IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No : JR 644/07

In the matter between:

ENVIROSERV WASTE MANAGEMENT (PTY) LTD	**Applicant**
and	
KM MOSIME N.O.	**First Respondent**
NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY	**Second Respondent**
JEFFREY ZAKARIA MOGASE	**Third Respondent**

JUDGMENT

BHOOLA J:

Introduction

[1] The applicant seeks an order reviewing and setting aside the arbitration award ("the award') of the first respondent ("the arbitrator') on 23 January 2007, and substituting it with an order declaring that the dismissal of the third respondent was substantively and procedurally fair.

[2] The application was opposed by the third respondent. The opposing affidavit was filed approximately two weeks out of time and an application for condonation was made. The application for condonation was not opposed by the applicant. In any event, I am satisfied that good cause has been shown for the late filing and that condonation should be granted.

The background facts

[3] The applicant is a waste management company that mainly deals with the disposal of hazardous and/or dangerous waste on behalf of its clients. Its activities are regulated and monitored by the Department of Water Affairs and Forestry ("DWAF") under environmental conservation legislation. Due to the nature of the applicant's business, it has strict rules and policies in place that regulate the conduct of its employees in regard to the safe disposal of waste. This includes the rule that is in issue, which prohibits removal of waste material that is brought by clients onto the applicant's landfill sites under any circumstances ("the rule in issue").

[4] Third respondent was a supervisor at the applicant's Rosslyn landfill site ("the site"). He had 15 years' service and a clean disciplinary record. Following an incident at a company yearend function at the site on 18 December 2003, he was charged in February 2004 with misconduct. Only the second charge is relevant to these proceedings and was as follows:

Charge 2

"Possession of organizational property without authorization in that you were found in possession of wood that was admittedly removed from the workplace of Rosslyn Landfill site and loaded onto your vehicle on 18 December 2003.

ALTERNATIVELY

Non - compliance with standing orders in that you removed wood disposed of on the Rosslyn landfill site in contravention of a *company standing order on 18 December 2003."*

[5] Following his dismissal on this charge, the third respondent referred an unfair dismissal dispute to the second respondent. The arbitrator found that his dismissal was substantively and procedurally unfair and ordered the applicant to reinstate him into his former position with back pay retrospective to 1 February 2006.

The grounds of review – substantive fairness

A. Failure to prove existence of rule prohibiting removal of waste

[6] The arbitrator, in coming to the conclusion that the applicant did not have a rule or policy on the removal of waste material from a landfill site and that the third respondent was unaware of such rule, if indeed it existed, failed to take account of the evidence presented to him in that regard. Alternatively the arbitrator failed to assess or properly assess the probabilities of the respective versions placed before him. Such failure constitutes a reviewable irregularity and renders the award unreasonable. In support of this ground of review the applicant relied on the following submissions:

(a) The arbitrator blatantly ignored the evidence of the third respondent to the effect that he was at all material times aware of the rules and policies of the applicant. Third respondent was employed as the Site Supervisor and was, *inter alia* responsible for monitoring and management of "scavenger" activities (this is term used to refer to non-employees who scour the site for waste material). The applicant's witnesses testified that all employees (which obviously included the third respondent) were aware of the rules, including the rule in issue, and third respondent had to admit that he was familiar with those rules. This was therefore a common cause fact, and it is trite that common cause facts need not be proven. Despite this, the arbitrator proceeded to make a finding that the third respondent was not aware of the rule in issue, if indeed it had been proven. The arbitrator committed a gross irregularity in this regard. In addition, it is highly, or even inherently, improbable that a person in the position held by the third respondent, who is responsible for the enforcement of rules on the site, and with his years of service, would not be aware of the rules.

(b) In considering the scavengers on the site as a relevant factor in determining whether the rule in issue existed, the arbitrator took account of irrelevant factors

and failed to take account of the evidence, *inter alia* that scavengers are not its employees and the applicant had no right of supervision or control over their activities but merely tolerated them to avoid reprisals. The scavengers are permitted on site at the discretion of the Site Supervisor. The applicant's witnesses testified as to the problems experienced with scavengers and also provided a plausible explanation for the applicant's failure to act against them.

(c) The arbitrator made much of the fact that the minutes of the meeting of 11 June 2001 ("the minutes"), more specifically paragraph 6 thereof, cautioned employees against theft of material from the site. However, the applicant's testimony sought to establish that the third respondent had disobeyed an instruction not to remove waste property, and the charge on which he was dismissed related to unauthorised possession and contravention of company rules. The said paragraph 6 was as follows:

"DISCIPLINARY ACTION AGAINST EMPLOYEES WHO REMOVE MATERIAL FROM SITE. THE COMPANY VIEWS THE REMOVAL OF ANY MATERIAL FROM SITE AS THEFT AND THEFT IN THE COMPANY IS VIEWED IN A VERY SERIOUS LIGHT.

IF ANY PERSON OR PERSONS IS/ARE FOUND GUILTY OF THEFT THEY WILL BE SUMMARILY DISMISSED AND CRIMINAL CHARGES MAY ALSO BE LAID AGAINST WHOEVER IS RESPONSIBLE.

From the said paragraph it is clear that the removal of any material from a site is regarded as a serious disciplinary offence tantamount to theft. The fact that the third respondent was not charged with or found guilty of theft was not conclusive of the issue.

B. The finding that Third respondent was dismissed for insubordination

[7] The arbitrator required the applicant to prove the charge of insubordination i.e. that the misconduct for which the third respondent had been dismissed arose out of his refusal to obey a lawful and reasonable instruction (not to remove the wood from the landfill site). He found that the applicant would have discharged the burden if it had been established on a balance of probabilities that the instruction had been given, and

that it was wilfully, deliberately and seriously disobeyed. The arbitrator then discussed the factors to be taken into account in investigating a charge of insubordination. In doing so, he did not accept that the instruction had been issued by Johan Carstens ("Carstens), the Depot Manager and the third respondent's direct report, and found that even if it had been issued, it had not been clear, unambiguous and unequivocal. In this regard the arbitrator relied on the evidence that Carstens left without making sure that his instruction was carried out; that he did not notify the security guard at the gate to stop the third respondent from leaving with the wood; and that he failed to confront the third respondent when he saw his bakkie loaded with wood at the garage. The arbitrator also formed the opinion that it was possible that the third respondent was acting under the mistaken belief that he had obtained permission, despite his evidence that he was relying on express permission from Carstens. In so doing, he did not assess the probabilities on the evidence presented to him. His failure to do so constitutes a reviewable irregularity and renders the award unreasonable. In this regard both Carstens and George Saasa ("Saasa"), a co-employee, who were called as witnesses for the applicant, testified that the third respondent had been given a clear instruction not to remove the wood from the site and to offload the wood from his bakkie. Carstens testified that he had no reason to believe that the third respondent would blatantly ignore his instruction and accordingly had no reason to issue further instructions to the security guards. This also explains why Carstens left without making sure that his instructions were carried out. This was however, at most a neutral factor and could not provide the arbitrator with a basis for rejecting his version on this issue, or for refusing to accept that the instruction was clear, unambiguous and unequivocal.

[8] The arbitrator had no basis for rejecting the evidence of Carstens and Saasa on the probabilities. It is evident that he failed to evaluate their evidence. They had no motive to fabricate evidence against the third respondent and his failure to adhere to the instruction could only be regarded as wilful and deliberate. Third respondent's accusations of racism against Carstens and his averment that there was a full scale conspiracy against him (from everyone including the chair of the disciplinary enquiry, and all but one of his co-employees), should have been rejected with the utmost

contempt. He had moreover testified in the arbitration that he worked with Carstens without problems and that he had a "*very good relationship*" with him up until his dismissal.

[9] Third respondent had not been charged with insubordination. The arbitrator appears to have accepted that the chairperson of the disciplinary enquiry did not dismiss him for insubordination, and that he was found guilty on the charge of unauthorised possession of company property or contravention of a company standing order or policy. The applicant led evidence on the instruction issued by Carstens merely in order to counter the third respondent's defence that he had permission. By evaluating the evidence against the backdrop of a charge of insubordination the arbitrator misconstrued the nature of the charge and thereby prevented a fair hearing of the issues. In this regard, the applicant submitted that it is trite that insubordination has different elements compared to a charge of unauthorised possession of company property or contravention of a company standing order or policy. The arbitrator's flawed reasoning in this regard renders his award unreasonable. However, even if it is accepted that the applicant had to prove a charge of insubordination, it was never the third respondent's evidence that he had acted under the mistaken belief that he had permission to remove the material, or that the instruction was unreasonable, as reasoned by the arbitrator. Third respondent's version at all times was that he had express permission from Carstens.

[10] The arbitrator's assessment on the appropriateness of the sanction of dismissal was also undertaken against the backdrop of a charge of insubordination. If it is accepted that the third respondent was not dismissed for insubordination it is evident that the arbitrator committed a gross irregularity in this regard.

[11] In opposing this ground of review, the third respondent's legal representative made the following submissions:

(a) The third respondent testified that he had asked Carstens if he could take the wood home, and Carstens asked him what he would use it for. He replied that there was a funeral at his home and it would be used as firewood. Carstens indicated that it was in order. The third respondent testified that if Carstens had not given permission he would not have jeopardised his job for a couple of wooden pallets. He said that the wood was already in his bakkie when Carstens left, and that Carstens had said nothing to him about it and had wished him well over the Christmas holidays because he was going on leave that day. He disputed Saasa's testimony that the generator was not running (because its noise would have prevented the conversation from being heard), and that he therefore overheard Carstens issuing the instruction. His evidence was that Saasa and the other employees, being contractors rather than permanent employees like him, were afraid of Carstens and avoided being in his presence so they were some distance away from them during the time when Carstens was supposed to have issued the instruction. They could not have overheard the conversation or any instruction being issued.

(b) Mathew Havinga ("Havinga"), a senior manager, gave contradictory evidence in that he confirmed that under no circumstances could material be removed from the premises, but admitted he had given permission for some material (i.e. steel cabinets and windows) to be removed by the third respondent and another employee. This raises issues of his credibility and reliability, and his evidence is *"flagrant, frivolous and vexatious".*

(c) The existence of the rule in issue was not proven by way of documentary evidence regarding the license conditions issued by DWAF which the applicant claimed to be bound by. The applicant relied in this regard only on the minutes, and it was common cause that the third respondent had not been present at that meeting.

(d) There was no proof of the applicant's allegation that it treated *all* removal of waste as serious misconduct and that it had acted consistently against all employees who failed to comply with the rules. No further evidence was led of the alleged previous dismissal of 110 employees for theft, and the arbitrator had moreover established that the rule was unreasonable.

(e) Third respondent testified he was aware of the rule prohibiting removal of materials from the site without permission, and he had therefore sought permission.

(f) Third respondent stated that he had never had any interaction prior to his disciplinary enquiry with Vuyo Nduna ("Nduna"), who allegedly conducted the training sessions with employees about rules and policies.

(g) Carstens took two months to charge the third respondent because he wanted to get rid of him. His failure to instruct the security guards at the entrance to ensure that the third respondent did not remove the wood from the premises implies that he had indeed given permission to remove the wood. The applicant therefore failed to prove on a balance of probabilities that he had no permission.

Grounds of review - procedural fairness

A. Refusal of representation

[12] The arbitrator's finding that the third respondent was not afforded an opportunity to seek a representative during his disciplinary and appeal hearings is reviewable. During cross examination the third respondent admitted that he had never formally requested his representative to attend the disciplinary hearing. It is not also strange that the representative/s never presented themselves before, during or after the disciplinary and appeal hearings, nor was there any correspondence from the third respondent's

trade union complaining about the applicant's alleged conduct in refusing him representation. Both Havinga and Esmé Gombault ("Gombault"), the chairperson of the disciplinary enquiry, testified that they questioned the third respondent prior to commencement of the enquiry to determine whether he required representation, and he said that he would represent himself. The third respondent's right to representation was also evident from the notice to attend the disciplinary enquiry, which formed part of the evidence before the arbitrator. The third respondent moreover, conceded in cross examination that the right to representation was a right extended to all the applicant's employees, and he could not explain why it would be refused in his case. It is thus more probable than not that he was afforded the right to representation. Furthermore, even if the third respondent had been refused the opportunity to obtain a representative, he did not succeed in showing that he had been prejudiced as a result. It was submitted that the arbitrator did not take any account, alternatively did not take proper account of these material aspects in finding that the third respondent's dismissal was procedurally unfair. Such failure renders his award unreasonable.

B. Allowing testimony in camera

[13] The arbitrator did not provide any reason for rejecting Gombault's evidence, and for accepting that she interviewed witnesses in camera. Gombault confirmed that she had interviewed the applicant's witnesses in camera, to verify their statements submitted to the enquiry, and that this had been done on the third respondent's suggestion and request because he feared they would be intimidated by Carstens. It is inherently improbable that she would have done so of her own volition. It was submitted by the applicant that she was a credible witness and that due regard should have been given to her evidence. In regard to the arbitrator's failure to provide reasons for rejecting her evidence, it was submitted that it is trite that absence of reasoning may lead to the review of an award. *See: Vodacom Service Provider* Co *(Pty) Ltd v Phala NO & Others* (2007) 28 ILJ 1335 (LC) at par 20; *Greater Letaba Local Municipality v Mankgabe NO & Others* (2008) 29 ILJ 1167 (LC) at par 20; and *Boxer Superstores (Pty) Ltd v Zuma & Others* (2008) 29 ILJ 2680 (LAC).

[14] Third respondent was moreover given a proper opportunity to respond to allegations made against him by the witnesses who testified in his absence. He was also afforded the opportunity to hear their evidence and to cross examine them during his appeal hearing. He did not appear to have been prejudiced as a result. Even if it is accepted that the chairperson departed from the procedure for conduct of a fair disciplinary enquiry of her own accord, this cannot *per se* give rise to a finding of procedural unfairness, and was not taken into account by the arbitrator. Any such defect would moreover have been corrected on appeal.

[15] The arbitrator also committed a gross irregularity in finding that Gombault did not permit the third respondent to present evidence in mitigation, and that she failed to take mitigating factors into account prior to concluding on the sanction. She presented credible and probable evidence to the effect that due consideration was indeed given to sanction, and that she took account of the third respondent's mitigating circumstances (which she would not have known of had the third respondent not testified to this effect). Carstens also testified that the third respondent was presented with an opportunity to present evidence in mitigation and that he had displayed much emotion during his submissions about his personal circumstances.

[16] In opposing this ground of the review, the first respondent submitted that the third respondent's evidence established that he had been treated unfairly in his disciplinary enquiry and appeal, and that the chairperson had been biased against him.

The appropriate sanction

[17] The applicant submitted that once it had been found that the misconduct was indeed proven, dismissal was the appropriate sanction under the circumstances. The third respondent's length of service is outweighed by his position as Site Supervisor, and the serious impact of his misconduct on the trust relationship.

[18] The third respondent's legal representative submitted that the sanction of dismissal imposed by the disciplinary enquiry chair was inappropriate and harsh under the circumstances. In deciding whether to dismiss or not the employer should, in addition to the gravity of the alleged misconduct have considered factors such as the employee's circumstances, the nature of his job, and the circumstances of the infringement itself. In this case the employee had over 15 years service and an unblemished disciplinary record; he is married with children; his employment was his only source of income; he took care of his sick father; and his own age and ailing health should have indicated to the applicant that dismissal was not an option. The applicant was therefore unreasonable in exercising its discretion to impose a sanction of dismissal. The third respondent confirmed that the trust relationship had not been broken as he did not contravene company policy, and that the continued working relationship had not been rendered intolerable.

[19] In his testimony the third respondent appeared to admit at some point that he had committed the offence but that the sanction was too harsh. He appeared to suggest that he should have received a final warning, but after his legal representative interjected he insisted that he should not have been found guilty at all.

[20] However, during his oral submissions the third respondent's legal representative stated that given the lapse of time the third respondent had no wish to be reinstated, but instead sought compensation should this Court be inclined to confirm the award. The applicant submitted that this confirmed its submission that the relationship between the parties had become intolerable, particularly given the accusations of racism leveled against the applicant in the third respondent's papers, and moreover justified its submission that the remedy of reinstatement ordered by the arbitrator had been inappropriate in the circumstances.

The applicable review standard

[21] The review test has been laid down by the Constitutional Court as follows:

"*[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."* (*Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC)).

[22] In considering the reasonable decision maker test as articulated above, Sangoni AJA stated as follows in *Edcon Ltd v Pillemer NO & Others* (2008) 29 ILJ 614 (LAC) at par 21 :

"*If the commissioner made a decision that a reasonable decision maker could not reach, he/she would have acted unreasonably which could then result in interference with the award. This, in my view, boils down to saying the decision of the commissioner is to be reasonable. To my understanding the dictum in Sidumo is not about shifting from the 'reasonable employer test' in favour of the so-called reasonable employee test. Instead, meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as the decision maker at the arbitration whose function it is to weigh up all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof".*

Analysis and evaluation of the evidence and award

[23] The arbitrator commenced his analysis of the evidence by correctly stating that the employer bears the onus of proving that the dismissal of an employee was for a fair reason and was carried out through a fair procedure under section 188 of the Labour Relations Act, No. 66 of 1995, and that the employer is required to discharge this

burden on a balance of probabilities. He then dealt with the three key issues that arose in the arbitration. Firstly, that the applicant had rules in place which prohibited the removal of any waste material from site. Secondly, that the third respondent was instructed not to remove from the premises the wood loaded onto his bakkie, which he failed to do, and thirdly that there was procedural unfairness in the disciplinary enquiry in that the third respondent opted to proceed without a representative and the applicant's witnesses testified in camera.

[24] In considering whether the applicant had proven it had specific policies and rules in place which prohibit the removal of any waste from its landfill sites, the arbitrator referred to the evidence of Havinga, as well as that of Nduna about regular communication to staff in this regard. This does not establish, he finds, that the third respondent *"was ever informed or notified of the rules as outlined by Havinga".* Furthermore, the only documentary proof of the existence of such a policy was a "*badly typed minute"* of a meeting of 11 June 2001, which cautions employees against theft. The applicant failed to establish that the third respondent was at this meeting and there was no indication of the meeting having discussed any rule prohibiting the removal of waste material from landfill sites. He accordingly found that the existence of such a rule had not been established, and even if it had, the applicant had not succeeded in proving the charges against the third respondent.

[25] He then finds that the applicant's witnesses testified that the third respondent had been dismissed for disobeying a lawful and reasonable instruction, and that the chairperson of the disciplinary enquiry had dismissed him for refusing to obey a lawful instruction. The chairperson also noted that the third respondent's actions constituted "*direct contravention of company policy",* which the arbitrator found had not been established. He then considered whether the applicant had succeeded in proving that the misconduct with which the third respondent had been charged arose from his refusal to obey a reasonable and lawful instruction.

[26] The arbitrator's conclusion and findings were as follows:

"(a) The presiding officer did not apply her mind fully to all relevant issues traversed in the testimony before her, and thus did not establish the existence of any reasonable basis for her findings and sanction.

(b) The employer has not established that the pertinent elements that constitute an offence of insubordination, for which a sanction of dismissal is justified, exist in this case. In particular, it is not established, on a balance of probabilities, that the employee was expressly prohibited from removing the wood. It is further not established that, if such prohibition was indeed given, the employee deliberately and wilfully disobeyed that instruction. In this regard I found the testimony of the employee to be more probable than that of the employer.

(c) It is therefore my conclusion that the employer did not show, on a balance of probabilities, that the employee did in fact commit the infraction insubordination, or that if he did, he did so wilfully, with an unmistakable intention to defy the authority of his manager. As such, I find that the employee was not dismissed for a fair reason.

(d) The dismissal of the Applicant, Mr. Jeffery Mogase on the 5 April 2004 was not based on fair reasons and was not carried out through a fair procedure".

[27] In my view, it is apparent that the arbitrator failed to take account of the relevant facts in reaching the conclusion that the rule in issue had not been proven, alternatively that the third respondent was unaware of such a rule. Firstly, it was the third respondent's own evidence that he had knowledge of *all* the applicant's rules and policies. Although he initially denied the existence of the rule in issue, he conceded this in cross examination. The following was put to him: *"[y]ou know the policies that you cannot remove stuff from site? You know that?"* and he replied "*Yes, Sir".* Thereafter it was put to him that:*"[s]o that story about being in sessions and not knowing the policy, that's rubbish?"* To which he replied "*I never said [I] didn't know the policy".* He also conceded that this was the first time in his history of over 15 years' employment with the applicant that permission had been given to remove waste from the premises. On

previous occasions the security guards had only ever been given permission to utilise the waste wood for making fire on the premises.

[28] Even if one were to ignore the third respondent's concession, the arbitrator's finding that the company had failed to prove the existence of the rule in issue was a misdirection. In reaching this conclusion the arbitrator relied exclusively on the applicant's failure to produce anything other than the minutes of a meeting which the third respondent had not attended. In so doing, he failed to have regard to the direct evidence of all the applicant's witnesses confirming the existence of the rule in issue. There was accordingly no basis for the finding that insufficient proof of the rule existed. In addition, the arbitrator's finding that if the third respondent did not have express permission, he acted in the mistaken belief that he had permission, is misguided. There is no evidentiary basis for this conclusion as it was the third respondent's consistent version that he relied on express permission.

[29] In my view, the arbitrator failed to appreciate the difference between removal of the applicant's property with permission, which was possible, and the absolute prohibition on the removal of waste materials, i.e. the rule in issue. Havinga testified that he was unaware of any instance where waste materials could be removed from site by employees, and in such instances the applicant was consistent in considering this to be serious misconduct for which dismissal was justified, and it had done so by dismissing a large number of employees previously. This was not disputed. The third respondent confirmed that he (and a co-employee) had received permission from Havinga in the past to remove materials from site. This related to two incidents where property belonging to the applicant was allowed to be removed (windows from a wooden hut and a cabinet). He could not dispute that such property had not been waste brought onto the site by a client or third party. He could furthermore not dispute that the wood removed by him was brought onto the site as waste, and he conceded that this was the first time in the history of his employment with the applicant that permission had been given to remove wood from the premises. It was thus not open to the arbitrator to take the other incidents where employees were allowed to remove property from the

site into account in the evaluation of the substantive fairness of the third respondent's dismissal for removing waste. He does allude in his questioning of the witness to this *"serious technical distinction"*, but appears to pay no further attention to it in reaching his conclusion. The third respondent had moreover conceded in cross examination that the applicant could not do as it pleased with waste because it was not its property but that of its clients.

[30] The arbitrator was faced with a dispute of fact on the issue of whether the third respondent had been given permission. The third respondent's case was that he had express permission from Carstens but the applicant's witnesses disputed this. In this regard the arbitrator was required to have regard to the principles applicable to resolving disputes of fact, as described in *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA), and which was held to be equally applicable to a commissioner conducting an arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration ("CCMA") in *Vodacom Service Provider Co (Pty) Ltd v Phala NO & Others* (2007) 28 1LJ 1335 (LC) at par [20] and *Lukhanji Municipality v Nonxuba NO & Others* (2007) 28 ILJ 886 (LC) at par [28]. It was submitted by the applicant that this is equally applicable to an arbitrator acting under the auspices of a bargaining council, as in *casu.* I agree. It is apposite to set out the approach approved by Nienaber JA in *Stellenbosch Farmers' Winery (supra* at para 5*)*:

> *"To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a) 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. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (iii) the quality, integrity and independence of his recall thereof. As to (c) this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail".

[31] In my view, the arbitrator did not make any findings that the applicant's witnesses were not satisfactory, and there are no reasons provided for his conclusion that the version of the third respondent on the probabilities must be preferred. This would constitute a gross irregularity and denial of a fair trial on the issues. Had he applied the correct approach to resolving disputes of fact, the arbitrator would have taken account of the third respondent's denial that the statements of the three witnesses testifying on behalf of the applicant had been shown to him at the disciplinary enquiry. He alleged that he had seen them for the first time when his attorney consulted with him prior to the arbitration. The evidence of the applicant's witnesses was consistent from the time prior to the disciplinary enquiry, when they presented their written statements, up until the arbitration. The third respondent however alleged that they had, when he first showed them the charge he was facing, confirmed their support of his version, but that they were subsequently influenced to change their versions to support Carstens. This contradicts his version that he had never seen their written statements and that they had given evidence in camera, in that if this were the case he would not have known that they changed their versions. The fact that he was unable to explain this in cross examination casts doubt on his credibility. His evidence was that everyone was lying (all the applicant's witnesses including its senior management), and this supported his

notion of a wide scale conspiracy to get rid of him. In these circumstances the arbitrator does not provide any indication of how he weighed the probabilities and accepted the third respondent's version, despite the contradictions in his evidence, and despite the dispute of fact on the material issue of permission. This would, in my view, appear to imply that he failed to consider all the relevant material facts, and would vitiate the reasonableness of his decision.

[32] Furthermore, once the arbitrator found that the removal of the wood was authorised, and that there was no failure to comply with a standing rule or policy, it was not appropriate to consider whether the applicant had proven the charge of insubordination. Even though this would not have affected the outcome, it would still appear to me to arise from a failure to apply his mind to the relevant facts.

[33] It is unclear what factors were considered by the arbitrator in accepting the third respondent's version in respect of procedural unfairness. Firstly, in regard to being denied representation, Gombault's evidence was clear and consistent, while the third respondent's version vacillated between expecting his representative to arrive; not being able to reach him; his representative having gone to the head office where enquiries were usually held; and eventually conceding not having made formal arrangements to be represented. None of this explains his failure to bring it to the attention of the chairperson, or to request a postponement, which Gombault said she would have granted. Instead, he blames her for being impatient and insisting on proceeding with the enquiry, which was moreover conducted in English without him having the benefit of an interpreter. However, despite his initial denial he conceded in cross examination that he was fluent in English and would not have been appointed Site Supervisor had this not been the case. His version contradicts Gombault's on every point, notwithstanding her written record of the proceedings which she relied on in the arbitration. It would appear to me to be highly improbable that the General Manager of the National Treatment and Disposal Division, with 18 years' experience and whose function includes chairing enquiries and appeals and investigating grievances (and whose evidence was that she had conducted about 25 – 30 disciplinary hearings) would

so flagrantly flout every conceivable natural justice right in the disciplinary enquiry. The applicant had moreover taken seriously the third respondent's previous objection to Havinga chairing the enquiry. It is improbable that the applicant would accommodate this request only to thereafter deviate from every basic natural justice right in the enquiry.

[34] Furthermore, in regard to his appeal, the third respondent's initial evidence that the appeal took less than ten minutes and he was simply informed of the outcome, was followed by a concession that it took almost an hour. In any event, any defect that may have existed in the enquiry would in all likelihood have been cured on appeal: *Semenya & others v CCMA & others* [2006] 6 BLLR 521 (LAC). This would apply equally to the third respondent's allegation that he was not given any opportunity to present evidence in mitigation of sanction at the disciplinary enquiry. The arbitrator failed to take into account that any procedural irregularities in the disciplinary enquiry were rectified on appeal, which would appear to have been a full rehearing on the merits. He failed moreover to provide any reasons for rejecting the applicant's evidence on this issue, despite corroboration, and preferring the third respondent's bald denial that he was afforded any element of procedural fairness at every stage. In my view, the probabilities in this regard are glaringly obvious and the third respondent's version falls to be rejected. No reasons are provided why the arbitrator ruled otherwise.

[35] It is clear that the arbitrator, save for the common cause facts (i.e. the third respondent's knowledge of all the rules, including the rule in issue; and permission having been given by Havinga for property of the applicant to be removed on two occasions), was faced with two conflicting versions. In *Masilela v Leonard Dingler (Pty) Ltd (2004)* 25 *ILJ* 544 *(LC)* Francis J held (at para 29) that in such circumstances the approach to be taken is as follows:

> *"This court is faced with two mutually destructive versions only one of which is correct. In deciding which version to accept and which one to reject I am obliged to consider inter alia the issue on* a *balance of probabilities. The onus is on the respondent to prove on* a *balance of probabilities that its version is the truth. The*

onus is discharged if the respondent can show by credible evidence that its version is the more probable and an acceptable version. The credibility of the witnesses and the probability and improbability of what they say should not be regarded as *separate enquiries to be considered piecemeal. They are part of* a *single investigation into the acceptability or otherwise of the respondent's version, an investigation where questions of demeanour and impressions are measured against the contents of a witness' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed and against the inherent probabilities,* so *that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety. In this regard see Mabona & another v Minister of Law & Order & Others 1988 (2) SA 654 (SE). "*

[36] Although it must be borne in mind that the arbitration award is an administrative decision, and even if the arbitrator is not bound by the above approach, he is nevertheless required to provide reasons for his conclusion on the general probabilities. This he failed to do. In *casu*, the arbitrator, in determining the probabilities as he did, accepted the weight of every aspect of the third respondent's evidence, including the conspiracy theory advanced by him to the effect that his dismissal was effected as a result of lies and racism. This cannot by any stretch of the imagination be said to be a reasonable decision. However, he went even further and misconstrued the nature of the misconduct and substituted his view of the misconduct as constituting the charge of insubordination. The finding that the applicant fell short of proving this charge would then be obvious. Accordingly, the only conclusion that can be reached is that the arbitrator failed to apply his mind to all material factors, and since this is essential to a reasonable administrative decision, it would render the award reviewable. His award therefore stands to be set aside on the grounds that it constitutes such a misdirection and a gross irregularity in the proceedings that it could not have been reached by a reasonable decision maker applying his mind to the evidence.

[37] It is evident from the record that the arbitrator also acted as interpreter, but this did not form part of the review and is accordingly not relevant.

[38] In regard to costs, the applicant seeks an order for the payment of costs. It submitted that instead of concentrating on the merits of the review, the third respondent deliberately sought to present the applicant and its management in a bad light. His opposing affidavit is littered with serious unwarranted accusations of racism, bias, untruthfulness and incompetence on the part of the applicant. It was submitted that this conduct should be considered by this Court in exercising its discretion in regard to whether to award costs. The third respondent's legal representative did not address me on this issue. I have had regard to these submissions and do not consider a costs order to be in the interests of justice.

[39] The parties were *ad idem* that substitution would be appropriate and that this Court was in as good a position to determine the matter. Moreover given the lapse of time, it would not be appropriate to refer the matter back to the CCMA for arbitration *de novo*.

[40] In the circumstances I make the following order:

(1) The arbitration award made by the first respondent under case number D352/JHB/1147/2005A on 23 January 2007 is hereby reviewed and set aside.

(2) The arbitration award is substituted by the following order :

"The dismissal of the third respondent was substantively and procedurally fair".

(3) There is no order as to costs.

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Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 16 February 2010

Date of judgment: 26 March 2010

Appearance:

For the Applicant: Adv B Roode instructed by Bester & Rhoodie Attorneys

For the Third Respondent: Baloyi Mafuyeka Phalatse Inc.