THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C 611 / 16

In the matter between:

MINERAL SANDS RESOURCES (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

MELWYN NASH N.O. (AS COMMISSIONER) **Second Respondent**

NUM obo LYNETTA SIMMERS **Third Respondent**

Heard: **May 2017**

Delivered: **8 December 2017**

Summary: **CCMA arbitration proceedings – review of proceedings, decisions and awards of commissioners – test for review – s 145 of LRA 1995 – meaning of gross irregularity and reasonable outcome**

Evidence – evaluation and determination thereof – arbitrator properly considering all crucial evidence – arbitrator making proper credibility and probability findings – arbitrator's findings on the charges against the employee

supported by evidence and reasonable – employee only committed misconduct relating to one of the charges

Dismissal – nature of misconduct proven – misconduct relating to racist and derogatory comments referring to manager as 'jong' – principles considered – arbitrator failing to have proper regard to the nature of the misconduct – dismissal justified for this kind misconduct – award of final written warning not being appropriate

Dismissal – dismissal as an appropriate sanction – principles considered – issue of remorse considered – nature of misconduct considered – no proper remorse shown – trust relationship broken down – dismissal as sanction justified and fair

Dismissal – dismissal as an appropriate sanction – existence of binding final written warning considered – nature of warning considered – warning for related misconduct – further progressive discipline not possible – dismissal justified and fair

Review of award – conclusion of arbitrator of dismissal being an inappropriate sanction irregular and unreasonable – arbitration award reviewed and set aside – substituted with award that dismissal fair

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an application to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] This matter arose from the dismissal of the individual third respondent by the applicant, following disciplinary proceedings instituted against the individual

[1] Act 66 of 1995.

third respondent on three charges of misconduct. The individual third respondent was at all relevant times a member of the third respondent trade union, National Union of Mineworkers, which is a representative trade union in the workplace of the applicant. I will refer to the individual third respondent, Lynetta Simmers, as 'Simmers', in this judgment, and to the third respondent trade union as 'NUM'. Following the dismissal of Simmers by the applicant, NUM then pursued such dismissal as an unfair dismissal dispute to the CCMA on her behalf, and this dispute ultimately came before the second respondent for arbitration.

[3] It was common cause that Simmers had been dismissed by the applicant on 14 March 2016, on three charges, the first being the disseminating of confidential information, the second being the use of abusive or disrespectful / racist language, and the third being disseminating false information about the general manager. The second respondent was called upon to decide whether such dismissal was substantively fair, with procedural fairness not being in dispute in the arbitration. In an award dated 5 August 2016, the second respondent decided that Simmer's dismissal by the applicant was substantively unfair, and afforded her the consequential relief of reinstatement with retrospective effect to date of dismissal, with 4 (four) months' back pay in the sum of R35 600.00. It is this award of the second respondent that forms the subject matter of the review application brought by the applicant.

[4] The arbitration award of the second respondent was served on the applicant on 6 August 2016. The applicant served and filed its review application challenging this award on 16 September 2016, which was within the time limit as contemplated by Section 145(1) of the LRA.[2] The applicant's review application is thus properly before Court. I will now proceed in deciding this review application by first setting out the relevant background facts in this matter.

The relevant background

[5] The applicant conducts the business of a mine in the Lutzville area in the Western Cape. Simmers was employed by the applicant as a logistics

[2] The prescribed time limit is 6 (six) weeks.

administrator, commencing employment on 13 June 2014. As referred to above, Simmers was dismissed on 14 March 2016 on three charges of misconduct.

[6] The events giving rise to the disciplinary proceedings against Simmers took place on 14 October 2015. On the day in question, Simmers had sent an e-mail to her husband in which she complained about events that happened at her workplace on that day. She wrote about an airplane that flew low over the mine taking photos when someone she referred to as 'die jong' told his bodyguard to shoot at the airplane which the bodyguard then did, in an area where there were people around. She was upset by these events. Her husband then mailed back and said that he did not understand what she was trying to say. She then repeats the following:

> '… die jong het vanmore by bodyguard opdrag gegee om die vliegtuig wat lugfotos neem af te skiet, en daai een skiet ook net sommer twee skote. …'

She also refers in the same e-mail to having to collect a voucher, but that she did not want to collect it, because the 'meid' from whom she was supposed to collect it may say something.

[7] Although Simmers does not say in her mail who the 'jong' was she was referring to, it was in the end common cause that the 'jong' she was referring to was the general manager of the applicant, Gary Thompson ('Thompson'). It was clear that what Simmers was saying is that Thompson ordered his bodyguard to take shots with a firearm at an airplane passing overhead (which the bodyguard then did) and she took issue with Thompson for doing so.

[8] As a result of the above events, disciplinary proceedings were instituted against Simmers. The three charges were all founded on the above events of 14 October 2015, and can be unpacked as follows:

8.1 The charge of revealing confidential information was based on an allegation that what happened at the mine on 14 October 2015 in the context of the above events was confidential, and Simmers breached

her duty of good faith towards the applicant as her employer in disclosing it to a third party.

8.2 The charge of using racist and insulting language towards Thompson was based on the words she had used in her e-mail of 14 October 2015, and in particular the use of the word 'jong' and the context in which it was used.

8.3 Lastly, the third charge was based on the fact that Simmers in essence disseminated false information by conveying to her husband that Thompson ordered his bodyguard to shoot at the passing aircraft when this was not so.

[9] The disciplinary enquiry ultimately convened on 14 March 2016 before an independent chairperson, Kal Louw ('Louw'). Simmers pleaded guilty in the disciplinary hearing to the first charge relating to the disseminating of confidential information. She pleaded not guilty to the other two charges. The disciplinary hearing then continued by way of leading evidence on the second and third charges, and Simmers was then found guilty by the chairperson on these charges as well.

[10] The disciplinary hearing then continued on the issue of an appropriate sanction, and argument in this regard was submitted by both parties. In this regard, it was apparent that the disciplinary record of Simmers was not unblemished. She had a valid and binding final written warning dated 14 August 2015 for gross insubordination towards her superior. In the end, Louw decided that Simmers be dismissed, and she was then dismissed on 14 March 2016.

[11] As referred to above, the second respondent as arbitrator, seized with considering Simmers' unfair dismissal dispute, found that her dismissal by the applicant on 14 March 2016 was substantively unfair. The reasons for this conclusion, in short, was because the second respondent considered Simmers to be not guilty of charges 1 and 3, and that despite being guilty of charge 2, dismissal was an inappropriate sanction for such misconduct and she should rather have received a final written warning to remedy her behaviour.

Simmers was consequently reinstated by the second respondent, with part back pay, prompting the current review application brought by the applicant.

The test for review

[12] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution[4] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[5]

[13] The aforesaid means that what the review applicant must show to exist in order to succeed with a review is firstly, that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[6] the Court said:

> '…. A result will only 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

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[3] (2007) 28 ILJ 2405 (CC).
[4] Constitution of the Republic of South Africa, 1996.
[5] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.
[6] (2013) 34 *ILJ* 2795 (SCA) at para 25.

[14] The Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[7] applied this reasonableness consideration as follows:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[15] Accordingly, the reasonableness consideration means that all the evidence and issues before the arbitrator must be considered, so as to determine whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[8] This is done by the review court considering the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at, that the review application would succeed.[9] In this regard, and in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[10] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[7] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.
[8] See *Fidelity Cash Management* (*supra*) at para 102.
[9] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[10] (2015) 36 ILJ 1453 (LAC) at para 12.

[16] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

[17] In order to properly decide a review application, it is also important to identify the grounds of review upon which the application is founded. These grounds must be properly set out and identified in the founding affidavit. A review application can only be decided on the basis of the grounds of review so raised. As was said in *Northam Platinum Ltd v Fganyago NO and Others*[11]:

> '…. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[18] In the case of review applications, these grounds of review may however be supplemented, after the filing of the record, by way of a supplementary affidavit.[12]

[19] *In casu*, the applicant has articulated a number of review grounds, both in the founding affidavit, and in a supplementary affidavit later filed. Succinctly, these review grounds can be summarized into six main grounds of review. These are:

19.1 The second respondent failed to appreciate that the term 'jong' in this instance used by Simmers was in fact tantamount to a racist insult, and the second respondent simply classifying it as disrespect that was not gross was a serious misdirection. According to the applicant, the misconduct went far beyond mere disrespect and insolence.

[11] (2010) 31 ILJ 713 (LC) at para 27.
[12] See Rule 7A(8) of the Labour Court Rules; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

19.2 The second respondent committed a reviewable irregularity in failing to appreciate that the misconduct of Simmers was such that dismissal as a sanction was fair and appropriate. According to the applicant, the second respondent should not have interfered with the sanction of dismissal.

19.3 The applicant complained that the second respondent should have taken the final written warning into account.

19.4 The second respondent failed to properly analyse the evidence before him, and committed a gross and reviewable irregularity in preferring the evidence of Simmers over the testimony presented by the applicant's witnesses.

19.5 The second respondent in considering the evidence where it came to the first charge, instead of simply relying on the guilty plea by Simmers to the charge, actually considered the merits of the charge, which he should not have done. Further, the second respondent erred in finding that Simmers in any event did not disclose confidential information.

19.6 Finally, the applicant took issue with the relief of reinstatement afforded by the second respondent to Simmers.

[20] I will now proceed to consider the applicant's review application based on these principal grounds of review, summarized above.

Analysis: The misconduct

[21] I will commence with considering the first charge relating to revealing confidential information to a third party. It is of course true that Simmers pleaded guilty to this charge. The second respondent considered this guilty plea, and found that it was in reality not a proper guilty plea. I tend to agree with him. There was no evidence or indication that Louw, as disciplinary hearing chairperson, took steps to ensure that Simmers understood the elements of the charge and what she was in fact pleading guilty to.[13] Like the second respondent, I am convinced that what Simmers was in fact pleading

[13] See *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at paras 71 – 73.

guilty to, was simply sending the e-mail, which she certainly did. But she never understood what confidential information meant, and pleaded guilty to this element of the charge. The second respondent therefore acted well within the bounds of reasonableness in deciding not to simply accept the guilty plea as proof of this misconduct.

[22] The second respondent then considered the evidence and concluded that Simmers did not reveal any confidential information. The second respondent held that all Simmers did was to convey to her husband something she had witnessed, and there was nothing confidential about this. It was also common cause that Simmers had reported the matter to the police (even though the case was later closed due to a lack of evidence). The second respondent thus concluded that Simmers was not guilty of this charge.

[23] I am compelled to say that I find the second respondent's reasoning on this first charge compelling. In my view the second respondent cannot be faulted when he concluded that the information Simmers had conveyed was not confidential. I agree that all she was doing was in effect telling her husband of her experience. I also agree with the second respondent's reasoning that as a matter of principle, it can hardly be said that conveying what the second respondent believed to be a crime could be seen to be disclosing confidential information. For the purposes of this charge, it is irrelevant to decide whether what Simmers said was true or not, because, as the second respondent properly appreciated, this was the substance of the third charge. There is accordingly nothing irregular or unreasonable in the finding the second respondent arrived at in respect of the first charge, and there is no basis for me to interfere with this conclusion.

[24] The third charge of Simmers conveying false information about her superior (Thompson), is a different matter. In this regard, it was undeniable that what Simmers did, was to say that Thompson ordered his bodyguard to fire on a passing aircraft, which the bodyguard then did. Central to deciding this charge was determining whether this allegation was true, because if it was not, then Simmers could be seen to have made a false statement.

[25] The second respondent considered that what Simmers had said was true. In arriving at this conclusion, the second respondent considered the testimony of all the witnesses that testified about the events on the day. The second respondent held that because the events dated back to October 2015, the recollection of the witnesses were not 'fresh'. The second respondent considered the testimony of Stella Matthys, and held that because she had earphones on she could not confirm or deny hearing that shots were fired, but she could confirm there was a 'commotion'. In considering the testimony of Dereck Scheepers, the second respondent referred to Scheepers being unable to confirm or deny having heard shots fired, but said he heard a 'bietjie geraas'. The second respondent rejected Herman Beukman's evidence because he was still in his vehicle driving to the scene and was too far away. The second respondent rejected the evidence of the witness called by Simmers as well, being Imelda Klaase, because she contradicted her police statement.

[26] The second respondent accepted the testimony of Simmers, and her witness Caron Cupido. He accepted the testimony of Cupido that she heard the shots being fired, and saw the bodyguard pick up the bullet casings. In considering the evidence of Simmers, the second respondent held that she was closest to the incident, she could clearly hear what was happening and then immediately told her husband what happened. The second respondent reasoned that she would not have reported the matter to the police if she simply fabricated a version. Finally, the second respondent concluded that the testimony of Simmers emerged unscathed under cross examination.

[27] The second respondent in the end found Simmers not guilty of the third charge relating to the conveying of a false statement about her superior, based on his determination and evaluation of the evidence, referred to above. The applicant has attacked the second respondent's determination of the evidence in this regard, as part of its grounds of review raised. I must now decide whether there is any substance in this attack.

[28] It is of course so that the second respondent was confronted with two mutually destructive versions where it came to the third charge, only one of which could be true. The second respondent had the duty to decide which of these two

versions was the truth. This task of the second respondent was also bedevilled by the fact that Thompson was never called to testify. The second respondent, in deciding which version to accept, needed to adopt the following approach, as enunciated in *SFW Group Ltd and Another v Martell et Cie and Others*[14]:

> '…To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...'

Also, and as said in *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and others*[15]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. …'

[29] It is clear from his award that the second respondent did make credibility findings. Although it may be so that these findings were somewhat sparse, the fact remains that he did appreciate that he had to decide which testimony to prefer and motivate why. The second respondent undoubtedly preferred the testimony of Simmers based on his assessment of her credibility. This kind of preferring of testimony by arbitrators is not lightly interfered with by this Court.

[14] 2003 (1) SA 11 (SCA) at para 5.

[15] (2011) 32 ILJ 723 (LC) at para 7. See also *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 33126 (LC) at para 37. See also *Kok v Commission for Conciliation, Mediation and Arbitration and Others* [2015] JOL 32888 (LC); *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) at para 20. In *SFW Group* (*supra*) at para 5, the Court said the following as to how to assess credibility: '…the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf…, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. …a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. …'

In *Standerton Mills (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[16] the Court dealt with credibility findings made by arbitrators as follows:

> '... Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow and Others* (2004) 25 *ILJ* 1462 (LC) at 1468C-D Ntsebeza AJ observed in this regard as follows:
>
> 'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.... I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[30] The issue of challenging credibility findings of arbitrators in Labour Court review proceedings, was also dealt with in *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[17] where the Court said:

> 'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely

[16] (2012) 33 ILJ 485 (LC) at para 18.
[17] (2013) 34 ILJ 945 (LC) at para 31.

> out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. … '

[31] Reading the record leaves me convinced that there is simply nothing irregular about the manner in which the second respondent determined the evidence. The evidence presented by Matthys and Beukman did not in any way serve to contradict what Simmers testified to with regard to what she witnessed. Neither of them were in a position to witness anything concerning the shooting incident. Scheepers also did not see anything, but he did testify that he heard a noise in the form of two bangs, but he could not say if it was crackers, shots or a vehicle backfiring. This testimony of Scheepers indeed appears to even confirm what Simmers was saying. The record also indeed shows that Simmers emerged unscathed form what was fairly detailed cross examination. Finally, it was indeed so that Cupido's testimony corroborated that of Simmers in all material respects.

[32] Accordingly, and in my view, the credibility findings by the second respondent where it came to the various witnesses' testimony pertaining to charge three is unassailable on review. A careful evaluation of the transcript of the testimony in the arbitration makes it clear that there is nothing out of kilter between the evidence on record and the credibility findings made by the second respondent. The criticisms of the evidence of the various witnesses by the second respondent referred to above was justified. Once the evidence of Simmers is to be preferred, that is in reality the end of the matter where it comes to the third charge. I must however add that I have concerns about the fact that Thompson was not called to testify. In my view, he should have been called to testify about the events on the day. There was no explanation why he could not be called to testify. This is a factor that had to count heavily against the applicant when deciding which version to accept with regard to charge three.[18] As said in *ABSA Investment Management Services (Pty) Ltd v Crowhurst*:[19]

[18] See *General Food Industries Ltd v Food and Allied Workers Union* (2004) 25 ILJ 1260 (LAC) at para 46; *Simelane and Others v Letamo Estate* (2007) 28 ILJ 2053 (LC) at paras 22 and 23; *United People's Union of SA on behalf of Khumalo v Maxiprest Tyres (Pty) Ltd* (2009) 30 ILJ 1379 (LC) at para 29.

[19] (2006) 27 ILJ 107 (LAC) at para 14.

> '... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case. Compare Zeffertt et al SA Law of Evidence (5 ed) at 128-30.'

[33] But the second respondent did not just consider credibility. He also had regard to a number of pertinent and inherent probabilities. These were that Simmers immediately reported what she saw of her own accord to her husband, and went so far as to lay a charge with the police. Also, even two of the applicant's witnesses confirmed that there was some or other 'commotion' on the day. Based on all these events, is was simply unlikely that Simmers had made it all up. As held in *SA Post Office v De Lacy and Another*[20]:

> 'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be 'consistent with all the proved facts. If it is not, then the inference cannot be drawn' and it must be the 'more natural or plausible, conclusion from among several conceivable ones' when measured against the probabilities.'

[34] In the end, and based on the above reasoning, there is simply no basis for me to interfere with the second respondent conclusion that Simmers was not guilty of the third charge relating to distributing false information. On the probabilities, she was telling the truth. This conclusion of the second respondent is supported by the evidence and resorts well within the bounds of what may be considered to be a reasonable outcome. The second respondent's finding in this respect must be sustained.

[35] This the only leaves the issue of the second charge, being the insulting and racist language used by Simmers in her e-mail of 14 October 2015. As reflected above, it was undisputed that Simmers indeed sent the e-mail concerned, containing the references complained about, and that these references were in respect of Thompson. In short, Simmers called Thompson a 'jong'. The second respondent, in his award, came to grips with this reference, and concluded that the message reflected some form of contempt, but not to the effect that it would constitute what the second respondent called

[20] 2009 (5) SA 255 (SCA) at para 35.

'gross disrespect'. The second respondent however accepted that the reference was insulting, and concludes:

> '… in respect of charge 2, namely insulting, abusive, obscene communication, I find she was guilty of such misconduct.'

[36] There is simply nothing wrong with the second respondent's findings of fact where it comes to the second charge. There can be no doubt that Simmers had committed this misconduct with which she had been charged. However, and considering what she had said, it must be asked whether the second respondent properly appreciated what the actual nature of the misconduct was he was dealing with. This consideration lies at the heart of the applicant's ground of review where it comes to the second respondent's findings on this charge.

[37] As the second respondent seemed to understand, the term 'jong' must be considered in the context it was used and considering all the events as a whole. In *South African Equity Workers Association obo Bester v Rustenburg Platinum Mine and Another*[21] the Court dealt with the use of the word 'swartman' by an employee in referring to another employee, and then, when considering whether the use of the word was derogatory, held:

> 'The Labour Court was, indeed, constrained to consider context in determining whether the expression "swartman" as used by Bester, in his exchange with Mr Sedumedi, was derogatory. On the objective test, this meant that the Labour Court had to examine the entire context in which the misconduct is alleged to have occurred and the effect thereof. The context of course had to disclose, as the only reasonable inference from the proven facts, that the word "swartman" was derogatory and racist, and that Bester had acted with intent to demean.'

[38] Applying this approach in *Rustenburg Platinum Mine*, the context in which Simmers made the utterances concerned occurred in circumstances when she was clearly aggravated by what she witnessed Thompson do. She reacted in a manner so as to express her dissatisfaction. How she felt was reflected in the record, where she testified: 'Ai, ek was so geskok gewees to ek gesien het wat

[21] (2017) 38 ILJ 1799 (LAC) at para 20.

gebeur het meneer. Kal, ek het daar gesit, “I mean”ek, dit was vir “like in, really”?!’ (sic). This surely confirms that what Simmers intended to do was to refer to Thompson in an insulting manner, motivated by how she felt.

[39] Further, the message must also be read in totality, and in this regard, Simmers refers to another party in the same message as a ‘meid’, also in the context of expressing her dissatisfaction. Simmers also used the phrase twice and even after her husband asked her to clarify her message. Objectively speaking, and considering the message as a whole, there can be little doubt that Simmers made these statements with the intention to demean and to convey an insult. Calling someone a ‘jong’ and a ‘meid’ in this context has clear racist connotations. It is the male and female sides of the same coin, male being ‘jong’ and female being ‘meid’. These are racist insults used in the past against persons of colour that are intended to be derogatory of and demeaning to the person against whom it is used. It implies that such person is of lesser status and inferior in some way, and is linked to race.

[40] The case *in casu* is distinguishable from ‘jong’ being used in other, and permissible, contexts. For example, it can be used to refer to someone being young, like ‘Dit is ‘n jong kind’. Or it can be used to refer to a person as being someone’s child, like ‘Dit is my jong’. What is immediately apparent is that the term is not used in these kind of contexts as part of a confrontation or insulting statement. Simmers was in my view alive with this distinction. She tried to explain this by referring to her husband whom she said she had the greatest respect for, but she would say to him “Jong, nie so nie” or “Jong, nie dit nie”. She said that is how they spoke. But this explanation is not consistent with what the e-mail in totality conveys, in that it is clear that the term is not used in the context of normal everyday speech, but intended to convey an insult.

[41] Again, a reference to the judgment in *Rustenburg Platinum Mine* is appropriate. In that case, it was held that the use of the term ‘swartman’ (black man) was not used in a racist context, but was used to identify someone. The Court said:[22]

[22] (*supra*) at para 27.

> 'While it is clear on the evidence that Bester had no reason to denigrate either Sedumedi or Tlhomelang, he did have a need to identify Mr Tlhomelang — a person whose name, rank and division were unknown to him — and he used race as a descriptor in doing so. He may have been unwise to opt for this descriptor but his lack of wisdom is not the point in issue. He was charged with 'making a racial remark by referring to a fellow employee as a "swartman" when requesting that he moved his vehicle' …'

In casu, Simmers had a reason to denigrate Thompson. She was obviously very unhappy with him ordering his bodyguard to shoot at an aircraft in a public place. She did not use the term in a neutral and descriptive manner, or the manner which she sought to explain in evidence in the arbitration. And once again, when asked by her husband what she talking about, she repeats the very same term in the context of the same insult. As held in *Modikwa Mining Personnel Services v Commission for Conciliation, Mediation and Arbitration and Others*[23]:

> 'Simply put, the context in which the words were spoken simply aggravates the purpose for which they were used. The words constitute a racial slur or a racial remark on their own and in the context in which they were used. …'

[42] The Oxford Dictionary[24] defines 'meid' being used by Afrikaans speaking persons, as including an insulting form of address or reference to a (young) black woman. Similarly, the use of the word 'jong' is defined in the same way, but referring to a (young) black man. This means that the reference is part of an insult. The racist connotation as part of the insult is then apparent. The term 'meid' was considered in *Johnson v 94.7 Highveld Stereo*[25] where the broadcasting complaint tribunal referred to another case in *Hart v Radio 702* where it was held:

> '… this Tribunal found that the use of derogatory language like … "meid" … amounts to a step back into the past, as far as South African history is concerned. These words are bound to cause severe emotional pain. It

[23] (2013) 34 ILJ 373 (LC) at para 34.
[24] See the Oxford Living Dictionary published by the Oxford University Press.
[25] [2003] JOL 10511 (BCCSA) at 10512.

amounts to a form of advocacy of hatred based on race and should be outlawed. …'

[43] Also considering that Simmers published the words concerned in e-mail correspondence, which was in turn clearly read by third parties, including Thompson, it should also be considered what a reader would think of that which was written. In the context of a defamation case, the Court in *Sindani v Van der Merwe and Others*[26] said:

> 'The ordinary meaning of the words under consideration does not necessarily correspond with their dictionary meaning. The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply …'

It is my view that any third party reader of Simmer's e-mail would consider that she was directing a derogatory insult at Thompson, when referring to what he did. She could have just called him an idiot, which may be insolent, but would not be racist. But by using the word 'jong' in this context, the insult became racially charged.[27]

[44] In *City of Cape Town v Freddie and Others*[28] the Court considered an e-mail sent by an employee which recorded the following about his superior: '…the way I look at you are even more than Verwoerd …'. On face value, there would be nothing racist in this. However, the Court said the following in this regard:[29]

> 'However, it seems to me, given the painful and shameful atrocities perpetrated against the black people in this country during the so-called Verwoerdian period, one should expect to see all right-minded and peace-loving people not to dare to be even perceived as associating themselves with anything to do with Verwoerd and his lieutenants, as well as his similarly minded successors. Therefore, for Freddie to describe Robson, without any justifiable cause, as being 'even [worse] than Verwoerd' was an offensive

[26] 2002 (2) SA 32 (SCA) at para 11.
[27] Compare *Sindani* (*supra*) at para 12.
[28] (2016) 37 ILJ 1364 (LAC) at para 24.
[29] Id at para 55.

> racial insult, absolutely unacceptable for any employee to use against any other employee in the workplace, irrespective of whether the accuser is white or black. …'

[45] There was no justifiable cause for Simmers to describe Thompson, her superior, as a 'jong'. This term had been used in the past as a derogatory reference to young black men, and sought to convey that they were inferior in some way. Simmers thus reverted to a racial insult from the past when seeking to convey her dissatisfaction about Thompson, in a manner similar to what happened in *Freddie*. Also, and in *Vodacom (Pty) Ltd v Gildenhuys and Others*[30] the Court held:

> '… People were classified according to the colour of their skins, the texture of their hair, the shape of their noses etc. White people were regarded as superior to black people. We must be vigilant against racism. Where there are allegations of racism these must be thoroughly investigated. We should guard against labelling certain actions for being racist without having investigating it properly. We should guard against looking for racism in certain conduct where it is not. There is off course no *numerus clausus* of examples of what conduct should be construed as racist. What might be innocent to one person might not be that innocent to another person. We must all be sensitive towards this and other people. Employers do have a role to play. …'

And in *South African Chemical Workers Union and Another v NCP Chlorchem (Pty) Ltd and Others*[31] it was said:

> ''Racist' is defined in *The New Shorter Oxford English Dictionary* as 'a person believing in, advocating, or practising racism'. 'Racism' in turn is in the same dictionary defined as 'belief in, adherence to, or advocacy of the theory that all members of each race possess characteristics, abilities, qualities, etc, specific to that race, especially distinguishing it as inferior or superior to another race or races; prejudice, discrimination, or antagonism based on this'

The reference to 'jong' by Simmers must be understood in the context referred to in the above *dicta* in *Vodacom* and *NCP Chlorchem*. It links Thompson, as

[30] (2008) 29 ILJ 1762 (LC) at para 16.
[31] (2007) 28 ILJ 1308 (LC) at para 10.

a matter of racial insult, to being a lesser class citizen and being inferior, for what he did.

[46] In the end, there is in my mind little doubt that when Simmers twice referred to Thompson as a 'jong' she intended to derogate and insult him, on the basis of a racist utterance. The misconduct Simmers is guilty of is thus not only insulting and abusive (as the second respondent himself accepted), but also racially charged. This latter consideration the second respondent unfortunately did not appreciate, and as I will now elaborate on, it impacted directly on the reasonableness of the outcome he arrived at.

[47] Once it is appreciated that the misconduct of an employee being dealt with is racially charged, then certain imperatives come into play. In *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[32], Mogoeng CJ said:

> 'The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy related issues, it behoves our courts to embrace that judgment call as dispassionately as the judicial affirmation or oath of office enjoins them to and unflinchingly bring an impartial mind to bear on those issues, as in all other cases.
>
> Judicial officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. …'

[48] In *Freddie*[33] the Court said the following about racist utterances:

> 'With the advent of our constitutional democracy, the racial attitudes and practice of discrimination amongst persons on the basis of race, colour, culture or creed is something that ought now to belong in the past. However, it

[32] (2017) 38 ILJ 97 (CC) at paras 12 – 13.
[33] (*supra*) at para 50.

> cannot be denied that it constitutes the saddest part of the history of this country. Sadly, it remained a common cause feature in our society. Significantly, our Courts have expressed strong views against racism …'

[49] Further, and in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*[34], Nicholson JA (as he then was), said:[35]

> '… Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question. The judge president has dealt comprehensively with this matter in his judgment and I wholeheartedly endorse everything that he says in this regard.'

Zondo JP (as he then was), in his judgment in *Crown Chickens* conducted a comprehensive analyses of the legal position where it came to racist remarks / insults, and held:[36]

> '… It seems to me that in being required to uphold the Constitution and the human rights entrenched in it, the courts are enjoined to play a particularly critical role in, among others, the fight against racism, racial discrimination and the racial abuse of one race by another. They must play that role fairly but firmly so as to ensure the elimination of racism in our country and the promotion of human rights. This court is alive to this role and will seek to play it fully, fairly but firmly. The role of the Labour Court and this court is particularly important in the field of labour and employment. This is so because the decisions of these two courts have a significant impact in almost every workplace throughout the breadth and the length of the country - in offices, in shops, in factories, on farms and elsewhere. ….'

[50] It must also be considered that dealing with issues of racism have a far wider impact that just the individual actors involved the events. The whole employment environment may be negatively impacted upon, especially considering how third parties and other employees perceive the manner in

[34] (2002) 23 ILJ 863 (LAC).
[35] Id at para 24.
[36] Id at para 34 – 35

which the employer has dealt with it. As said in *Lebowa Platinum Mines Ltd v Hill*[37]:

> '… The position was well expressed by the arbitrator in *Siemens Ltd v NUMSA* (a case of racial abuse) in saying: "racial insults go beyond those to whom they are individually directed. They impact upon the workforce as a whole ...".'

[51] The employer in fact has a duty to sternly deal with all instances of comments that are racially charged and that are conveyed for the purposes of belittling, insulting and in effect abusing a fellow employee. In *NCP Chlorchem*[38] it was held:

> 'Therefore, in our country with its history of racial discrimination, it needs hardly be debated, I believe, that employers, generally speaking, are enjoined to do their best to create a working environment free from racism. Apart from employers being statutorily obliged to do so, it is patently the right thing to do. …'

[52] It is clear from the manner in which the applicant dealt with this charge against Simmers in the disciplinary proceedings is that it considered the misconduct to be racially charged. It was alive to its duty to eradicate this kind of conduct out of the workplace, and dealt with the matter accordingly. Based on the reasoning set out above, I can find little fault with this view and approach of the applicant as employer. The second respondent failed because he did not appreciate this. He diminishes the nature of the misconduct to something lesser, which in my view is grossly irregular. The second respondent should have considered the racist connotation attached to the insult of Simmers when deciding the issue of an appropriate sanction.

<u>Analysis: the sanction</u>

[53] With Simmers having found to have committed misconduct described by the second respondent himself as being 'insulting, abusive, obscene communication', it was thus necessary to consider whether dismissal was an

[37] (1998) 19 ILJ 1112 (LAC) at para 12. See also *Modikwa Mining* (*supra*) at para 35.
[38] (*supra*) at para 13.

appropriate sanction. As touched on above, the second respondent concluded that dismissal as a sanction was unfair and inappropriate, and that the imposition of a final written was required. The applicant takes pertinent issue with this conclusion in its grounds of review.

[54] The second respondent reasoned that the reference to 'jong' was disrespectful, but not to the extent of being so 'gross' as to justify dismissal. He accepted that she 'genuinely believed' that there was nothing wrong in referring to him like that. He then held that even though Simmer's conduct was not to be encouraged, it was just 'her way' of describing someone 'she had issues with'.

[55] The second respondent then dealt with the final written warning Simmers was still subject to, which was for insubordination. He accepted that this warning had 'commonalities' to the current misconduct. But he then sought to distinguish the same because Thompson was not the 'direct recipient' of message and the wording was not 'excessively disrespectful'.

[56] The above constitutes the sum total of the reasoning articulated by the second respondent in arriving at the conclusion that the sanction of dismissal imposed on Simmers was inappropriate. Considering the grounds of review raised by the applicant, the question that must now be answered is whether this conclusion constitutes a gross irregularity, and if so, whether a finding that dismissal is inappropriate is also not a reasonable outcome.

[57] Navsa AJ in *Sidumo* said the following where it came to deciding the issue whether dismissal was an appropriate sanction:[39]

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's

[39] *Sidumo* (*supra*) at paras 78 – 79. This *dictum* was also referred to with approval in *Fidelity Cash Management* (*supra*) at para 94; *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC) at para 82; *Bridgestone SA (Pty) Ltd v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2277 (LAC) at paras 17 – 18; *Woolworths (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* (2016) 37 ILJ 2831 (LAC) at para 14; *Msunduzi Municipality v Hoskins* (2017) 38 ILJ 582 (LAC) at para 30.

challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances'

[58] Following the judgment in *Sidumo*, a number of other principles were crystalized out that would require consideration in assessing whether the sanction of dismissal is fair. These further principles are the issue of the breakdown of the trust / employment relationship between the employer and employee, the existence of dishonesty, the possibility of progressive discipline, the existence or not of remorse, the job function and the employer's disciplinary code and procedure.[40] However, and in general terms, what requires consideration by an arbitrator was articulated by Van Niekerk J in *Vodacom (Pty) Ltd v Byrne NO and Others*[41] as follows:

'… the determination of the fairness of a dismissal required a commissioner to form a value judgment, one constrained by the fact that fairness requires the commissioner to have regard to the interests of both the employer and the worker and to achieve a balanced and equitable assessment of the fairness of the sanction …'

[40] See *Eskom Holdings Ltd v Fipaza and Others* (2013) 34 ILJ 549 (LAC) at para 54; *Harmony Gold Mining Co Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 912 (LC) at para 22; *Trident SA (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2012) 33 ILJ 494 (LC) at para 16; *Taxi-Trucks Parcel Express (Pty) Ltd v National Bargaining Council for the Road Freight Industry and Others* (2012) 33 ILJ 2985 (LC) at para 18; *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council and Others* (2011) 32 ILJ 1057 (LAC) at para 34; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1189 (LC) at paras 26 – 27; *City of Cape Town v SA Local Government Bargaining Council and Others (2)* (2011) 32 ILJ 1333 (LC) at paras 27 – 28; *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC) at paras 37 – 38.

[41] (2012) 33 ILJ 2705 (LC) at para 9.

And in *Wasteman Group v SA Municipal Workers Union and Others*[42] Davis JA said:

> '… The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner. …'

[59] The difficulty that I have with the award of the second respondent, from the outset, is that he completely failed to consider and then determine virtually all of the issues he was required to consider in terms of the judgment in *Sidumo*. In effect, all he considered was the issues of the gravity of the misconduct and the applicability of the final warning. He did not consider the critical issue, in these particular circumstances, of remorse. He had no regard to the applicant's disciplinary code and procedure, and the interests of the applicant as an employer. He only considered the issue of the trust relationship in the context of deciding whether reinstatement as relief was appropriate and not in the context of deciding whether dismissal was a fair sanction.

[60] I believe that what the second respondent in fact did in this case was to decide whether he would have dismissed Simmers if he was her employer. Such an approach is entirely irregular. In terms of *Sidumo*, what the second respondent needed to do was decide whether the applicant's conduct in dismissing Simmers was unfair, and not adopt the 'clean slate' kind of approach the second respondent in fact did. As was said by Ngcobo J in *Sidumo*:[43]

> '… the commissioner… does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair'.

[61] What the second respondent needed to do was analyse all the evidence, apply this analysis to all the requisite considerations identified above, and come to a properly reasoned conclusion as to whether dismissal was a fair or

[42] (2012) 33 ILJ 2054 (LAC) at 2057G-I.
[43] (*supra*) at para 178.

unfair sanction. In *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) and Others*[44] the Court said:

> '… Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts. Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair. Reaching a value judgment in relation to competing factors will in many cases be fairly straightforward but in others it may be helpful to conduct the comparison process with reference to a common question, being how the factor relates to the relevant features of the employer's operational requirements. A proper assessment of those requirements underlies the determination of what is fair and at the same time provides an objective framework for a value to be placed on one factor and another.'

[62] A consideration of the second respondent's award and the reasoning contained therein leaves one with little doubt that he never did any of this, nor conducted the kind of evaluation and assessment actually required of him, other than the two considerations referred to above. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*[45] the Court said:

> 'Although a commissioner is required to give brief reasons for his or her award in a dismissal dispute, he or she can be expected to include in his or her brief reasons those matters or factors which he or she took into account which are of great significance to or which are critical to one or other of the issues he or she is called upon to decide. While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

[44] (2010) 31 ILJ 2475 (LC) at para 19.
[45] (2008) 29 ILJ 2189 (LAC) at para 8. See also *Pack 'n Stack v Khawula NO and Others* (2016) 37 ILJ 2807 (LAC) at paras 19 – 20.

[63] Applying the above dictum in *Maepe*, it would have been necessary for the second respondent to set out all his considerations on an appropriate sanction in his award, and it is therefore clear that the second respondent has failed to consider most of the factors he was required to consider, and certainly had no regard to the factual matrix as a whole. This failure is tantamount to the second respondent not discharging the duty that rested upon him to decide whether dismissal was a fair sanction. This would be the kind of gross irregularity contemplated by the review test I have articulated above. In *Solari v Nedbank Ltd and Others*[46] the Court said the following, specifically referring to conduct of a commissioner in deciding if dismissal was an appropriate sanction:

> '… it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach'

[64] I also have concerns about what seems to be contradictory reasoning by the second respondent. On the one hand, he accepts Simmers is guilty of what he calls abusive and obscene communication, being phrases which in my view speak for themselves. But on the other hand, he finds that the misconduct is only disrespect which is not gross. Despite having also earlier found that the word used by Simmers was insulting, the second respondent in deciding sanction then says the word can be used in different contexts and it was just the way of Simmers in dealing with someone she had a problem with. The point is that the second respondent cannot have it both ways. Either Simmers insulted Thompson or she did not. If the word 'jong' could be used in different contexts and it was just Simmers' way of talking, there could be no insult in the first place.

[46] (2014) 35 ILJ 3349 (LAC) at para 29.

[65] The above being said, is the finding of the second respondent that dismissal was not appropriate nonetheless sustainable as a reasonable outcome, despite all the irregularities mentioned above? The only way in which the answer this question is to consider the evidence as a whole and then specifically apply this evidence to *Sidumo* principles articulated above.

[66] I will start with the issue of the nature of the misconduct, which is at least one of the sanction principles the second respondent did consider. As I have dealt with above, the second respondent completely misconstrued the nature of the misconduct. He seemed to be unduly influenced by the subjective views of Simmers, which is the very thing Mogoeng CJ warned about in *SA Revenue Service*. The second respondent should have brought an objective mind to bear on the question, and this does not include considering how Simmers may have personally felt about the word and what her own habits may have been. If this kind of approach is propagated, then any wrongdoer accused of making racist comments could escape responsibility by simply saying that he or she genuinely did not think what was being said was wrong, and this is how he or she normally spoke. This is simply an untenable proposition.

[67] As a matter principle, comments that are insulting and with the insult being racially charged, this should carry with it the penalty of dismissal. This was affirmed in *Rustenburg Platinum Mine*[47] where the Court said:

> '… Our courts have correspondingly dealt with acts of racism, and the use of racist language in particular, very firmly visiting upon such conduct the sanction of dismissal.'

The application of this principle *in casu* already places the reasonableness of the outcome arrived at by the second respondent on very shaky ground, because it would certainly justify the dismissal of Simmers as being fair.

[68] I now move on to the next crucial consideration where it comes to the kind of misconduct found *in casu*. That is the issue of remorse. What is critical for an employee to do, where the employee has transgressed by making racially

[47] (*supra*) at para 15. See also *SA Revenue Service* (*supra*) at para 42; *Crown Chickens* (*supra*) at para 38*; Oerlikon Electrodes SA v Commission for Conciliation, Mediation and Arbitration and Others* (2003) 24 ILJ 2188 (LC) at para 37; *Solidarity on behalf of Van Zyl v Kpmg Services (Pty) Ltd and others* (2014) 35 ILJ 1656 (LC) at para 22.2.

charged insults, is to own up to the wrongdoing, express regret, and then exhibit a clear intention to be rehabilitated. The regret expressed must be genuine, and not just what can be called 'crocodile tears' for being taken to task.[48] In simple terms, the employee must admit the wrongdoing, sincerely apologize, and commit to rehabilitative discipline. As said in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[49]:

> '… Acknowledgment of wrong doing is the first step towards rehabilitation. In the absence of a re-commitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken.'

[69] The requirement of remorse is a particularly important consideration where it comes to racist utterances. This was specifically considered by Mogoeng CJ in *SA Revenue Service*[50] in saying:

> 'Worse still, this was a case of an employee who, though guilty of racism, did not acknowledge his racist conduct, apologise to all concerned, show remorse or genuinely volunteer to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity. …'

[70] Considering what Simmers did, I am confident in saying that she has no remorse of any kind for her misconduct. She persistently maintained that she did nothing wrong. In the arbitration, she suggested that she would do the same thing again. She even sought to offer what was simply opportunistic explanations about the meaning to be attached to the word 'jong' when it was clear from the context of the e-mails written by her that this simply could not be so. She expressed no wish to be rehabilitated, and change her ways. Also, a plea of guilty from the outset on this charge would have gone a long way

[48] See *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 46.
[49] (2000) 21 ILJ 1051 (LAC) at para 25.
[50] (*supra*) at para 45. See also *Freddie* (*supra*) at para 59; *NCP Chlorchem* (*supra*) at para 18.

towards showing proper remorse.[51] In *City of Cape Town v SA Local Government Bargaining Council and Others (2)*[52] the Court said:

> ' … The fact that an employee shows remorse for his or her actions and takes responsibility for his or her actions may militate, depending on the circumstances, against imposing the sanction of dismissal. The converse also applies, dismissal may be an appropriate sanction where the employee commits an act of dishonesty, falsely denies having done so and then shows no remorse whatsoever for having done so.'

Simmer's failure to exhibit the requisite remorse, her persistent denial of wrongdoing, and her reliance on opportunistic explanations, was yet another factor that strongly motivated the proposition that her dismissal was indeed a fair sanction.

[71] The next important consideration is the valid and binding final written warning that still applied to Simmers. The final written warning was for gross insubordination towards her superior, and was issued to her only two months before the misconduct giving rise to the matter *in casu* took place.

[72] The existence of a prior final written warning has a direct and material consequence where it comes to deciding whether dismissal for misconduct would be fair. The Court in *Transnet Freight Rail v Transnet Bargaining Council and Others*[53] specifically dealt with the very issue of the consequences of a final written warning, and said:

> 'Usually, the presence of a valid final written warning at the time of the commission of the same or similar form of misconduct should be properly interpreted as aggravating in nature. The principles of progressive discipline require such a re-offending employee usually to be considered irredeemable. …. I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

[51] Compare *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2273 (LAC) at para 23.
[52] (2011) 32 ILJ 1333 (LC) at para 29.
[53] (2011) 32 ILJ 1766 (LC) at para 42 – 43. See also *Builders Trade Depot v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 1154 (LC) at paras 45 – 46.

And in *Gcwensha v Commission for Conciliation, Mediation and Arbitration and Others*[54] the Court held:

> 'I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

[73] The above being the case, and should it be accepted that Simmer's final written warning was for related misconduct, this would similarly be an important consideration pointing to the fact that she now earned her dismissal. Clearly alive to this, the second respondent sought to distinguish the final written warning, despite accepting the 'commonalities'. The reasoning of the second respondent is in my view contrived. To simply use the fact that the e-mails of Simmers were not directed specifically at Thompson is an artificial basis of distinction. The fact is that the warning was for gross misconduct directed at a superior. Her comments *in casu* were on the common cause facts about Thompson, also a superior. The second respondent himself considered the current misconduct of Simmers to be insulting and disrespectful.

[74] The offence relating to the final written warning (insubordination), and the misconduct *in casu*, constitute the kind of misconduct that can in general be described as behavioural offenses directed at a superior. In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[55] the Court said:

> '… The offence of insubordination in the workplace has, in this regard, been described by our Courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority. Whereas in some cases defiance of an instruction may indicate a challenge to the authority of the employer, this is not so in every case. Insubordination may also be found to be present where disrespectful conduct poses a deliberate (wilful) and serious challenge to, or defiance of the employer's authority, even

[54] (2006) 27 ILJ 927 (LAC) at para 32.
[55] [2015] 5 BLLR 484 (LAC) at para 19

where there is no indication of the giving of an instruction or defiance of an instruction. It is, therefore, not essential for an instruction to be given or disobeyed to found a challenge to the employer's authority.'

[75] In *Palluci*, the Court specifically considered the judgment of the former Industrial Court in *Commercial Catering and Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)*[56] which dealt with the meaning of insolence. The Court in *Palluci* then came to the following conclusion:[57]

'…. *Wooltru* makes it clear that although an employee can be both insolent and insubordinate at the same time, he or she can be insolent without necessarily being insubordinate. Notably, the Court in *Wooltru* held that a mere disrespect for the employer (or insolence, impudence, cheekiness or rudeness) cannot, on its own, constitute insubordination which by its very nature requires disobedience or an outright challenge to authority.'

The Court in *Palluci* concluded:[58]

'As demonstrated, there is a fine line between insubordination and insolence, and insolence may very well become insubordination where there is an outright challenge to the employer's authority. … '

[76] Therefore, there can be no doubt that the final written warning of 14 August 2015 and the current misconduct are related. Both instances exhibited an attitude of disrespect by Simmers towards her superior(s). To describe it as simply as possible, insolence is disrespect without a challenge to authority, whilst insubordination is disrespect with a challenge to authority. But this does not change the undeniable truth that the basis of the misconduct lies in the disrespect. Accordingly, and on the back of the applicable final written warning, it should have followed that Simmers indeed earned her dismissal for her current misconduct. As the Court held in *Motor Industry Staff Association*

[56] (1989) 10 *ILJ* 311 (IC). In this judgment it was said: '… Insolent is defined as: "offensive; impudent or disrespectful". It is clearly a synonym for cheeky which is defined as: "disrespectful in speech or behaviour; impudent". Disrespectful (the other synonym for both of these words) is defined as: "contempt; rudeness; lack of respect for". It is clear that insolence, disrespect, rudeness and impudence are birds of a feather.'
[57] Id at para 20
[58] Id at para 22

and Another v Silverton Spraypainters and Panelbeaters (Pty) Ltd and Others[59]:

> '….It is trite that mutual trust and respect constitute a fundamental pillar in every sustainable employer-employee relationship. In my view, Mr Van Jaarsveld's unbecoming conduct completely ruined his employment relationship with the company, which rendered his dismissal justified. The misconduct was so serious that the sanction of dismissal would, in my view, have been justified.'

[77] Considering the trust relationship, this was specifically dealt with in the disciplinary hearing, and evidence was presented that it had been destroyed. In the arbitration, Louw and Matthys testified to this effect. This testimony was never contradicted under cross examination, nor was it ever put to these witnesses that there still existed a workable employment relationship. Significantly, Simmers herself never testified about the trust relationship.

[78] As touched on above, the second respondent did not deal with the issue of the trust relationship in the context of dismissal as an appropriate sanction, but at least did deal with it in the context of considering the relief of reinstatement. The manner in which he chose to basically disregard the evidence about the break down in the trust relationship is perplexing. He finds that there was no evidence of the breakdown of the trust relationship other than statements to this effect by witnesses. Surely statements by witnesses in the arbitration to this effect are evidence. Matthys, who is responsible for HR matters, specifically said that the employment relationship was broken down beyond repair. The second respondent's finding on the issue of the trust relationship is unsustainable on the proper evidence, as it is clear from the evidence that the trust relationship had broken down. It is trite that a break down in the trust relationship is another important factor justifying dismissal.

[79] I also consider the applicant's disciplinary code that provides for dismissal as being a competent sanction for this kind of misconduct. I further consider that Simmers had a short service of less than two years, meaning that long service

[59] (2013) 34 ILJ 1440 (LAC) at para 47.

as a mitigating factor does not come into play.[60] These factors further support a conclusion that the dismissal of Simmers was justified and fair in the circumstances.

[80] It is clear that an application of the bulk of the principles for consideration in deciding whether the dismissal of Simmers was a fair sanction, can only lead to one reasonable outcome. This outcome is that the dismissal of Simmers by the applicant was, holistically considered, a fair sanction in all the circumstances.

[81] For all the reasons as set out above, it is my view that any determination by the second respondent in his award to the effect that that the dismissal of Simmers was not an appropriate sanction is grossly irregular, and resorts well outside the bands of what may be considered to be a reasonable outcome.[61] In my view, Simmers certainly earned her dismissal, and the only reasonable outcome could be that her dismissal was indeed a fair sanction for the misconduct she committed, where it came to the second charge. As such, the award of the second respondent falls to be reviewed and set aside.

Conclusion

[82] Therefore, I conclude that the second respondent's award that the dismissal of Simmers was substantively unfair cannot be sustained, and falls to be reviewed and set aside. It is clear that the only reasonable outcome the second respondent could have arrived at, considering the evidence as a whole and the applicable principles of law, has to be that the misconduct Simmers had committed where it came to the second charge was racially charged, and was very serious misconduct. Similarly, and again considering the evidence as a whole and the applicable principles of law, Simmers earned her dismissal for this misconduct, which was, all considered, a fair sanction.

[83] Having reviewed and set aside the award of the second respondent, I see no reason to remit this matter back to the first respondent again for determination *de novo* before another arbitrator. As stated above, the factual matrix in this

[60] See *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC) at para 15.
[61] Compare *Msunduzi Municipality* (*supra*) at para 30.

matter was fully established by the transcript, and the supporting documents. The facts relating to the misconduct Simmers was indeed guilty of is largely uncontested. There is simply no need to go through the whole exercise of arbitration again. I therefore consider it appropriate to finally determine this matter. I shall thus substitute the arbitration award of the second respondent with an award that the dismissal of Simmers by the applicant was substantively fair.

[84] This then only leaves the issue of costs. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, I do not intend to burden the third respondent parties with a costs order, especially considering the opportunity afforded to me to bring this matter finally to an end. I accordingly exercise my discretion as to costs in this matter by making no order as to costs.

Order

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

1. The applicant's review application is granted.

2. The arbitration award of the second respondent, arbitrator M Nash, dated 5 August 2016 and issued under case number WECT 5403 – 16, is reviewed and set aside.

3. The arbitration award is substituted with an award that the dismissal of the individual third respondent, Lynetta Simmers, was substantively fair.

4. There is no order as to costs.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv L Ackermann
Instructed by:	Bernadt Vukic Potash & Getz Attorneys
For the Third Respondent:	Adv M L Davis
Instructed by;	Cheadle Thompson & Haysom Inc Attorneys