IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA40/17

In the matter between:

SOLIDARITY	**First Appellant**
JM JOUBERT	**Second Appellant**
and	
ARMAMENTS CORPORATION OF SOUTH AFRICA (SCO) LTD	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
WILLEM KOEKEMOER N.O.	**Third Respondent**

Heard: **21 August 2018**

Delivered: **27 November 2018**

Coram: Phatshoane ADJP, Davis JA and Murphy AJA

Summary: Review of arbitration awards – employer's policies provide that members or employees may not be enrolled, appointed or promoted, receive a commission or be retained as members or employees unless they had been issued with the appropriate or provisional grade of security clearance by the Intelligence Division. Employee's service terminated in that he was denied all grades of security clearance.

Held: that s37 of the Defence Act makes it a prerequisite for an employee to be issued with an appropriate grade of security clearance in order to be retained in its employ. Further - that it is axiomatic that employee's termination of service was based on supervening impossibility of performance which constituted a form of incapacity to fulfil the attendant contractual obligations.

The court finding - that a fair procedure as set out in s39 read with s41 of the Defence Act and Clauses 5.12.1 and 5.15 of employer's Security Clearance Practice A-Prac-2033 was designed to create a platform where the grounds and reasons for the refusal, downgrading or withdrawal of security clearance would be provided to an aggrieved employee so as to afford such an employee a reasonable opportunity to present information, make representations and/or statements to the Review Board regarding the decision to, *inter alia*, refuse the security clearance. Substantive fairness of the decision to terminate under s 37(2) could not have been determined in the absence of reasons for the decision not to grant the security clearance. The termination letter was issued before employer had finally established that it had become permanently and objectively impossible for employee to be retained in its service. In other words, the incapacity had not yet been determined to be of a permanent nature that warranted the employee's dismissal.

As far as relief is concerned, the court held - that reinstatement was impracticable as employee did not hold the relevant security clearance certificate. Further holding that - what was a temporary supervening impossibility of performance become permanent because the review of the decision to deny the employee all grades of security clearance came to naught. The Court concluding - that the maximum compensation was an appropriate relief.

Labour Court's judgment was set aside and the appeal upheld with costs.

JUDGMENT

PHATSHOANE ADJP

[1] This appeal lies against part of the judgment and order of the Labour Court (*per* Whitcher J) reviewing and setting aside the arbitration award (GATW534-13) dated 24 August 2013 issued by Commissioner W Koekemoer ("the commissioner"), the third respondent, under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"), the second

respondent; substituting it with an order that the dismissal of Mr Jacobus Martinus Joubert ("Mr Joubert"), the second appellant, was substantively fair and that Armaments Corporation of South Africa (SCO) Ltd ("Armscor"), the first respondent, pays Mr Joubert eight months compensation on the basis that his dismissal was procedurally unfair. The present appeal is with leave of the Labour Court. Its judgment has since been reported as *Armaments Corporation of SA (SOC) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2016) 37 ILJ 1127 (LC).

[2] Mr Joubert was in the employ of Armscor for more than three decades, since 01 July 1981, throughout which he obtained the requisite security clearance certificates, appropriate to his position, from the Intelligence Division of the South African National Defence Force ("SANDF"). On 23 October 2006 he was issued with a grade "*Secret*" security clearance certificate which expired on 11 September 2011. In accordance with Armscor's Security Practice Mr Joubert submitted an application to renew his security clearance certificate to Armscor's Personnel Evaluation Division ("APED") on 26 September 2011. For the period 11 September 2011 to 26 November 2012 Mr Joubert held a security clearance certificate classified as "*Confidential*". Thereafter, for reasons never explained to him or to Armscor the vetting panel of the Intelligence Division of the SANDF refused to grant him all grades of security clearance, let alone at the highest level he previously enjoyed.

[3] Armscor's conditions of employment provide that an appointment of an employee to its staff establishment is subject to "obtaining and maintaining" of an applicable security clearance. Those "who fail to qualify for any grade of security clearance as a result of a negative vetting content will be dismissed or their contract of employment terminated."[1] Significantly, s 37(2) of the Defence Act, 42 of 2002 ("the Defence Act"), which is central to this litigation provides:

> '(2) A member or employee contemplated in subsection (1) *(a)* may not be enrolled, appointed or promoted, receive a commission or be retained as a

[1] This is set out in para 6.6.1 of Armscor Conditions of Employment, A-Prac-2021, issue 11 and para 5.5.1 of Armscor Security Clearance Practice, A-Prac-2033, Issue 3.

> member or employee, unless such member or employee has been issued with the appropriate or provisional grade of security clearance by the Intelligence Division.' (My emphasis)

[4] On 07 December 2012 APED addressed a letter to Mr Dawie Griesel, acting general manager, Acquisition Department, informing him of the outcome of Mr Joubert's application for security clearance; bringing to his attention certain provision of Armscor policies; and further requesting him to convey a message of the results of the vetting process to Mr Joubert. On 18 December 2012 Mr Griesel addressed a letter of termination to Mr Joubert in these terms:

> 'In terms of para 6.6.1 of the Armscor Conditions of Employment Practice, A-Prac-2021[2] and further in terms of paragraph 5.5.1 of Armscor Security Clearance Practice, A-Prac-2033,[3] an appointment and employment of an employee are subject to obtaining and maintaining of an applicable security clearance.
>
> Furthermore, in terms of paragraph 5.15.2.4 of A-Prac-2033, *persons who fail to qualify for any grade of security clearance as a result of negative vetting content will be dismissed or their contract of employment terminated*. You are hereby informed that you have been refused all grades of security clearance. Consequently, your contract of employment is terminated with immediate effect.
>
> You are further advised of your right to appeal within 30 days from the date of this letter, the decision to refuse you all grades of security clearance should you so wish, by personally requesting a review of the clearance by lodging a written request via APED to the Personnel Security Review Board (PSRB).'

[5] The aforesaid letter effectively terminated, with immediate effect, Mr Joubert's services with Armscor on 18 December 2012. Having been advised of his

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[2] A-Prac-2012 stipulates: "The appointment and employment of an employee are subject to obtaining and maintaining of an applicable security clearance, and the employee must, on request, properly complete all the necessary forms which may be provided."

[3] A-Prac-2033 provides: "an appointment in Armscor is subject to obtaining and retaining a security clearance in relation to the security classification of the information to be accessed."

right to review the decision to refuse him all grades of security clearance he pursued that course.

[6] On 20 December 2012 Solidarity, the first appellant, a trade union acting on behalf of Mr Joubert, directed a letter to Armscor recording that: Mr Joubert had not received reasons for the refusal of his security clearance; he had not been afforded any opportunity to state his case in response to the refusal; and that Armscor did not follow any pre-dismissal process in terminating his services. Solidarity demanded that reasons be provided to Mr Joubert to enable him to formulate a reply or representations to the negative vetting content. It further put Armscor on terms to reply by 04 January 2013. On the next day, 21 December 2012, Mr Joubert wrote a letter to APED in the same vein.

[7] By means of a letter dated 07 January 2013 Mr Joubert lodged an urgent revision of his security clearance with APED.[4] Following this, correspondence was exchanged between the parties but no reasons were forthcoming for the refusal of any of the grades of security clearance by the Intelligence Division. His application for the review or revision remained pending with no end in sight.

[8] In the end, Mr Joubert referred an unfair dismissal dispute to the CCMA for conciliation and arbitration. At arbitration the parties agreed that the matter would be determined by way of exchange of written heads of argument. The only evidence that was led was that of Mr Joubert in respect of his employment status and earnings post his dismissal.

[9] The commissioner, in his assessment of the evidence and argument, was of the view that the provisions of the Labour Relations Act, 66 of 1995 ("the LRA") had to be interpreted "*by casting the net wide to draw employees into protection of the LRA*" so as to conform with the right to fair labour practice as expressed in s23 of the Constitution.[5] He rejected Armscor's argument that it did not dismiss Mr Joubert in that the termination of his services came about

[4] This is referred to on the record as a review at times an appeal.
[5] The Constitution of the Republic of South Africa Act, 108 of 1996.

by the operation of the law, viz s37(2) of the Defence Act. He further rejected its contention that it had no discretion in the matter but to terminate Mr Joubert's services.

[10] The commissioner was of the view that Armscor could have placed Mr Joubert on suspension or considered alternative sanctions short of dismissal. He found that Armscor opted to terminate Mr Joubert's services by merely issuing a notice to that effect without providing reasons for the termination of employment as envisaged in s188 of the LRA. The commissioner reasoned that Armscor was required to decide on a fair reason for the dismissal and to act in accordance with the procedures laid down in the LRA.

[11] The commissioner found that Armscor did not prove a fair reason for the dismissal and concluded that Mr Joubert's dismissal was both substantively and procedurally unfair. He reinstated him retrospectively on the same terms and conditions of employment that applied prior to his dismissal, with back-pay equivalent to his nine months' remuneration in the amount of R737 280.00

[12] Dissatisfied with the outcome of the arbitration process Armscor lodged a review application with the Labour Court contending, as it were, that the commissioner's decision, on the substantive and procedural fairness of the dismissal and the relief granted, was one that a reasonable decision-maker could not have reached.

[13] The review required the consideration of the substantive fairness of the dismissal and relief awarded by the commissioner. Armscor conceded the procedural unfairness of the dismissal and consequently it did not require any determination.

[14] The Labour Court found that the commissioner failed to consider Armscor's alternative defence that Mr Joubert had been dismissed for incapacity. In the premises, the commissioner did not consider the material facts and submissions placed before him and accordingly committed a material irregularity. The Court found that incapacity was the correct categorisation of the basis for Mr Joubert's dismissal. As support for its conclusion the Court

invoked the following passage from Brassey *Commentary on the Labour Relations Act* at para A8-76 which was approved by this Court in *Samancor Tubatse Ferrochrome v Metal & Engineering Industries Bargaining Council & Others:*[6]

> '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 Practice: Dismissal conceives of incapacity as ill-health or injury but it can take other forms. Imprisonment and military call-up, for instance, incapacitates the employee from performing his obligations under the contract. The dismissal of an employee in pursuance of a closed shop is for incapacity; so is one that results from a legal prohibition on employment.'

[15] The Court *a quo* held that Mr Joubert's dismissal was fair because it resulted from a legal prohibition on further employment brought about by s37(2) of the Defence Act and the corresponding Armscor's internal policies. The Court found the injunction (that employees who fail to qualify for any grade of security clearance as a result of a negative vetting outcome will be discharged from their services) to be patently fair and reasonable. The Court was of the view that failure to consider these legal issues resulted in the commissioner producing an unreasonable outcome on the substantive fairness of the dismissal.

[16] In respect of the contention that it was premature to dismiss Mr Joubert, absent a finding that it had become permanently and objectively impossible for Mr Joubert to be retained in his position, the Court agreed with Armscor that Mr Joubert could not be deployed elsewhere because his security clearance was removed in its entirety. Further, that it would be unreasonable to expect Armscor to keep a high earning employee in its employ with no work to perform pending the review process, the duration of which was unknown to Armscor.

[17] The Labour Court found the commissioner's award, insofar as it reinstated Mr Joubert, to be incompetent and unsustainable because the commissioner failed to bring his mind to bear on the fundamental aspect that in law a party

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[6] (2010) 31 ILJ 1838 (LAC) at 1842B-C para 10.

cannot enforce a contract that is in contravention of a statutory provision, in this case s37(2) of the Defence Act.

[18] As already alluded to, the Court concluded that the dismissal was substantively fair. In view of the fact that Armscor conceded that the dismissal was procedurally unfair, the Court upheld the commissioner's award in that respect. It found an award of eight-months compensation to be just and equitable, regard being had to Mr Joubert's 31 years of service with Armscor and the abrupt manner in which Armscor set about terminating his services without following the pre-dismissal procedural steps.

[19] Before us Solidarity and Mr Joubert (the appellants) contended that:

19.1 The Labour Court erred in finding that Armscor relied on the provisions of the Defence Act in terminating Mr Joubert's employment. It was argued that, on the contrary, Armscor relied on its own policies in laying down the basis for termination of employment and in terminating Mr Joubert's employment. It did not rely on the operation of the law, in particular s37(2) of the Defence Act, as a motivation for the termination.

19.2 The Labour Court held that the commissioner erred in not accepting submissions concerning the alleged incapacity of Mr Joubert. The Court ought to have held that the commissioner correctly applied the law by refusing to allow Armscor to rely on the alternative reason for dismissal not communicated to Mr Joubert at the time of his dismissal as the basis for termination.

19.3 The Labour Court ignored the principle enunciated in *Fidelity Cash Management Services v CCMA (Fidelity Cash Management Services)*[7] that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the employer gave at the time of the dismissal.

19.4 The Court failed to record the relationship between the procedural unfairness of Armscor's decision and the substantive basis for the

[7] [2008] 3 BLLR 197 (LAC) at para 32.

termination of employment. The procedural fairness, that is, refusing to provide reasons for the failed security clearance and declining to allow Mr Joubert to complete the review of the adverse security clearance, created the substantive basis for the dismissal that the Judge in the Court *a quo* relied on.

19.5 The Court ought to have taken into account that in Armscor's policies provision is made for requesting a revision of security status and that clause 5.12.1 of Armscor's Security Clearance Practice treats the denial of Security clearance, in the first round, as conditional so that the legal impediment to employment had not been finally determined.

19.6 The Court ought to have considered s39(3) of the Defence Act which provides that: *"No security clearance or specific grade of security clearance may be refused, downgraded or withdrawn without the member or employee who will be affected thereby being afforded reasonable opportunity to present information regarding such matter*" and further s 39(2)(a) which stipulates that: *"…(T)he Secretary for Defence must, in writing, furnish every member or employee whose security clearance or particular grade of security clearance has been refused, downgraded or withdrawn with the grounds and reasons for such refusal, downgrading or withdrawal*."

19.7 The Court failed to appreciate that determination of security clearance under the Defence Act is not a unilateral exercise during which clearance can be denied, without reasons, in the absence of representation by a person potentially adversely affected by the decision. Lastly,

19.8 The Labour Court erred in the application of the review test. The conclusion reached by the commissioner, it was argued, is one that a reasonable commissioner could have reached.

[20] Mr Myburg SC, for Armscor, contended that properly construed, the policy provisions relied upon by Armscor in dismissing Mr Joubert equated to him being incapacitated. He argued that this is not a case of an employer

dismissing an employee on one ground and seeking to defend the decision on a different ground. Therefore, the *Fidelity Cash Management Services* principle relied upon by the appellants, he argued, finds no application in this case. He further contended that the absence of reasons for the decision could not be laid at the door of Armscor. It was the decision not the reasons therefor that caused Mr Joubert to be incapacitated. He further argued that the appellants' reliance on para 5.15.2.1 of Armscor Security Clearance Practice which provides for a right to request "a revision" of the security clearance decision cannot assist them because when para 5.15 is read in its entirety it is clear that the dismissal of an employee who fails to qualify for any grade of security clearance is not subject to the outcome of the revision process by PSRB.

[21] Mr Myburg further argued that s37(2) operated so as to render continued employment of Mr Joubert by Armscor unlawful. Insofar as s37(2) provides that an employee of Armscor "*may not*" be retained as an employee *"unless [he/she] has been issued with the appropriate...grade of security clearance by the Intelligence Division",* cognisance must be taken that the words "*may not*" in this context are not permissive but peremptory. The policies of Armscor adopt this form of interpretation. Furthermore, he argued that s39 which provides for, *inter alia*, an opportunity to present information; to be provided with reasons; and to review negative decision, was misplaced because it applies to a "*member or employee*". A "*member or employee*" in the definition section of the Defence Act did not cover the employees of Armscor, it was contended.

Analysis

[22] This appeal lies, in the main, against the substantive fairness of Mr Joubert's dismissal. It remains to be considered whether the loss by Mr Joubert of all levels of security clearance triggered impossibility of performance. Put differently, whether the termination of Mr Joubert's services by Armscor was actuated by reasons of his incapacity. If the answer to the question is in the affirmative then it has to be established whether the incapacity was temporary

or permanent, and therefore, warranting being visited with a sanction of dismissal.

[23] The CCMA's awards are reviewed on the grounds of, *inter alia*, unreasonableness. The test is whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached.[8]

[24] In his work *Workplace Law*,[9] Mr John Grogan posits, correctly in my view, that incapacity need not arise from illness or injury. Employees may be dismissed for incapacity arising from any condition that prevents them from performing their work. In other words, incapacity may give rise to a species of impossibility of performance.

[25] The following remarks in *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others*[10] are pertinent to this case:

> 'While ordinary principles of contract permit a contracting party to terminate the contract if the other party becomes unable to perform, that is not the end of the matter in the case of employment. The question that still remains in such cases is whether it was fair in the circumstances for the employer to exercise that election. In making that assessment the fact that the employee is not at fault is clearly a consideration that might and should properly be brought to account.'

[26] In terms of s37(1) (a) of the Defence Act the Minister of Defence may prescribe different grades of security clearance to be issued by the Intelligence Division for various categories of members, the employees of Department of Defence and employees of Armscor. In terms of s37(2) those members or employees may not be enrolled, appointed or promoted, receive a commission or *be retained as members or employees, unless they had been issued with the appropriate or provisional grade of security clearance by the Intelligence Division*. Section 37(4) provides that the Intelligence Division must, on the instruction of the Secretary for Defence, determine whether any

[8] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)
[9] Workplace Law John Grogan- 12th Ed, 2017, ch 14-p 287.
[10] (2011) 32 ILJ 1618 (SCA) at 1623 para 12.

security clearance or a specific grade of security clearance should be issued to any member or employee concerned.

[27] In the letter of termination of service, referred to earlier, Mr Joubert was informed that he had been refused all grades of security clearance by the Intelligence Division and consequently that his contract of employment was terminated with immediate effect. The argument by Armscor that the dismissal of Mr Joubert was actuated by incapacity is not new. As correctly found by the Court a quo, it was one of the issues the commissioner was enjoined to determine.[11] As more fully appearing on the Pre-arbitration minutes amongst issues that had to be considered by the commissioner was whether: *"(T)he true reason for dismissal falls within the definition of 'incapacity' as contemplated in the LRA. Further, whether the reason for dismissal had to be "classified as being due to incapacity."*

[28] There can be no question that s37 of the Defence Act makes it a prerequisite for an employee of Armscor to be issued with an appropriate grade of security clearance in order to be retained in its employ. The policies relied upon by Armscor,[12] in effecting termination in this case, have the same import. They also have their genesis in s37 of the Defence Act. The argument by Ms Engelbrecht, for Solidarity and Mr Joubert, that Armscor did not rely on s37(2) of the Defence Act, as a motivation for the termination of employment but on its employment policies, is therefore unmeritorious. It is axiomatic that Mr Joubert's termination of service was based on supervening impossibility of performance. This constituted a form of incapacity to fulfil the attendant contractual obligations. As correctly found by the Court *a quo* Mr Joubert's inability to perform his services, due to the legal impediment imposed by s37 of the Defence Act and Armscor's corresponding employment policies, falls squarely within the ambit of a dismissal based on capacity. However, this is not the end of the enquiry.

[11] See Pre-Arbitration Minutes (Vol 3 page220) under the heading "Disputed Facts" at para 3.9.
[12] The policies are quoted at fn 2 and 3 *supra*. The relevant clauses are: 6.6.1 of Armscor Conditions of Employment A-Prac-2021, Issue 11; 5.5.1 and 5.15.2.4 of Armscor Security Clearance Practice, A-Prac-2033, Issue 3.

[29] Section 39(1) of the Defence Act requires the Secretary for Defence to give written notice to every member or employee in respect of whom a determination, of whether any security clearance or a specific grade of security clearance should be issued, has been made by the intelligence Division as envisaged in s37(4). The Secretary is further required, in terms of s39(2), to furnish in writing to every member or employee, whose security clearance or particular grade of security clearance has been refused, downgraded or withdrawn, the grounds and reasons for such refusal, downgrading or withdrawal. Very importantly, in terms of s39(3) no security clearance or specific grade of security clearance may be refused, downgraded or withdrawn *without the member or employee* "*who will be affected thereby being afforded reasonable opportunity to present information regarding such matter*." Section 39(4)(a) provides that the member or employee concerned may, within 14 days after receipt of the grounds and reasons from the Secretary of Defence referred to above, lodge a written objection against the refusal, downgrading or withdrawal, as the case may be, with the Secretary for Defence and further furnish the Secretary with such written representations, statements and documents as the member or employee deems necessary for a review by the Personnel Security Review Board ("the PSRB").

[30] The argument by Armscor that s39 of the Defence Act did not apply to its employees because they were not "*members or employees*" as defined in the Defence Act is devoid of substance. The Secretary of Defence is charged with the responsibility of giving notice of security clearance or refusal thereof to "*every member or employee*" contemplated in s37(4). The "*members or employees"* contemplated in 37(4) includes the employees of Armscor.[13]

[31] The PSRB is established by the Minister of Defence in terms of s40 of the Defence Act. The board is obliged to review any objection against the refusal, downgrading or withdrawal of security clearance, as the case may be, referred to it in terms of section 39(4)*(c).*[14] It is further imbued with the power to confirm the determination of security clearance made by the Intelligence

[13] See s 37(1)(a) of the Defence Act.
[14] See s 41 (1) of the Defence Act.

Division or to set it aside and substitute it as contemplated in s41(2) of the Defence Act.

[32] So far it is clear that the condition precedent introduced by s37(2), to the effect that an employee may not be retained in the services of Armscor unless he/she had been issued with the appropriate or provisional grade of security clearance, cannot be implemented independently of ss 39 and 41 of the Defence Act, particularly in circumstances where an employee has lodged an objection against the negative vetting outcome as in this case. What Armscor did, on the basis of its policies which are founded on s37(2), was to terminate Mr Joubert's services with immediate effect for reasons that he had been refused all grades of security clearance. This notwithstanding, Mr Joubert was advised of his right to "appeal" the decision within 30 days from the date of receipt of the notice of termination.

[33] Clause 5.12.1 of Armscor Security Clearance Practice, A-Prac-2033, issue 3 Provides:

> 'Any person who regards himself /herself as having been wronged in the **conditional** issuing, downgrading or **denial of a security clearance**, **has the right** to apply for revision of his/her security status by the PSRB. An application for such an appeal to the PSRB must be made personally and submitted via APED within 60 days after notification of the clearance decision to the requesting body.'

[34] An employee's right to apply for revision of the decision in respect of the grade of security clearance by the Intelligence Division is repeated in Clause 5.15. of A-Prac-2033, issue 3, which provides in part:

> '5.15.1 In the event of a clearance refusal, the requesting body will be informed immediately whether a lower grade of clearance was issued or all grades of clearance refused. Reason(s) for the refusal will not be disclosed in order to maintain confidentiality regarding the person concerned or references consulted.
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> 5.15.2 Course of action then lies within the following options:
>
> 5.15.2.1 The person concerned may, within 30 days of notification by his/her manager, exercise his/her right to request a revision of the

clearance decision by personally lodging a written request, via APED to the PSRB, for revision...'

[35] The argument by Armscor that Mr Joubert was disqualified from lodging an objection in terms of its Security Clearance Practice because he was denied all grades of security clearance cannot be sustained for two reasons. First, Armscor itself extended an invitation to Mr Joubert to file an objection if he wished to do so. Second, Clause 5.12.2 of Armscor's Security Clearance Practice-A-Prac-2033 sets out only two categories of persons who are disqualified to lodge an objection. This includes: persons who had been refused security clearance during the recruitment process and whose appointment had not yet been confirmed prior to the denial of a security clearance; and the independent contractors, who tender to work on defence projects. Mr Joubert did not fall into any of the two categories and was therefore entitled to lodge an objection.

[36] Ms Engelbrecht argued that the aforesaid clause 5.12.1, to the extent that it provides that: *"Any person who regards himself /herself as having been wronged in the* ***conditional*** *issuing, downgrading or* ***denial of a security clearance****,* ***has the right*** *to apply for revision of his/her security status by the PSR,"* treats the denial of security clearance in the first round, before review of the decision, as conditional. The net effect of this, she contended, is that the legal impediment had not been finally determined. In countering this submission, Armscor contended that reliance on para 5.12.1 of the policy cannot avail the appellants because it provides for an employee having the right to apply to the PSRB for revision of "the conditional issuing, downgrading or denial of security". The word "conditional", it was argued, relates only to "the conditional issuing of security clearance" and not "denial of security clearance". The denial of security clearance to Mr Joubert was not conditional, the argument continued.

[37] As I see it, nothing turns on the argument that denial of all grades of security clearance by the Intelligence Division was conditional pending the review of the decision. What is crucial here is that there rested an obligation on the PSRB to review any objection referred to it in terms of section 39 (4)*(c).* The

difficulty with this case is that PSRB never reviewed the decision of the Intelligence Division which refused Mr Joubert all grades of security clearance and, worse, the reason(s) for the refusal of all the grades of security clearance remains unexplained.

[38] A fair procedure as set out in s39 read with s41 of the Defence Act and Clauses 5.12.1 and 5.15 of Armscor Security Clearance Practice A-Prac-2033 was designed to create a platform where the grounds and reasons for the refusal, downgrading or withdrawal of security clearance would be provided to an aggrieved employee so as to afford such an employee a reasonable opportunity to present information, make representations and/or statements to the PSRB regarding the decision to, *inter alia*, refuse the security clearance. The grounds or reasons for the refusal of a grade of security clearance are, in my view, fundamental to the establishment of the substantive basis of a dismissal contemplated in s37(2) of the Defence Act. In other words, substantive fairness of the decision to terminate under s 37(2) could not have been determined in the absence of reasons for the decision not to grant the security clearance.

[39] The procedure laid down in s39 of the Defence Act must precede the final adjudication of the review of the decision refusing the security clearance by PSRB. In my view, if the final determination has not been made, then the substantive reason for the dismissal under section 37(2) has not been determined. In this case the termination letter was issued before Armscor had finally established that it had become permanently and objectively impossible for Mr Joubert to be retained in its service. It follows that, at the time of issuing the letter of termination, the incapacity had not yet been determined to be of a permanent nature that warranted Mr Joubert's dismissal. It was only once the review process had been completed, and resulted in the confirmation of the decision of the Intelligence Division, that it could be said that Mr Joubert's incapacity had become permanent.

[40] It is common cause that two of Armscor's employees were allowed or retained in its service without the requisite security clearance certificates. In the final analysis, there could never have been any rationality to the decision by

Armscor to terminate the employment of Mr Joubert prematurely and prior to the determination of the review. The conclusion is irresistible that the dismissal was substantively unfair.

[41] While it is true that the dismissal came about as a result of the legal impediment brought about by s 37(2), the Court *a quo* erred in holding that such a dismissal was fair without assessing the impact of s39 on the substantive fairness thereof. In *Head of Department of Education v Mofokeng and Others,*[15] this Court held that the reviewing court must consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Mere errors of fact or law may not be adequate to vitiate the award. Although the commissioner did not devote his attention to what the correct categorisation of the dismissal could have been on the available material before him, his conclusion, although inelegantly put, that Armscor was required to prove a fair reason for the dismissal and to afford Mr Joubert a fair hearing is unassailable.

[42] On the question of relief, as correctly found by the Court *a quo*, an award of reinstatement was not legally competent. This is so for the following reasons:

42.1 First, Mr Joubert did not hold the relevant security clearance certificate and was therefore disqualified to hold the position of senior manager (technical) that he held at the time of his dismissal. In these circumstances reinstatement would not be reasonably practicable in terms of section 193(2)(c) of the LRA. In *Maepe v Commission for Conciliation, Mediation & Arbitration and Another,*[16] this Court made this instructive illustration: If the evidence before an arbitrator or the Labour Court in an unfair dismissal dispute between A and B, where A who had been employed by B as a driver, established that his driver's licence was withdrawn after his dismissal with the result that he could no longer drive lawfully, it would definitely be “reasonably impracticable” within the meaning of that phrase in s193(2)*(c)* for the

[15] (2015) 36 ILJ 2802 (LAC) at 2812D-G paras 31-32.
[16] (2008) 29 ILJ 2189 (LAC) at 2201A-B para 18.

employer to reinstate him/her because in such a case the employer would not be able to require the employee to perform his duties without requiring the employee to commit a criminal offence. Mr Joubert's position is analogous.

42.2 Second, what was a temporary supervening impossibility of performance has become permanent because the review of the decision to deny Mr Joubert all grades of security clearance came to naught.

[43] The Court *a quo* cannot be faulted in concluding that the commissioner committed a reviewable irregularity by reinstating Mr Joubert into Armscor's employ. The remedy available to Mr Joubert, under these circumstances, is that of compensation. Regard being had to the egregious manner in respect of which his termination was effected, without providing a fair reason and following due process, the maximum compensation allowed in terms of s194(1) of the LRA is justified.

[44] Armscor did not challenge a costs order that was made against it in respect of the aborted review that was instituted under Case No: JR 1510/13. There can be no reason to upset the order of the Court *a quo* in respect of those costs. Concerning the costs in respect of this appeal, Mr Myburg argued that this is not a case where a costs order was called for. Ms Engelbrecht urged that costs follow the result. Having had regard to the requirements of law and fairness, I am inclined to award costs. In the result, I make the following order.

Order

1. The appeal is upheld with costs;

2. The order of the Court *a quo* is set aside and substituted with the following:

"1. The dismissal of Mr Jacobus Martinus Joubert, the fourth respondent, was substantively and procedurally unfair;

2. The Armaments Corporation of South Africa (SOC) Ltd (Armscor), the applicant, is ordered to pay Mr Jacobus Martinus Joubert, the fourth respondent, compensation equivalent to his 12 (twelve) months' salary;

3. There is no order as to costs in respect of the review application filed under Case No: JR 1961/13;

4. Armscor is ordered to pay Solidarity and Mr Jacobus Martinus Joubert's, the third and fourth respondent's, costs in respect of the review application instituted under Case No: JR 1510/13.

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MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Davis JA and Murphy AJA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANTS:	Adv MJ Engelbrecht Instructed by Serfontein Viljoen & Swart Attorneys
FOR THE FIRST RESPONDENT:	Adv A Myburgh SC

Instructed by Bowman Gilfillan Attorneys