IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NUMBER: C397/07

In the matter between:

MORKEL NO, DIRK CLOETE obo

THE HOUDAMOND TRUST Applicant

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION First Respondent

BHANA NO Second Respondent

BEUKES, WERNER Third Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award made by the second respondent on 28 June 2007 under case number WE2786/07 and under the auspices of the first respondent.

[2] The second respondent found that the third respondent's dismissal on 28 February 2007 had been "*substantively unfair*" and ordered payment of compensation in the sum of R23 100 by 31 July 2007.

[3] The applicant now seeks to have the award of the second respondent set aside on the ground that it is unreasonable. This charge is founded on the following factors:

[3.1] the third respondent threatened and intimidated a superior with a stick in front of fellow employees;

[3.2] the second respondent ignored a range of relevant factors;

[3.3] the award is predicated on a charge that was never preferred against the third respondent – assault.

[4] But what are the facts underpinning the second respondent's decision which the applicant says is unreasonable?

The Facts

[5] The third respondent worked at the Belevue Estate wine farm as a driver and store man earning a monthly salary of R3300. He had been working there for 17 years when he was dismissed on 28 February 2007 after he had been found guilty at a disciplinary hearing on charges of undermining authority and intimidation. He did not attend the disciplinary hearing which was held in his absence on 28 February 2007.

[6] Notice of the disciplinary hearing given to him on 26 February 2007 (which he tore up and threw in a dust bin) advised him that the charges to be preferred against him were undermining authority ("*ondermyning van gesag*") and threat to assault ("*dreigement to aanranding*"). However, in his evidence-in-chief Mr Morkel, the chief director at the farm, confirmed that the third respondent had been dismissed for "*intimidasie en ondermyning van gesag*". According to the applicant's disciplinary code both infractions carry a sanction of summary dismissal on a first offence.

[7] The following events gave rise to the dismissal. On 26 February 2007 Anneke Potgieter told Kritzinger about what she termed the third respondent's suspicious behaviour ("verdag"). Kritzinger then saw the third respondent carrying a bunch of grapes and placing it on the dashboard of his car. He was doing this right in front of Kritzinger, the chief wine-maker, who was senior in rank to the third respondent (Kritzinger said in his evidence-in-chief, "*hy het toe een takkie haneppot druiwe by die aflaaibak gaan haal en voor my daarmee verby geloop*").

[8] Because he did not want to confront the third respondent about the suspicious behaviour, Kritzinger waited until the third respondent had returned to work and then searched his car. He says he discovered about 20 bunches of grapes in the third respondent's boot. The third respondent and his witnesses denied this. That employees are generally at liberty to take grapes from the farm for their own consumption is not in dispute.

[9] Kritzinger then telephoned Morkel to enquire whether he had given the third respondent permission to take grapes. Morkel said he had not but that he would take the matter up with the third respondent himself.

He asked Kritzinger not to take the matter any further with the third respondent.

[10] Kritzinger then left the farm for about two hours to buy enzymes at Killarney Gardens. On his return, the third respondent confronted him for searching his car in his absence without his permission. The third respondent was very angry (Kritzinger says he was "*buiten homself van woede*" on several occasions in his evidence).

[11] A heated exchange of words ensued between the two and the third respondent turned around and walked away from Kritzinger towards his car. Kritzinger followed him. The third respondent picked up a stick and persisted in asking Kritzinger why he had searched his car in his absence and without his permission. Kritzinger says the third respondent prodded and tapped him in his chest, his body and on the shoulders with this stick in front of other employees thus lowering his esteem in their eyes. The third respondent and his witnesses deny this.

[12] Under cross-examination Kritzinger advanced as the reason for not asking the third respondent to open his boot so that he could search it that he wanted to avoid a confrontation as he could see the third respondent was beside himself with rage or anger ("*woede*").

[13] When asked by the second respondent why he followed the third respondent to his car if he wanted to avoid a confrontation with him, Kritzinger said he wanted to explain to the third respondent in private his reason for searching his car.

[14] The third respondent reported to Morkel what he considered to be an unlawful search of his car by Kritzinger and sought disciplinary measures to be taken against Kritzinger. Morkel considered such action against Kritzinger to be unjustified. Instead he gave the third respondent notice of a disciplinary hearing on charges of undermining authority (presumably Kritzinger) and threatening to assault Kritzinger. The latter charge later became intimidation.

[15] The third respondent tore the notice up and threw it in the dust bin. He did not attend the hearing at which he was found guilty. Morkel then dismissed him for intimidation and undermining authority.

The Standard

[16] Section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") on which the applicant relies for this review application requires that he

proves one of four grounds of review. These are misconduct on the second respondent's part in relation to his duties as an arbitrator; gross irregularity in the conduct of arbitration proceedings; *ultra vires* conduct by the second respondent in the exercise of his powers and an improper obtaining of the award.

[17] On a *conspectus* of all the cases, however, it seems to me the permissible grounds of review are wider than those set out in section 145 of the LRA and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 *ILJ* 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1425 (LAC) at paragraph [37]; *Pharmaceutical Manufacturers' Association of SA and Others: In re Ex Parte Application of the President of the RSA and Others* 2000 (3) BCLR 241 (CC)). It is not the reviewing court's task to consider whether or not the decision is correct in law as that would be an appeal

(*Minister of Justice and Another v Bosch NO and Others* (2006) 27 *ILJ* 166 (LC) at paragraph [29]).

[18] More recently, the Constitutional Court has pronounced that "the better approach" is to enquire whether the decision reached by the commissioner is one that a reasonable decision-maker (presumably faced with the same evidence) would not reach (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), at paragraph [110]).

[19] In my respectful view the "constitutional standard" now propounded by the Constitutional Court in *Sidumo* bears a striking resemblance to the test usually applied in applications for leave to appeal, the only difference being the substitution of "a reasonable decision-maker" for the higher court or another court. The danger is thus the blurring of the line between an appeal on the merits on the one hand, and a review based on the rationality and justifiability of the decision when regard is had to the evidence advanced on the other. It is hoped that the reasonableness standard now introduced by the Constitutional Court will in future be tightened to ensure there is no confusion as regards the extent to which reasonableness of the commissioner's decision may be tested.

[20] It seems to me the proper approach is to ask not whether the commissioner's decision is one that a reasonable court (or reasonable decision-maker) could not reach but rather whether, in light of the evidence advanced and having due regard to considerations of equity (after all, the Labour Court is primarily an equity court), the commissioner's decision is one that can properly be said to be reasonable. Thus phrased, the standard avoids a review enquiry that leads inexorably to entanglements in appeal territory.

[21] This in my respectful view is not an exercise in substituting this court's own standard for that of the Constitutional Court. It is rather, I make bold to say, an attempt at giving the constitutional standard a construction that eschews the blurring of the line between reviews and appeals.

Applying the Standard

[22] On an objective assessment of all the evidence presented before the second respondent I am unable to fault his decision as being unreasonable. In the Constitutional Court's turn of phrase, this is not a decision that in my view a reasonable decision-maker could not reach.

[23] It seems to me Kritzinger was riled by a farm worker who is a "store man" and a driver screaming at him, in his first name, in front of other farm workers of similar low rank. He felt embarrassed by it. Nowhere is this evinced more poignantly than in his evidence-in-chief when he said:

> "Normaalweg het hy vir my aangespreek altyd as meneer, en baie vriendelik en alles, en in die geval het hy absoluut op my geskree jy en jou en Wilhelm en super-aggressief. (sic)"

[24] In my view this does not constitute the undermining of authority, especially in circumstances where the employee's superior invades the employee's privacy without reasonable justification. Kritzinger could not advance a plausible explanation as regards why he did not ask the third respondent to open his boot so that he could search it in his presence. The explanation that he sought to avoid a confrontation with the third respondent is immediately rendered implausible by his following the third respondent to his car while the third respondent was, in Kritzinger's own evidence, beside himself with rage.

[25] What Kritzinger did in this case was at least disrespectful and, more accurately, an unjustified infringement of the third respondent's right

to privacy. A superior position in employment does not confer on one a right willy-nilly to rummage through the possessions of those who are lower in rank. Kritzinger testified that the third respondent walked past him with the grapes that ultimately triggered the confrontation ("*hy het . . . voor my daarmee verby geloop*"). Why did he not ask him then to open his boot so that he could search it? The event that gave rise to the third respondent's rage had not yet arisen at that stage, and could very well have been averted if Kritzinger had simply asked the third respondent to open his boot instead of assuming authority simply to rummage through the third respondent's property.

[26] The second respondent's decision was in these circumstances eminently reasonable. The evidence of intimidation, such as it was, was unsatisfactory. Even the applicant's representative was alive to this and sought to introduce into evidence, irregularly, a polygraph test report to "prove" that the applicant's witnesses were telling the truth.

[27] The evidence of intimidation was unsatisfactory for another reason. While Kritzinger said he had been prodded, stabbed ("*steek*") and tapped ("*tik*", not of the inebriating variety) with a stick in his stomach, body, neck, shoulders and chest his witnesses said, variously, that he was tapped on his shoulders ("*Hy het hom getik, tik op sy skouers*"),

that he was not seriously tapped ("*Nee, dit was nie baie hard gewees toe hy hom getik het nie*") and that he was pressed around the stomach and shoulders ("*hierso in die maag rond gedruk en teen die skouer gedruk*"). Moreover, none of the witnesses could hear what words were exchanged between the third respondent and Kritzinger. On that evidence, it cannot be said that the second respondent's decision that there was no intimidation was one which a reasonable decision-maker, on the same evidence, could not reach.

[28] The applicant says the second respondent ignored a range of relevant factors. Among these he counts

[28.1] the fact that Kritzinger had confronted the third respondent over the theft of grapes thus looking after the best interests of the applicant. Theft was not even raised as an issue before the second respondent and so it is unclear why it should have been a relevant factor for him to consider at all.

[28.2] Kritzinger's seniority and authority over the third respondent. It is not clear why this should give Kritzinger the license to rummage through the third respondent's property without permission. It does not and the second respondent was with

respect quite reasonable in not according this factor more weight than he did.

[28.3] Kritzinger's evidence that employees started ridiculing him a few days after the incident of 26 February 2007, and that the confrontation took place in front of other employees. By this, the applicant seems to suggest this demonstrates that the third respondent had set a precedent for continuing insubordination or undermining of authority. In my view this factor is relevant only to show what happens when a superior pulls rank improperly. It should serve more as a lesson to Morkel and Kritzinger than reason to discipline employees.

[28.4] the fact that the confrontation was planned. There is no evidence of this on record.

[28.5] the fact that the third respondent did not "raise a grievance". This is not borne out by the evidence. In Morkel's own evidence he said the third respondent sought to have Kritzinger disciplined for rummaging through his car without permission but that he (Morkel) considered that unjustified.

[28.6] the fact that the polygraph test results were intended to corroborate the applicant's witnesses' evidence, and that there was no need for the witnesses themselves to testify to it. The applicant misses the point. He presented no evidence on the authenticity and veracity of the results and so it would have been impossible for the third respondent to test its veracity. Nevertheless, the document forms part of the record. There is no indication in the award that the second respondent rejected the document. Instead, he drew an adverse inference from its introduction. That in my respectful view was not an unreasonable thing to do in these circumstances.

[28.7] the fact that the third respondent refused to attend the disciplinary hearing and tore up the charge sheet. This in my view is more a sign of frustration with management than intimidation or undermining authority. The context is that this happened shortly after Morkel, the owner, had refused to discipline Kritzinger for what was in effect an unjustified infringement of the third respondent's right to privacy. Instead he sought to discipline the third respondent in circumstances where the third respondent considered it was he who had been wronged.

[28.8] the fact that the third respondent admitted to taking the law into his own hands. On a holistic consideration of the facts in this case, this hardly justifies a different decision by a reasonable decision-maker.

[29] There are numerous other factors which the applicant says should have been considered by the second respondent. They do not warrant any mention or consideration. While there is no evidence that they were indeed never considered, the second respondent would in my view have been justified and reasonable in rejecting them. For example, the applicant says one factor that should have been considered is that the third respondent should have given evidence first before his witnesses and his not doing so was a relevant factor. There is no merit in this and other similar submissions.

[30] The applicant also claims that the award is predicated on a charge that was never preferred against the third respondent, namely, assault. Much of the applicant's case appears to be rooted in this edifice. It is unstable. The second respondent pointed out clearly as follows in his award:

> "It is also important to note that the [third respondent] was not charged with assault and the [applicant's] witnesses testified to what would be defined as assault. The [third respondent] was instead charged with intimidation and undermining authority, but none of the [applicant's] evidence showed how the [third respondent] was possibly guilty of these alleged offences. I am not convinced that by questioning someone who had searched his vehicle without permission, the [third respondent] was guilty of intimidation or undermining authority."

[31] On the basis of this clear language, a submission that the second respondent's finding is premised on the charge of assault is clearly without any merit. The second respondent's decision in this regard was also eminently reasonable.

Relief

[32] In these circumstances, the application cannot succeed.

Costs

[33] In his answering affidavit the third respondent asked for costs. In argument, Mr Faber sought costs of two attorneys and for him costs on a scale of senior counsel. I am not aware of any such scale or rate in general terms. Senior counsel vary in the rates they charge, and the fee parameters issued by the constituent Bars from time to time serve simply as a guide (more so to some than to others, it must be said).

[34] It would thus be inappropriate to grant the costs order sought by Mr Faber at the rate he seeks.

[35] Mr Stelzner opposed the costs order sought by Mr Faber on the basis that both Mr Faber and Mr Steenkamp appear pro bono in this matter and so have no basis for claiming costs. I am inclined to agree. Costs are incurred by the litigant and not the legal representatives. When the

litigant secures legal counsel on a pro bono basis he thereby incurs no costs in prosecuting his claim.

[36] This is not to discourage legal practitioners from accepting pro bono cases. Counsel acting in such matters ought in my view to be satisfied, and indeed derive some pride, in the knowledge that they have contributed in assisting a person who would otherwise not have afforded their services in these days of unaffordable legal services for the vast majority of South Africans. With any luck, judicial gratitude should be an icing on their cake. After all, theirs is primarily a profession and only secondarily (if at all) a business.

[37] In the result, each party is to pay its own costs.

Ngalwana AJ

Appearances

For the applicants:	*Mr R G L Stelzner*
Instructed by:	*Basson Blackburn Inc*

For the 3rd respondent:	*Mr P Faber and Mr A Steenkamp*
Instructed by:	*Edward Nathan Sonnenbergs*
Date of hearing:	*29 October 2008*
Date of judgment:	*06 November 2008*