)(ii) requires a reasonable

expectation, on the part of the employees, to be retained on an indefinite basis but otherwise on the same or similar terms as their fixed-term contracts.

[35] In the context of the public service, the applicants could not have reasonably expected indefinite employment other than in a post on the new fixed establishment.

[36] The new fixed establishment, as finalised in October 2017, did not contain any TNT posts, nor did it contain any Network Technologist posts. The applicants can only conceivably have expected indefinite employment in the new structure in CNT posts.

[37] The difficulty for the applicants, however, is that their appointment as CNT's would clearly have amounted to a promotion – an outcome which was expressly excluded from the matching and placement principles.

[38] Although some attempt was made by the applicants to persuade the arbitrator that they were in fact performing the same functions CNT's, this was untenable. In this regard *inter alia*:

38.1 It was common cause that the applicants job titles were TNT's and that they were employed between job levels 6 and 8, on salaries that ranged between R197742 and R303168. If they were appointed as CNT's their salary level would have gone up to level 9 and their salaries would have increased to R334545. On this ground alone, direct placement as CNT's would have fallen foul of clause 5 of the Principles.[31]

38.2 The CNT post was, on the face of it, more senior than the positions occupied by the applicants and it contained a minimum 3-year tertiary qualification requirement, which none of the applicants met.

38.3 After the applicants were informed that they had not been matched and placed into any post on the new structure, they all applied for appointment into the CNT post. This was a

[31] Reproduced in paragraph 29 above.

recruitment and selection process which necessarily meant that they might not be successful in their applications. This is a factor which, although not decisive, does tend to militate against the existence of a reasonable expectation of permanent appointment.[32]

38.4 In his evidence, one of the applicants, Mr Mxokisi Williams, admitted[33] that the CNT post was a senior technology support function which carried with it high level supervisory functions. The CNT may be required to supervise TNT's and Network Technologists. He ultimately agreed that a TNT could not be matched and placed as a CNT as this would amount to a promotion.

38.5 In his evidence Mr Joel Manasse, the Department's Director ICTI gave comprehensive evidence spelling out the differences between the CNT post and the roles which the applicants were performing as TNT's.[34] His evidence remained largely undisturbed in cross-examination.

[39] In summary, the applicants did not establish that they had a reasonable expectation of indefinite employment in CNT posts. This was the only potential post into which they could have been permanently placed in the new structure. It is significant, in this regard, that the new establishment was the product of a consultative process between the employer and organised labour.

[40] As an alternative submission, the applicants sought to rely one of the "Guiding Principles"[35] in the Principles document. This provided that:

> *"Persons employed on contract, excluding those appointed for a specific project, and who have been employed <u>in the same post</u> for*

[32] See *Pikitup Johannesburg (SOC) Ltd v Mugoto* (2019) 40 ILJ 2829 (LC) para 42.9. Of course, it was open to the applicants to pursue an unfair labour practice dispute pertaining to promotion in connection with their unsuccessful applications. However, they elected not to do this.

[33] Transcript pp 81-88.

[34] For example, at Transcript pp 236-238.

[35] Item 5 of the Principles, under the heading "Guiding Principles".

> *18-months or longer must be regarded as permanent for the purposes of this exercise."* (emphasis added)

[41] The applicants argued that this provision applied to them because they had been employed for longer than 18 months. The Department submitted that the term "post" meant a post on the fixed establishment (and it is common cause that the applicants never occupied posts on the fixed establishment).

[42] Even if one accepts, as the applicants contended, that by 2018 they were no longer appointed for a specific project, the applicants' submissions on this point do not stand up to scrutiny when viewed in the context of the restructuring process as a whole (which took place within a government department regulated by the PSA) and when read together with the Personnel Plan in particular.

[43] Under the heading "Scope of Application", paragraph 3.1 of the Personnel Plan provided that:

> *"This Personnel Plan is applicable to all employees appointed permanently and on contract for 18-months or longer in the same post in terms of the Public Service Act, 1994 (as amended) within the Department of the Premier."* (emphasis added)

[44] This clarifies any ambiguity in the Guiding Principles document and makes it clear that only contract employees who were in a "post" within the meaning of the PSA (i.e. a post on the fixed establishment) were to be regarded as permanent for the purposes of the restructuring exercise.

[45] For the reasons set out above, in my view the arbitrator was correct in finding that the applicants had failed to establish that they had a reasonable expectation of being retained on an indefinite basis on the same or similar terms as their fixed-term contracts and that, accordingly, they had not been dismissed within the meaning of section 186(1)(b)(ii) of the LRA. This part of the award warrants no interference on review.

Citto and Felaar

[46] As foreshadowed above, the circumstances of Mr Marco Citto and Ms Meghann Felaar are distinct from those of the other applicants.

[47] Ms Felaar was employed in the position of Programme / Project Manager at salary level 11, with an annual salary of R697914. It would appear that the only reason why Ms Felaar was not appointed as a CNT was because she lacked the minimum academic qualification for the post.[36] (Her highest qualification was grade 12, NQF4). Ms Felaar testified that, after her contract with the Department terminated on 30 April 2018, she was appointed by a third party service provider to do precisely the same job as before, with effect from 2 May 2018.

[48] In Ms Felaar's case, unlike the bulk of the applicants, appointment to the CNT post would not by any means have amounted to a promotion. There is no question that she was capable of performing the duties of the post, as evidenced by her seamless continuation of the role (albeit via a third party service provider) from 2 May 2018. The need for the role continued to exist and there were vacant CNT positions in the new structure. In these circumstances, a reasonable person in Ms Felaar's position would have expected her employer to retain her on an indefinite basis.

[49] Similar considerations apply to Mr Citto, who was employed in the position of Network Technologist at salary level 9, with a salary of R355 059 (in excess of the advertised salary for the CNT post). Again, the only reason why Mr Citto was not appointed to the CNT post was because he did not have the necessary tertiary qualification. In my view Mr Citto, too, would reasonably have expected to be retained on an indefinite basis as a CNT.

[50] The arbitrator's finding to the contrary, in respect of Felaar and Citto, was wrong. It falls be set aside. Having established that they were dismissed, it will be for another arbitrator appointed by the council to determine whether their dismissals were fair and, if not, the appropriate relief to be awarded.[37]

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[36] The Department did not make much of an attempt to explain why a tertiary qualification was required, save for a statement by Ms Elsa Olivier (Director: Recruitment and Selection) that a tertiary qualification was a national benchmark in the sense that it was a formal requirement of all departments in the public service for network technologists.

[37] This was the extent of the relief sought in the notice of motion.

MacKay, Naidoo and Kamalie

[51] Three of the applicants, MacKay, Naidoo and Kamalie were successful in their applications for the CNT post and were appointed with effect from 21 May 2018. The arbitrator held that, since they were appointed to the CNT posts, they were not entitled to any relief.

[52] In this review application, an order of "payment" is sought in respect of the 21 days when MacKay, Naidoo and Kamlie were unemployed. In reality this a prayer for compensation in that amount, not a claim for "payment" of damages. No case has been made out in the applicant's papers for interfering with the award in this regard. This prayer for relief falls to be dismissed.

[53] Neither party pressed for an order of costs.

[54] In the premises, I make the following order:

Order

[1] The arbitration award issued by the Third Respondent on 23 December 2018 under the Second Respondent's case number GPBC857/2018 ("the award"), is reviewed and set aside only insofar as it pertains to Felaar and Citto.

[2] The award is substituted with the following:

> *"Felaar and Citto were dismissed by the Respondent within the meaning of section 186(1)(b)(ii) of the Labour Relations Act 66 of 1995, with effect from 30 April 2018.*
>
> *Save as aforesaid, I find that the other Applicants, except MacKay, Naidoo and Kamalie, have failed to prove a reasonable expectation to be retained by the Respondent on an indefinite basis. MacKay, Naidoo and Kamalie were appointed permanently on or about 21*

May 2018 and are not entitled to any relief. The application is dismissed except insofar as it pertains to Felaar and Citto."

[3] The dispute under the Second Respondent's case number GPBC857/2018, insofar as it pertains to Felaar and Citto, is remitted to The Second Respondent for arbitration before an arbitrator other than the Third Respondent, for determination on the following issues: (a) whether the dismissals of Felaar and Citto were unfair; and (b) if so, the relief to be awarded to Felaar and Citto.

[4] There is no order as to costs.

Leslie AJ
Acting Judge of the Labour Court of South Africa

Representatives -

For the Applicant:	T Du Preez, instructed by Malcolm Lyons & Brivik Inc
For the Third Respondent:	C Kahanovitz SC and S Harvey, instructed by the State Attorney