REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

CASE NO C 65/12

Not reportable

In the matter between:

FOOD AND ALLIED WORKERS UNION	**FIRST APPLICANT**
Z NEWU AND OTHERS	**SECOND AND FURTHER APPLICANTS**

and

RAINBOW FARMS (PTY) LTD	**1ST RESPONDENT**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**2ND RESPONDENT**
N ABRAHAMS N.O	**3RD RESPONDENT**

Application heard: 23 October 2013

Judgment delivered: 29 January 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside parts of an arbitration award made by the respondent, to whom I shall refer as 'the arbitrator'. The proceedings under review were conducted in terms of s 188A of the Labour Relations Act, 66 of 1995 (the LRA), which enjoys the unfortunate but in this case prescient heading 'Agreement for pre-dismissal arbitration'. The purpose of s 188A is to permit allegations of misconduct made against employees to be tested by a process of statutory arbitration, bypassing domestic disciplinary procedures. Although these proceedings were initiated as a single review, there are three separate cases in issue. They all emanate from an agreed procedure in terms of which the arbitrator conducted consecutively a number of hearings into allegations of misconduct made against the second and further applicants following a strike at the first respondent's premises in Worcester in June 2011. Those parts of the award that are sought to be reviewed and set aside relate to the dismissal of Z Newu and 13 others, Allen Rose Skafungana and Chrispan Melite.

The applicable legal principles

[2] I propose to discuss the applicable legal principles and thereafter to assess each case on its merits. The test to be applied in any review of a decision made by an arbitrator in terms of s 188A is that which applies to a review of an award issued under s 145. That test was enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC) and recently affirmed by the Supreme Court of appeal in *Herholdt v Nedbank* (2013) 34 ILJ 2795. In the latter judgment the court summarised the position as follows:

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2)

> (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[3] In the present instance, the applicants do not contend that the arbitrator misconceived the nature of the enquiry. To the extent that they rely on a gross irregularity in the form of material errors of law or fact (or the weight or relevance to be attached to particular facts), is approach to be adopted is the following:

a. Those errors, if demonstrated, are not in and of themselves sufficient to warrant interference. They are only of any consequence to the extent that their effect renders the decision under review unreasonable.
b. The fundamental enquiry remains whether the outcome of the proceedings (i.e., the arbitrator's decision on the existence of any misconduct, or an appropriate sanction for that misconduct, or both) falls within a band of decisions to which a reasonable decision-maker (presumably a fictional reasonable arbitrator) could come on the available material.

[4] In *Goldfields Mining South Africa (Pty) Ltd v CCMA* (JA 2/2012, 4 November 2013) the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a "process-related review", at least in the sense that it is no longer open to a reviewing court to set aside an arbitration award only on account of a process- related irregularity on the part of the arbitrator. This has the consequence that the failure by an arbitrator to mention a material fact in the award, or to deal with any issue that has a bearing on the issue in dispute, or any error in regard to the evaluation of the facts presented at the arbitration hearing, is of no consequence. Provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and

dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material.

[5] I turn to deal in turn with each element of the application.

Chrispan Melite

[6] Chrispan Melite was charged with throwing a petrol bomb at a truck carrying live birds on 14 June 2011, alternatively, attempted assault in that he endangered the life of the driver of the truck. He was also charged with intimidation, by preventing non-striking employees from attending work and preventing busses from entering the first respondent's premises.

[7] The arbitrator found that Melite had thrown the petrol bomb at the truck, with the intention of causing damage to the first respondent's property. He was also found to have prevented employees from tendering their services, by placing rocks in front of a bus transporting non-striking employees to the first respondent's plant. The arbitrator considered that the misconduct committed by Melite was sufficiently serious to warrant dismissal, and ordered that Melite be dismissed.

[8] The applicants contend that the arbitrator's decision in relation to the throwing of the petrol bomb is reviewable on the basis that the arbitrator failed to apply the cautionary rule applicable the case of a single witness. In relation to the second charge, the applicants do not seriously dispute the substance of the charge, but contend that the sanction of dismissal was too harsh.

[9] Turning first to the charge of throwing a petrol bomb at the delivery truck, what is at issue is whether the evidence that served before the arbitrator was sufficient to identify Melite as the perpetrator. In the founding affidavit, it is contended that the evidence was insufficient to sustain that conclusion, in particular because Wolhuter claims to have recognised Melite, 'someone that he had seen for the first time on that day and through a mirror."

[10] The arbitrator was required to make a finding as to the identification of Melite, on a balance of probability. The cautionary rule that applies to single witness evidence generally finds application in criminal trials. As 188A arbitration is not a criminal trial. The arbitrator was not required to apply any formal rule relating to single witnesses – she was required to assess the totality of the evidence before him and draw conclusions based on the probabilities. Even if the cautionary rule did apply and the arbitrator failed to apply it properly or at all, this court is entitled to interfere with the arbitrator's conclusion only if it is unreasonable in the sense referred to above. To the extent that the applicants contend that Wolhuter's evidence was limited to what he had seen through a rear view mirror, this is simply incorrect. Wolhuter testified that he saw Melite run past the front of the truck and then to the back of the vehicle, when he was visible in his side mirror. He specifically stated that he clearly saw Melite's face as he passed in front of the truck, and that he 'concentrated one hundred percent on him.' It is common cause that Melite was wearing black. Wolhuter said that there may have been a red stripe in his jacket, but conceded that there may not have been a red stripe in the black top or pants. But Wolhuter's recollection of having seen clearly Melite's face and his ability to identify him in the arbitration hearing was not seriously called into question.

[11] In short, there is nothing in the record to indicate that the arbitrator misconceived the nature of the enquiry, or in the language of *Goldfields,* that he failed to give the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, misunderstood the nature of the dispute or failed to deal with its substantive merits. Given the evidence before the arbitrator, the result reached cannot be said to be unreasonable in the sense explained in *Sidumo*.

[12] Turning next to the challenge to the sanction of dismissal, the *Sidumo* approach requires the court to defer to the arbitrator, whose function it is to determine a fair sanction for any act of misconduct that has been established by the evidence. The court is entitled to intervene if and only if the sanction that the arbitrator

consider fair in all the circumstances falls outside of a band of decisions to which reasonable decision makers could come on the evidence. The court is not entitled to interfere only because it would have imposed a different (less severe) sanction, or because it considers the sanction to be unduly harsh. It follows, as the Labour Appeal Court has observed and as the conclusion reached by the Constitutional Court on the facts of *Sidumo* demonstrates, that the scope for interference in decisions on sanction is very narrow.

[13] In the present instance, the arbitrator, set out the factors to be taken into account, and specifically records that Melite's clean disciplinary record and 12 years' service were taken into account in the assessment of a fair sanction. Against those, the arbitrator took into account the breakdown in the trust relationship, the fact that Melite had failed to respect the rights of those employees who had elected not to participate in the strike, and the serious implications of his conduct.

[14] In my view, the sanction of dismissal for the conduct that forms the subject of the second charge against Melite is not one that is so unreasonable that it stands to be set aside. There is therefore no basis to interfere with the arbitrator's decision.

Allen Rose Skafungana

[15] Rose Skafungana was charged with intimidation and/or assault in that she prevented non-striking employees from attending work by threatening them with physical harm. Four witnesses testified *in camera* against Skafungana, identified as witnesses D, E F and G. Their evidence is summarised in the arbitration award, and I do not intend to repeat it here. It is sufficient to note that the witnesses had gone to their employer's office to resolve pay queries when Skafungana and others told them to join the strike and not to return to the plant. Skafungana told them that if they left the plant, they would not be permitted to return. The video evidence produced at the arbitration hearing supports the version of the witnesses, and contradicts Skafungana's averment that she had made a joke.

[16] Skafungana's version was in effect a denial of the allegations made against her, and an averment that the words she uttered on the video recording were taken out of context.

[17] The arbitrator recorded that she was faced with two conflicting versions, and dealt with the dispute of fact principally on account of the video footage which contradicted Skafungana's version regarding what she had said, and that she had made a joke. The arbitrator found further that there was no reason to question the veracity of the four witnesses who had testified that Skafungana had prevented them from going to work, and that she had disrupted the first respondent's workplace. On the second charge, the arbitrator gave Skafungana the benefit of the doubt in the allegation that she had threatened to burn down witness C's house, but found her guilty of intimidation on the basis of her statement to C that she 'would be in her hands if she reported for work'.

[18] In relation to sanction, the arbitrator applied the *Sidumo* approach and considered Skafungana's clean record and nine years' service. On the other hand, the arbitrator considered that Skafungana had been found guilty of serious misconduct, and had failed to respect the rights of non-striking employees. In these circumstances, the arbitrator considered that dismissal was the only appropriate sanction.

[19] The arbitrator's decision is sought to be reviewed on the basis that the evidence against Skafungana is insufficient to sustain the arbitrator's finding that Skafungana had committed an act of serious misconduct. In the case of witness C, the applicants concede that the words uttered by Skafungana are 'arguably intimidating', but contend that in the absence of actual assault, no reasonable decision maker could have found Skafungana guilty of this offence.

[20] There is nothing in the record to indicate that the arbitrator failed to meet the threshold established by the *Goldfields* judgment. The evidence before the arbitrator is sufficient to sustain the result – i.e. the finding that Skafungana was

guilty of intimidation, in the sense that the result reached cannot be said to be so unreasonable that no decision- maker could reach it on the available material.

[21] In so far as the applicants attack the sanction imposed by the arbitrator on account of its severity, the scope of this court's right to interfere in a decision on sanction for proven misconduct is set out above. The question is not whether the sanction of dismissal was severe or overly harsh in all the circumstances, or whether this court would have imposed a different penalty in the circumstances. The challenge against the penalty of dismissal can succeed if and only if it is so unreasonable that a reasonable decision maker could not have imposed the same sanction on the basis of the evidence. A failure to respect the rights of non-striking employees is an act of serious misconduct, especially when assumes the form of threats. Employees who elect not to participate in a strike are entitled to continue working without threats to their physical integrity, and without fear of reprisals. Any employee who by words or conduct compromises that right would ordinarily risk dismissal. For the reasons reflected above, I cannot find that dismissal is a sanction that falls outside of a band of decisions to which a reasonable decision-maker might come on the available material.

Zolani Newu and 12 others

[22] The employees were charged with intimidation and/or assault in that during the strike, they prevented non-striking employees from attending work by threatening them with physical harm. All of them, except Kenneth Sibiya, were also charged with throwing stones at the police and non-striking employees. Zolani Newu was also charged with beating non-striking employees with a knobkerrie, and throwing a stone at a bus transporting employees to and from work.

[23] The arbitration award records the evidence of Denis Dalton, a security manager. He testified that on 15 June 2011, at about 08:50, he saw a group of striking employees approaching the first respondent's plant where Capacity employees were entering the plant. The group was waving sticks and clubs and shouting abuse at the police and non-striking workers. He called the SAPS. When they

arrived, the group began to throw stones at them. The SAPS fired buckshot at the group. Gerhard Robberts, the operations manager for Capacity testified that the observed striking employees leave the designated picketing area and move toward the Capacity employees. He saw the group picking up stones and throwing stones at the Capacity employees. Robberts heard the SAPS warn the striking employees, and then heard shots. Robberts's evidence was that the striking employees were aggressive, and that he feared for his life. The witnesses for the applicants, Kelkeletso Timati and Sonwabile Dondolo did not dispute leaving the designated picketing area. They denied any aggressive behaviour, intimidation or assault, denied that any of the applicants had thrown stones, and could not understand why the SAPS called in reinforcements or opened fire. Their intention had been to address concerns with the police commander.

[24] The arbitrator found that the first respondent's witnesses were clear, consistent and reliable, and consistent with the video footage. The approach by the group was clearly 'forceful and aggressive', and showed stones being thrown before any response by the SAPS. For this reason, the arbitrator accepted the first respondent's version, and rejected that of the applicants.

[25] In her award, the arbitrator refers to Grogan *Dismissal* and the application of the common purpose doctrine to the determination of misconduct in employment-related cases. The arbitrator found that the applicants had associated themselves with the misconduct of the group, a group that had moved from a designated picketing area toward non-striking employees and the SAPS, an event immediately followed by stones being thrown by and shots fired by the SAPS. The arbitrator concluded that the conduct of the applicants was clearly designed to intimidate the non-striking employees and to prevent them from tendering their services. The applicants were accordingly found guilty on the charge of intimidation.

[26] The primary attack in these proceedings is directed at the arbitrator's application of the doctrine of common purpose. In particular, the applicants contend that

there are no specific findings regarding the conduct of particular individuals and the absence of any finding that any of the applicants associated themselves with individuals found to have committed specific acts of violence. The applicants also contend that there was insufficient evidence regarding the conduct of the group as a whole to sustain any finding of acts of violence committed by the group. An alternative and more plausible explanation, the applicants contend, is that the shots were fired by the SAPS because they and the applicants were in disagreements about where the applicants should be picketing. Principally on this basis, the applicants contend that the arbitrator committed errors of fact and law and failed properly to apply her mind to the question of whether the applicants had committed acts of violence.

[27] It follows from the summary of the applicable legal principles above that the relevance of any mistake of law or fact is limited to the extent to which they render the outcome of the proceedings unreasonable. If that outcome is capable of being sustained irrespective of the arbitrator's conduct or reasoning, then it must be sustained.

[28] It is common cause that the applicants were part of the group that marched and the non-striking employees and the SAPS. It is also common cause that the group left the designated picketing area and carried sticks and knobkerries as they marched. The evidence that the group conducted themselves aggressively as they advanced on the non-striking employees and the SAPS was not seriously called into question, and is clearly reflected on the videotape. In my view, that in itself is an act of serious misconduct. The applicants chose to leave the area that was designated for the purpose of picketing when they saw the Capacity employees being brought to the plant. Their clear intention was to prevent the employees from working. Deliberate breaches of picketing rules may have become so common so as to characterise South African industrial relations life, but that does not mean that they are acceptable. Picketing rules exist for a purpose, and are integral to the peaceful exercise of the right to strike. An integral element of picketing rules is the respect that striking employees are

required to show towards those who elect not to participate in the strike. When striking employees breach picketing rules, they disrespect others, especially when that disrespect is directed against those who wish to work. When striking employees breach picketing rules, and especially when they engage in conduct that is designed to threaten those who not to participate in the strike, they can expect to be disciplined.

[29] In other words, irrespective of any application of the doctrine of common purpose in relation to the act of throwing stones, the evidence discloses an act of serious misconduct on each of the applicants that participated in the march from the designated picketing area toward the non-striking employees. In any event, the labour courts have long recognised that individual employees may legitimately be dismissed on account of the actions of a group of which they are part, and that it is not necessary to establish one or more acts of misconduct by each member of the group for that consequence to be sustained. (See, for example, *Foschini Group v Maidi & others* [2010] 7 BLLR 689 (LAC)). This is not to apply any criminal law test relating to common purpose; it is a principle that recognises that for the purpose of the maintenance of discipline in the workplace, in certain circumstances, responsibility for the collective conduct of a group is indivisible.

[30] In short, the evidence before the arbitrator is sufficient to sustain the reasonable conclusion that the applicants had committed an act of serious misconduct, and that their dismissals were a reasonable response to that misconduct.

Costs

[31] Section 162 of the LRA confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. In the exercise of its discretion, the court must take into account all relevant facts and circumstances. In the present instance, the applicants have failed in their bid to have the arbitrator's award reviewed and set aside. On the other hand, the parties are clearly in a collective bargaining relationship, a factor that this court will often take into account, especially where an ongoing relationship might be

compromised by an order for costs. In the present instance, I cannot ignore the conduct by the second defendant applicants that formed the basis of the arbitration proceedings, and of the arbitration award under review. Strike-related violence is endemic in South Africa. It is appropriate for this court to indicate its displeasure at the fundamentally disrespectful conduct of the second to further respondents by ordering the applicants to bear the first respondent's costs. Costs orders of this nature will obviously not serve in any absolute sense to prevent violence, intimidation and the like on picket lines or in circumstances where picketing rules are breached. But they may go some way to preventing a recurrence of the events that form the basis of these proceedings, and of encouraging employees' representatives to ensure that their members conduct themselves in a peaceful manner.

I make the following order:

1 The application is dismissed.

2 The applicants are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

For the applicants: Adv C Kahanovitz SC, with him Adv instructed by Cheadle Thompson and Haysom Inc.

For the first respondent: Adv M Nel, instructed by MacGregor Erasmus Attorneys