**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

Not Reportable

Case no: C285/2010

In the matter between:

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| **POWERTECH TRANSFORMERS (DPM)** | **Applicant** |
| and | |
| **NUMSA OBO JONGIKHAYA CHRIS SINUKO** | **First Respondent** |
| **DANIEL DU PLESSIS** | **Second respondent** |
| **METAL AND ENGINEERING INDUSTRIES BARGAINING COUCIL (MEIBC)** | **Third Respondent** |

**Heard:** **25 May 2011**

**Delivered:** **1 February 2012**

**Summary:** **Review, determining jurisdiction, allegations of unfair discrimination during arbitration proceedings**

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**JUDGMENT**

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VAN VOORE AJ

[1] This is an application in terms of section145 of the Labour Relations Act (the LRA)[1] for an order, *inter alia*, reviewing and setting aside an arbitration award (the award) made by the Second Respondent (the commissioner). The commissioner made an arbitration award in which he found that the dismissal of the First Respondent,

[1] 66 of 1995.

Jongikhaya Chris Sinuko (Sinuko) was substantively unfair. The commissioner awarded that Sinuko be reinstated and that he be paid an amount of R28 751.80 (twenty eight thousand seven hundred and fifty one rand and eighty cents). It is this arbitration award which the applicant seeks to have reviewed and set aside. Sinuko was employed by the applicant until the date of his dismissal on 1 October 2009 Sinuko was dismissed for alleged misconduct. It was alleged against Sinuko that he had:

"Verbally abused (sic) and refuse (sic) to carry out a lawful instruction from Elliot Johnson on Monday 15 June 2009."

[2] Sinuko was instructed to wear his hard hat whilst on the premises and it was alleged that he had refused to comply with this instruction. At a disciplinary hearing, Sinuko was found guilty of misconduct and was dismissed. At the time of his dismissal, Sinuko had been employed by the Applicant for some 15 (fifteen) years and had a clean disciplinary record. Further, between the date of the alleged misconduct (15 June 2009) and the date on which he was dismissed (1 October 2009) Sinuko was not placed on suspension and he continued to perform his normal duties. After he was dismissed, Sinuko referred an 'alleged unfair dismissal (misconduct)' dispute to the Third Respondent (the Bargaining Council).

[3] During the course of the oral evidence as presented at the arbitration proceeding, evidence was given which appears to indicate that victimisation and in particular union victimisation was the reason for Sinuko's dismissal. In this regard, Sinuko himself gave evidence that he was not "Simemo". It is agreed between the parties that this was a reference to another employee who was a Union member (and a shop steward). It appears to be Sinuko's view that Elliot Johnson (Johnson) and other employees of the applicant and management were taking action against him on the basis of his union membership and activities in the same way that they have treated 'Simemo'. Further, and under cross-examination Sinuko gave evidence that there was a 'plot' by the Applicant to rid itself of NUMSA members in its employ. Further, Sinuko gave evidence that Johnson may have had a grudge against him.

[4] Allegations of misconduct were made against Sinuko following an incident between Sinuko and Johnson. This incident apparently commenced when Johnson enquired from Sinuko why he was not wearing a hard hat. Sinuko and Johnson exchanged words. Sinuko responded by saying, *inter alia*, that when other employees

leave their work stations to go home at the end of their working day they too do not wear hard hats, that he too had left his workstation to go home on the day and that for this reason it was permissible for him not to be wearing a hard hat. Further, Sinuko appeared to be of the view that Johnson's approach and admonition for his failure to wear a hard hat was not justified and was in fact provocative.

[4] At the arbitration proceedings, and as appears from the transcript, there does indeed appear to have been a confrontation between Sinuko and Johnson. During the exchange Sinuko responded to Johnson in, *inter alia*, the following terms:

'Waarvoor moet ek 'n helmet dra, ek will mos nie die helmet op sit nie.'

[6] The Applicant contends that this constituted aggressive behaviour on the part of Sinuko.

[7] Further, it is common cause that during their interaction on the day, Sinuko did indeed use his hand making the sign of a gun in pointing at Johnson. Sinuko, most improbably, said that:

'It is something that I do frequently when I talk. I do use my hands and my fingers. It does not indicate that I am angry or cross or something like that.'

[8] This version was properly rejected by the arbitrator. A further part of the interaction between Johnson and Sinuko followed when, rather than going home Sinuko followed Johnson to his office and there he said the following to Johnson:

'Jy sien, Elliot, ek sal jou wys wat sal ek saam met jou maak, ek is nie Simemo nie.'

[9] Later Sinuko again approached Johnson and repeated that he was not 'Simemo' and that 'Ek sal jou wys wat sal ek met jou doen.'

[10] During his testimony, and by way of explaining the reference to 'Simemo' Sinuko said the following:

'What Elliot does he calls us the Kaffirs and he calls the colours his brothers, his uncles. That's what his doing on the job. Only because his complexion is regarded dark he calls himself uncle to the blacks. When he is amongst us he calls the coloured people Kaffirs who would, when he is amongst the coloured people the blacks Kaffirs.'

[11] On this basis, the Applicant contends that the case of the union and indeed Sinuko is that the real reason for his dismissal was victimisation and for this reason the arbitrator ought to have found that he did not have jurisdiction to determine the dispute. In particular, the Applicant contends that jurisdiction is based on the case which a party in Sinuko's position wishes to pursue and not the case which the arbitrator, after having heard all the evidence, thinks would be more beneficial to the Applicant. It is the Applicant's case that at the time that Sinuko raised the version of victimisation and union victimisation in particular, the commissioner was required to stop the proceedings and advise the union and Sinuko that the matter ought to be referred to the Labour Court.

[12] The Applicant contends that the approach adopted by the commissioner is impermissible. The Commissioner's approach is the following:

The commissioners findings

[13] The crux of the commissioners findings are the following[2]:

'The summary of evidence above was restricted to the events on 15 June 2009 at the workplace. Evidence was presented about union rivalry and other issues. It is not necessary to refer to this evidence as my findings are not based on any such rivalry. Rivalry which is often present in a workplace where there is more than one union active. I do not see the applicant's membership of NUMSA as reason for the dismissal. If that was the case then the matter should have been referred to the Labour Court.

As procedural fairness is not in dispute and as there was no evidence presented to indicate that there was anything amiss with the procedures followed, I hold that the dismissal was effected in terms of a fair procedure.

It was not disputed that a hard hat/helmet needs to be worn whilst working. There are certain areas and times when one needs nto wear this protective gear. From the evidence it is clear that the rule is not that the hat must be worn at all times. The evidence shows that workers leave their helmets at their workstations or at the gate area. Those who leave their hard hats at the work station when going home will obviously have to pass through "dangerous" areas on their way out. Applicant was one of those who left his helmet at the workstation. If he was going home and was on his way home he need not wear the helmet,

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[2] See paras 5.1 — 5.14 at pages 27 — 30 of the pleadings, Paragraph numbers have been inserted for ease of analysis in the pleadings.

however if he was not going home it was compulsory to wear the hardhat. Mr Johnson's response when hearing applicant was on his way home clearly supports this. He said "but why did you not say so" when hearing applicant was to wearing the helmet because he was going home.

There is no reliable evidence to show that applicant remained in the "dangerous" areas after that. He went to the office area, where the helmets are not worn, to sort out a pay query. He then went home. Applicant was thus not in breach of the rule to wear the hardhat. Consequently he cannot be guilty of "refusal to carry out a lawful instruction" as he was charged with. It is clear that this rule and the application of this rule needs to be streamlined. If at all practical then hardhats should be compulsory all the time when on the premises and hardhats are to be stored at the entrance/exit areas.

Did applicant verbally abuse and/or threaten Mr Johnson? Both applicant and Mr Johnson were asked to stand up during Mr Johnson's cross-examination. / observed that the applicant is much shorter and smaller than Mr Johnson. Applicant made much of the fact that he always "talks with his hands". However, during the course of the proceedings he sat almost always with folded arms. As far as "talking with hands" is concerned everybody else used their hands more frequently than applicant.

I accept that Mr Johnson stopped the applicant when he saw him without the helmet. An argument must have ensued between the men. Mr Solomons conceded that both were talking loudly. I do not accept that only the applicant was angry. The whole incident should have been put to bed once the applicant had informed Mr Johnson that he was on his way home. The evidence points to the fact that neither of them let it go.

Mr Johnson summoned people and again approached the applicant. Applicant then also, probably as a sign of "spite" entered Mr Johnson's office. He admitted that he then became angry when Mr Johnson waved him away. That is also when he told Mr Johnson that he was not Simemo. When applicant was on his way out, Mr Johnson again approached applicant. There was no reason on earth why he should have done that. It does seem that both of them wanted to state some point to the other.

I do not consider the applicant's statement that he was not Simemo and that Mr Johnson would see what would happen as a threat. It is irrelevant whether or not Mr Johnson felt scared or intimidated. The evidence does not support "verbal abuse". There was certainly a heated argument between the men an dthe applicant's version that he was calm throughout is rejected. He must have done or said something to provoke the applicant to such an extent to suddenly become angry and behave in a manner that has not been seen in almost 18

years of working at the respondent. Even if all other evidence is ignored, then on applicant's own version he threatened Mr Johnson in his office. Applicant was therefore guilty of uttering a threat. I do not consider it verbal abuse though.

The respondent's "Personnel Policies and Procedures" document indicates that "insolence and/or using abusive and/or insulting language to fellow employees" and "refusal to carry out lawful instructions or perform duties" carries as suggested sanction for a first offence a final written warning thereafter dismissal with notice. Mr Harmsen testified that the matter warranted a departure from the code due to the seriousness. Mr Harmsen was the sole witness to testify that the employment relationship had broken down irretrievably (or as he put it the trust relationship). It is not Mr Harmsen who works with the applicants. None o the other three witnesses testified that they could no longer work with applicant. In fact, after the applicant was charged with misconduct he was not suspended. He worked throughout the protracted disciplinary process and there were no incidents between the men.

It seems thus that somehow they had all moved on and that it was only management who was still unhappy. I cannot accept Mr Harmsen's evidence as proof of the irretrievable breakdown of the employment relationship and definitely not as proof of the irretrievable breakdown of the employment relationship and definitely not as proof of breakdown of the trust relationship. Applicant was not found guilty of having been dishonest. How can the trust relationship therefore have broken down? Mr Harmsen simply did his job when stating that the relationship had broken down. As Mr Johnson was not completely innocent in the whole incident I do not see this as an appropriate matter where the respondent could deviate from their own code of conduct.

As the circumstances I hold that dismissal was not a fair sanction and that the dismissal was therefore not for a fair reason. A final written warning valid for 12 months would have been appropriate.

This was an "attitudinal offence". Behaviour and/or attitude needs to be managed. To simply resort to dismissal for such offences seem to be generally not in line with the principal of "corrective discipline".

Applicant requested reinstatement. I see no reason not to award him this together with backpay and a final written warning to be placed on his record.'

[14] The Applicant contends that at the stage when it appears that the reason relied on by an employee party at arbitration concerns an alleged automatically unfair

dismissal, then an arbitrator is required to determine the true nature of the dispute and then rule that he has no jurisdiction with the true nature of the dispute concerns an alleged automatically unfair dismissal. In this regard, the Applicant relies on a number of cases including the following:

[15] An example of the correct approach may be found in *Chuma and Giflo*

*Engineering* (BOP) (PTY) Ltd:[3]

'The Wardlaw case was revisited in Communication Workers Union obo Chabangu & others v CCMA & others (unreported - case no JR 1354-03). The arbitrating commissioner in this case issued a ruling in terms of which the CCMA lacked jurisdiction to arbitrate an unfair dismissal dispute because the applicants had been dismissed for participating in unprotected industrial action 'rather than mere misconduct in the strict sense of the word'. The applicants sought to have the said ruling reviewed and set aside. The Labour Court extended the principles laid down in the Wardlaw case to arbitrating commissioners and, in para 15, held that a commissioner was enjoined to determine the 'real' or 'true' nature of a dispute that was referred to the CCMA irrespective of the characterization of the dispute in the referral form. The court pointed out that a commissioner at the CCMA might well have 'to hear sufficient evidence in order to identify the true reason for the dismissal if it is not possible to determine this question in the light of, for example, documentation or even the opening statements of the respective parties'. And in para 16 of the written judgment the court once again emphasized that it was 'the duty of the commissioner to determine the true nature of the dispute, not the parties'. The court concluded by stating that a (CCMA) commissioner who finds that a dispute falls within the Labour Court's jurisdiction, should either suspend the proceedings and refer the matter to the Labour Court or seek the consent of the parties to continue adjudicating the dispute that falls within the jurisdiction of the Labour Court - see para 17 of the written judgment.

Arbitrating commissioners at bargaining councils are obviously also enjoined to determine the true nature of a dispute, but it is necessary to point out that s 141(1) of the Act (in terms of which parties may agree to arbitration under the auspices of the CCMA) does not apply to bargaining councils. Section 51(8) of the Act, significantly, only extended the application of ss 142A and 143-146 to bargaining councils - no mention is made of s 141 of the Act.

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[3] (2009) 30 ILJ 2572 (BOA).

I consequently also accept Mr Lekhoaba's submission that the applicant 0 and his colleagues had been dismissed because of his participation in a strike that did not comply with the provisions of chapter IV of the Act and not because of any unrelated misconduct. This is the true nature of this dispute and it follows that the council does not have jurisdiction in this matter, regardless of the certificate of outcome issued by Commissioner Stemmett on 20 May 2009.

Ruling

1 The respondent dismissed the applicant because of his participation in a strike that did not *comply with the provisions of chapter IV - ie a reason as contemplated in s 191(5)(b) (iii) of the Act.*

2 The council does not have jurisdiction in this matter.

3 The applicant may refer the dispute to the Labour Court.'

[16] *CUSA v Tao Ying Metal Industries and Others*[4] the Court held that:

'Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities'. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties.... I

A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a headng will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration

[4] (2008) 29 ILJ 2461 (CC) at paras 65-66.

of all the facts. The dispute between the parties may only emerge once all the evidence is in.' [5]

[17] In my view, the commissioner's approach in relation to the jurisdictional issue does indeed constitute a gross irregularity as contemplated in section 145 of the LRA. In the circumstances, I make the following order:

(1) The review application is granted.

(2) The Respondent is ordered to pay the Applicant's costs, such costs being limited to the costs of the hearing of the application and the drafting of Heads of Argument. The matter is remitted back to the Third Respondent for determination before an arbitrator other than the Second Respondent.

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VAN VOORE

APPEARANCES:

FOR THE APPLICANT: Mr Colin Kahnovitz SC

INSTRUCTED BY: Louis van Zyl Attorneys

FOR THE FIRST RESPONDENT: Mr J. White

INSTRUCTED BY: Cheadle Thompson and Haysom

[5] See also *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) V Commission For Conciliation, Mediation & Arbitration & Others* (2010) 31 ILJ 371 (LC)