CASE NO JR169/08

In the matter between:

DATE HEARD AND DELIVERED 11 MAY 2010

EDITED 10 JUNE 2010

NOT REPORTABLE

PPC JUPITER (PTY) LTD APPLICANT

And

THE COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION FIRST RESPONDENT

COMMISSIONER BUTI ZWANE N.O SECOND RESPONDENT

NUMSA obo LESIBA LAMOLA THIRD RESPONDENT

JUDGMENT

PILLAY D J

In this review the applicant was charged for misconduct as follows:

> "Refusal to carry out a reasonable instruction, in that you left your area of work without permission on 9 February 2007 and that you walked out during a meeting on 9 February 2007 after being instructed to return to the meeting;
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> Gross negligence, in that you failed to do your hourly sample (9h00 sample) on 9 February 2007."

The material evidence was that the employee had raised a grievance about Mr Herman Vermeulen, the head of the department, with his immediate supervisor, Mr Hlongwane. Mr Hlongwane tried to persuade the employee to be tolerant of Mr Vermeulen's aggressive style; he also referred the employee to Mr Vermeulen to discuss his problem.

On 8 February 2007 the employee completed a grievance form against Mr Vermeulen. On 9 February 2007 Mr Vermeulen saw the employee with a colleague, who was on the telephone. He summoned the employee to his office to reprimand him for not working. The employee attended the meeting and handed Mr Vermeulen his grievance. Mr Vermeulen read out the grievance, mimicking the employee as he did so. A shop steward entered the office. Mr Vermeulen did not know that he was a shop steward. A commotion ensued. Mr Vermeulen told the shop steward to leave the room. The shop steward left the room. The employee followed. Mr Vermeulen instructed the employee to return to the meeting. The employee ignored the instruction.

The employee prepared a letter requesting permission to be relieved of his duties pending finalisation of his grievance. He took his letter to the Human Resources Department. He was therefore not at his work station at 9:00 a.m. when he had to test samples. He did not know who did his job in his absence. However, his evidence that he had asked his colleague, Tsietse, to cover for him was not challenged under cross-examination at the arbitration.

There, the employee explained that he was too upset to work after the meeting with Mr Vermeulen. Mr Vermeulen had accused him of

incompetence and had said that he did not want to work with the employee. Hence, the employee decided to lodge his grievance, soon after the altercation with Mr Vermeulen. As a result he was not at his workplace to test the samples. These facts gave rise to the charges.

The arbitrator found as follows:

> "5.1) It is evident from the entire evidence and submissions that on the 9th at around 08h00 the applicant was called to the meeting by Mr Herman. It is further evident that the issue discussed at the meeting was triggered by Mr Herman's aggressive, negative attitude that even Mr Hlongwane conceded was unacceptable, but had to adapt with it. The walking out of the applicant taken into context within the deep-rooted conflict of unresolved issues between the applicant and Mr Herman, in my view, could not be construed as insubordination." (Sic)

The arbitrator accepted the employee's explanation for being away from his workstation in order to meet Mr Vermeulen and proceed thereafter to the Human Resources Department because Mr Vermeulen had upset him.

The arbitrator found as follows on the charge of being absent from his workplace and not testing the samples:

> "5.5) It would appear from the charge that the applicant was found guilty of leaving his area of work without permission as could be gleaned from the notice of disciplinary hearing on page 47 of Bundle "A". However it is common cause that the reason for the applicant to leave his area of work was that he was called to attend a meeting, thus he had permission to leave the work area. When he left the Human Resource Department he was from the office not the area of work, therefore there is no rationale to find the applicant guilty of the charge as set out on page 47;
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> 5.6) In the circumstances, it is my view that the respondent has failed to discharge the onus proving that the final written warning against the applicant is fair. The applicant is therefore entitled to the relief sought."

By preferring the employee's version in these circumstances does not mean that the arbitrator did not apply his mind to the facts supporting the employer's case. The facts that he found favouring the employee were, in his opinion, decisive, as they might well be, having regard to Mr Vermeulen's conduct. In preferring the employee's version, the arbitrator placed no greater onus on the employer, notwithstanding his comment that the employer bore the onus of proving the fairness of the disciplinary action.

In the circumstances, the application for review must fail. Furthermore, in the light of the judgment in *Sidumo v Rustenburg Platinum Mines Ltd & Others*[1] and decisions of the Labour Appeal Court, the arbitrator's decision in this case falls within the range of reasonable responses on the facts before him.

From the perspective of appropriate dispute resolution, disciplining the employee in those circumstances served no better purpose than to aggravate the conflict. The more effective course of action would have been to redress the tensions between Mr Vermeulen and the employee and to take steps to correct both parties' conduct, not only the employee's.

In the circumstances, the application for review is dismissed with costs.

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Pillay D, J

Appearances

For the Applicant: W Hitchinson

Instructed by: Fluxmans Inc

For the Respondent: G.I Hulley

Instructed by : K D Maimane Inc

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[1] Sidumo & Another v Rustenburg Platinum Mines LTD & Others [2007] 12 BLLR 1097 (CC)

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