

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 56/20

In the matter between:

LEWIS STORES (PTY) LTD

Appellant

and

VENKATSAMY NAIDOO

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

and **ARBITRATION**

Second Respondent

MOHAU NTAOPANE N.O.

Third Respondent

Heard: 23 September 2021

Delivered: Deemed to be the date the judgment is emailed to the parties 18 January 2022.

Coram: Waglay JP, Coppin JA et Kubushi AJA

JUDGMENT

COPPIN JA

[1] In an award, the third respondent (“the arbitrator”), acting under the auspices of the second respondent (“the CCMA”) found the dismissal by the appellant of the first respondent (“Mr Naidoo”) to have been both procedurally and substantively fair.

[2] This is an appeal against the order of the Labour Court (Ramdaw AJ) reviewing and setting aside that award in terms of section 145 of the Labour Relations Act¹ (“the LRA”) and substituting it with a finding that the dismissal was substantively unfair, directing the appellant to reinstate Mr Naidoo on the same terms and conditions that applied at the time of his dismissal and directing it to pay the

¹ Act 66 of 1995.

costs of the review application. Leave to appeal the order was granted on petition to this court.

Reinstatement of the appeal

[3] The appeal record was delivered 12 days late and, as a result, the appeal, in terms of the rules of this court, was deemed to have been withdrawn. The appellant has, however, at the outset, applied for condonation and its reinstatement. The lateness was essentially due to an under estimation by the attorney of the appellant of the time it would take to prepare the appeal record. Further, unfortunate delays occurred in the preparation of the record due to certain documents not being available on time, neither electronically or readily, and because of the need to adhere to strict health and safety rules and protocols necessitated by the Covid – 19 Pandemic.

[4] In its application for reinstatement, the appellant provided a full explanation for the delay. This is not an instance where the appellant ought to be penalised for the shortcomings of its attorney in the preparation of the record. The delay was not extensive and there is no doubt that the appellant intended prosecuting this appeal to its finality without delay. No prejudice was shown. In the light of those factors, the absence of prejudice and of the view taken in respect of the merits, there is no reason not to grant the application for condonation and reinstate the appeal.

Overview of the facts

[5] Mr Naidoo was employed by the appellant, a furniture, appliance and electronics retailer, since about September 2014. At the time of his dismissal by the appellant on 5 June 2018, he held the senior position of regional controller, with the responsibility, *inter alia*, for managing the appellant's Paul Kruger branch.

[6] Mr Naidoo's dismissal followed upon a disciplinary enquiry where he was charged with and found to have committed the following counts of misconduct: Firstly, in terms of charge 1, namely, "conduct unbecoming in that [he] on 6 March

2017 falsely accused [his] DGM² of inciting grievances from staff against [him] which were not true and that [he] contacted the DGM's secretary to inform her of these allegations." (The charge went on to state that the staff who were incited were the following: "Reuben Siteo and Alice Sedie from branch 1011, Garankuwa, Mandla Hlatswayo and Jane Baloyi from branch 574 Mabopane and further mentioned this to Corne van Gruene, the DGM's secretary.");

[7] Secondly, in terms of charge 2, namely, insolence and gross disrespect in that "on 6 March 2017 [he] used vulgar words and was grossly disrespectful towards [his] DGM when she confronted him about the performance of [his] region." The second charge alleged that his conduct constituted "serious misconduct as it places the employment relationship in jeopardy." The charge further went to state that Mr Naidoo specifically said to the DGM that she was talking "shit, whatever she is doing is nonsense, God will never forgive her and that she must look at herself in a mirror." The charge also alleged that his conduct in that regard was "totally unacceptable".

[8] Before his disciplinary hearing, Mr Naidoo had been placed on precautionary suspension and, on 28 March 2017 the branch which he was responsible for was closed.

[9] Unaccepting of the outcome of the disciplinary hearing, Mr Naidoo, on 2 July 2017, referred an unfair dismissal dispute to the CCMA. The dispute was eventually arbitrated by the arbitrator who found in his award dated 25 February 2018 that Mr Naidoo's dismissal was, both, procedurally and substantively fair.

[10] On 20 April 2018, Mr Naidoo brought an application in the Labour Court to review and set aside the arbitrator's award in terms of section 145(1) of the LRA. In his application, he relied on various grounds which are aptly summarised in the judgment of the court *a quo* as follows: "20.1 he raised the issue of his request for legal representation and the failure of [the arbitrator] to apply his mind to this issue before turning down his request; 20.2 he [alleged] that [the arbitrator] failed to appreciate that a policy existed for abusive and offensive language which stipulated a final written warning [as a sanction] for a first offence; 20.3 [he alleged] that the

² i.e. Divisional General Manager.

charges are for insolence and disrespect which is totally different to the offences of threats or intimidation; 20.4 [he alleged] that the [arbitrator] failed to apply his mind to the fact that no further charges were brought on the allegation of continued misbehaviour which justified the suspension. Furthermore, that an adverse inference is to be drawn, especially in view of the evidence that follows, vis-à-vis the closing of the store the next day after the service of the notice of suspension and charge sheet; 20.5 [he alleged] that it must be rationally conceivable that the suspension, given its timing, gives rise to a question of a predetermined outcome.”

[11] In addition, and also considered to be of significance by the court *a quo*, in his application for review, Mr Naidoo criticised the DGM, Ms Lerato Banda’s evidence, as well as the factual findings of the arbitrator. It is also recorded by the court *a quo* that in argument Mr Naidoo contended that he did contest the veracity of Ms Banda’s evidence and that he had proved that she was giving false evidence, despite the arbitrator’s finding to the contrary.

[12] In the court *a quo*, as in this court, the appellant, through its counsel, argued in support of the award, submitting that it fell within the bounds of reasonableness. Mr Naidoo’s representative, on the other hand, argued in support of upholding the judgment of the court *a quo*.

The court a quo’s findings

[13] In respect of the lack of legal representation, the court *a quo* held that since neither Mr Naidoo, nor, the representative of the appellant was legally qualified, the arbitrator had an “added responsibility” to ensure that Mr Naidoo was “not prejudiced in any respect” and that he “understood the rules of evidence” so as to “conduct his case properly”. The court *a quo* found that the arbitrator had failed in that regard; that he had treated Mr Naidoo “rather shabbily” and had exceeded his powers by “entering the arena unnecessarily” and by “making unfounded and unnecessary comments and curbing [Mr Naidoo’s] cross-examination on crucial issues”. The court *a quo* also found that that, in turn, gave rise to a reasonable apprehension of bias toward Mr Naidoo. According to the court *a quo*, this trend is perceptible throughout the arbitration proceedings and impacted on the arbitrator’s final decision,

suggesting that he had misconstrued the nature of enquiry before him and had misconducted himself as is contemplated in section 145 (2) (a) (i) of the LRA.

[14] Regarding the counts of misconduct, the court *a quo* essentially found that the language Mr Naidoo used must be “considered in context” and does not amount to “vulgar, rude, crude words” and therefore, did not constitute misconduct that was so serious that it could have jeopardised the employment relationship. According to the court *a quo*, counts 1 and 2 were “inter – related” and had “dealt with the same event, albeit on different occasions”.

[15] The court *a quo* embarked on an extended discussion at the end of which it essentially found that Mr Naidoo’s actual conduct, even if it constituted misconduct, was not so serious that it justified his dismissal and that there were ample mitigating factors that effectively rendered the dismissal unfair.

[16] The court *a quo* mentioned, *inter alia*, that disrespect for others and the use of abusive or other offensive language towards others, as well as insolent behaviour in the workplace, being a category C offence in terms of the appellant’s disciplinary code, merely carried a sanction of a final warning for a first offender, whereas a category D offence, which involved intimidation and threats, carried a sanction of dismissal and that Mr Naidoo was not charged with the latter kind of conduct. The court *a quo* found that even if the charge of falsely accusing Ms Banda of inciting false grievances against him were to be accepted, dismissal would be too harsh a sanction and that there was no proof that Mr Naidoo had acted deliberately. The court found that Mr Naidoo’s reference to Ms Banda as a “so-called DGM”, “did not take the matter any further.”

[17] The court *a quo* remarked that it was “plain” that there was “a great deal of animosity” between Ms Banda and Mr Naidoo; that it appears that Ms Banda prevaricated when she gave evidence at the CCMA to the effect that Mr Naidoo had been shot with rubber bullets and that she saw his injuries and that he was facing charges for poor work performance. According to the court *a quo*, this showed that Ms Banda was “a drama queen” and prone to exaggeration and hyperbole; that it was possible that Mr Naidoo had never used the pejorative word “shit” when

speaking to her and that she had falsely alleged that he had used the word, whereas he had merely used the word “nonsense”.

[18] Under a section headed “conclusion”, the court *a quo* stated, *inter alia*, the following: “[76] The applicant never threatened nor intimidated Ms Banda in any way with harm or otherwise. The [arbitrator] speaks of ‘Guidelines to the Code of Conduct to the LRA’ but disregarded the same totally. He merely rubberstamped the decision of the [appellant] who imposed a sanction of dismissal whilst the same was not justifiable given the evidence as well as the offences committed. [77] [Mr Naidoo] in his founding affidavit set out his personal circumstances since being dismissed, which includes the death of his mother, his mother-in-law, and him suffering a stroke. He gives details of his long service in the industry, his age almost reaching retirement and the hardships he had to endure since his dismissal. [78] The application to review and set aside the arbitration award of the [arbitrator] must succeed for the reasons as outlined herein...”

[19] The court *a quo* then concluded that it was in a position to finalise the matter rather than submit it back to the CCMA. Having discussed the law on the possible remedies and the approach to the remedies as contemplated in section 193 of the LRA, it held that no evidence had been led by the appellant to show that the reinstatement of Mr Naidoo was inappropriate or not reasonably practicable, and therefore his reinstatement had to be ordered. The court *a quo*, accordingly, ordered Mr Naidoo’s reinstatement retrospectively to the date of his dismissal and ordered the appellant to pay the costs of the review application. The appellant’s application for leave to appeal to this court was dismissed by the court *a quo*.

[20] On appeal, the appellant argued, in essence, that the court *a quo* erred in its approach and that while it referred to the test of reasonableness, as explained in *Sidumo*³, it actually applied the standard of correctness, as if the matter before it was an appeal; and that a proper analysis of the grounds relied upon by Mr Naidoo shows that they lacked substance. Counsel for Mr Naidoo in argument, basically, tried to justify the findings and conclusions of the court *a quo*.

³ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC) para 110.

Discussion

The issue of legal representation and the alleged bias of the arbitrator

[21] There is no indication on the record that Mr Naidoo challenged the fairness of the arbitrator at the arbitration itself. This point of the alleged bias seems to have been raised for the first time in the review application. In the review, Mr Naidoo complains in particular because the arbitrator did not allow him legal representation even though he was not legally qualified.

[22] If that was the only criteria for allowing legal representation at the CCMA, virtually every employee would have to be allowed legal representation, unless he or she was legally qualified. That would further imply that virtually every employer would have to be given the same benefit as the employee. That, in turn, would have a negative impact on the traditional and legally sanctioned ethos of dispute resolution in the CCMA, which includes simplicity, speed and as far possible minimal, if any, legal formality.

[23] The record shows that the arbitrator only made a ruling on the matter of legal representation after having heard the parties on the matter. Both, Mr Naidoo and the representative of the appellant, were not legally qualified, but had on occasion represented the appellant at the CCMA. They were familiar with the basic procedures. The arbitrator ruled as follows on the point “legal representation was declined because the matter was not complex and the fact that [Mr Naidoo] has represented [the appellant] at the CCMA would eliminate the appellant disparity in ability.”

[24] The court *a quo* correctly did not find, given all the facts and circumstances, that the arbitrator had exercised his discretion wrongly in refusing Mr Naidoo, as well as the appellant, legal representation. What the court *a quo* did do was to criticise the alleged treatment of Mr Naidoo who was not legally represented. The question is whether the criticism is valid.

[25] Even though the court *a quo* found that Mr Naidoo “was shabbily treated” it provided no explicit example of such treatment on the record. The findings by the court *a quo* that the arbitrator exceeded his powers by entering the arena unnecessarily and that he made unfounded and irrelevant comments, and unfairly curtailed Mr Naidoo’s cross-examination, are also not apparent from the record. Unfortunately, the court *a quo*’s omission to refer to specific instances, and its reliance on generalisation, makes it difficult to deal with those findings in any detail and other than by way of generalisation.

[26] There are no material irregularities apparent from the record. On the contrary, the record does show that the arbitrator tried to guide Mr Naidoo as best as he could, in a manner that would not compromise his impartiality - a difficult feat indeed. In my view, the court’s criticism of the arbitrator is not borne out by the record and is not justified. The record shows, *inter alia*, that on more than one occasion the arbitrator checked with Mr Naidoo whether he understood what he had to do when cross-examining witnesses, and even assisted him with questioning and clarifying issues.

[27] In terms of section 138 of the LRA, the appropriate form of the arbitration proceedings is within the arbitrator’s discretion. Section 138(1) provides that “the Commissioner” (i.e. the arbitrator) “may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly.” The arbitrator is, however, required to “deal with the substantial merits of the dispute with the minimum of legal formalities”. In the resolution of disputes in such proceedings fairness and speed are paramount and legal formality is to be minimised. It is accepted that arbitrators in terms of the LRA are to be afforded “a significant measure of latitude” in the conduct of arbitration proceedings and in dealing with the substantial merits of disputes⁴.

[28] The active management of the hearing by an arbitrator, in order to control those proceedings, does not, by itself, show impartiality. The court *a quo* itself seems to have implicitly acknowledged, by its finding that the arbitrator ought to assist an unrepresented person, that the arbitrator cannot just be a “silent – umpire”, or mere “figurehead” in the arbitration proceedings. The arbitrator has to be actively involved

⁴ *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC) para 65.

in the management of the proceedings, to control them in order to ensure that the dispute is dealt with fairly and as speedily and cost effectively as possible. An arbitrator is not obliged to listen to irrelevant evidence or to allow irrelevant, or ill-conceived or pointless questioning⁵. By virtue of his or her statutory duty, the arbitrator would be obliged to prevent such questioning, and exclude such evidence.

[29] An arbitrator is essentially required to perform a balancing act as there is a thin dividing line between the management of the arbitration and getting involved in the fray. It has been held (albeit in the context of a trial) that “should the line on occasion be overstepped it does not mean that a recusal has to follow, or the proceedings have to be set aside.”⁶ It would depend on the materiality of the overstepping in relation to the outcome⁷.

[30] While it is possible to say, with the advantage of hindsight, that the arbitrator could have managed the hearing better, it cannot be said that the arbitration hearing was handled in an unfair manner. There was no overstepping of the boundaries, let alone material overstepping that influenced the outcome. The curtailment of questioning was not unfair and was consistent with the arbitrator’s obligation to determine the dispute as speedily as possible.

In respect of the other grounds

[31] The issues for resolution in this matter were quite straightforward and clear. Ultimately the question was whether the dismissal of Mr Naidoo by the appellant was both procedurally and substantively fair. Regarding the latter, the question was whether Mr Naidoo was reasonably found to have committed the misconduct he was charged with, and if so, whether the sanction imposed in that regard could reasonably be found to have been fair and appropriate⁸.

⁵ In respect of trials see for example, *Take and Save Trading CC v Standard Bank South Africa* 2004 (4) SA 1 (SCA) paras 2 and 3.

⁶ *Ibid.* para 4.

⁷ See, *inter alia*, *Herholdt (Congress of SA Trade Unions as Amicus Curiae) v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

⁸ See, *inter alia*, *Wasteman Group v SA Municipal Workers Union & others* [2012] 8 BLLR 778; (2012) 33 ILJ 2054 (LAC) (“*Wasteman*”) para 25.

[32] In considering the arbitrator's award in respect of those matters the test is not correctness, as in an appeal, but whether the arbitrator's findings and conclusions in that regard were reasonable, i.e. fell within the range of possible decisions a reasonable arbitrator, in dealing with such a dispute, facts and circumstances, would have arrived at⁹.

[33] As with a court of appeal¹⁰, when it comes to factual findings of a trial court, a reviewing court must be mindful thereof that the arbitrator had certain advantages which the reviewing court does not have, namely, that of seeing and hearing the witnesses first hand, and of being steeped in the atmosphere of the arbitration proceedings. The arbitrator not only had an opportunity to observe the demeanour of the witnesses , but also to observe their appearance and personalities. Further, for those very reasons, like a trial judge, the arbitrator would have been in a better position than the reviewing court in drawing inferences.

[34] Thus, in the absence of a clear proof of a misdirection or unreasonableness by the arbitrator in the drawing of inferences, or making of factual findings, the reviewing court should be reluctant to interfere with them.

[35] The court *a quo*, unfortunately, did not seem to show the required reluctance in this instance in effectively concluding that the arbitrator's findings, that Mr Naidoo was proved to have committed the misconduct he was charged with, were (effectively) wrong. The court *a quo*, for example, held that Mr Naidoo's version, which, basically, was a denial of any misconduct, specifically of the use of vulgar language, in particular the use of the word "shit" in his telephonic conversation with Ms Banda, that formed the basis of charge 2, had been corroborated by his witnesses; that Ms Banda had a motive to falsely implicate Mr Naidoo in wrongdoing in order to have him dismissed; that there had been a gross abuse of power in the way Ms Banda went about charging Mr Naidoo with misconduct; That she had fabricated the version that he had used the word "shit"; that if Mr Naidoo "was indeed a rude, arrogant or abusive person he would have been disciplined some time ago."

⁹ See, *inter alia*, *Sidumo* (above)

¹⁰ For the *locus classicus* see *R v Dhlumayo and another* [1948] 2 ALL SA 566 (A); in respect of arbitrations specifically see, *inter alia*, *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration and others* (2013) 34 ILJ 945 (LC) para 31.

[36] The court *a quo* also found that Ms Banda had lied previously about injuries Mr Naidoo had allegedly sustained in a looting incident; that she was a “drama queen” and prone to exaggeration; that her testimony, that she was not aware of the closure of Mr Naidoo’s store, “dented her credibility”; that it was possible that the word “shit” was never used by Mr Naidoo. The court *a quo* also concluded that the evidence of Ms van Greune, Ms Banda’s secretary who testified in respect of charge 1, “does not appear to be very convincing”, and (effectively) that her testimony was not credible because “after all” she was Ms Banda’s secretary “who owes her allegiance to her to remain in her job.” According to the court *a quo*, the arbitrator had “failed to evaluate all of this under the banner of ‘Survey of Evidence’ in his arbitration award.”

[37] Even though it was not Mr Naidoo’s version that he had been provoked by Ms Banda the court *a quo* found that she “also contributed to those verbal outbursts if indeed it did take place and may have provoked [Mr Naidoo] and baited him so that there will be a verbal outburst.” It also went on to find that “the entire episode is nothing but a well-orchestrated campaign to discredit [Mr Naidoo] which the [arbitrator] did not see through or reflect in his arbitration award”; and that “[a]s such the award cannot be the decision of a reasonable decision maker given the evidential material before the [arbitrator].”

[38] These findings of the court *a quo* are serious indictments concerning the character and credibility of Ms Banda, Mrs Van Greune, the other witnesses of the appellant, of the appellant, and also the conduct of the arbitrator. One would expect clear evidence or proof of wrongdoing that justified such scourging, but, alas, that is lacking.

[39] The court *a quo* seemingly accepted Mr Naidoo’s version of what Ms Banda had (allegedly) testified in another hearing without taking into account Ms Banda’s version in that regard. She effectively testified that she did not say that he had been injured by the rubber bullets which he had shown to her, but that he was traumatised and had to see a doctor after the incident. There was also no basis for the court *a quo*’s finding that Ms Banda testified falsely that Mr Naidoo had faced disciplinary charges for poor work performance. That was not her evidence. She testified that

although Mr Naidoo's performance was not ideal he was never dismissed or demoted because of it- since the appellant had taken into account that he had been traumatised by the looting incident; and that she had engaged him concerning his performance.

[40] There was also no basis for its finding that Ms Banda prevaricated in her testimony that she was not aware of the store closure on 27 March 2017. Save for conjecture and speculation, there was no evidence to show the contrary, and no basis for drawing a contrary inference. The finding that Mr Naidoo's witnesses corroborated his version, i.e. that he was not vulgar and did not use the word "shit", is simply wrong. On the contrary, both those witnesses, Mr Frans Lukhele and Mr Japtha Makoba, could not give any detail of the conversation that Mr Naidoo had with Ms Banda. They did not know what words were used. In fact, Mr Lukhele did not even know of the telephone conversation of 6 March 2017.

[41] The court *a quo*'s criticism of Mrs van Greune was also not justified. At the arbitration Mr Naidoo could not and did not dispute her evidence. He could not deny that he did tell her that Ms Banda was inciting other staff to lay false grievances against him. The findings of provocation and of conspiracies to falsely implicate Mr Naidoo in wrongdoing, in the absence of evidence substantiating them, are also not justified.

[42] If the evidence and the arbitrator's findings are closely and properly analysed, the court *a quo* could not correctly conclude that the arbitrator did not reasonably find, taking into account all the facts, that Mr Naidoo was rightly found to have committed the acts of misconduct as charged, save for the fact that in respect of the first charge, as correctly conceded by the appellant and its (relevant) witnesses, he did not actually name the staff who were that were (allegedly) incited by the DGM as alleged in charge one.

[43] Essentially, the court *a quo*'s main difficulty with the award was not whether the finding of misconduct was reasonable, but concerned the exact nature and seriousness of the charges and ultimately the appropriateness of the sanction of dismissal that was imposed in respect of the misconduct.

[44] The arbitrator found that Mr Naidoo had been dismissed for making false allegations concerning his manager (i.e. the DGM) to her secretary. This, according to the arbitrator, went beyond mere disrespect and insolence as it was done in the presence of other employees and Mr Naidoo openly exhibited a defiance of authority. The arbitrator also found that Mr Naidoo's conduct towards the DGM followed after she had enquired about his work. By "publicly" declaring that he did not intend to listen to his manager, or to respect her, Mr Naidoo displayed more than insolence. He was insubordinate. This behaviour, according to the arbitrator, justified his dismissal. In support of his findings, the arbitrator cited the decisions in *Wasteman*¹¹ and in *SAMWU and another v Rand Water and Others*¹². The arbitrator accordingly found that Mr Naidoo's dismissal, for the misconduct he is found to have committed, was substantively fair.

[45] In *Wasteman*, this court made clear that while not every case of insubordination justified dismissal certain of such cases did. A reasonable arbitrator would have been alive to the distinction between those acts of misconduct, including insolence, insubordination, et cetera, where dismissal is justified, and those where it was not justified. In order to arrive at the reasonable conclusion on the point the arbitrator would have had to analyse the facts and find a plausible and reasonable justification for the sanction that had been imposed by the employer.

[46] The court *a quo* seemingly found that the arbitrator's conclusion that the dismissal was reasonably justified was not one that a reasonable arbitrator would have arrived at. This finding of the court *a quo* was based on what at face value seems to be a "host" of reasons, but which, on further analysis, could be distilled to what has been stated above concerning the summation of the decision of the court *a quo*.

[47] Turning to a consideration of those reasons – the court *a quo*'s approach, for example, in finding in respect of charge 2, namely, that even if the appellant's version was to be preferred, what Mr Naidoo is alleged to have said to Ms Banda was not "vulgar, rude or abusive", was not correct. The test to be applied is whether

¹¹ See above.

¹² [2015] BLLR 138 (LC).

the arbitrator could reasonably have found that the words used by Mr Naidoo were indeed “vulgar, rude or abusive”. As the court *a quo* correctly observed, the word “shit” possibly has many meanings, including “nonsense, foolishness, something of little value...”, but that does not detract from the fact that it is a vulgarity and its use showed total disrespect and was abusive.

[48] The very source relied upon by the court *a quo* for the possible meanings it assigned to the word “shit”, namely, Wikipedia, states that the word is generally considered to be vulgar and profane in the modern English language. A reasonable, objective and informed person would, given the facts and circumstances, perceive the words used by Mr Naidoo to have been derogatory and abusive¹³.

[49] In any event, it was not for the court *a quo* to proffer a defence that the meaning intended was innocuous, when that was not Mr Naidoo’s defence at all. He denied uttering the word and never alleged that he did not intend using it in a pejorative sense.

[50] Although the court *a quo* was correct that the charges were “inter-related”, they were indeed, albeit in this sense: it showed Mr Naidoo’s thorough disrespect and disdain for his superior, Ms Banda. He did not only not apologise for his inappropriate conduct in complaining about Ms Banda to her secretary: that she had falsely incited grievances against him, but when he was confronted about it by Ms Banda, he reacted rudely and defiantly, using vulgar and profane language toward her and adjudged and insulted the genuineness of her religious faith and morality. But for his say-so Mr Naidoo did not produce any proof that Ms Banda incited staff to lay grievances against him, let alone that the grievances against him were false.

[51] This was not new or the last of it. At the hearing, his inherent disrespect for Ms Banda was also shown by his continued reference to her as the “so – called DGM”. That was not a term of endearment as he tried to explain, but was clearly derisive, insulting and abusive of and concerning Ms Banda, his superior. To add insult to injury, he also tried to show at the arbitration hearing that she was a liar, a

¹³ See, *inter alia*, *Rustenburg Platinum Mines v SA Equity Workers Association on behalf of Bester and others* (2018) 39 ILJ 1503 (CC) para 38.

person prone to exaggeration who was not to be believed. He did not show remorse for his despicable behaviour and continued unrepentantly and wilfully to try and justify himself.

The sanction

[52] The arbitrator's findings regarding the grossness of Mr Naidoo's behaviour cannot be faulted. The arbitrator was clearly alive to all the facts, aggravating and mitigating, and essentially effectively found that the aggravating factors significantly outweighed those which otherwise would have been mitigating. That such conduct could cumulatively, be justified as warranting dismissal, is reasonable. The court *a quo*'s finding to the contrary is wrong.

[53] There is more than ample proof on the record that the employment relationship between Mr Naidoo and the appellant, represented by its DGM, had seriously deteriorated to the point where it could reasonably be said to have become intolerable or irretrievably broken down. Mr Naidoo's misconduct of insolence and disrespect, in the context of the facts of this particular matter, was sufficiently serious to render his dismissal fair.

[54] In the circumstances, the appeal must succeed. Taking into account all the facts, circumstances, the law and fairness, including the fact that the court *a quo*'s decision possibly emboldened Mr Naidoo's further pursuit of this matter, there is to be no costs order.

[55] In the result, the following is ordered:

55.1 The late delivery of the record is condoned and the appeal is reinstated.

55.2 The appeal is upheld;

55.3 The order of the Labour Court is set aside and is substituted with the following order: "The review application brought by Mr Naidoo is dismissed."

40.2 There is no costs order.

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Kubushi AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Mr E Ellis

Instructed by Edward Nathan Sonnenbergs Inc.

FOR THE FIRST RESPONDENT:Mr LCM Morland

Instructed by VDMS Attorneys Inc.