IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG CASE NO: JR3232/06

In the matter between:

VODACOM (PTY) LIMITED Applicant

and

ANNELIE GILDENHUYS First Respondent

TOKISO DISPUTE SETTLEMENT (PTY) LTD Second Respondent

CLERMY MASHABANE Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award made by the first respondent (the arbitrator) in terms of which she found that the third respondent's dismissal was unfair and ordered his retrospective reinstatement with no loss of benefits.

2. The review application was opposed by the third respondent.

Background facts

3. The third respondent was employed by the applicant as a senior accountant and was also a shop steward at the time of his dismissal on 9 October 2006. During May and June 2006 he represented a fellow employee Kenneth Madonsela (Madonsela) in a

disciplinary hearing. Madonsela was charged with absenting himself from his workstation without authorization and without notifying his manager. The initiator of the disciplinary hearing was Hein Draht (Draht), a manager in the applicant's finance department. During the disciplinary hearing the third respondent made the following three remarks directed at Draht:

3.1 *The attitude of Hein it is in such a way that he doesn't trust other people of colour.*

3.2 *I won't answer the question as if I am in a Vlakplaas here, we are not in a Vlakplaas here.*

3.3 *We have a very bad history here and when Hein is behaving the way he is behaving he is reminding me of my history.*

4. On 14 July 2006 the third respondent was notified to attend a disciplinary enquiry on 19 July 2006. He was charged with the following act of misconduct:

"Misconduct in that you made derogatory and racist-related remarks towards Hein Draht (a fellow employee/manager) during a disciplinary hearing held from the 9th of May 2006 to 5 June 2006."

5. A disciplinary enquiry took place. The chairperson of the disciplinary found the third respondent guilty of making racist and derogatory remarks to Draht during a previous enquiry, with particular reference to the first two comments. The third respondent was dismissed and was informed to either refer the matter to the Commission for Conciliation, Mediation and Arbitration (the CCMA) or apply for private arbitration through the applicant's human resources department. On 13 October 2006 he requested private arbitration.

6. The arbitration hearing took place under the auspices of the second respondent on 13 November 2006. Two bundles of documents were handed up by both parties. The contents were common cause. The applicant handed up a transcript of the third respondent's disciplinary hearing with extracts of the disciplinary hearing of Madonsela. The applicant called one witness who testified about the procedural aspect of the third respondent's dismissal. The third respondent testified in his own defence. None of the witnesses who testified at the disciplinary hearing testified under an oath. Ms Mohube testified about the procedure followed by the applicant when the third respondent was dismissed. I do not deem it necessary to repeat this since it is captured in the arbitrator's award. I do not deem it necessary to repeat the third respondent's evidence in full, since this is also captured in the arbitrator's award. It is worthwhile to point out that the third respondent testified that in respect of the first utterance that he made he was mainly relaying what Madonsela had said. He made the first statement on 11 May 2006 when he was representing Madonsela. This happened when he was preparing for the disciplinary hearing of Madonsela. He was only reiterating what he had said when he was representing him after he related a number of issues about his manager Draht. Several examples were given. The statement was based on what Madonsela told him and later testified about it. As for the second statement, the third respondent said that Draht had asked him whether he was going to represent Madonsela in the grievance and it was clear from the grievance form that he was going to represent him. Draht had received the grievance form and should have known that he was going to represent Madonsela and Draht still insisted that he had to answer him. He told Draht that he found it strange that he had to answer him and they argued around those lines. Draht then told him to answer the

question with a yes or no and when he told him again to do so he told him that he would not answer that with a yes or no. He then told him that he was not going to answer questions as if he were in a Vlakplaas there. By using the word Vlakplaas, he had no intention to harm or to be racial. All that he was doing was to stop Draht asking him questions as if he were interrogating him. He was basically sending a message or driving a point to him to say that he must not ask him questions as if he were being interrogated. During cross examination he said that Vlakplaas was basically on interrogation and it had not colour in it. He was at the disciplinary hearing not given an opportunity to explain what he meant after the chairperson in the Madonsela disciplinary hearing had intervened and said that he was out of order. The whole context of what he had said had to be taken into account. There were both white and black persons in the security forces who interrogated people and it had nothing to do with race. When he spoke about Vlakplaas he did not mention black or white. As for the first statement he was asked whether he was repeating what Madonsela was saying and he agreed. He was asked whether it was right for him to repeat that in his capacity as a representative. He said that he was only repeating what Madonsela had said to him. Putting to Draht what Madonsela had said was right. Madonsela was called as a witness to testify about it. He said that it was not a racist comment and that was the reason that he had called Madonsela to testify about it.

The arbitration award

7. It is not necessary to repeat what the arbitrator said in detail in her arbitration award. She said that the question that she must ask to make a proper finding in this matter, considering the argument and all the evidence presented in the arbitration, is whether

or not the applicant has proved its case against the third respondent on a balance of probability. In other words, is there sufficient evidence upon which one could find that the third respondent was indeed guilty of the charges preferred against him at his disciplinary enquiry and therefore to dismiss him? The arbitrator said that there was not and gave reasons for arriving at her decision. The arbitrator said that although she considers the third respondent and his representative to be adversarial, oppositional, confrontational and perhaps insensitive in their approach and interpretation of their role as representatives, she believed that the argument of the third respondent to be more acceptable than that of the applicant. The testimony of the third respondent, taken as a whole, did not display any serious contradictions or material points and it did not contain any inherent improbabilities, given the contextual derivation of the incident.

8. The arbitrator said that the applicant had argued that the third respondent had failed to justify his racist comments. The applicant's interpretation of the comments as racism related and derogatory, gave rise to the disciplinary process being evoked because the applicant regards racism as a serious transgression. The third respondent did not seek to justify his racist comments, because he did not regard them or intend them as racist. He rather sought to justify and contextualise this point to the applicant. The third respondent denied the interpretation of his statements as racist or derogatory. The applicant on the other hand argued that the statements could only have been race related and derogatory because of the word Vlakplaas deemed a racist thing. The arbitrator said that in analysing the entire bundle of documents and the arguments presented at the arbitration, the applicant's interpretation was clearly, that because "Dirk Coetzee, a white male was in charge of Vlakplaas, the statement made by the

third respondent (as a Black male) was racist in intention". Racism was implied in the statements made by the employee, because Black people were tortured there. Draht felt aggrieved by the statements that he was being blamed for that action. The statement that "Hein does not trust people of colour" was regarded as a judgment against his character and derogatory. The third respondent on the other hand argued that he had never been asked for clarity in his reference and that the applicant had concluded he regarded Draht as racist.

9. The arbitrator found that the third respondent's arguments were more acceptable than that of the applicant. She said that the third respondent's testimony taken as a whole did not display any serious contradictions or material points and it did not contain any inherent improbabilities, given the contextual derivation of the incident. The applicant had argued that the third respondent had failed to justify his racist comment. The applicant's interpretation of the comments as racism-related and derogatory, gave rise to the disciplinary process being evoked because the employer regards racism as a serious transgression. The third respondent did not seek to justify his racist comments because he did not regard them or intend them as racist. He rather sought to justify and contextualise this point to the applicant. The third respondent had denied that the interpretation of his statements was racist or derogatory. The applicant on the other hand had argued that the statements could only have been race related and derogatory because of the word Vlakplaas and the connotation to Vlakplaas was deemed a racist thing. Draht had admitted that he did not have knowledge of the history of Vlakplaas but that he felt hurt and was disgusted by the statement.

10. The arbitrator said that the third respondent's comments might have been insensitive, and his aggressive manner in presenting his case annoying, which in all likelihood aggravated the incident, but she did not regard the statements as race-related or derogatory towards Draht. The statement within its context was not used in a derogatory sense. She regarded the statement referred in analogy to the interrogation he felt he was subjected to and secondly he had provided an impression of Draht as held by the employee he was representing. The statement might have referred to the "racist past" and might effect be perceived as an indirect accusation of racism levelled against Draht, but this in itself did not make the third respondent guilty of racism. Herein lied, what the arbitrator believed the fundamental difference in this matter to those referred to in argument by the applicant and the matter of Old Mutual in particular. That matter referred to whether the employee had wrongfully discriminated against (Black) employees on the grounds of their race. The specific ground and context in which the statement was made was clearly to express dissatisfaction with Draht's management style and actions, against the background of the number of resignations in Bank and Cash, which had been referred to the "CC Forum" and subject to investigation by the CC Forum. The applicant had argued its case primarily from a "Colour blind, universalism diversity paradigm", and suggested that the third respondent through his actions are "interested in creating polarisation in the workplace", by implication a form of Colour Identity, diversity paradigm. Whilst this case might very well have arisen from the difference in diversity paradigm of the parties, she said that she could not agree that the third respondent was indeed guilty of the charges. The actions of the third respondent constituted direct unfair discrimination against persons based on their race, ethnic or social origin as foreseen

by section 9 of the Constitution. The arbitrator said that she believed that he had adequately justified that his remarks were not racist in implication or intention.

11. The arbitrator said that since she could not find that the third respondent was guilty of misconduct, which has harmed the employment relationship or has rendered the relationship as intolerable, she found that the applicant had acted unfairly in imposing the sanction of dismissal. The finding of dismissal imposed was primarily based on its interpretation of the comments as racist-related and derogatory. The arbitrator said that she believed for the reasons set out in her award, the sanction should be overturned, because it falls outside the range of options, which could reasonably have addressed the matter at hand, without undue interference with the employers obligation and right to minimize the risk of racism or unfair discrimination at the workplace. The arbitrator deemed it appropriate to award reinstatement as a remedy and to make it with retrospective effect to the date of his dismissal and with no loss of benefits.

The review application

12. On 19 December 2006 the applicant brought a review application in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA) and section 33 of the Arbitration Act. Mr La Grange, who appeared for the applicant, conceded that the application could not be brought in terms of section 145 of the LRA but only in terms of section 33 of the Arbitration Act. The applicant had initially relied on several grounds of review but when the matter was argued, it limited itself to the following grounds of review:

12.1 The arbitrator's reasoning shows that she is guilty of gross carelessness in failing to consider the evidence about the decided cases on the matter, alternatively making a mistake so obvious or manifest that the only conclusion that can be drawn in the circumstances is that she committed a misconduct as envisaged in section 33 of the Arbitration Act.

12.2 She failed to apply her mind to the issues before her in that she took into account considerations (such as the intention with which the comments were made) that were not relevant considerations such as the objective meaning and effect of the statements so that it then rendered her findings inappropriate and unreasonable such as she committed a misconduct as envisaged in section 33 of the Arbitration Act.

12.3 Her reasoning process was so flawed as to evidence a material misconception of the nature of the dispute she was required to consider and so that the applicant did not have a fair arbitration and the process was irregular as envisaged in section 33 of the Arbitration Act.

Analysis of the facts and arguments raised

13. It is now trite according to *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* CCT85/06 that when a commissioner of the CCMA is called upon to decide whether dismissal as a sanction is fair in a particular case he or she must not apply the reasonable employer test, must not in any way defer to the employer and must decide that issue on the basis of his or her own sense of fairness. When a commissioner of the CCMA conducts an arbitration in terms of the compulsory provision of the LRA, he or she is conducting an administrative action. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) does not apply to such administrative action. The justifiability of administrative action in relation to the reasons given for it as propounded in *Carephone (Pty) Ltd v Marcus NO and others* 1999 (3) SA 304 (LAC) as a ground of review of CCMA arbitration awards under section 145 of the LRA, does not apply any more. The grounds of review set out in section 145 of the LRA are suffused by the criterion of reasonableness as dealt with in

Bato Spar Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others 2004 (7) BCLR 687 (CC) and the constitutional requirement that CCMA arbitration awards must meet is that they must be lawful, reasonable and procedurally fair.

14. In my view the remarks made in *Sidumo* apply equally to awards made in terms of the Arbitration Act. An arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside. See *Fidelity Cash Management Service vs CCMA and others* DA10/05 (LAC). To decide whether an arbitration award is reasonable or unreasonable, the question that must be asked is whether the decision or finding reached by the commissioner is one that a reasonable decision maker could not reach. If it is an award or decision that a reasonable decision-maker could not reach, then the decision or arbitration award is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or arbitration award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker would not reach but one that a reasonable decision maker could not reach. In deciding the reasonableness or otherwise of a decision, a judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.

15. The LAC has cautioned in *Fidelity Cash Management Service* at paragraphs 98 to 100

as follows:

"It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.

In my view Sidumo attempts to strike a balance between, two extremes, namely, between, on the one hand, interfering too much or two easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike the aforesaid balance, it may be said that, while on the one hand, Sidumo does not allow that a CCMA arbitration award or decision be set aside said simply because the Court would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA's commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review - it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision-maker could not reach in all of the circumstances.
The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached".

16. Racism is a cancer that has devoured our society. The Apartheid system was based on

race. It was legal. White people were regarded as superior to black people. The Apartheid system was designed to benefit white people. There were different classes of citizens. It went from first class to fourth class citizens. The holy scriptures were wrongly interpreted to justify Apartheid. Racism is still alive and kicking in our society. It cannot be tolerated and should not be tolerated in the workplace and in any other place for that matter. Racism cannot be condoned and decisive actions should be taken to eradicate it. We come from a deeply racially divided society. We are still suffering the after effects of Apartheid. 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 be 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. There are experts in the field that can guide employers to deal with issues of racism, gender discrimination etc. in the workplace. This case shows the need to do so.

17. The third respondent, an African male person was employed as a senior accountant by the applicant. He was a shop steward and represented Madonsela in a disciplinary enquiry. During the disciplinary proceedings he levelled certain remarks against Draht, a fellow White male employee. These remarks were construed as derogatory and racist which resulted in disciplinary actions be taken against the third respondent.

This led to his dismissal. In a normal society and working environment one would have expected that the remarks uttered would have been thoroughly investigated before disciplinary actions were considered. It is only at the arbitration proceedings where what was said in the Madonsela proceedings were fully explained.

18. There is no indication placed before me that the third respondent had indeed worked with Draht or that he had reported to him. What is clear however is that Madonsela had referred to various incidents about his dealings with Draht. This is what prompted the third respondent to put this to Draht. I accept that the third respondent is not a legal practitioner and had not put his client version eloquently to Draht. He did what was expected of all representatives to do which is to put their client's version so that the other side can comment on it. The applicant referred to a passage in the disciplinary hearing of Madonsela where the said utterances were made. However they failed to also refer this Court to the third respondent's disciplinary hearing record where he explained why he had said so. None of the witnesses who testified at the third respondent's disciplinary enquiry were sworn in. The third respondent testified under an oath at the arbitration hearing and repeated this version. Draht did not do so. I am satisfied that the third respondent had put his client's version to Draht. It will be a sad day when practitioners who act on instructions and place their clients' version to the opposing side are than charged with misconduct.

19. It is clear from the findings of the disciplinary chairperson that he had found the third respondent guilty of having uttered the first two statements. Mr Le Grange who appeared for the applicant had attempted to prove that he was found guilty of all three

utterances but was confronted by what the disciplinary chairperson had said. I am satisfied that the third respondent was found not guilty of the third utterance. Even if he were found guilty of the third utterance which to recap was "*We have a very bad history here and when Hein is behaving the way he is behaving he is reminding me of my history"*. I do not see how objectively determined the said statement could be regarded as derogatory and racist.

20. The applicant has confined itself to three grounds of review when the matter was argued. I have set out the grounds of review in paragraph 9 above and do not deem it necessary to repeat those.

21. Mr Le Grange conceded that as far as the second utterance is concerned it could not be construed for being racist. The utterance made was that "*I won't answer the question as if I am in a Vlakplaas here, we are not in a Vlakplaas here"*. This may be on the basis that the interrogators at Vlakplaas were both white and black and so were the victims of apartheid. This is a factor that was over looked in the applicant's haste to charge the third respondent with racism. Mr Le Grange contended that the first respondent was guilty of uttering a derogatory statement. I do not know what is so derogatory of the statement that he had uttered.

22. I have carefully considered the three grounds of review raised by the applicant. They are baseless. The arbitrator's reasoning does not show that she is guilty of gross carelessness in failing to consider the evidence about decided cases on the matter. She has also not made any mistake that is so obvious or manifest that the only

conclusion that can be drawn in the circumstances is that she committed misconduct as envisaged in section 33 of the Arbitration Act. It is clear from the award that the commissioner has applied her mind to the issues before her and that she took into account relevant considerations. Her findings are reasonable and she has not committed any misconduct.

23. In my view, the analysis of the evidence and the issues before the arbitrator undertaken above, reveals without any doubt that the decision that the arbitrator reached in this case that the third respondent was not guilty of the acts of misconduct for which he was dismissed and that his dismissal was substantively unfair was a decision that a reasonable decision maker could reach. It was a reasonable decision or finding that could certainly have been reached by a reasonable decision maker. I am satisfied that the applicant has failed to prove that the arbitrator has committed the misconduct she was alleged to have committed. She has given comprehensive reasons for her findings and her thought process was not flawed. There is therefore no basis for it to be interfered with on review.

24. The application stands to be dismissed.

25. There is no reason why costs should not follow the result.

26. In the circumstances I make the following:

26.1 The application is dismissed.

26.2 The applicant is to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	:	W LA GRANGE INSTRUCTED BY DENEYS REITZ ATTORNEYS
FOR THIRD RESPONDENT	:	ATTORNEY GRAHAM
DATE OF JUDGMENT	:	14 FEBRUARY 2008