

LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)

Case: JS 390/07

In the matter between:

GIFLO ENGINEERING (BOP) (PTY) LTD

Applicant

and

**METAL AND ENGINEERING INDUSTRIES BARGAINING
COUNCIL (MEIBC)**

First Respondent

COMMISSIONER SEENG LETELE (N.O.)

Second Respondent

**NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA (NUMSA)**

Third Respondent

ELIJA MONTSO

Fourth Respondent

JUDGMENT

LAGRANGE, J:

Background

^{1]} The employer in this matter seeks to review and set aside an arbitration

award issued by the second respondent, a CCMA Commissioner, on 3 February 2007. The Commissioner found that the fourth respondent's dismissal on 31 July 2006 had been procedurally and substantively unfair and reinstated him with retrospective effect.

2] The fourth respondent, Mr E. Montso, had been employed by the company ("Giflo") since March 2002 and was working as a 'quality inspector/control' prior to his dismissal. He was dismissed by the applicant on the grounds of insolence and refusing to obey a lawful instruction. The context in which the incident giving rise to the disciplinary enquiry took place was a series of events which occurred when the employer wanted to transfer the applicant to the premises of a client, All Lite, to perform quality control functions at All Lite's premises instead of Giflo's premises where Montso normally worked. Travelling to the client's premises would have entailed additional travel costs for Montso.

3] The charges against Montso read as follows:

"1) Insolence towards a superior in so far as on 29/05/06 you refuse to listen to the instructions given by Jan Groenewald by shouting him down and then proceeded to put the phone down in his ear.

2) Insolence towards a superior insofar as on 30/05/06 when confronted by your superiors Groenewald and Dawie Lubbe as to why you disobeyed their direct instruction to report for duty at

A L and not Giflo, you again shouted him down and proceeded to block your ears, turned around and walked away.

3) Insolence towards a superior in so far as on 30/05/06 when approached by the manager of the metal finish area (Willie Heyneke) to stop interfering with the workforce in the grinding area, you blocked your ears and turned around and walked away.

4) Insolence towards a superior in so far as on 12/06/06 you threatened your superior DL with putting the phone down and not reporting for duty at A L unless you demand for transport money is not met.

5) failure to carry out a lawful instruction in so far as on 30/05/06 you came to Giflo, not adhering to the instruction given to you by your superiors on 29/05/06 to report to All Lite on 30/05/06 which could lead to the company incurring unnecessary expenses as a result of rejected parts being shipped to the customer due to the fact that you were not there to inspect the parts." (sic)

^{4]} Montso was found guilty of insolence and failing to obey a lawful instruction and was dismissed.

Applicant's prescription claim

- 5] After the review application hearing, the applicant belatedly raised a claim in a letter to the court, that the original award had prescribed based on the fact that the union and Montso had not taken any steps to enforce the award which had been served on the applicant on 14 February 2007.
- 6] The applicant sought to rely on the decision of this court in ***Police & Prisons Civil Rights Union on behalf of Sifuba v Commissioner of the SA Police Service & Others* (2009) 30 ILJ 130**. That case dealt with an application by the employee party, in whose favour an arbitration award had been issued, to dismiss a review application brought by the employer and to enforce the award as an order of court. The employer raised a special plea of prescription, which the court upheld. Some important principles were affirmed in the judgment of Musi AJ. Firstly, the court held:

“[33] A valid arbitration award, like a court judgment in certain circumstances, is regarded as a novation of the former debt on which the award was granted and the arbitration award itself constitutes the new debt. The former debt is converted into a debt that is due by virtue of the valid arbitration award. New rights, duties and obligations are created by a valid arbitration award. If an arbitrator's award is not made an order of court it will prescribe after four years.”

See s 13(1)(f) and (i) read with s 11(d) of the Prescription Act. On the other hand, a party's right to enforce the award by way of application to have it made an order of court prescribes within three years of the publication of the award. *Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 4F-H; *Trust Bank of Africa Ltd v Dhooma* 1970 (3) SA 304 (N) at 308; *Swadif (Pty) Ltd v Dyke NO* 1978 (1) SA 928 (A) at 944E-F; *Primavera Construction SA v Government: North West Province* 2003 (3) SA 579 (B) at paras 13 and 14. If the arbitration agreement provides between the parties that the arbitrator's award shall have the status of a judgment of a court the prescription period applicable to a judgment debt shall apply in such a case. See *Blaas v Athanassion* 1991 (1) SA 723 (W) at 725H-J.”¹

- 7] The court also confirmed that the fact that a review application has been filed does not suspend the enforceability of an award automatically, but the court may do so on application in terms of section 145(3) of the LRA.² Importantly, the court also held that the mere filing of an answering affidavit by the award creditor in a review application, does not amount to taking a legal step to recover the debt owing in terms of the award that would interrupt the running of extinctive prescription in

¹ Para [33] at 1318. In passing, it should be noted that it does not appear from the judgment in *Sifuba's* case, that the question was raised whether or not an arbitration award's status in terms of the Prescription Act might in any way be affected by s 143(1) of the LRA, which states that an '*arbitration award ... may be enforced as if it were an order of the Labour Court, ...*'

² Para [36] at 1319.

terms of section 15(1) of the Prescription Act:

*“[41] The answering affidavit, in casu, is not a process whereby a creditor claims the payment of a debt. In this matter a counter-application would have sufficed as a process whereby a debt is claimed. An answering affidavit is not a counter-application. If the applicant wanted to apply, simultaneously with its opposition to the review application, to make the arbitration award an order of court it should have launched a counter-application. Sifuba's request in the answering affidavit is not a counter-application.”*³

8] In *Sifuba's* case the employer was the respondent party in an application to enforce the award, which had raised a special plea of prescription. In this instance, it is the applicant who seeks to invoke prescription as a distinct cause of action after pleadings have closed and not as a defence. Section 17(2) of the Prescription Act 68 of 1969 states:

“A party to litigation who invokes prescription shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the

3 Paras [40] – [41] at 1320.

proceedings.”

(emphasis added)

9] The respondents’ attorneys refer to the judgment of Hendricks J in the case of ***Minister of Justice and Constitutional Development v Mathobela and Others*** (1185/05) [2007] ZANWHC 5 (25 January 2007). Judge Hendricks summarised the courts’ approach to the way in which prescription can be introduced to proceedings as follows:

*“[13] In the case of **Rand Staple-Machine Leasing v I.C.I. (SA) Ltd** 1977 (3) SA 199 (W) Viljoen J stated the following on page 201 H – 202 A:-“I do not agree with Mr Kuny that the interlocutory motion proceedings initiated by a party who wishes to amend his pleadings are such proceedings as are envisaged by sec 17 (2) of Act 68 of 1969. The litigant who invokes prescription is invariably the defendant or the defendant in reconvention in trial proceedings or the respondent in motion proceedings and the document to be filed by him of record in the trial proceedings is his plea or plea in reconvention or his opposing affidavit in motion proceedings.”*

(My underlining.)

*I am in full agreement with this **dictum** of Viljoen J.*

*[14] In **Heeriah and Others v Ramkissoo** 1955 (3) SA 219 N Milne J states the following on page 225 G – 226 A:-*

“The question of prescription was not raised by the defendants in their plea, nor was any application made to the Magistrate or to this court to amend the plea so as to refer to it. I mention this because it is provided for in sec 14 of Act 18 of 1943, as follows:- ‘A party to a suit who raises prescription shall do so in the pleadings: Provided that the court may allow prescription to be raised at any stage in the proceedings.’

I think that the requirement that a party to a suit who raises prescription shall do so in the pleadings, is peremptory in this sense that the court will not hold a claim made before it to be prescribed by extinctive prescription unless the prescription is raised in the pleadings, whether in convention or reconvention, though I take it that the word ‘pleadings’ would be extended to cover affidavits if the relevant proceedings were by way of application or cross-application. I think that what was intended by sec 14 was that prescription must be specifically raised in the pleadings (or affidavits, as the case may be) where it is relied upon as rendering unenforceable the claim made by the opposite party.”

(My underlining.)

[15] Though Section 17 (2) refers to “relevant document” and not specifically to “pleadings” as contained in its predecessor (Section 14 of Act 18 of 1943), I am of the view that the “relevant document” is either a

plea (special plea) in trial proceedings or an opposing affidavit in motion proceedings.

[16] In my view heads of argument is an aid prepared by counsel or an attorney or a litigant for the convenience of the Court. Heads of argument cannot be regarded as evidence by a party. In my view the way to invoke prescription as envisaged in Section 17 (2) is either by way of a plea (special plea) in trial proceedings or an opposing affidavit in motion proceedings. First Respondent should have filed an opposing affidavit even if the only issue contained therein would have been prescription. By raising the issue in the manner it did, the First Respondent has, in my view, done so in an incorrect manner.”⁴

¹⁰ I believe the same considerations apply to the manner in which the the applicant has sought to raise the issue of prescription, quite apart from whether it was even entitled to raise it given that the applicant had not taken a step to enforce the award. In this instance, the matter was not raised in the affidavits, nor was it even raised in heads of argument or at the hearing, but simply in the form of a letter as an afterthought. Even if it was possible for the applicant to raise prescription, I do not think that the interpretation of the phrase ‘the relevant document filed of record’ can encompass the applicant’s letter, any more than it includes heads of argument. In any event, as the applicant was not raising prescription as a defence to the third respondent’s claim it was ill-founded in the first

4 Paras [13] – [16] of the unreported judgment.

place.

^{11]} Accordingly the issue of prescription cannot be entertained in these proceedings.

The arbitrator's findings

^{12]} In deciding the question of procedural fairness the arbitrator found that the chairperson had interfered "too much with the process instead of demonstrating impartiality" as a chairperson. She found that Montso's second representative in the hearing had been warned by the chairperson in circumstances where the first representative had been charged for misconduct for asking certain questions in the hearing. The arbitrator believed this constrained the employee's representative in the conduct of his defence of the employee and compromised the principle that justice must not only be done but be seen to be done. For this reason, the arbitrator found the dismissal had been procedurally unfair. This issue is discussed in greater detail later in this judgment.

13] Before mentioning the arbitrator's findings on the question of substantive fairness, it is necessary to elaborate a bit on the context in which the insolence and alleged refusal to obey a command took place. Groenewald said that he had originally discussed the question of Montso's transfer with him, but at that time had not given him a date of the transfer. It appears that it was only on 29 May 2006 that Montso was instructed to report at All Lite the following day.

14] According to the testimony of S Mokake, who was the supervisor who gave Montso the instruction to report at All Lite, Montso raised the question of transport money to go to All Lite. He also raised the fact that he was a shop steward and needed to serve his constituency at Giflo, which among other things required him to attend union meetings at 16h00 on Wednesdays at Giflo's premises.

15] When it was reported to Groenewald that Montso was refusing to go to All Lite unless he was given transport every morning and was back at Giflo by 16h00 on Wednesdays to attend union meetings, Groenewald phoned the applicant and told him that he must go to All Lite the following morning. Groenewald complained that Montso had responded rudely to him because Montso put the phone down on him during the phone conversation, but Groenewald conceded that he could not be sure if it was Montso who cut him off.

16] On 30 May 2006, Montso did not report for work at All Lite but reported at Giflo, contrary to Groenewald's instruction to him. Groenewald then called a meeting between himself, D Lubbe, and Montso in which he

reiterated the instruction that Montso must report for work daily at All Lite. He testified that Montso responded disrespectfully by shouting at him and then covering his ears with his hands. Montso admitted to putting his hands over his ears, but denied that he shouted at Groenwald. Rather he claims he was the one being shouted at, and he covered his ears with his hands to prevent himself being provoked to react in a similar fashion.

17] Despite the tensions in this interaction, management did agree to give Montso transport money up front, contrary to the company's normal policy of not paying transport allowances in advance. After the meeting Montso was given R 50-00 for transport and the company still transported him to All Lite that day. The events up to this point were dealt with under charges one, two, four and five against Montso.

18] The third charge against Montso related to an allegation that he was singing and dancing in the grinding room area, as a result of which other workers were watching him instead of working. Mr Heyneke, the grinding room manager, testified that when he approached Montso to stop his distracting behaviour, Montso did not respond but simply waved his hand at him, closed his ears with his hands and walked away. Montso simply denied having behaved like this in the grinding room but does admit that he was there while waiting for his transport to All Lite.

19] The arbitrator pronounced on the issue of substantive fairness thus:

"With regard to the substantive fairness I am also persuaded to agree with the applicant that the applicant was not insolent towards his superiors. He closed his ears because he was being shouted at and he was restraining himself from acting in like manner and undermining authority. With regard to [his] refusal to obey lawful instructions on that day, I find the applicant's explanation very reasonable that he did not have transport money due to the fact that he was given short notice of a transfer. He was actually told to go to All Lite on 29th May and the respondent had not made any prior arrangements to warn the applicant on time about such a transfer. I cannot accept the respondent's argument the applicant was expected to have money because it was the beginning of the week. People budget for different things in life with the money and it was very important for respondent to give the applicant adequate notice about the transfer to All Lite to let him budget for the transport. I also disagree with the respondent's argument that the applicant wanted to change the company's policy by asking for money in advance. He was simply not informed on time about the transfer and had just incurred expenses when he buried his grandmother.

I find it was unfair to dismiss the applicant for the offences he

was charged for. There was no conclusive evidence that the applicant was insolent with regards to the three charges and I find the applicant not guilty of all the offences for which he was charged."

Grounds of review

20] The applicant broadly claims that the arbitrator "...committed gross irregularities in relation to the conduct of the matter and that she did not properly apply her mind to issue and facts which were pertinent before her and the conclusions which she seeks to draw not justifiable."

However, such a general statement needs detailed substantiation, and it is only when the specific complaints raised by the applicant are considered that the real merits of the review application can be properly evaluated.

21] The applicant proceeds to point out aspects of the arbitrator's award which it describes as 'factually incorrect'. It complains that the arbitrator appeared to accept everything in Montso's evidence without appreciating the applicant's evidence.

22] For instance, it cites the fact that the arbitrator stated in relation to what transpired at the disciplinary hearing that: "*The representative had to*

cross-examine Mr Groenewald after listening to a tape recording which was not even very clear because the chairperson could not allow Mr Groenewald to testify for the second time to be cross-examined by the new representative". The arbitrator was referring to what happened in the disciplinary hearing after Montso's first representative had been expelled from the hearing by the chairperson. The applicant points out that in fact Groenewald was cross-examined by the second representative after being given an opportunity to listen to the recording of Groenewald's evidence in chief, and that no objection had been raised to this procedure at the hearing. In her evaluation of the procedural fairness of the enquiry the arbitrator made no reference to this issue. Rather, her findings in this regard relates more to what she believed was the stifling effect of the chairperson warning the second representative at the enquiry not to misconduct himself like his predecessor.

The arbitrator's finding of procedural unfairness

23] Another supposedly important flaw in the reasoning of the arbitrator identified by the applicant was that she stated that the second employee representative at the disciplinary enquiry was warned by the presiding officer at the *commencement* of that hearing that he would be charged in the same way as his predecessor if he did not conduct himself properly. The applicant makes much of the fact that this warning was not issued at the start of the enquiry because the second representative was not present at that stage. It points out that the arbitrator herself later mentions that the fourth respondent testified that it was in the *middle* of

the hearing that the second representative was warned he would be charged in the same way as his predecessor if he continued asking "certain questions".

24] The applicant emphasises also that it was not the questions which the first representative asked but the manner in which he conducted himself during the course of the hearing which led to him being expelled and charged with misconduct. In the arbitration hearing, the chairperson of the enquiry, Mr L Steenkamp, testified it was not anything in particular which the first representative had said which was disrespectful, but the 'aggressive' way in which he said it. It is true that the arbitrator concluded that the Montso's second representative, Mr G Mashiane, felt constrained in asking questions because his colleague had been charged for misconduct for asking certain questions.

25] This was not an entirely accurate reflection of the evidence. What Mashiane complained about was that he had been told he would be charged if he was disrespectful and disrupted the hearing. However, it is clear from his evidence that he certainly did feel uncomfortable when he examined the employer's witnesses and this constrained him in the conduct of the defence of Montso. I do not think that in the circumstances, much turns on the fact that the arbitrator incorrectly referred to Mashiane's predecessor being charged for asking specific questions, rather than for acting disrespectfully. It was reasonable for the arbitrator to have concluded that threatening to charge a representative with misconduct, after his predecessor had just been expelled and charged for the way he had conducted Montso's defence,

would have dampened the new representative's own enthusiasm for spirited cross-examination and reduced his effectiveness as a representative. Nothing on the face of the record of the disciplinary enquiry demonstrates that Mashiane had committed misconduct which would have warranted such a warning.

26] When Mashiane was cross-examined in the arbitration hearing by Steenkamp, it was put to him that Steenkamp had only warned him at a stage *after* a verdict had been reached when an altercation had arisen about whether or not closing argument could be presented. However, Mashiane insisted that the occasion in question was merely the last time he had been accused of disrupting the enquiry and that the threat had also been made while he was questioning a witness.

27] The thrust of the arbitrator's finding was that Mashiane's ability to conduct his member's defence was inhibited and the chairperson had exerted an improper influence on him which rendered the proceedings unfair in the procedural sense. On the limited evidence available this was certainly a possible conclusion that might have been reached and I cannot say it was an unreasonable one.

28] In circumstances where one representative was already facing disciplinary charges relating to his conduct in the same hearing, management should be particularly sensitive to the possibility that such drastic action can cast a threatening and oppressive shadow over the continued proceedings, which might create an impression in the mind of the employee and his representative's that a robust defence will not be

LABOUR COURT

tolerated, especially if it involves challenging senior management witnesses. Other measures can be used to ensure orderly proceedings. Adjournments to allow the tempers of witnesses and representatives to cool, a cautionary word without the threat of disciplinary action, or the clarification of the rules of engagement are examples of less draconian ways of imposing order on unruly conduct. It is of course accepted that representatives of both parties should treat witnesses with respect and gratuitous abuse of witnesses is unacceptable, but it must also be recognised that in order to test a witness, propositions may be made and a witness's integrity may be challenged in ways which might not be appropriate in the context of ordinary workplace interactions between subordinates and superiors. Chairperson's should make due allowance for the adversarial context of an enquiry.

The grinding room incident

29] The applicant also submits that the evidence of Heyneke concerning Montso's behaviour in the grinding room on the morning of 30 May 2006 was completely ignored by the arbitrator. Mr Montso's response to Heyneke's account of what transpired in the grinding room at that time, which has been related above, was simply to baldly deny it

30] The applicant submits that because there was no good reason for Montso to be in the grinding room at the time as he was waiting for transport to All Lite, that Heyneke's evidence ought to have been

preferred. More pertinently, the applicant submits that if one rejects Heyneke's evidence, one must necessarily have concluded that it was trumped-up evidence. There was no reason advanced by Montso why Heyneke would have done that. Heyneke was not involved in the interactions between Montso and other managers relating to his transfer.

31]A related difficulty raised by the applicant regarding the arbitrator's evaluation of the evidence in the grinding room incident, is that Heyneke also testified that Montso had 'closed his ears' when he approached him to request him not to disrupt work in the grinding room. This evidence clearly resonates with the evidence of the other witnesses about the interaction between Montso, Groenewald and Lubbe the same morning. Although Montso provided an explanation why he closed his ears during his encounter with Groenewald and Lubbe, namely to avoid being provoked, the dismissive gesture he used was clearly one he was not averse to employing in his interactions with management.

32]The arbitrator's failure to explain why she simply accepted the applicant's version of the interaction with Heyneke and disregarded the latter's evidence does require an explanation, which is not apparent from her analysis of the substantive fairness of the dismissal. Accordingly, it must be concluded that the arbitrator failed to give consideration to relevant evidence in relation to this incident, which means she failed to consider the evidence for and against the charge arising from the incident in a balanced way..

The employee's failure to report for work at All Lite

33] In relation to the charge that Montso failed to comply with an instruction to report for work at All Lite on 30 May 2006 because he went instead to Giflo, the applicant submits that it is clear from the evidence that Montso did not comply with the instruction from Groenewald that he should report at All Lite that day. The arbitrator's analysis only deals with whether or not Montso had disobeyed the instruction in an implicit sense. Even if she did not find expressly that Montso had not complied with the instruction, it is implicit in her reasoning that he did receive the instruction, but that he had a good justification for not complying with it. She accepted Montso had a valid reason for not reporting at All Lite because he had no money for transport.

34] The applicant submits that the arbitrator failed to consider that Montso must have had funds for transport to Giflo in order to get there that morning and therefore he could have gone to All Lite. However, this was never put directly to Montso and the arbitrator's conclusion that his reason for not reporting at All Lite was a valid one was reasonable.

35] The upshot of the arbitrator's reasoning was that even if Montso was technically guilty of the charge of not reporting for work at All Lite, no sanction should have been imposed because of his explanation for not doing so. The arbitrator also pertinently points out that even if the policy of the company was that transport money would be paid in arrears, the applicant was only notified the day before he was supposed to travel to All Lite and would not necessarily have made provision for the additional transport costs on that occasion.

Insolence arising from the telephone conversation

36] Another ground of complaint raised by the applicant, which is difficult to distinguish from a ground of appeal, concerns the arbitrator's evaluation of the incident in which the applicant is alleged to have put down the phone on Groenewald during their conversation on 29th May 2006. The applicant contends that, in the light of other evidence relating to Montso's behaviour, the overwhelming probabilities were that he probably did put down the phone on Groenewald, given that he had a history of not obeying instructions. I agree with the applicant that this would have been a fair conclusion to draw on the probabilities. However, Groenewald himself conceded that he could not say that it was Montso who put the phone down and Montso's own evidence was that the telephone "just went off".

37] In the disciplinary enquiry, Montso had offered a different explanation for the termination of the telephone conversation. He claimed then that he could not hear because of the surrounding noise and switched of the phone.

38] The arbitrator's conclusion that Montso had not been insolent on this occasion is also one she did not explain, except to say there was no "conclusive evidence" that he was guilty on that occasion. Quite apart from what appears to be a criminal standard of proof applied by the arbitrator, the fact that there was evidence for and against the conclusion that Montso put down the phone on his manager demanded at least some explanation why the arbitrator reached the conclusion that

the employer had failed to discharge the onus of proving this charge.

39] There is also no indication the arbitrator even considered the other factual components of the charge of insolence which were based on what transpired during that phone call. Groenewald testified that Montso had shouted at him and repeatedly said "No, and no, and no, no..." while he was trying to speak to him. Under cross-examination, Groenewald further said that if Montso did have difficulties in complying with the instruction to go to All Lite, he could have said so during the telephone conversation. However Montso had refused to engage in any discussion after Groenewald had made it clear that the company was willing for him to continue attending the monthly shop steward meetings at Giflo, but not the weekly union meetings. Groenewald claimed that the issue of transport money never arose during that conversation.

40] Montso's version was that Groenewald was the one who would not listen when he raised the issue of transport money with him on the phone. He admitted saying "no" more than once to Groenewald when the latter repeated his instruction that he should go to All Lite the following morning. What he wanted to explain was that he said 'no' because he did not have transport money, but Groenewald would not allow him to. Montso testified: *"I did not shout at him. He said to me look, when you knock off do not come to Giflo, go straight home and the following morning you must report again at All Lite. Then I will meet you there and tell you everything I intend you to do."*

41] As already mentioned, Montso denied putting the phone down on

Groenewald and said that he did not know what happened to the call but it was just cut off and he did not know why. When confronted with his previous version of how the conversation terminated, which he presented in the disciplinary enquiry, Montso confirmed that despite Groenewald's own evidence that he could hear Montso clearly, it was noisy on his (Montso's) side of the phone. Nevertheless he said he did not hang up because of the noise and he denied making a statement to this effect in the disciplinary enquiry, even though it appears in the minutes of that enquiry.

42] On an overall consideration of the disputed contents of the telephone conversation, I am persuaded that the arbitrator did not give consideration to all the material evidence relating to the charge. In particular, she did not deal with important aspects of the alleged insolent conduct and gave no indication why she disregarded the contradictions between Montso's evidence at the enquiry and the arbitration, or why she simply ignored Groenewald's evidence of what he claims Montso said before they were cut off.

43] The arbitrator accordingly failed to consider relevant evidence in relation to this charge in addition to misconstruing the standard of proof that the employer had to satisfy in proving the charge.

The employee's disciplinary history

44] Lastly, the applicant submits that the arbitrator failed to give due weight to Montso's previous disciplinary history. However, the arbitrator did

acknowledge that Steenkamp testified that Montso was on a previous warning for a similar charge and that that was the reason his services were terminated. The arbitrator also acknowledged the evidence of Groenewald, who confirmed that he believed dismissal was appropriate because the applicant had been very disrespectful and had two previous warnings for a similar offence of refusing to follow the lawful instructions. In her analysis, the arbitrator further notes that Groenewald had conceded that the first written warning given had expired.

45] However, the arbitrator failed to address the relevance of the final written warning, which had been issued on 5 September 2005 and which was still valid at the time of Montso's dismissal. It is worth noting that the final written warning was issued as a result of his failure to deliver a report despite having already been given a written warning for failing to do so. It appears the arbitrator failed to give any consideration to this. Nevertheless, because the arbitrator had concluded that the applicant was not guilty of the charges, it follows that she would not have had reason to consider the relevance of any previous warnings because they would not have arisen as an issue. Accordingly, Montso's previous disciplinary history only becomes relevant in the context of re-evaluating the fairness of his dismissal after setting aside the arbitrator's findings on substantive fairness.

Conclusion

LABOUR COURT

46] In summary, I am satisfied that arbitrator's reasoning on the question of procedural unfairness is justifiable when evaluated against the evidence. The same cannot be said of the arbitrator's evaluation of the evidence of the substantive charges, which is wanting in a number of important respects, as discussed above. Given the time which has elapsed since the arbitration award was handed down and the adequacy of the record, this is a case in which it is appropriate for the court to substitute its own findings for those of the arbitrator and to substitute an order of relief in keeping with those findings.

Re-evaluation of the substantive fairness of the dismissal

47] In relation to the first charge of shouting at Groenewald and putting down the phone, the contradictory explanations given by Montso as to how the conversation terminated, suggest on the probabilities that he terminated it, because he would not go to All Lite unless his transport and meeting arrangements had been sorted out. It is not unlikely that he refused to go as instructed. Groenewald only phoned Montso because Montso had already told his other superiors that he would only go if he could return in time for meetings. Consequently he had not complied with Mr Groenewald's instruction. However, I also accept that it was not

unjustifiable for him to have tried to ensure that his transport arrangements were sorted out beforehand and to get clarity on how the move might interfere with his shop steward duties. Moreover, there is no evidence that he was refusing secondment to All Lite as such. Accordingly, his failure to report on 30 May 2006 at All Lite was not altogether unreasonable in the circumstances. On its own I do not think it warranted Montso's dismissal.

48] Nevertheless, those legitimate concerns could not justify his conduct in the grinding department, which was clearly disruptive and unprovoked. His response to Mr Heyneke was contemptuous and he offered no explanation why Heyneke would have falsely tried to implicate him, which follows necessarily from Montso's bare denial of this episode. Moreover, Heyneke's evidence that Montso blocked his ears is consistent with his conduct in the meeting with his other managers that morning. I am satisfied he most probably did behave as alleged and was guilty of the related charge. The previous final warning was clearly relevant and should be taken into account in assessing the gravity of his conduct.

49] What Montso's behaviour demonstrates, is that he did not accept the authority of management to manage as it saw fit. He was prepared to make fun of a manager, Heyneke, in front of Heyneke's staff in a

manner which showed he was thumbing his nose at managerial authority in the workplace. The fact that he conducted himself in that way despite a warning for refusing to obey an instruction issued after a previous warning to comply, indicates that his attitude towards managerial authority had not been moderated by the warning and there is no reason to believe it would improve if he was yet again issued with a final warning.

50] I have also indicated in the discussion of the arbitrator's findings on the Montso's alleged insolence during his phone call with Groenewald, that the arbitrator did not consider the factual allegation about what was said before the call ended, but dwelt on the question of *how* the call had terminated. Given Montso's conflicting evidence on how the call ended, I believe it is more probable he did terminate the call, a fact he had originally conceded in the internal enquiry, albeit that he said this was on account of the alleged noise. Secondly, I believe it is more likely that he was aggressive and obstructive in his conversation with Groenewald on the phone. It is clear from what transpired the following day that the firm was willing to accommodate Montso's request for transport money. There is no reason to believe if he had been prepared to discuss this with Groenewald on the phone that this issue could have been resolved then and there. It is more likely that the phone 'conversation' did not achieve anything because Montso was refusing to go to All Lite unless the problem of his attendance at Wednesday afternoon union meetings was resolved first. Montso agrees he said 'no' to Groenewald, and it is

more probable this was said in relation to his refusal to go to All Lite unless he could attend union meetings on Wednesdays at Giflo, and not because of a disagreement over funding transport.

^{51]} Accordingly, I do not think Montso's dismissal was substantively unfair, even if his conduct in failing to report at All Lite on 30 May 2003 was not unreasonable in the circumstances. The contemptuous attitude he displayed towards Groenewald and to Heyneke could not be justified. Moreover, the disrespectful conduct he showed towards Heyneke was particularly undermining of Heyneke as it occurred in front of Heyneke's subordinates in the grinding room. When this is considered against the backdrop of a final written warning relating to his refusal to accept instructions, the indications are that another final written warning was unlikely to modify his behaviour.

Remedy

^{52]} In this instance, I believe the inappropriate threat of disciplinary measures against the second representative in the context of the enquiry in question was sufficiently serious to warrant an order of three and a half month's remuneration.

Costs

^{53]}As both parties are partially successful and it cannot be said that either acted in bad faith in bringing or defending this application, no order is made as to costs in the main application. However, I have made an order in relation to the unnecessary additional costs the fourth respondent incurred in having to address the applicant's belated and misplaced prescription claim

Order

^{54]}In the light of the above the following order is made

- a. The second respondent's arbitration award issued on 03 February 2007 under case number MEGA 13041 is reviewed and set aside in respect of her findings that the fourth respondent's dismissal was substantively unfair and that the fourth respondent should be reinstated.
- b. The second respondent's findings are substituted with a finding that the fourth respondent's dismissal was substantively fair but

procedurally unfair

- c. The relief of reinstatement in the second respondent's award is substituted with an order that the applicant is required to pay the fourth respondent an amount equivalent to three and a half months' remuneration at the time of his dismissal equivalent to R 20,328-00 within 15 days of the date of this judgment.
- d. The parties must pay their own costs for the review application, save that the applicant must pay the fourth respondent's costs of preparing a reply to its claim that the arbitration award had prescribed.



R LAGRANGE, J

JUDGE OF THE LABOUR COURT

Date of hearing: 20 August 2010

Date of judgment: 16 August 2011

Attendance:

For the Applicant: Mr Brian Bleazard of Brian Bleazard Attorneys.

For the Respondent: Advocate Jabu Luvuno instructed by Ranamane Phungo Incorporated.