

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR261/07

In the matter between:

UTI MATERIAL HANDLING

Applicant

and

NATIONAL BARGAINING COUNCIL

FOR THE ROAD FREIGHT INDUSTRIES

First Respondent

COMMISSIONER KENNITH MOSIME NO

Second Respondent

SOUTH AFRICAN COMMERCIAL

CATERING AND ALLIED WORKERS UNION

Third Respondent

E TSHABALALA & 28 OTHERS

4th-32nd Respondents

JUDGMENT

AC BASSON, J

[1] This was a review of an arbitration award dated 15 December 2006 in terms of which the Second Respondent (hereinafter referred to as “the Arbitrator”) found the dismissal of the individual Respondents unfair. The Arbitrator directed the Applicant to reinstate all the individual Respondents who were dismissed on account of their repeated failure to attend morning meetings which were considered to be critical from an operational point of view.

[2] The Applicant in this matter is UTI Material Handling. The 4th – 32nd Respondents (hereinafter referred to as “the individual Respondents”) were all employed by the Applicant and members of the Third Respondent. The present dispute has its origins in the refusal of the individual Respondents to attend the regular morning meetings that were held daily at the Applicant’s operations. The individual Respondents were dismissed following a guilty finding on the following charge: *“Disobeying reasonable and lawful job instructions by refusing to attend the morning meeting as instructed on several occasions.”*

Brief summary of the evidence

[3] It was the case for the Applicant that the Respondents were given a reasonable instruction to attend morning meetings and that there existed no justification for the refusal to attend those

meetings. Progressive discipline was only taken after the 3rd refusal to attend. It was the Applicant's case that the individual Respondents had persisted with their refusal to attend the morning meetings in the face of repeated communication to them instructing them to attend the meetings. The Applicant thus argued that it had a valid and fair reason to dismiss.

[4] It was the Respondents' case that there was no instruction to attend morning meetings and argued that there was in fact no standing practice to attend such morning meetings. Despite the fact that it was claimed that there was no instruction nor practice to attend such meetings, it was also alleged by the individual Respondents that their failure to attend the meetings resulted from provocative conduct by management.

[5] Mr. Acton (the service delivery manager – hereinafter referred to as "Acton") was the only witness on behalf of the Applicant. He gave extensive evidence about the practice of attending morning meetings and the manner in which employees at the Applicant's operation worked. He testified that all employees had been made aware of the fact that meetings were held at the start of each working day in order to discuss certain important operational issues. He testified that he was employed at the Centurion plant since March 2005 when he took over the

management. He explained that it took about 3-6 months to settle down the facility. Without repeating in detail his evidence, Acton explained that, although meetings were held prior to him taking over, those meetings were held on an erratic basis. He explained that it was thereafter a matter of standard practice that morning meetings were held and testified that attendance of these meetings were a prerequisite. Acton also testified that he considered the morning meetings as important to the general operation of the Applicant. His evidence in this regard was not challenged.

[6] Action testified that management initially gave verbal instructions to team members of these meetings. After the initial verbal instructions, the holding of meetings was consistent. He also confirmed that he had attended most of the meetings.

[7] During May 2005 a schedule of the meeting times was in fact published on the notice board. This notice was part of the bundle of documents before the arbitration and specifically recorded that meetings will be held every day at 08H00 – 08H10. Acton's evidence in this regard was not seriously disputed in cross-examination although it was suggested that the notice did not convey an instruction to attend a meeting. According to Acton this was a standard arrangement and it was

therefore not necessary to instruct workers on a daily basis to attend.

[8] This pattern of regular attendance continued until 15 September 2005 which was five months after the practice had been implemented. As a result of the problems which started then, Acton began to record events on a daily basis. He referred to this document as “*an event tracking document.*” In cross-examination it was boldly put to Acton that he had drafted this document simply for use during the arbitration. Acton strongly denied this.

[9] Acton explained in fair detail how and when the individual Respondents had started their refusal to attend the morning meetings. He also explained that only union members failed to attend the meetings. As a result Acton then approached the two shop stewards (Roberts and Tsotetsi). During that meeting the shopsteward gave reasons for the failure to attend the meetings which reasons included the fact that there was no incentive scheme in place. It was also conveyed to management that they were not happy about the fact that the morning meetings lacked an agenda. No mention was made that the workers were not aware of the meeting and that that was the reason for the non-attendance. It is important to point out that it was not disputed in

cross-examination that the shop stewards had met with Acton regarding the union members failure to attend the morning meetings. It was also not disputed in cross-examination that certain reasons were advanced for the failure to attend the morning meetings. Acton then informed the shop stewards that the Applicant would not tolerate a continued failure to attend the meetings. This event was recorded by Acton in his diary. This issue was also not specifically disputed in cross-examination.

- [10] A meeting was held on 16 September after the tea-break. The morning meeting was postponed as a result of work pressure. At the meeting of 16 September it was explained that the meetings were not a negotiated issue but fell within management prerogative based on the company's operational needs. Acton also testified that the meeting was an attempt to consult with the broader group in order to find out why the meeting of the previous day was boycotted. At the meeting the incentive scheme was again raised. The meeting ended with the union members walking out. In passing, it should be pointed out that this evidence is consistent with the evidence that the shopstewards had raised the incentive scheme with management early when the reasons for non-attendance were given to Acton. Again, this evidence was not specifically challenged during the course of Acton's evidence.

- [11] On Monday 19 September a meeting was held in the canteen at a time when the majority of the individual Respondents were enjoying their morning coffee. As a result, it was difficult for management to determine if the Respondents were continuing with boycotting meetings.
- [12] On 20 September a further meeting took place. Again the individual Respondents failed to attend and the meeting was conducted in their absence. As a direct consequence to this failure, Acton then prepared a notice dated 20 September 2005. In this letter it is pointed out to all employees that the meetings were compulsory. The letter also referred to the earlier meeting with shop stewards. It was also stated in this letter that disciplinary action will be taken against offenders.
- [13] On that same day management also published a lengthy document in which it addressed various concerns that had been raised in the various meetings. These notices were also forwarded to the Respondent's trade union on 20 September 2005. The Applicant also submitted proof that the notice was faxed to the union. This was not disputed. The notice was also posted on the Applicant's general notice board.

[14] On 21 September the individual Respondents again failed to attend the meetings. A final written warning was issued to all the individual Respondents. On this particular day two shop stewards (Roberts and Tsotetsi) entered the office and expressed their dissatisfaction with the attempts to issue the warnings. They also stated that no employee will come to the office to sign for the warnings. Acton also testified that the shopstewards informed management that the actions of boycotting the meetings persistently did not constitute a strike and that they did not see it as an illegal boycott. This evidence of Acton was also not properly challenged during cross-examination.

[15] A final written warning was then drafted as a general notice and duly published on the Applicant's notice board. The notice also recorded that the shopstewards had a meeting and that during that meeting it was indicated that they would not attend. The employees were informed that should they not attend the next meeting, they would be dismissed. This evidence was not disputed. More in particular, it was not disputed that the final written warning was duly published on the notice board. In cross-examination Tsotetsi conceded that he received the final written warning although he denied that it was given to all

employees. It was, however, common cause that the two shopstewards were the representatives of all the employees.

[16] On 22 September 2005 the individual Respondents again refused to attend the meetings. As a result disciplinary charges were drawn up. Two disciplinary enquiries were held.

[17] It is, in my view, clear from the evidence that morning meetings were a general practice. Apart from the fact that Tsotesi eventually conceded in cross-examination that such meetings were held, it is also clear from other evidence: It was not disputed that on either 13 or 15 September Acton had enquired as to why the individual Respondents did not attend the morning meetings. It is also important to point out that Tsotetsi himself testified that the failure to attend the meetings resulted in Acton becoming angry although Acton disputed that he used vulgar language. Tsotetsi himself also claimed to be the person who initiated the morning meetings to discuss problems. A further fact that points to the practice of general meetings is the evidence of the individual employees themselves to the effect that they would not attend the meetings until such a time Acton apologises for his language. I am thus in agreement with the Applicant that it is somewhat startling for the Arbitrator to have concluded that there was no such a practice in light of the

overwhelming evidence that there was such a practice. Moreover, Tsotetsi also acknowledged the need for such meetings. If the minutes of the disciplinary hearing is perused it is further clear that some of the witnesses called on behalf of the individual Respondents in fact confirmed that Acton had pointed out certain notices on the notice board, that regular meetings were held and that the Respondents were told on 16 September to attend these meetings. They also admitted that they were informed that a failure to attend the meetings would result in disciplinary action being taken against them. Tsotetsi was also unable to explain why Acton would communicate false information to the union on 20 September. During the disciplinary hearing Tsotetsi also confirmed that Acton had conveyed to him that morning meetings were to take place every morning. During cross-examination during the arbitration, Tsotetsi also confirmed that Acton wanted meetings to take place every morning. He said the following: *"Yes he wanted them [the meetings] to take place every morning."* Acton also referred to a notice contained on page 11 of the bundle which is a notice which was placed on the notice board informing employees of the meetings. These meetings were held, according to Acton, since May 2005. Acton explained that these meetings were mandatory and it was not necessary to inform the employees time and again of the meetings. It was not

disputed in Acton's evidence that union and non-union members attended the meetings since May 2005.

[18] In essence, the Arbitrator had to decide the following:

- (i) Firstly, were the Respondents required to attend regular morning meetings and was it an existing policy of which the individual Respondents were aware?
- (ii) Secondly, did the individual Respondents repeatedly refuse to comply with this requirement and did they repeatedly make themselves guilty of insubordination by not attending?
- (iii) If they were insubordinate, was dismissal an appropriate disciplinary sanction?

[19] In deciding these questions the Arbitrator had to take into account that there is an onus on the Applicant to prove on a balance of probabilities that the dismissal was for a fair reason and that a fair procedure was followed. In this particular case the Applicant had to establish that the dismissal arose out of the Respondents' refusal to obey a lawful and reasonable instruction of which the individual Respondents were aware. Insubordination may attract a sanction of dismissal but it must be clear from the facts that the insubordination was wilful and repetitive.

The arbitration award

[20] The Arbitrator concluded that there had been no misconduct and that the Applicant did not discharge its burden of proving that the Respondents had wilfully and deliberately disobeyed a reasonable and lawful instruction. The Arbitrator further concluded that there was no clear and consistently applied rule that the Respondents have contravened. According to the Arbitrator the Applicant also could not establish that there was an instruction given or that the Respondents had deliberately and wilfully disobeyed that instruction.

[21] The Arbitrator held that it was alarming that the Applicant had introduced a rule regarding attendance of morning meetings verbally rather than in writing. The Arbitrator also found it strange that Acton did not sign the written notice which was on the notice board and which set out the agenda of the morning meetings. According to the Arbitrator this notice itself was merely a timetable and not an instruction and could have been placed on the notice board by “anyone”.

[22] The Arbitrator also found the evidence of Acton unconvincing despite finding that Acton’s evidence was not discredited by way of cross-examination. Although Acton gave clear evidence that

he did attend a meeting with the shopstewards to discuss their dissatisfaction, the Arbitrator found that no such a meeting was held. The Arbitrator also found that disciplinary action was taken too soon and that Acton had used vulgar language in a meeting thus acting provocatively.

Review

[23] Before referring to the evidence in more detail, it is necessary to briefly set out what the test for review is. The Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) stated the following in respect of Labour Court reviews:

“That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”¹

¹ The standard of review

[107] The reasonableness standard was dealt with in *Bato Star*. In the context of section 6(2)(h) of PAJA, O'Regan J said the following: “[A]n administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decisionmaker could not reach.”

[108] This Court recognised that scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeals and reviews continues to be significant.

[109] Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in “judicial overzealousness in setting aside administrative decisions that do not coincide with the judge’s own opinions.” This Court in *Bato Star* recognised that danger. A judge’s task is to ensure that the decisions taken by

[24] The Commissioner is therefore required to apply his or her mind to the evidence and to arrive at a conclusion that is reasonable. In determining whether the decision is reasonable, the Court will inevitably be required, as was acknowledged in the *Sidumo*-case, to have regard to the merits of the case in order to determine whether the decision is reasonable. A factor that this Court will consider is whether or not the Commissioner had applied his or her mind to the relevant facts and whether the decision arrived at is reasonable and rational in light of the evidence that was properly placed before the Commissioner. The question is not whether this Court itself would have arrived at a different conclusion; the question is whether or not the decision is reasonable. The Court will, however, interfere with the award if the Commissioner had reached a conclusion which is unrelated to, or which is in direct conflict with unchallenged evidence placed before her during the arbitration. See in this regard the decision in *Moodley v Illovo Gledhow & Others* [2004]

administrative agencies fall within the bounds of reasonableness as required by the Constitution.

[110] *To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.*

2 BLLR 150 (LC) at paragraph 22 where the Court held as follows:

“It should be extremely reluctant to upset the findings of the arbitrator, unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilt with her functions as an arbitration that her findings can only be considered to be so grossly irregular as to warrant interference from this Court.”

[25] I am in agreement with the submission that the Arbitrator in the present matter had ignored large portions of the evidence introduced by the Applicant through Acton which evidence went completely unchallenged during the course of cross-examination. The Arbitrator also ignored evidence which was clearly supportive of the Applicant's version. In determining the probabilities, the Arbitrator also failed to accept unchallenged evidence and to assess that evidence with the view of determining the probabilities. What the Arbitrator chose to do was to question the credibility of the Applicant's witness but at the same time to accept that his evidence was not disturbed during cross-examination. A fact finder cannot ignore unchallenged evidence. This was clearly pointed out by the Court in *Small v Smit* 1954 (3) SA 434 (SWA) at page 438

where the Court confirmed how important it is to challenge evidence:

“It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved. Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever. (See the following authorities: Browne v Dunn (1893), 6 The Reports 67, H.L.; Phipson on Evidence (7th ed. p. 460); Rex v M., 1946 AD 1023 at p. 1028.)”

See also *President of the Republic of South Africa & Others v South African Football Union & Others* 2000 (1) SA 1 (CC) at paragraph 61 – 63 where the Constitutional Court also stressed the importance of challenging evidence:

“[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts.

[62] The rule in Browne v Dunn is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in

the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where 'a story told by a witness may have been of so incredible and romancing a nature that the A most effective cross-examination would be to ask him to leave the box.'

[26] Applying the above rules it is clear that the Arbitrator had failed to consider and accept the unchallenged evidence to the effect that morning meetings were critical and was in fact a standard practice after Acton took over. I have already referred to the evidence in paragraph [17] *supra*. These meetings were consistently attended until mid-September 2005 when the individual Respondents decided to boycott these meetings. Because the workforce understood the need for these meetings it became a standard practice and it was therefore not necessary for the workforce to have been reminded of that on a daily basis. The Arbitrator also failed to take into consideration

that the shopstewards expressly informed management that they would not attend the hearing because they had a grievance about the incentive scheme. The evidence of Acton that several notices were drafted and published is consistent with the diary which he kept on a daily basis. Notwithstanding these notices the Respondents continued to ignore the meetings. I am in agreement with the submission that it is ridiculous to argue on the one hand that there was no practice of meetings and then to argue on the other hand that they would refuse to attend the hearings until Acton apologised for his language.

[27] I am in light of the foregoing persuaded that Arbitrator committed a gross irregularity in the course of conducting the arbitration. In arriving at this conclusion I was also mindful of the comments made by Ngcobo J in the *Sidumo*-case:

“[256] In its review application the employer relied upon all three grounds of review in s 145(2)(a), namely, misconduct, gross irregularity and acting in excess of powers conferred. This is plain from its affidavit in support of the review application. The employer submitted that the findings complained of had no reasonable basis on the evidence presented to the commissioner and they flew in the face of direct and to a large extent unchallenged evidence to the

contrary. The employer submitted that these findings which were fundamental to the commissioner's award demonstrate that the commissioner failed to apply his mind to the matter to such an extent that it cannot be said that the employer was afforded a fair hearing. It was submitted that in these circumstances the commissioner committed a gross irregularity or misconduct or otherwise exceeded his powers."

And at [267] – [268]:

"[267] It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.

[268] It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate.² In so doing, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined.³¹⁵ This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."

[28] I am satisfied that the award cannot stand. It is clear from the record and the findings that the Arbitrator did not fully consider material aspects of the evidence which is supportive of the Applicant's fundamental version. As a result of this failure the Arbitrator arrived at a decision which is not reasonable. In the event the Applicant's review succeeds with costs.

[29] This Court is in a position to substitute the findings of the Arbitrator with its own. I have already pointed out that I find the facts in favour of the Applicant. The individual Respondents were clearly refusing to attend the meetings. Their refusal was

² My emphasis.

deliberate and notwithstanding warnings they persisted with their wilful conduct. I am of the view that their conduct warrants the ultimate sanction namely that of a dismissal.

[30] In the event the following order is made:

1. The arbitration award of the Second Respondent dated 12 January 2007 is reviewed and set aside and replaced with an order that the dismissal of the Individual Respondents was fair.
2. The Third, Fourth to Thirty Second Respondents are ordered to pay the costs jointly and severally the one paying the other to be absolved.

AC BASSON, J

Date of judgment: 11 August 2009

Date of proceedings: 15 August 2009

For the Applicant:

Adv Wade. Instructed by Francois Le Roux Attorneys.

For the Respondents:

Mr. Motang. Union official.