IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

Case number: JR 1254/09

In the matter between:

SATAWU	First Applicant
PENNY MKHIZE	Second Applicant
and	
ARIVIA (PTY) LTD T/A ARIVIA.COM	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
DUMISANE NGWENYA N.O	Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] The applicants seek an order in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") reviewing and setting aside the award of the third respondent ("the arbitrator") under case number GAJB31643-08 of 23 July 2009, in which he found the dismissal of the second applicant ("the employee") to have been procedurally and substantively fair.

Background facts

[2] The employee was employed by the first respondent as a Proposals Specialist / Bid Manager. She was dismissed on 7 October 2008 after being found guilty on a charge of insolence towards the Acting General Manager, Tshepo Boikanyo ("Boikanyo").

[3] It was common cause that the charge was triggered by events following a meeting held on 15 July 2008, called by Boikanyo. The meeting occurred at a time when the first respondent was undergoing restructuring, and it was common cause that this formed the basis of consultation between the first respondent and the first applicant in terms of the Recognition Agreement in existence between the parties. The employee and other members of the first applicant were concerned that the meeting convened on 15 July was an attempt to proceed with the restructuring process without the first applicant. As such, when the employee was notified of the meeting she forwarded the information to two officials of the first applicant, Lubabalo Tinzi ("Tinzi") and Thuli Thwala ("Thwala"). Boikanyo objected to this and a series of emails followed which aptly depict the nature of the relationship between them and which the arbitrator described as "*frosty and quite unfriendly*".

[4] The first respondent's evidence was that the 15 July meeting was the third meeting Boikanyo had called to address operational issues arising from the restructuring. Two previous meetings had been discontinued because of the conduct of the employee. Despite the invitations making it clear that the meeting was with the Bid Management Team the employee insisted she was participating in her capacity as a shop steward of the first applicant. Boikanyo then rescheduled the meeting for 15 July stating in an email that the first applicant and the Human Resources department were not invited. He also informed the employee not to invite participants on his behalf. She responded to his email stating that she had a constitutional right to have representatives present at a meeting which dealt with labour issues, and that she would refer the matter to Human Resources and to the first applicant. Boikanyo responded stating that the disruption of internal meetings by her would not be tolerated and that it was tantamount to unruly behaviour and would be dealt with.

[5] At the meeting of 15 July, another employee (Dennis Cooper) expressed a concern about the proposed change in job titles as a result of the restructure (from Bid Specialist to Proposal Specialist). Boikanyo advised that this issue had not been raised previously and that he would ensure that it was

properly addressed during the restructuring process. Despite Cooper being satisfied with the assurance received from Boikanyo, the employee demanded that the issue be addressed immediately. A heated exchange followed between Boikanyo and the employee. As the arbitrator points out, there was a dispute about the actual events that occurred at the meeting. The first respondent's version is that the employee became disruptive and shouted loudly that the issue raised by Cooper should be addressed immediately. The employee's version was that Boikanyo had belittled her in the presence of her colleagues. The meeting was then discontinued.

[6] A further incident arose immediately after the abandoned meeting, and which led to the charges against the employee. The first respondent alleges that the employee continued her insolent behaviour. The applicants allege that she simply wanted to express her dissatisfaction about the manner in which she had been treated by Boikanyo at the meeting. The first respondent's evidence was that she approached Boikanyo outside the boardroom where the meeting had been held in a loud and rude manner and pointed a finger at him. She accused him of disrespecting her and he tried to move away from her, but she followed, insulting and shouting at him. Boikanyo went into the office of a colleague, to avoid embarrassment but she followed him and continued shouting at him and obstructed his way. Boikanyo told her to leave him alone and to *"tell someone who cares*". She continued addressing him in a rude manner and reminded him that he was only an acting manager. Boikanyo then proceeded to his office and called Thwala in order to advise her what had occurred and she apparently agreed that the employee's conduct constituted serious misconduct.

[7] The employee lodged a grievance against Boikanyo. She was suspended and thereafter was charged with insolence and intimidation. She was found guilty on the charge of insolence and was dismissed. She referred a dispute to the second respondent and the arbitrator issued an award declaring her dismissal procedurally and substantively fair.

The grounds of review

Exclusion of evidence relating to inconsistency

[8] The applicants do not challenge an *in limine* ruling made by the arbitrator in regard to the admissibility of documentary evidence not included in the bundle. This ruling also determined that inconsistency had not been placed in issue in the pre-arbitration minute, and as such any evidence on this issue was irrelevant and inadmissible. Notwithstanding the exclusion of this ruling from the review, the applicants submit that had they been permitted to do so, evidence would have been led that Thwala had insulted and threatened a shop steward (Groenewald) during a consultation meeting, but the first respondent took the view that as they had engaged on an equal footing there was no need for discipline. The same approach should have applied to the present situation in that the employee challenged Boikanyo on trade union related issues and he knew that she was a shop-steward of the first applicant. The applicants therefore contend in their heads of argument that the exclusion of evidence on this issue was a gross irregularity.

Admission of unsigned pre-arbitration minutes

[9] The arbitrator admitted into evidence minutes of a pre-arbitration meeting despite these not being signed by the applicants. In so doing he committed a gross irregularity. The first respondent submits that the applicants refused to sign the minutes and did not object to their admission during the arbitration, and they cannot now raise it. They cannot seek to attribute their own conduct in refusing to sign the minutes to the arbitrator as a gross irregularity. In any event, it was submitted by Mr Moshoana for the first respondent, that in order to establish the existence of a gross irregularity they would have to show that the admission of the minute prevented "a fair trial of the issues", which was the test used by Zondo JP in *County Fair Food (Pty) Ltd v CCMA and others* (1999) 20 *ILJ* 2609 (LAC).[1]

1 At [30].

Failure to consider material evidence

[10] The arbitrator omitted from the award material and substantial evidence led by the applicants, and in so doing he misdirected himself and committed a gross irregularity. In amplification of this ground, the applicants allege that the arbitrator improperly excluded any reference to the following relevant and material evidence in his award:

a) The evidence of Thwala, which spans at least 33 pages of the transcribed record, and which dealt with the procedures applicable to the suspension of shop stewards, and which should have applied to the employee.

The evidence of Cas van Niekerk, which spans some 10 pages of the record, in which he dealt with the events that took place after the meeting of 15 July that eventually led to the dismissal of the employee. His evidence was that he was summoned to the office of Boikanyo, who indicated that he intended to dismiss the employee and who sought assistance with this. This confirmed that a decision had been made to dismiss the employee even prior to her being charged with a disciplinary offence. The record further indicates that Thwala was at pains to persuade Van Niekerk to refer to the employee's suspension instead of dismissal. Van Niekerk's testimony was that there was no struggle or any form of violence, and he further corroborated the employee's version that at the time the altercation occurred she was waiting to speak to Thwala about her grievance.

Ezrah Sithole, whose evidence was not challenged by the first respondent and spans about 13 pages of the transcribed record. He was called by the applicants as a shop steward who deals specifically with restructuring and consultation processes at the first respondent. He is also a member of the consultative forum. His testimony was that Boikanyo had disguised his consultation meeting with the staff by pretending that it was an operational meeting. He testified further that as members of the consultative forum they heard from Zodwa Dlamini ("Dlamini") that Boikanyo was intent on continuing with the restructuring without the participation of the first applicant. His evidence was consistent with Blondie September's evidence that internal procedures had to be followed before restructuring could take place, and that management had also registered concerns about the unilateral implementation of the restructuring undertaken by Boikanyo. Sithole testified that the employee was dismissed for raising questions about the restructuring meeting occurring in the absence of shop stewards. He confirmed further that the procedure in the recognition agreement had not been complied with prior to the suspension of the employee.

Blondie September was an expert witness subpoenaed by the CCMA to lead evidence on the policies and procedures applicable. She was a Human Resources Consultant servicing the business unit of Boikanyo and confirmed that at the time the employee was suspended there had been no agreement between the first applicant and management regarding the restructuring. She

testified further that Boikanyo's intention to move the Internal Business Services to the Internal Project Office fell within the ambit of restructuring and that the "Restructuring during Normalisation" policy had been applicable and should have applied, in conjunction with the "Consultation during Restructuring" policy. She also recalled that Boikanyo had not presented the proposed new structure to the consultative forum because it lacked a business case. Her testimony was that she had advised him about the importance of consultation in terms of the process set out in the relevant policies. Despite the fact that the policy documents applicable to the first respondent and mentioned in the evidence formed part of the bundle of documents accepted by the arbitrator as relevant to the dispute but he failed to discuss let alone mention them in his award. September's evidence confirmed that the conflict between the employee and Boikanyo arose as a result of his non-compliance with the policies and procedures of the first respondent. This explained Boikanyo's hostility to the first applicant and his intention to exclude it from the 15 July meeting.

Aaron Gumede's evidence, which constitutes about 26 pages of the record and related to events that took place after the 15 July meeting. He confirmed that the employee lodged a grievance at about 13:00 that day, and that she was suspended later that day. This contravened the disciplinary and grievance procedure which provided that a grievance must be dealt with before a decision in regard to discipline of the grievant is taken. He was present at the time of the employee's suspension and he corroborated her version.

Sanction

[11] Mr Ngako, appearing for the applicants, submitted that in confirming the sanction of dismissal the arbitrator failed to take into account the employee's lengthy and unblemished service and her role as a shop steward, as well as Boikanyo's hostile attitude to the first applicant. He should have taken into account that a corrective penalty may have been more appropriate particularly given the fact that following the restructure the employee would no longer be reporting to Boikanyo. The applicants submit further in regard to sanction it was the duty of the arbitrator to take into account the totality of events in considering whether the sanction imposed was appropriate. This involves a consideration of whether the sanction was consistently imposed in the past between employees who participated in the same misconduct.

Additional irregularities

[12] The applicants raise the following further irregularities which they

submit justify the review:

(a) In analysing the evidence to the exclusion of the material evidence set out above, the arbitrator found that the meeting of 15 July 2008 did not concern consultation or restructuring but dealt with the functional move of the employees to another department. He found that this negated the contention that the employee was at the meeting in her capacity as a shop steward. However, he does not provide a reason why it would be justified for the first respondent to exclude a shop steward from an operational meeting but not from a consultative one.
(b) Whilst the arbitrator accepted that Dlamini had told a minor lie during her evidence, he concluded that this did not warrant rejection of her evidence in its entirety.
(c) The arbitrator incorrectly states that the employee was found guilty of gross insolence and/or intimidation when she was only found guilty of insolence. He also permitted evidence of a video recording related to alleged intimidation although this charge was not upheld at the disciplinary enquiry.
(d) No reasonable decision-maker would have disregarded the conduct of Boikanyo as not being relevant to the relationship with the applicants given the language he used towards the employee in the presence of her colleagues and his attitude when she sought to address concerns with him.

The review standard

[13] It is trite that the function of this court in deciding whether to interfere with the arbitration award is limited to the grounds provided for in section 145 of the LRA, suffused by the standard of reasonableness : *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 *ILJ* (CC). This requires an applicant on review to show that the decision reached by the commissioner is one that a reasonable decision maker could not have reached : see *Sidumo* (supra) as well as *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).

Analysis and evaluation

Sanction
[14] Mr Ngako submitted that this Court should have regard to the approach advocated by the authorities in regard to sanction. In *Woolworths (Pty) Ltd v CCMA & Others* [2010] 5 BLLR 577 (LC) [2] Molahlehi J held:

[24] This Court has previously observed that in addition to the general test

2 At par [24].

applied in review cases the Constitutional Court in Sidumo also dealt with the approach which the CCMA commissioners should follow when determining the appropriateness of the sanction imposed by the employer. The approach adopted by the Constitutional Court confirmed two of the decisions of the Labour Appeal Court in the cases of Engen Petroleum Ltd v CCMA & others (2007) 28 ILJ 1507 (LAC) and Chemical Workers Industrial Union & others v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC). In those cases the Labour Appeal Court held that the reasonable employer test must not be applied and there should be no deference to the employer's choice of a sanction when a CCMA commissioner decides whether dismissal as a sanction is fair in a particular case. The commissioner is in terms of these decisions required to decide the issue of the appropriateness of the sanction in accordance with his or her own sense of fairness (see Engen, supra, paragraph [117] at 1559A; paragraph [119] at 1559H-I; paragraph [126] at 1562 C–D, paragraph [147] and Sidumo at paragraphs [75]-[76]). The determination of the fairness or appropriateness of a dismissal is an issue to be left to the commissioner and not the employer or the reviewing court. In this regard it was said in Sidumo (at paragraph [75]) that : "Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view".

[15] Further, in *Lithotech Manufacturing Cape, A division of Bidpaper Plus (Pty) Ltd v Statutory Council Printing, Newspaper & Packaging Industries & others* [2010] 6 BLLR 652 (LC) Basson J held stated[3] that, in reviewing an arbitrator's decision as to what would be an appropriate sanction, the court must consider whether or not the commissioner took all relevant factors into account in arriving at a decision. Basson J cited the factors set out by the Labour Appeal Court in *Fidelity Cash Management Services v CCMA & Others* [2008] 3 *BLLR* 197 (LAC) in light of the *Sidumo* test as follows :

"*[94] In terms of the Sidumo judgment, the commissioner must -*

(a) 'take into account the totality of circumstances' (para 78);

(b) 'consider the importance of the rule that had been breached' (para 78);
(c) 'consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal' (para 78);

(d) consider 'the harm caused by the employee's conduct' (para 78);

(e) consider 'whether additional training and instruction may result in the employee not repeating the misconduct';

(f) consider 'the effect of dismissal on the employee' (para 78);
(g) consider the employee's service record.
The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice:

3 At para [20].

Dismissal and the relevant provisions of any applicable statute including the Act. In this regard ss 188 and 192(2) of the Act will usually be of relevance. Section 188(1) provides in effect that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Section 182 enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Section 192(2) is the provision that places the onus on the employer to prove that the dismissal is fair.

[95] Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable".

[16] Mr Ngako submitted further that paragraph 4.5 of the award makes it clear that the arbitrator failed to consider all the factors and instead deferred to the first respondent thus failing in his duties as a commissioner. In paragraph 4.5 the arbitrator states as follows:

"According to the established version, Penny behaved insolently towards her superior during the meeting. She further compounded her misconduct by persisting with this conduct outside the meeting to the extent that she followed Tshepo to his office. The applicant's conduct amounted to gross insolence as it was deliberate, persistent and aimed at a very senior employee of her department (Tshepo was heading the department. The respondent was thus justified to dismiss her. The dismissal was thus substantively fair".

He was duty bound to consider all the circumstances including that of the employee, and therefore failed to consider whether the sanction of dismissal was appropriate in the circumstances. No reasonable commissioner would have reached this conclusion. The arbitration was a hearing *de novo* and he was required to determine the substantive guilt of the employee on *all* the evidence before him and not selectively as he did. He therefore failed in his duties as commissioner and his award falls to be set aside.

[17] Mr Moshoana argued that paragraph 4.5 does not support the applicants' submission that the arbitrator was deferential. He provided his reasons for finding that the conduct of the employee was *'deliberate'* and *'persistent'* and in so doing deals with the facts before him on this issue. He obviously rejected the applicants' version. He did what was required of him in terms of the approach of the Labour Appeal Court, as referred to above, which was confirmed in *Sidumo*, and applied his own sense of fairness. There is no justification for the court to interfere with the award. It is a well reasoned award supported by the evidence. As was held by the Labour Appeal Court in *Palaborwa Mining Company Ltd v Cheetham & Others* [2008] 6 BLLR 553 (LAC), the commissioner exercises a discretion in respect of fairness and courts must be slow to interfere. This Court must contend with decisions even though it may have adopted a different approach, provided they fall within the bounds of reasonableness.

[18] I agree with the submissions made by Mr Moshoana. There is no basis in fact or law to conclude that the arbitrator's finding on sanction was deferential or that it constituted a gross irregularity on any other ground.

Omission of material evidence

[19] Mr Ngako submitted that even if the evidence of the seven witnesses was considered to be irrelevant and immaterial, a reasonable commissioner would at least have referred to the evidence and then given reasons for rejecting it. There is therefore no indication that he took any of this evidence into account. Submissions were also made in the heads of argument that the arbitrator lost his notes and hence was not able to state objectively all the evidence presented to him. In my view, even if this hearsay submission is accepted, the explanation for the omission is not relevant. It is apparent from the award and the evidence as a whole that the arbitrator properly sifted the evidence relating to the charge from the evidence about the union-company relationship. Irrelevant evidence, whether it is given by seven or 20 witnesses, as Mr Moshoana correctly asserted, remains irrelevant.

[20] However, in considering the award and the proceedings in the light of the above submissions, I make specific findings as follows:

(a) It emerges that the evidence of Van Niekerk was irrelevant to the misconduct committed by the employee and the arbitrator correctly excluded it and took into account the fact that the charge of intimidation against the employee had fallen away at the disciplinary enquiry. Boikanyo's evidence was that he called Van Niekerk into his office to remove the employee, who was accompanied by Gumede, from his office because he was running late for another meeting. Boikanyo had summoned the employee into his office to issue her with a suspension letter.
(b) The evidence of Thwala was likewise immaterial to the issues before the arbitrator – she had not even been considered as a witness and was only called to address issues about the consultation process taking place between a Consultative Forum and the first applicant that fell outside Boikanyo's personal knowledge. Her testimony was accordingly not relevant to the misconduct with which the employee had been charged and the omission from the award would appear to be justified.
(c) Sithole's participation in the consultative forum did not render his evidence material to the misconduct with which the employee was charged. He was in any event not present at the 15 July meeting. His opinion that Boikanyo had "disguised" the meeting as purely operational in order to avoid consultation with the first applicant was not only irrelevant but not substantiated by the facts. However, even if it had been I agree with the approach of the arbitrator in that it could not have been a justification for the employee's undisputed belligerence, which was the basis of the testimony of her own witness, Dlamini, and which resulted in her being declared a hostile witness. Dlamini's evidence was properly found by the arbitrator to have been consistent with that of the first respondent's witnesses.
(d) September's evidence likewise was irrelevant in that Human Resources had already been assured that the terms and conditions of employment and job descriptions of affected employees would remain unchanged. September had no knowledge of the misconduct, her evidence was irrelevant and was properly not mentioned in the award.
(e) Gumede is an official of the first applicant who became involved after the misconduct in question had already been committed. He accompanied the employee to Boikanyo's office where she was issued with her letter of suspension. His evidence was accordingly of no consequence to the question of whether the employee had committed the misconduct or not, and the issues to be determined by the arbitrator.

[21] Furthermore, in my view the arbitrator properly had regard to the evidence of Dlamini, which was that the employee was disruptive during the meeting of 15 July and kept pointing her finger at Boikanyo. She also testified that she tried to dissuade the employee from confronting Boikanyo after the meeting when the employee informed her that she intended to do so because he had been impudent. The essence of the applicants' submissions is that her

version was accepted by the arbitrator despite her being declared a hostile witness. There is no factual or legal basis on which it can properly be contended that this constitutes a gross irregularity.

[22] The issue before the arbitrator was whether the employee committed the misconduct with which she had been charged, and whether the procedure used to dismiss her was fair. It is trite that insolence is a disciplinary offence that justifies disciplinary action: see *Rostoll en 'n ander v Leeupoort Minerale Brom (Edms)Bpk* (1987) 8 *ILJ*366 (IC) and *Transport and General Workers Union & Another v Interstate Bus Lines (Pty) Ltd*(1988) 9 *ILJ*877 (IC). *In casu*the insolence is without doubt of a serious nature, being directed against an Acting General Manager who reported directly to the CEO, and involving unacceptably belligerent conduct of a nature that cannot be tolerated in a workplace irrespective of the seniority of the employee involved. The arbitrator properly applied his mind to this issue, and in my view properly excluded and implicitly rejected evidence which sought to justify the employee's conduct on the basis that she was a shop steward. In fact, for this very reason her conduct should have been dignified and respectful.

[23] Mr Moshoana submitted that if the test on review is applied it is apparent that the award of the arbitrator in one which a reasonable decision maker faced with such overwhelming evidence against the employee, could reach. There is no basis for this Court to infer that the award falls out of the bounds of reasonableness and there is therefore no basis for this Court to interfere with it. The arbitrator complied with the basic duty imposed on him as set out in *Sidumo*: *"While cognisance should properly be taken of the circumstances under which commissioners' work, this is no excuse for making unsubstantiated statements or reasons for a conclusion. At the bare minimum, an award should set out facts found and the reasons for the finding, the conclusion based on those facts and the reasons for the conclusion".* [4]

[24] I agree. The arbitrator has provided detailed reasons which are not

4 At para [283].

capable of being assailed under the reasonableness test. Although the reference to "gross' insolence is incorrect this is not in itself a gross irregularity – from the context of the award the arbitrator applied his mind to all the issues and the relevant material and reached a conclusion that was reasonable and justified in the circumstances. Furthermore it is not correct that he totally ignored the evidence led by the applicants – he states for instance in his analysis that "*all the witnesses*" except the employee testified that the 15 July meeting was not about restructuring consultation but discussed the functional move of Bid Department employees. Given that this was not a consultative meeting, and that evidence was led that consultation with the first applicant was occurring at another level in the business, he was justified in concluding that the employee had not attended the meeting in the capacity of shop steward.

[25] I now turn to deal with the grounds for review not canvassed in argument :

(a) The inconsistency issue was not raised as a ground of review in the pleadings. However, even if it were properly before the Court, there is no merit in this ground of review given that the arbitrator considered submissions from the parties, the pre-arbitration minute and other relevant documents, and issued a ruling expressly excluding the "Consistency document". Since it is common cause that the applicants do not take issue with this ruling they cannot now raise this as a ground of review. It is trite that a commissioner is empowered by section 138 of the LRA to conduct the arbitration proceedings in a manner he or she considers appropriate in order to determine the dispute fairly and quickly. This includes the power to decide what evidence will be allowed and disallowed : See *Moloi v Euijen & Another* [1997] 8 *BLLR* 1022 (LC) referred to by Basson J in *Sondolo IT (Pty) Ltd v Gordon Howes and Others* (unreported case number JR3217/06). Accordingly this ground of review must fail.
(b) In my view the admission of the minutes did not constitute a gross irregularity in the proceedings. The applicants moreover did not dispute the contents of the minutes and do not suggest that if they had not been admitted the outcome of the arbitration might have been different.
(c) I do not propose to the deal with the additional irregularities. They were not addressed in the heads or oral submissions and in any event would appear to be singularly lacking in merits.

Order

[26] Therefore, I make the following order:

The review application is dismissed, with costs.

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Bhoola J
Judge of the Labour Court

Date of hearing: 5 August 2010

Date of judgment: 10 September 2010

Appearances:
For the Applicants: Mr X Ngako, Ruth Edmonds Attorneys

For the First Respondent: Mr G N Moshoana, Mohlaba and Moshoana Inc.