**LABOUR COURT OF SOUTH AFRICA**

**(HELD AT BRAAMFONTEIN)**

**Case: D293/09**

**In the matter between:**

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| **TOYOTA BOSHOKU (PTY) LTD** | **Applicant** |
| **and** | |
| **NUMSA** | **First Respondent** |
| **VUYO NTONJANA** | **Second Respondent** |
| **SUNGAREE PATHER (*N.O.*)** | **Third Respondent** |
| **DISPUTE RESOLUTION CENTRE OF THE MOTOR INDUSTRY BARGAINING COUNCIL** | **Fourth Respondent** |

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**JUDGMENT**

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**LAGRANGE, J:**

**Introduction**

[1] The employer party in this matter ('Toyota') has applied to set aside an arbitration award issued in favour of the second respondent, Mr Ntonjana a former employee and union shop steward.

[2] Ntonjana was dismissed on 19 October 2007 after being found guilty of four charges arising from a series of connected incidents on 17 October 2007. The charges he was found guilty of were as follows:

1. Leaving his workstation without permission;

2. Gross insubordination in that he deliberately refused to leave the meeting to which he had not been invited;

3. Intimidation and threatening behaviour by threatening to stop the production line;, and

4. Gross disrespect in that he shouted at a manager in the presence of subordinates.

[3] Without attempting to narrate every detail of the factual context in which the charges occurred, a summary of events is useful to contextualise the areas of dispute. The employer's position in brief is that Ntonjana left his workstation without obtaining the necessary permission from his team leader and proceeded to interrupt a production meeting being conducted by his group leader, Ms Govender. He asked to speak to her as a matter of urgency but she advised him that she was busy and would do so when she was available. Govender attempted to carry on with the meeting with team leaders and moved the meeting to another work area but the applicant followed them and would not leave. Ntonjana insisted that Govender speak to him and threatened to interrupt production if she did not do so. He was shouting at Govender and had to be asked to calm down by another team leader who was present at the meetinGovender. Ntonjana allegedly also said that Govender did not deserve her position and people in her department were not "children".

[4] While there is some commonality between the employer's version of events and that of Ntonjana there are a number of factual disputes. Ntonjana’s case is essentially that another union member Mr Clement Arjoona was facing imminent possible disciplinary action at the hands of Govender and required his assistance. The meeting he attempted to intervene in was in fact a meeting convened for that purpose between Govender and Arjoona. Govender refused to allow him to participate in a discussion with Arjoona,and he waited until Arjoona and Govender had finished a discussion. Govender asked him what he wanted in her department and when he explained that he wanted to speak to her about Arjoona’s situation, her response was that the matter between her and Arjoona was a personal one and did not concern him. Ntonjana claims he had not left his workplace unattended, but when he could not find his team

leader to request permission to leave his workstation he asked another employee to attend to it while he was gone. He said this was normal practice when an employee left the workstation. He denied that he had spoken loudly or harshly to Govender, but stated that he may have raised his voice in order to be heard above the noise of the workplace.

**The arbitrator's award**

[5] The arbitrator found that the evidence did not support a finding that Ntonjana was grossly insubordinate, that he intimidated Govender or anyone else, or that he was grossly disrespectful. While not expressly finding that Ntonjana had permission to leave his workplace the arbitrator found that he did not leave his workstation in the sense of simply abandoning it but did so for a legitimate reason and for a brief period. Consequently, the arbitrator found that he had been unfairly dismissed because no fair reason existed to justify his dismissal.

[6] In finding that Ntonjana was not guilty of the first three charges, the arbitrator made an important probability findinGovender. She found that the evidence of Govender should be rejected as improbable and Ntonjana’s evidence supported by that of Arjoona was to be preferred as being reasonable and probably true. She reached this conclusion based on two subsidiary findings of fact. Firstly, the arbitrator held that it was improbable that Govender would have been so upset by Ntonjana's presence if she had simply been having a production meeting at the time he approached her. The arbitrator put it thus:

> "Her [Govender’s] own evidence was that the discussion had not been about Clement -this at a time in the evidence when neither party had even mentioned the name ‘Clement’. Even if, as she testified, the meeting was a ‘private’ matter with Team Leaders, nothing could have been so private so as to cause tempers to rise merely because the applicant was present. He was, after all, a colleague, even if from another department. From her own evidence too, it is clear that the situation was tense; the applicants mere presence and refusal to move away from her "private discussion" so disturbed that she accused him of being arrogant. It is

probable even [on] her evidence, that there was an underlying reason for the tension between her and the applicant. Based on the applicant's evidence which Clement corroborated, the reason for the tension was that in his capacity as shop steward, he had attempted to support a fellow employee who was at the time in difficulty with his supervisor. It is clear that Govender felt that the applicant was attempting to undermine her authority and for this reason, refused to allow him to participate in the discussion."

[7] The second basis for the arbitrator disbelieving Govender's version is that she found the reasons advanced by Ntonjana and Arjoona to explain why she might have falsely accused Ntonjana were probable. The supposed motive of Govender was her own wrongful treatment of Arjoona. In order to deflect attention away from her own misconduct she falsely implicated Ntonjana.

**Grounds of review**

[8] The applicant's grounds of review in the main attack the reasonableness of the arbitrator's findings. The applicant's other ground of review is that the arbitrator allowed the employee's representative to cross-examine company witnesses after they had already been re-examined, which it claims constituted an irregularity in the proceedings.

*Attack on reasonableness*

[9] The first finding attacked by the applicant is the arbitrator's conclusion that Ntonjana did not abandon his post but left it for a legitimate reason. The applicant says that in arriving at this finding the arbitrator ignored the unchallenged evidence of Mr Mkhize that employees can only leave their place of work if authorised to do so "in matters of life and death." The applicant contends that there was no evidence to support a finding that Ntonjana's desire to speak to Govender was sufficiently urgent to justify him leaving his workstation without permission.

[10] The applicant also contends that the arbitrator's finding that the reason for the tension between Govender and Ntonjana lay in him challenging her authority in the

performance of his duties as a shop steward, was also a finding that cannot be supported by evidence. The applicant argues that there was no evidence that Govender would have felt her authority undermined simply because Ntonjana was attempting to represent his member.

[11] In relation to the events of the interrupted meeting, the applicant argues that the arbitrator failed to weigh up the two versions properly in the context of the circumstances. Stated thus, this appears to be more like a ground of appeal than a ground of review, but in support of its contention, the applicant claims that the arbitrator simply failed to have regard to certain evidence, and that she misconstrued the evidence before her. These grounds of review are better expressed in the applicant's founding and supplementary and affidavits.

[12] The first important piece of evidence which the applicant claims the arbitrator misconstrued was the nature of the "private" meeting that Ntonjana interrupted. The applicant claims that there was no evidence to dispute the applicant's version that the meeting was a normal production meeting held at the start of the nightshift, and was not an investigative meeting prior to an enquiry involving Arjoona.

[13] Although it is true that Govender said that she was speaking with her team leaders, she also mentioned that when she went to the shop floor she called the respective team leaders and the person that she was speaking to before, namely Arjoona, and they had a discussion in the back of the sewing area. Govender said that she had been discussing Arjoona's performance with him before the second meeting was convened, but it is unclear why he was still present in the so-called "production meeting" if his performance was no longer a topic of discussion. Ntonjana also testified that Arjoona told him of Govender's complaint about his (Arjoona's) performance and that he was to meet with Govender and his team leader. There was no evidence tendered by the company identifying any of the other participants in the meetinGovender. The only person who appears to have been in close proximity was Mr Simelane, a team leader, who intervened to calm Ntonjana down. In fact when Ntonjana was cross-examined it was put to him that Govender had specifically told

Ntonjana to go back because she was having a meeting with Arjoona specifically related to his performance the previous night. Thus, even at an advanced stage in the arbitration hearing, the company itself was ambiguous about the character of the meeting. In the circumstances, I think it can be said on the basis of the evidence that it was not unequivocal that the meeting was a production meeting which did not concern Arjoona. Consequently, I cannot say that the arbitrator's findings about the nature of the meeting were unreasonable.

[14] It should also be mentioned that the applicant criticises the arbitrator for failing to consider the probabilities that Govender would have conducted a disciplinary meeting in an open factory without written notification. If this was an issue which had been prominently raised in the arbitration proceedings such criticism might have some merit, but this appears to be an afterthought which the applicant is raising concerning an issue on which it should have led evidence to highlight this issue. The arbitrator can hardly be criticised for not spotting something which the applicant itself did not pertinently raise at the time.

[15] A more serious criticism of the arbitrator's reasoning concerns what she failed to consider when she decided that Govender had falsely accused Ntonjana. There was ample evidence that Ntonjana had become agitated in his interaction with Govender. Arjoona himself confirmed that the altercation was loud enough to be heard by workers in the production lines nearby, and also conceded that Ntonjana's remarks about how Govender was 'given' her position were uncalled for. It was also common cause that at one point Mr Simelane, another team leader, had seen fit to intervene to restrain Ntonjana and asked him to leave the area. The arbitrator fails to explain in her reasoning why she did not find this evidence relevant in determining whether or not Ntonjana had been insubordinate.

[16] The arbitrator simply does not address these allegations of Ntonjana's conduct directly, even though she does accept that matters got heated because she refers to tempers rising and that the voices were raised during the exchange between Ntonjana and the group manager. However, because she decided to determine the truth of the

charges against Ntonjana by focusing on Govender's motives for falsely implicating Ntonjana, it seems that she have failed to consider the significance of this material evidence, which was largely common cause and clearly implicated Ntonjana in confrontational and aggressive conduct towards Govender. The arbitrator should first have considered the overall probabilities of the evidence in support of the charges before embarking on credibility findings. Had she done this, she would have been more alive to the less contested portions of the evidence in respect of each charge and it is less likely she would have failed to consider the significance of it.

[17] It should also be mentioned in relation to the arbitrator's finding that Govender reacted adversely to Ntonjana's attempts to intercede on behalf of his member, that it was never put to Govender that she was hostile to Ntonjana playing the role of shop steward nor was she confronted with the proposition that she had a motive to fabricate evidence against him because she knew she had not handled her complaint about Arjoona's performance properly. At the very least, this should have been put to the witness before the arbitrator could draw conclusions about Govender's motives for falsely implicating Ntonjana. In ascribing motives to Govender as a reason for disbelieving her evidence, the arbitrator failed to have regard to the fact that these issues were not raised during Govender's cross-examination.

[18] The applicant also takes issue with the arbitrator's effective finding that Ntonjana was not guilty of leaving his workplace without permission. In so doing, the applicant argues that this conclusion fails to take account of the unchallenged evidence that Ntonjana was obliged to obtain permission before leaving his workstation, that his group leader was only away from his workstation for a maximum of ten minutes, and that he could have waited until his team leader returned to request such permission.

[19] On Ntonjana' own evidence, he was only aware that Arjoona had approached him on two occasions during the shift for assistance and that his intention in approaching Govender was to ask if there was a problem or whether something needed to be discussed. The applicant submits that, on this basis, there was no compelling urgency which required Ntonjana to leave his workplace.

[20] If one examines the arbitrator's reasoning on this charge it is apparent that she did not distinguish between whether Ntonjana was guilty of the charge and whether he had a justification which excused his transgression. Instead the two issues were rolled into one. In effect, the arbitrator found him not guilty of the charge because he had acted responsibly in leaving his workplace without permission. While it might be so that's Ntonjana's conduct in leaving his workstation without authorisation might be regarded as less deserving of a sanction on account of his reason for doing so, the enquiry into his motives is something that properly speaking should have been considered in the course of determining an appropriate sanction *after* finding that the transgression took place, rather than collapsing the two issues into one.

[21] The last material ground of review raised by the applicant is the fact that the arbitrator allowed the employee's representative to pose further questions to Govender and Mkhize after they had been re-examined by the employer's representative. As a general rule further cross examination of the witness should not be permitted, but exceptions can be made, if for example new issues are raised in re-examination which cannot be said to arise from the original cross examination. From the record it is clear that during her evidence in chief, Govender was not asked about the intimidatory character of Ntonjana's conduct towards her, nor was it canvassed during her cross examination. It was only when she was re-examined that this aspect of the case was properly dealt with. I see nothing inappropriate in the circumstances in allowing the employee's representative a further opportunity for cross examination, at least on this issue.

[22] In the case of Mkhize, the employee's representative was allowed to conduct further cross examination of him after he was re-examined. However, the only issue which was canvassed was how Mkhize claimed to have known that Ntonjana was not acting on behalf of Arjoona or at his request. His answer, in essence, was that he was told this by other persons. As such, it constituted hearsay evidence and clearly did not affect the arbitrator's findings one way or another. Moreover, it comprises less than one page of the transcript of the oral evidence. In the circumstances, it cannot be said that by permitting these additional questions that the applicant was deprived of a fair

hearing. It is also noteworthy that the applicant's representative did not see anything objectionable in this residual line of questioning at the time.

**Conclusion**

[23] Although not all of the grounds of review raised by the applicant are justified, there are some which do warrant setting aside important findings of the arbitrator. Above I have discussed the problems with the arbitrator's approach to the fundamental question of whether Ntonjana was guilty of charges by focussing her attention on making a credibility finding. This led her to disregard important material evidence pointing to serious misconduct on Ntonjana's part. In the circumstances it cannot be said that the arbitrator's findings on whether or not Ntonjana was guilty of the charges were reasonable, and her failure to consider the overall probabilities of the evidence meant that she did not conduct a balanced evaluation of the evidence, which in turn denied the applicant a fair hearing.[1] It follows accordingly that the award must be set aside.

**Remedy**

[24] The difficulty this conclusion presents is whether or not the matter should be reheard or whether this court should substitute its own decision for that of the arbitrator. Ntonjana was dismissed on 19 October 2007. The arbitration award was only issued on 20 March 2009. Arjoona had already left the applicant's employment by the time the arbitration was conducted. The applicant submits that the court should substitute its own decision for that of the arbitrator in the event that the arbitrator's award is set aside. The respondent's made no submissions on this question in the event the review succeeds.

[25] I believe that there is sufficient material on the record at least to determine whether or not as a matter of probability Ntonjana was correctly found guilty of the

[1] In this regard see ***Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and others*** **(2010) 31** ***ILJ*** **452**,at 462, par [20] and ***Santam Bpk v Biddulph*** **2004 (5) SA 586 (SCA)** at 589, par [5], where the SCA held: "… *findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.*"

misconduct for which he was dismissed. Accordingly it is necessary to reconsider the evidence relating to the charges.

*Was Ntonjana guilty of insubordination?*

[26] There was no real dispute that Govender did not want Ntonjana to participate in the meeting. In her view, his presence was not required. He might have thought that she was about to issue a warning to Arjoona and that he needed to intercede on his members behalf, but once he had made his request and was denied permission to participate, it is obvious he did not return to work but remained present even when Govender tried to move the meeting to another location to avoid him. His constant presence at the meeting only ended when he was physically restrained by Simelane and asked to leave.

[27] He argued openly with the Govender, his group manager, in front of other employees and would not abide by her instruction to leave her meeting. His own witness confirmed the altercation could be heard by other workers on the nearby lines and that Ntonjana made an unacceptable remark about how Govender was appointed to her position.

[28] His conduct amounted to persistent and aggressive defiance of the group manager's authority in full view of other subordinates. It might not have been physically threatening enough to have amounted to assault, even in the limited sense of conveying an impression of a threat of harm, but it was certainly aggressive and beyond the bounds of acceptable levels of civil interaction between a shop steward performing their duty and their superior given the context of what was at issue. Ntonjana was not dealing with a situation in which members were being asked to perform dangerous work and were facing imminent danger. There was at best a possibility of Arjoona being issued with a warning and there is no reason why an appeal could not have been lodged if this happened or if he had been entitled to shop steward representation before a warning could be issued. Although Ntonjana asserted he was motivated to act in his member's interest, it was never established or argued that Arjoona was entitled as a matter of right to shop steward representation even if

only a warning was contemplated.

[29] In short, even on a benign interpretation of what motivated his conduct, Ntonjana's reaction was wholly disproportionate to the matter which he believed required his attention. At the very least, he should have backed down once he had registered his concern, but he was intent on imposing his will on the situation. As such I am satisfied on the record that he was guilty of a serious gross insubordination, which might justify his dismissal.

*Displaying disrespect*

[30] Regarding the last charge of showing disrespect to Govender, I believe this should properly speaking have been an alternative charge to that of gross insubordination. Disrespectful conduct was part and parcel of his insubordinate behaviour. To hold him guilty of this as well as insubordination would amount to an unfair splitting of charges.

*Leaving his workstation without permission*

[31] As to the charge of leaving his workstation without proper permission, there is no real dispute that he did not have such authority and he should have obtained it before leaving. The central question is whether the persistent requests from his member for assistance and his perception that some kind of disciplinary action might be in the offing was sufficient reason to justify him leaving his workstation after arranging someone to keep an eye on it. It could not really be disputed on the evidence that permission to leave one's workstation was not readily granted. If disciplinary action was taken against Arjoona without Ntonjana being present and if Arjoona had been entitled to representation in any disciplinary matter, then good grounds for appealing against any warning improperly issued would have existed. There was no evidence that Arjoona was facing a situation where any adverse disciplinary consequences could not be reversed by delayed action. I accept that Ntonjana showed some degree of responsibility in not simply abandoning his workstation, but some disciplinary sanction would still be warranted for this misconduct, in my view.

*Intimidatory or threatening behaviour*

[32] Even though a team leader physically restrained Ntonjana, it does not seem that he actually threatened physical violence against Govender. The only evidence that he threatened to stop production was given by Govender and there was no evidence to show he made any attempt to give effect to it. In any event, a threat to stop production is not the same as threatening a person with physical harm and is not comparable to a threat of imminent assault, which appears to have been the real concern underlying this charge. For this reason, and for the reasons discussed above regarding the nature of Ntonjana's aggression towards the group leader, I do not think he was guilty of intimidatory conduct in the sense that there was an implicit threat of violence towards Govender if she did not back down. There was also the uncontested evidence that Ntonjana was not suspended immediately after the incident and did have some limited contact with Govender in the course of work which did not give rise to any problems. In so far as a threat was made, it was a threat of wildcat strike action. It may have had a coercive intention but such coercion was of the economic variety and did not involve a threat of personal injury. I do not think this falls into the normal ambit of what would be described as intimidation. Accordingly, I do not find that Ntonjana was guilty of intimidatory action or threatening behaviour. The aggressive character of his engagement with Govender has been dealt with under the charge of gross insubordination.

[33] Given that my findings of misconduct are not the same as the employer's, I think it would be unfair to both parties for the court simply ti pronounce on the fairness of the dismissal or on any other appropriate sanctions without giving them an opportunity to make representations and, if necessary, lead limited evidence on the question of appropriate sanctions and remedies in the event it is found that Ntonjana's dismissal for the misconduct described was unfair. By so doing, it is not my intention to suggest that the court has adopted a view on the fairness of Ntonjana's dismissal in the light of the proven misconduct.

**Order**

[34] In the light of the reasons above, the following order is made:

1. The arbitrator's award issued on 13 March 2009 under case number MIDB3526 is reviewed and set aside.

2. The arbitrator's findings that the second respondent was not guilty of the charges for which he was dismissed are substituted with the following findings for the reasons stated in the body of this judgment:

    i. The second respondent was guilty of serious gross insubordination towards Govender;

    ii. The second respondent was guilty of leaving his workstation without permission.

3. The matter is referred back to the fourth respondent, which must set the matter down before an arbitrator other than the third respondent to determine if the dismissal of the second respondent was substantively fair in the light of the substituted findings of misconduct above and, if not, to determine an appropriate remedy, including any alternative disciplinary sanctions, after considering this judgment, the evidence of the record of the arbitration and any additional relevant evidence the parties might lead, or representations they wish to make on these issues.

4. No order is made as to costs.

**R LAGRANGE, J**

**JUDGE OF THE LABOUR COURT**

**Date of hearing: 26 October 2010**

**Date of judgment: 25 May 2011**

For the applicant: M G Maeso of Shepstone & Wylie

For the first and second respondents: P Naidoo of Harkoo, Brijlal & Reddy Attorneys