IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR 3015/04
J 1265/07

MOPANI DISTRICT MUNICIPALITY **APPLICANT**

And

SA LOCAL GOVERNMENT BARGAINING COUNCIL **1ST RESPONDENT**

FATIMA CACHALIA N.O. **2ND RESPONDENT**

JACOBUS DANIEL VISSER **3RD RESPONDENT**

JUDGMENT

CELE AJ

INTRODUCTION

[1] The applicant seeks to have the arbitration award issued by the second respondent on 23 November 2004 reviewed and corrected or set aside in terms of section 158 (1)(g) of the Labour Relations Act 66 of 1995 ("the Act"). The third respondent, being the erstwhile employee of the applicant not only opposed this application but has filed an application to have the same arbitration award made an order of this court, in terms of section 158 (1)(c) of the Act.

BACKGROUND FACTS

[2] The applicant is a Municipality duly established in terms of section 12 of the Local Government Municipal Structures Act No 117 of 1998 ("the Municipal Structures Act"). Its principal place of business is at Giyane, Limpopo Province.

[3] The third respondent was employed as a Regional Director, Fire and Emergency Services by the then Northern District Council. He was based at Tzaneen Fire Station.

[4] In the year 2000, there were major structural changes entailing the disestablishment of various municipalities and in their places, new ones were established. Pursuant to that restructuring, the Tzaneen Fire Station where the third respondent, Mr Visser, was deployed, was transferred to the applicant on 01 July 2003, in terms of section 197 of the Act. As a consequence, the applicant became the employer of Mr Visser. However, Mr Visser was only advised on 5 September 2003 that he had been transferred to the applicant with effect from 1 September 2003, with the retention of all his service benefits. On 12 November 2003 he was also advised that he had been placed in the applicant's organogram, with effect from 10 November 2003 as a Chief Fire Officer subject to him accepting the placement. Mr Visser conditionally accepted his placement by indicating that he could not relocate to Giyane and he requested an undertaking for the finalisation of additional travelling arrangements. In the alternative, he requested for the continual payment of the travelling costs emerging from the change of his work place, which he was then receiving. The parties are in dispute about whether or not the applicant responded to the conditional

acceptance. According to the applicant, it undertook to pay an amount for, either his travelling or accommodation expenses for a period not exceeding three months, commencing from 1 November 2003. The payment was made subject to Mr Visser sorting out issues of his accommodation. Mr Visser's version is that no communication was received by him, whereby the applicant only undertook to remunerate him for travelling or accommodation costs for a period not exceeding three months from Tzaneen to Giyane is about 117 kilometres.

[5] The applicant and various trade unions concluded a collective agreement which was yet to be formalised. Placement was to be regulated by the South African Local Government Association's (SALGA) guidelines on the placement policy.

[6] From November 2003 until 10 February 2004 Mr Visser rendered his services at Giyane. He was thereafter on sick leave until 28 February 2004. The applicant terminated the travelling expenses, which it had been paying to Mr Visser, with effect from 10 February 2004. On 1 March 2004 Mr Visser issued a letter to the applicant in which he pointed out that as from the beginning of February 2004, his travelling claims had not been met. He said further that his placement was being placed in jeopardy, saying that he was henceforth obliged to report daily at Tzaneen Fire Station instead of reporting at Giyane until the breach was remedied. Thereafter he addressed a letter to his superior Ms Mathebula also dated 1 March 2004 in which he informed her of his medical condition. He attached various medical reports pertaining to his injury on duty. On 3 March 2004 he then telefaxed a letter to his

supervisor, offering his services and his availabity to provide his services and duties from Tzaneen. He also requested a meeting to discuss outstanding issues between him and the applicant. On the same day, he telefaxed a note to which he attached a medical certificate from his doctor reporting that he was unwell. On 9 March 2004 he sent a note pertaining to "orders J.P. Mbhalati (08/03/2004)" in which he requested Ms Mathebula to explain the written order which he said she had attached for his attention. In that note, he expressed an uncomfortability with the way of doing things and his receipt of orders from her.

[7] On 10 March 2004 Ms Mathebula wrote to Mr Visser asking for a copy of the 2005/2006 budget which was due for submission to finance section. She similarly informed him of a committee meeting which was to be held on the following Monday. She asked him to furnish her with agenda items for discussion. She called for clarity on how he was to execute his job, seeing that he was then based in Tzaneen.

[8] Mr Visser was a member of the Independent Municipal and Allied Trade Union (IMATU). On 24 March 2004 IMATU issued a letter to the applicant *inter alia* pointing out that Mr Visser had conditionally accepted his placement at Giyane that the Placement Policy catered for alternative travelling arrangements and requesting an urgent meeting between all parties to resolve the matter amicably.

[9] On 6 April 2004 Ms Mathebula invited Mr Visser to attend a grievance hearing scheduled for 13 April 2004. Mr Visser wrote

back to her on 13 April 2004 and indicated that the locks to his office in Tzaneen had been changed, saying also that the key was given to a Mr J.P. Mbalati, the Acting Station Commander at Tzaneen. He said that the grievance document would be submitted to Ms Mathebula as soon as he could gain entry into the office. Mr Visser however attended the grievance hearing. Mr Visser's placement was identified as being the crux of the dispute for which the hearing was about. Ms Mathebula decided to await the outcome of the placement committee meeting scheduled for a hearing on 19 April 2004, but she pointed out that Mr Mbhalati was entitled to the use of the office in Tzaneen as Mr Visser had been transferred to Giyane. On 20 April 2004 Mr Visser wrote to Ms Mathebula enquiring when clarity regarding his placement could be expected. He simultaneously expressed a willingness to accept placement at Giyane provided that adequate travelling arrangements could be made or that the matter of costs for such travelling could be negotiated or agreed upon in terms of the Placement Policy. As an alternative, he suggested that he be placed at Tzaneen as a Station Commander or Fire Prevention Officer on a contractual – to – holder basis. On 26 April 2004 Mr Visser wrote to Ms Mathebula, informing her that he was available in Tzaneen to perform administrative work and to comply with orders given to him by his supervisor. Ms Mathebula again wrote another letter dated 3 May 2004 to Ms Visser, informing him of a follow-up grievance hearing which was to be in regard to the grievance he had lodged in April 2004. The hearing was scheduled for 10 May 2004.

[10] An invitation dated 5 May 2004 was then extended to Mr Visser by Ms Mathebula to attend the second inter-governmental working

session for the Mopani IDP. Again another invitation dated 17 May 2004, was given by a Mr Mashamba, IDP Manager, to Mr Visser to attend the internal IDP steering committee meeting. In a letter dated 17 May 2004, Mr Visser informed Ms Mathebula that he was available for administrative tasks and duties within Tzaneen Fire Station. IMATU then issued a letter dated 20 May 2004 for the attention of Advocate M.J.C Maake, the Municipal Manager of the applicant. The letter pertained to the placement of Mr VIsser. It recorded that, despite IMATU's request for an official response to Mr Visser's and other employees' placement, no correspondence had been received from the applicant. The applicant was invited to respond to whether its council was prepared to enter into negotiations for Mr Visser's additional travelling arrangements in terms of the Placement Policy. The applicant was once again requested to convene an urgent meeting to discuss the placement of IMATU's affected members. On 21 May 2004, Adv Maake issued a termination of employment letter to Mr Visser. The body of the letter reads:

> "According to our records you failed to report to your working section in Giyane since your placement. The municipality, being your employer is currently not aware of your whereabouts and for your activities since then.
>
> This letter therefore serves to advice you that your services have been terminated with immediate effect on the ground of desertion.

> Please take notice that in the event you report for duty at any stage after this letter, the municipality will hold an enquiry to determine the validity of the reasons for your absence and depending on the outcome of that enquiry you may be re-instated in your position."

[11] On 24 May 2004 IMATU dispatched a letter to the applicant in response to the termination of his employment. The letter indicated that Mr Visser would report for duty in Giyane from 25 May 2004 and that same was not to be construed as an admission of guilt. An urgent meeting between the parties was also requested in order to resolve the matter amicably. A meeting was then held on 31 May 2004 by Mr Visser, IMATU's representative and the Municipal Manager, wherein the Municipal Manager indicated that he stood by the termination of the services of Mr Visser. In early June 2004, Mr Mbhalati attempted to serve a notice to attend a disciplinary enquiry on Mr Visser who refused to accept such service, contending that the notice was to be served on IMATU as it was formally acting for him. As a consequence no notice was served either on Mr Visser or his union and the hearing proceeded in his absence. On 7 July 2004, the outcome of the hearing was that Mr Visser remained dismissed. A dismissal dispute arose and IMATU, acting on behalf of Mr Visser referred an unfair dismissal dispute to the first respondent for conciliation. When the dispute could not be resolved, it was referred to arbitration and the second respondent was appointed to arbitrate it.

THE PLACEMENT POLICY

[12] This is in reference to a "Memorandum of Agreement" made and entered into by and between the South African Local Government Association ("SALGA") and the two unions being IMATU and the South African Municipal Workers Union ("SAMWU"). While the Placement Policy is applicable in this matter, certain of its clauses are pertinently relevant for present purposes and they are:

> "**1. Statement of intent**
>
> **The parties accept that:**
>
> 1.1 **Arising from the need to restructure local government and functions within the applicable demarcated areas, the reorganisation of existing staffing structure (including geographic re-deployment) may be necessary to meet operational objectives to service delivery. All *placement* shall take place in accordance with the principles contained in this agreement.**
>
> ……
>
> **2. Organograms**
>
> …….
>
> 2.2 **Where it is not possible at this stage to prepare final organograms, the temporary deployment of staff shall take place in terms of structures prepared on a "cut and paste" basis. This temporary arrangement will be *governed* by the time frames of the Municipal Systems Act.**
>
> ……
>
> **2.5 All organograms, whether final or on a "Cut and Paste" basis shall, before implementation, be referred to the Local Labour Forum for consideration. The meaning of consideration shall be informed by the outcome of the arbitration referred to below.**

The parties agreed to refer the issue of what recourses the parties have in the event of a dispute about the content and or implementation of a structural organogram to final and binding arbitration.

The issue which the arbitrator shall determine is whether or not a dispute between the parties over the content of and or implementation of a structural organogram or part thereof , is a dispute in respect of which the parties may have recource to a strike or a lockout in terms of section 64, or to arbitration in terms of section 74 of the Labour Relations Act, as the case may be.

3. Placements

3.1 Placement Criteria

the parties agree to the following criteria:

3.1.1 Municipalities shall use their best endeavours to place existing employees that were transferred in terms of Section 197 of the Labour Relations Act into posts created in new structures.

3.1.2 The parties are committed to ensure continuity of employment and every attempt will therefore be made to ensure that no retrenchment or redundancy will occur provided that the effected employees are willing to accept alternative positions that are offered. In this regard every effort will be made to ensure that such alternative offers are reasonable.

.....

3.1.8 Employees shall not be moved from one geographical location to another location without the function which the employee is performing necessitating such movement.

……..

3.1.10 Employees that cannot be placed in any of the categories of posts or are not offered an alternative post that is not reasonable will remain in the pool of the transferred employees for a period of at least six months from the expiry of the period referred to in paragraph 3.5 unless otherwise agreed, whereafter the employees shall be dealt with in terms of existing redundancy policies or Section 189 of the Labour Relations Act.

3.2 Placement Committee

"Placement of employees shall be considered by the Local Labour Forum or a Sub-Committee of that Forum", provided that the Committee is composed of not more than eight persons.

…….

4. Dispute / Appeal process

4.1 Every individual employee and or trade union on behalf of their members shall have the right to refer a dispute about a placement or non-placement to arbitration. Such dispute shall be referred to arbitration within 5 working day of the date of receipt of a decision by an individual employee.

……

7. Geographical Relocation

…….

7.2 Geographical re-deployment of staff will only take place for the following sound operating and / or economic reasons:

7.2.1 The functions of the post/s are to be delivered in another geographical area.

7.2.2 The functions of the post/s may be reduced and / or combined resulting in a necessity to rationalise resource.

7.2.3 The functions of the post may be abolished in that particular geographical area.

……..

7.5 In the case of an employee accepting geographical relocation, end such employee, moves his place of residence in order to reside closer to his new place of work, the council concerned will pay the cost of removal of his household goods to his new place of residence.

7.6 In the case where the employee does not move his place of residence, additional travelling arrangements or costs may be negotiated with the Municipality."

THE ARBITRATION AWARD

[13] The chief findings made by the second respondent in her award in this matter, relevant for this application may be summarised thus:

Substantive fairness

- Mr Visser was transferred to Giyane in terms of the placement process of the applicant, with effect from November 2003: Such placement was conditionally accepted by Mr Visser and made subject to a travelling costs and \ or arrangement being negotiated by the applicant with him.

- As on 1 March 2004, the placement of Mr Visser had not been finalised. Due to the fact that the issue of his travelling costs and \ or arrangement had not been negotiated with him, he found the situation untenable and he reverted to his former workplace and tendered his services from Tzaneen Fire Station. The applicant was informed of that arrangement through several correspondence sent to it. The applicant being aware of the problem, should have taken steps to address the situation as it was due to its own inaction that Mr Visser found himself in that problematic situation. The explanation of Ms Mathebula, that she did not respond because Mr Visser was not on duty was not an acceptable reason.
- The transfer of services of employees was in terms of section 197 of the Act. The terms and conditions of an employment contract might be amended by agreement unless the "new terms" were not less favourable than those that existed before the transfer.
- The placement of Mr Visser at Giyane was a geographical transfer and should have been negotiated and finalised with him so that he could decide if he accepted it. The transfer to Giyane did affect him adversely in terms of travelling. A response to his correspondence was therefore necessary.
- While he had reverted to Tzaneen, Mr Visser complied wth certain official instructions given to him. He had at all times indicated his willingness to render his services as a Chief Fire Officer,

- Desertion presupposes an intention not to return to work. In this matter his intention at all times, as evidenced from his conduct and correspondence indicated that he wanted to render his services to his employer.
- It was only in the event of a finalised placement that an employee would have the right to refer a dispute about a placement or none placement to arbitration. If an employee did not accept his \ her placement, they would fall into a "pool" and a retrenchment would be undertaken thereafter.
- The dismissal of Mr Visser was accordingly, substantively unfair.

Procedural fairness

- Mr Visser had availed himself on 23 May 2004 to be notified of a hearing date as per the termination letter. The applicant was made aware of the where abouts of Mr Visser as from the date he reported at Tzaneen Fire Station.
- The applicant attempted to serve a disciplinary notification to Mr Visser on 31 May 2004 and on 2 June 2004. There is a document, the contents of which were not known to him, which Mr Visser refused to accept. He indicated that all documents were to be served to his union representative. The onus was on the applicant to ensure that the date of the hearing was brought to the notice of Mr Visser. Service of such a document did not necessarily have

had to be by hand, any other form of service could have been effected. No evidence indicated that the date of the disciplinary hearing was brought to the attention of Mr Visser. His dismissal was therefore procedurally unfair.

The order made

[14] The second respondent ordered the applicant to re-instate Mr Visser to the position of a Chief Fire Officer and to finalise the issue of his placement within 30 days of his reinstatement. Further, the applicant was ordered to compensate Mr Visser for a period of two months, calculated at the rate of his salary as at the date of his dismissal.

GROUNDS FOR REVIEW

[15] The submissions made by the applicant are that the second respondent committed a gross irregularity in dealing with the arbitration proceedings, alternatively she reached a decision which was unjustifiable on the facts or evidence, alternatively, she failed to apply her mind to the relevant provisions of the Act and alternatively, the arbitration award is reviewable on other grounds permissible in law for various reasons. The applicant proferred various reasons in support of the review grounds including that:

- The finding that the placement was not finalised was not justified by the evidence led. To hold that it was not finalised because of the meeting of April 2004 was to ignore important evidence that at that time, Mr Visser had already deserted work.

- Mr Visser was placed in Giyane in November 2003 and he stopped reporting there in February 2004 thereby, deserting his post. His whereabouts could therefore not be known by the applicant. The second respondent failed to have regard to such evidence.
- The second respondent failed to have regards to the fact that Mr Visser deserted his post with the result that another person was requested to act in his position.
- The finding that Mr Visser had at all times indicated his willingness to render his services as a Chief Fire Officer was an unjustifiable contradiction to his deserting his post. Mr Visser had intentionally stopped reporting for duty at Giyane. There was a clear intention that he did not want to render services there contrary to the finalised placement. The second respondent's finding to the contrary is not supported by evidence.
- The second respondent ignored important and essential evidence that Mr Visser indicated in his heads of argument that he regretted the day he took a decision to stay away from work, which was sufficient to substantiate common cause facts he deserted his post.
- The second respondent failed to appreciate the nature of the dispute before her and did not have a proper understanding of the issues by finding that the dispute procedure in respect of placements only applied when the placement has been finalised. It was common cause that the placement of Mr Visser had been finalised in November 2003, hence he started reporting for duty in Giyane.

- The second respondent ignored the evidence of the applicant when she found that the dismissal of Mr Visser was substantively unfair.
- The finding, that Mr Visser had always wanted to attend the disciplinary hearing when he refused to accept the notice, was seriously flawed. It was clear that Mr Visser had unreasonably refused to accept notice to attend the disciplinary hearing thereby making it possible for the applicant to stay the enquiry indefinitely.
- The second respondent exceeded her powers as a commissioner when she had to decide the substantive and procedural fairness of the dismissal of Mr Visser. She had no powers to order the finalisation of the placement which was completed in November 2003.

[16] In opposing the review application the submissions made by and on behalf of Mr Visser are, in the main that:-

Substantive fairness

- Mr Visser did accept the geographical relocation in his letter of 17 November 2003. His acceptance was subject to the finalisation of negotiations with him on additional travelling arrangements or for the continued payment of travelling costs, emanating from the change of workplace.
- The applicant was not entitled to demand Mr Visser to relocate as the memorandum of agreement specifically provided for further arrangements in respect of costs as well as negotiations with the applicant in respect of travelling costs.

- Until the applicant had finalised negotiations with Mr Visser in respect of travelling arrangements, the placement could not have been finalised. That was due to a failure on the part of the applicant to address the situation properly or at all.
- From 10 November 2003 to 10 February 2004 Mr Visser reported at Giyane. He went on sick leave thereafter until the end of February 2004. As from the end of January 2004 he had difficulties in having his travel claims being paid out to him. He was not notified that, as from 1 March 2004, he would no longer receive remuneration for his travel claims. He then wrote a letter dated 1 March 2004 to the applicant in which he addressed the issues of travelling expenses and the finalisation of relocation.
- In the light of his placement not being finalised, he reverted to his previous position in Tzaneen. The position offered to him in Giyane had not been finalised in respect of conditions relating thereto, only then would placement have been completed.
- In respect of redundancy or retrenchment, the Placement Policy stated that reasonable geographical re-deployment would not constitute grounds for retrenchment or redundancy. Mr Visser could therefore not have been placed in a pool being redundant and retrenched. The applicant was therefore obliged to address the issue of travelling costs but failed to do so.
- In a grievance hearing of 13 April 2004, Ms Mathebula noted that the root of the cause of the problem was the placement of Mr Visser. She said that the matter would be taken further after the placement committee meeting of 19

April 2004. On applicant's own contention, the placement of Mr Visser had not been finalised as on 19 April 2004.

- The applicant did not inform Mr Visser that it was discontinuing with the payment to him of a travelling allowance. The letter alleged to have been intended to inform him had no proof of service.
- Applicant did not object to Mr Visser's actions and thereby condoned his decision to render his services at Tzaneen Fire Station, knowing that placement had not been finalised.
- It was fair and reasonable for the second respondent to have concluded that the dismissal was substantively unfair.

Procedural fairness

- The termination of employment of Mr Visser was not preceeded by a fair disciplinary hearing. The applicant merely issued a letter of termination on 21 May 2004. The applicant's actions and intentions thereafter were only an attempt to rectify its procedural and substantive unfair dismissal of Mr Visser. The subsequent hearing was similarly unfair as it was conducted in the absence of Mr Visser.
- All communication in regard to the placement of Mr Visser, after the issue of the letter of dismissal, came from his union. The union was therefore on record as representing him in the dispute. Applicant failed to properly serve the notice of the disciplinary hearing to Mr Visser or this union. Mr Visser indicated to the applicant that serving of documents was to be effected to his union. On 30 June 2004 the union indicated to the applicant that Mr Visser was available to

attend the hearing and that a date thereof was to be arranged with the union. No such hearing was held as applicant had no intention to remedy the unprocedural dismissal.

- Mr Visser was not aware of the disciplinary hearing and could not therefore have waived his rights to it. His refusal to accept the notice to attend the enquiry can not be construed as a waiver of his rights.
- The second respondent's assertion that the onus lay on the applicant to notify Mr Visser of the disciplinary hearing was correct and justified.
- The award of the second respondent was correct and justified.
- The court is to make the arbitration award a court order.

[17] The submissions made on behalf of the parties were more or less the same as those made in the pleadings.

ANALYSIS

[18] The main review ground relied upon by the applicant is one of a gross irregularity allegedly committed by the second respondent. It was further submitted that the second respondent exceeded her powers through the order she issued.

[19] In *Sidumo And Another v Rusternburg Platinum Mines Ltd And Others [2007] 12 BLLR 1097 CC*, from paragraph 261 the court revisited the meaning of gross irregularity and stated that the basic principle was laid down in the off-quoted passage from *Ellis v Morgan: Ellis v Desai 1909 TS 576*, where the court said:

> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high handed or mistaken action which has *prevented the aggrieved party from having his case carefully and fairly determined* (Emphasis added)"

[20] Further reference was made to the decision in *Goldfields Investment Ltd And Another v City of Johannesburg And Another 1939 TPD 551* and at paragraph 265, the court had the following to say:

> "The decision of Ellis and Goldfields were recently endorsed by the Supreme Court of Appeal in the context of the Arbitration Act in Telcordia Technologies. Both Ellis and Goldfields make it plain that the crutial enquiry is whether the conduct of the decision maker complained of prevented a fair trial of issues. The complaint must be directed at the method or conduct and not the result of the proceedings. There is a fine line between reasoning and the conduct of the proceedings, and, at times, it may be difficult to draw the line; there is nevertheless an important difference. Determining whether the commissioner has committed a gross irregularity will inevitably require the reviewing court to examine the reasons given for the award. In doing so, the reviewing court must be mindful of the fact that it is examining the reasons not to determine whether the conclusion reached by the commissioner is correct but whether the commissioner has committed a gross irregularity in the conduct of the proceedings."

[21] In *Sidumo* the court held that section 145 of the Act has now been suffused by the constitutional standard of reasonableness. That standard is expressed to lie in the question whether the decision reached by the commissioner is the one that a reasonable decision-maker could not reach. In *Fidelity Cash Management Services v*

CCMA and Others [2008] 3 BLLR 197 (LAC), at paragraph 99 – 100, the court had the following to say:

> "[99] In my view, *Sidumo* attempts to strike a balance between two extremes, namely, on the one hand, interfering too much or two (sic) easily with decisions or arbitration awards of the CCMA and, on the other, refraining too much from interfering with CCMA's awards or decisions…
>
> [100] The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case."

[22] I return to the application with a caution that it is important to bear in mind the difference between a review application and an appeal. The complaint in review applications must be directed at the method or conduct and not at the result of the proceedings – *Sidumo* and *Goldfields*. It is also important to be mindful of the extent, if any, of interfering with the award of the second respondent – *Fidelity Cash Management Services*. In the main, the attack on the award is based on the decision reached by the second respondent than in how the decision was arrived at. In that event, the proper question is whether the decision reached by the second respondent is one that a reasonable decision-maker could not have made. Yet the complaint of the applicant is that the second respondent committed a gross

irregularity in the conduct of the arbitration proceedings, meaning that there was not a full and fair trial of the issues which she was called upon to determine. The applicant has failed to demonstrate how there was not a full and fair trial of the issues in this matter, in support of the allegation that the second respondent committed a gross irregularity. In the absence of submissions that attack the arbitration process, as opposed to the outcome thereof, this review application, to the extent that it is based on the commission of a gross irregularity, should fail. I will however proceed to examine whether the decision of the second respondent is the one that a reasonable decision-maker could not have reached, as the papers were prepared long before the *Sidumo* decision reached the Constitution Court.

[23] The parties are in dispute about whether or not the placement process for Mr Visser had been finalised. The second respondent found that it had not been finalised. I agree with that finding. The applicant became an employer of Mr Visser after a transfer of business, as a going concern, in terms of section 197 of the Act. A collective agreement, in the form of Placement Policy was concluded by the parties and the conditions of employment were, where relevant, governed by the Placement Policy. Clause 3.1.2 of the Policy provides that: *"the parties are committed to ensure continuity of employment and every attempt will therefore be made to ensure that no retrenchment or redundancy will occur provided that the effected employees are willing to accept alternative positions that are offered…"* (My emphasis). Further, clause 7.6 provides that in the case where the employee does not move his

place of residence, additional travelling arrangements or costs might be negotiated with the applicant. It is common cause between the parties that Mr Visser conditionally accepted his geographical relocation to Giyane. In the consideration of his transfer, he had a right to be consulted and to agree to such transfer. If he did not agree to the transfer, he might probably have ended in the pool, in terms of clause 3.1.10 unless an alternative reasonable post was agreed upon by him and the applicant. Mr Visser was clearly entitled to a response to the conditional acceptance of a geographical relocation. The letter which the applicant issued to limit the travelling claim payment to 3 months was certainly not a response to the conditional acceptance of a transfer. There appears to be merit in the second respondent's finding that Mr Visser did not receive that letter. Apart from the absence of proof of its delivery, Mr Visser would probably have made reference to it in his subsequent correspondence with the applicant. It is also not the applicant's case that this letter was an answer to the conditional acceptance of a transfer. Ms Mathebula's evidence corroborates the version of Mr Visser that no response was given by the applicant to the conditional acceptance of the transfer. Until such time that the parties negotiated in full, the form of a geographical relocation of Mr Visser, such transfer process could not reasonably be held to have been finalised. The second respondent attributed blame to the applicant for the non-finalisation of the transfer process for Mr Visser. To this I also agree. IMATU and Mr Visser sent several letters on this issue. By ignoring such correspondence, the applicant acted irresponsibly, in the circumstances and attracted negative consequences flowing there from.

[24] In my findings, the conditional acceptance of the geographical relocation was in itself reasonable. It left room for parties to negotiate whether or not Mr Visser was to be paid for his travelling costs. If the applicant chose to decline such payment, it would have been up to Mr Visser whether he repudiated his agreement to the transfer. Parties would then be left to consider alternatives. It is only at the stage that Mr Visser could also consider whether to resort to the dispute or appeal processes open to him. It is the applicant's non-co-operation which prevented him from having recourse to these processes.

[25] Parties were further in dispute about whether or not the whereabouts of Mr Visser were known to the applicant after he reverted to Tzaneen Station. The second respondent found that the applicant knew where Mr Visser was. Ms Mathebula was Mr Visser's supervisor. She very well knew that Mr Visser was reporting at Tzaneen Station. She corresponded with him on work related issues at the very period Mr Visser was said to have deserted. The applicant, as a legal person could only execute its function and obligations through its employees. It was never the case of the applicant that Ms Mathebula was not authorised to correspond with Mr Visser. On 17 May 2004 Mr Visser received an invitation to attend the internal IDP streering committee meeting from the IDP Manager, one Mr Mastamaba. Again this was during the very period it was alleged Mr Visser had deserted from his employment. According to the applicant's version, a notice to attend a disciplinary hearing was served by Mr Mbhalati to Mr Visser who declined to

receive it. Again, when the applicant needed Mr Visser, it knew where to find him. Mr Mbhalati and Mr Visser had a grievance relating to who was to use the offices at Tzaneen Fire Station. Ms Mathebula dealt with that grievance. Office keys were changed to deny entry to Mr Visser to those offices in Tzaneen. Instead of dealing with the very issue confronting the applicant, it chose to play ignorant of Mr Visser's whereabouts. When the applicant decided that Mr Visser had deserted, it appointed Mr Mbhalati and placed him at Tzaneen Fire Station. This was the very station from which Mr Visser was not supposed to execute his duties. In my view, the decision reached by the second respondent in this regard is one which was reasonable.

[26] In my view, the decision reached by the second respondent pertaining to whether the placement of Mr Visser was complete or not and the knowledge of the applicant of his whereabouts were very critical in this matter. I find that such decisions can not be reasonably said to be decisions that a reasonable decision-maker could not have reached. On substantive fairness, it is my view that I need not deal with each of the other grounds relied upon by the applicant. If it had been necessary to deal with each of them, I would have found them to constitute grounds of appeal and not review grounds.

[27] As the whereabouts of Mr Visser were very well known to the applicant, it ought not to have dismissed him without a hearing. The applicant knew how to correspond with Mr Visser. Similarly it could have used the same means to inform him of the disciplinary hearing.

It knew very well that he was represented by IMATU. Some of IMATU officials, it seems were members of the Placement Committee in terms of clause 3.2 of the Placement Policy. Others were working for the applicant as shopstewards. There was Ms Mathebula who was Mr Visser's supervisor. In my view, the applicant's failure to hold a disciplinary hearing preceding the dismissal of Mr Visser was visited by a procedural error.

[28] The service of a notice for a disciplinary hearing to reverse the dismissal, could legitimately have been served on Mr Visser, in my view. He had actively corresponded with the applicant before, in connection with his placement. He was a senior personnel in the employ of the applicant and could reasonably be expected to understand the implications of such service. When he however refused to accept service, the applicant should have resorted to other methods of service. That was recommendable, so as to obviate a dispute of facts coming in to existence on whether or not such service was effected. It is common cause between the parties that Mr Mbhalati failed to communicate the contents of the letter he sought to give to Mr Visser. As such it is only the version of the applicant that, what was to be given to him was a notice for a disciplinary hearing. Mr Visser was never therefore informed by the applicant of the date and place of the disciplinary hearing. That compromised the integrity of the hearing.

[29] Mr Visser may very well have regretted the day he took a decision to stay away from reporting at Giyane. It must however be borne in mind that it was firstly the applicant who had to prove the fairness of

the dismissal even before Mr Visser could answer. In my view, a case to which he had to answer was really not well grounded.

[30] The attack of the award on the premise that the second respondent exceeded her powers by ordering the applicant to finalise the issue of Mr Visser's placement, is without any merits, after a finding that such placement was not finalised.

[31] A proper conspectus of all the evidence and submissions informs me that the decision which the second respondent reached in this matter can not reasonably be said to be a decision which a reasonable decision-maker could not have reached. The review application should therefore fail and the application to make the arbitration award in this matter should succeed. I have also considered what, in law and in fairness of this case, a costs order should be.

[32] The following order will issue:

1. The review application is dismissed with costs.
2. The arbitration award issued by the second respondent in this matter on or about 23 November 2004, is made an order of this court.

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CELE AJ

DATE OF HEARING: **27 MARCH 2008**

DATE OF JUDGMENT: **13 AUGUST 2008**

APPEARANCE

FOR THE APPLICANT: **ADV W. HUTCHINSON**

FOR THE RESPONDENT: **J.C. VAN DER WALT**