**REPUBLIC OF SOUTH AFRICA**

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

**JUDGMENT**

Case no: C905/2015

Not Reportable

In the matter between:

**OLIVER NDALA KABEYA** **Applicant**

**and**

**CCMA** **1st Respondent**

**COMMISSIONER CM BENNETT** **2nd Respondent**

**KAPA BIOSYSTEMS (PTY) LTD** **3rd Respondent**

**Heard:** **25 May 2016**

**Delivered:** **17 November 2016**

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**JUDGMENT**

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RABKIN-NAICKER, J

[1] This is an opposed application to review an arbitration award under case number WECT8232-15. The applicant, a layperson, filed a condonation application for the relatively short period of delay in launching the review. It was not opposed and the court granted condonation and heard the review on the merits. The applicant was assisted in filing written heads of argument by the SASLAW pro bono office but represented himself in court.

[2] The background to the dispute is set out in paragraph 3 of the Award as follows:

> "3. Respondent employed Applicant as a Manufacturing assistant from 2010. He was paid a basic monthly salary of R8, 560.00.
>
> 3.1 On 18 May 2015 Philander passed on an instruction, given by Daniels, to Applicant to weigh materials and to begin immediately. Applicant replied that he would commence the weighing after the 10h: 00 meeting. He did so but did not finish the weighing that day.
>
> 3.2 On 20 May 2015 Daniels asked Applicant why he had not finished the weighing in one day, especially as he had been given the instruction at 08h:15. Applicant said that it had been given at 09.15. He went to see Philander to ask him why he had lied to Daniels[1]. A verbal altercation followed, for which, on 2 June, Applicant was dismissed."

[1] His supervisor

[3] The applicant was charged with 'failure to carry out a lawful instruction' and 'failure to act in good faith, in that you intimidated and threatened to instigate violence against a fellow colleague.' The Commissioner found that the dismissal of the applicant was both procedurally and substantively fair. The applicant has advanced a number of grounds of review for this decision. The manner in which the Commissioner performed his duties as an arbitrator is highlighted. The record of the arbitration reveals the following noteworthy exchanges when the applicant was cross-examining his former supervisor Daniels:

"COMMISSIONER: How long are you going to talk for? You just yak, yak, yak, yak, yak, yak, yak, yak, you never pause for a minute. She has to answer questions. You just ask her a question and she started answering it. You ask one question at a time, not twenty three. Okay?.....

MR NDALA: And if I threaten Chad to kill him, Can Chad prove, give me the police number, because when there is violence, then you have to go and report to the police.

COMMISSIONER: Okay, let's, let's not start being ridiculous, okay. That's a stupid question and you know it. Okay? I'm not here to waste time, I don't have any tolerance of wasting time, don't waste mine, and I won't waste yours."

[4] The manner the Commissioner interacted with the applicant did not befit his office in my view. A further complaint in submission before me is that the Commissioner did not take relevant evidence into account in coming to his decision and committed gross irregularities in the conduct of the arbitration proceedings. It appears from the record that Ms Daniels, the marketing manager gave evidence under oath about the complaint laid against the applicant and that she conducted the investigation against him. She also handed in a document entitled: "Appendix One" which she described as her preparations for the disciplinary hearing. There is no reference to her evidence in the summary of evidence in the Award. In as far as Appendix One was concerned, the Commissioner dealt with it in the following way:

"MS DANIELS: I'm not going to read exactly what the content is on the document here, I think that everyone can review it.

COMMISSIONER: Let's see if we can just clear up this. The Appendix One, did you write this?

MS DANIELS: Yes, that was my preparation for the disciplinary inquiry.

COMMISSIONER: Yes, but you but this is your document?

MS DANIELS: That's correct.

COMMISSIONER: Yes, but you, but this is your document?

MS DANIELS: That's correct.

COMMISSIONER: You wrote it?

MS DANIELS: Yes.

COMMISSIONER: You typed it out or

MS DANIELS: That's correct.

COMMISSIONER: And you are, you, you stand by, you confirm the accuracy of the contents insofar as it relates to you?

MS DANIELS: Yes, that's correct.

COMMISSIONER: Okay. All right, that's fine, thank you very much. Right. So do you have any questions Mr Ndala, for this witness."

[5] Appendix 1 covers three and a quarter closely typed pages. The Commissioner did not explain to the applicant, a lay person who does not hail from South Africa, that he can cross examine the witness on the contents of the document or that he should have reference to it. The Commissioner himself did not clarify any of the document's contents with Daniels nor does he refer to it when dealing with

the procedural fairness of the dismissal. It appears that he decided to treat it as though it was a sworn statement, rather than taking time to hear the evidence of Daniels in relation to it.

[6] On the issue of procedural fairness the Commissioner had this to say:

"Turning to the procedural issues, I note that Applicant was clearly notified of his right to be represented by a fellow employee and further that he was afforded the right to call witnesses. There was evidence that he was not denied these rights. Applicant appeared to be confused about what these two roles consist, arguing that he had wanted someone to witness the proceedings for him. I do not find from this that he was denied representation had he requested it, which he apparently did not or witnesses to testify on his behalf, had he called them, which apparently he did not. I find therefore that the dismissal was also procedurally fair."

[7] The use of the word 'apparently' is disturbing, considering that the employer has a legal onus to prove the dismissal was procedurally fair. The Commissioner further does not appear to have taken into account the following exchange contained in the record during the cross-examination of Daniels:

"MR NDALA: Ja, and they said you are not allowed to call the. They did not allow me to call the witness. They told me that what we are doing here, it's private. If we hear it out, we don't wasn't to hear it out. If we hear, it's going to be your fault. That's why I not call those witnesses. They won't give me a chance to call a witness.

COMMISSIONER: Okay.

MS DANIELS: So, basically, we can listen to the recording of the disciplinary hearing, when Oliviea got the chance to call a witness, he said he doesn't need to bring anybody in for a witness statement. That was during the hearing. Towards the end, when we had come to a conclusion on matters, he mentioned he was going to bring someone in. The hearing was scheduled for an hour.

When you were asked Oiviea, during the hearing are you going to bring anyone in you said no. When you, and requested at the beginning Oliviea, so in terms of the layout of the hearing at the beginning, the opening statements for what happened, and then you add the chairperson asks: do you want to bring any witnesses? When she asked me, I said no, I have statements. When she asked you, you also said no."

[8] In other words the applicant was not allowed to call witness because at the beginning of the hearing he said he did not want to, and when he did ask to, the hour set aside for the hearing was presumably running out. In addition, the Commissioner did not take into account the admission by Daniels that while the company had committed itself to bring an interpreter to the disciplinary hearing, it did not. The lack of an interpreter compounded the refusal to allow the applicant to call a witness when he asked to do so, calling into question whether his statement that he did not need a witness at the beginning of the proceedings was an informed one. None of the company witnesses to the alleged incident gave evidence at the disciplinary, only written statements were filed.

[9] In view of the above, the Commissioner did not take relevant evidence into account and committed a gross irregularity that prevented a fair trial of the issues relating to procedural fairness. As far as the finding on procedural fairness and whether this was a reasonable outcome, the case of **Head of Department of Education v Mofokeng & others** [2] is instructive:

" [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the

[2]( 2015) 36 ILJ 2802 (LAC)

ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[10] In **Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others** [3] Myburgh AJ stated in relation to the dictum above and the threshold of 'reasonableness' that:

[69] The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts or considerations (brought about by, for example, not engaging in proper analysis of the evidence as per Sasol Mining and Madikane), the award will be reviewable if the distorting effect of this misdirection was to render the award unreasonable.

[70] There is another issue that warrants some consideration for present purposes — what is the threshold for unreasonableness? Traditionally, the answer is that the decision must fall outside of a range of reasonable decisions. But this, in itself, is not particularly helpful, because how does one determine the range? To my mind, the issue turns on the intensity with which a review for

[3] (2016) 37 ILJ 923 (LC)

reasonableness should be undertaken in the context of this court having been tasked (through its review powers) to supervise the reasonableness of CCMA awards — the higher the intensity of the review, the narrower the range of reasonable decisions (and vice versa).

[71] In my view, on an overall assessment of the jurisprudence of the LAC (whose judgments are, of course, binding on this court and from which this court takes guidance), it adopts a relatively high intensity reasonableness review. As a result of this, on my assessment, where an award is obviously wrong, the LAC will typically set it aside on review on the grounds of unreasonableness — it does not have to be hopelessly wrong or absurd before it will do so (which is what the threshold in a lower intensity review might be). Seen thus, the permissible margin for errors by a CCMA commissioner is between what is objectively right and what is obviously wrong. Put differently, where a decision is obviously wrong, it falls outside of a range of reasonableness."

[11] In the court's view the decision taken on procedural fairness falls outside of the range of reasonableness. In as far as substantive fairness is concerned, the Commissioner reasoned as follows in relation to the evidence of the respondent's witnesses as far as the charge of intimidation was concerned:

"13. Insofar as there being a fair reason for dismissal is concerned, I am somewhat concerned that Philander and Mpange's recollection of what was said should be, at first blush, so vastly different. The only points of agreement were that Applicant asked Philander why he had lied and Philander asked Applicant if he was threatening him. Beyond that, especially concerning the alleged threat, veiled or otherwise, they could have been listening to two different conversations. "I will get you" is such a direct and simple statement that I am surprised that Mpange did not testify to hearing it said……..

15. Conversely, there was arguably some consistency between Philander's and Mpange's versions to the extent that there was some conversation about being upstairs/downstairs and being inside/outside. There was also consistency in the

assertion that Applicant made a threat. Is the fact that each witness recalled some different words more important than the consensus that Applicant was threatening? I find that it is not. On simple weight of numbers, with neither Philander nor Mpange appearing to be untruthful or appearing to have any motivation to lie about what had happened, two people say Applicant was threatening as opposed to his uncorroborated applicant's contention that he was not. The probabilities favour Respondent's version, despite applicant's contention that this was a 'put up job'. From a point of view, had it been a conspiracy against him, there probably would not have been the disparity of recollection between the witnesses as to what had been said. I conclude therefore that Applicant did say things that were impliedly threatening towards Philander."

[12] I do not find the Commissioner's assessment of the evidence in regard to substantive fairness to be unreasonable. Nor his finding that there is no place for threats or intimidation in the workplace and that the sanction of dismissal was fair.

[13] In the premises, I make the following order:

Order

1. The award under case number WECT8232-15 is reviewed and set aside and substituted as follows:

1.1 The dismissal of the applicant was substantively fair but procedurally unfair;

1.2 Kapa Biosystems is ordered to pay the applicant an amount equivalent to three months remuneration, less statutory deductions, as compensation for his procedurally unfair dismissal.

1.3 Payment of compensation is to be effected within 14 calendar days of this judgment.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: In person

Respondent: Weber Wentzel Attorneys