IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Case No: D224/06

Reportable

In the matter between

VISHNU CHETTY APPLICANT

And

TOYOTA SOUTH AFRICA (PTY) LTD FIRST RESPONDENT

COMMISSIONER A.R. DORASAMY SECOND RESPONDENT

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION THIRD RESONDENT

JUDGMENT

SHAI, AJ

INTRODUCTION

[1] This as an application for review and setting aside of the award issued by the second respondent "the Commissioner" dated 20th February 2006 under the case no KMDB2348-05 and issued under the auspices of **Commission for Conciliation,**

Mediation and Arbitration,(**the CCMA**). Further that, the applicant prays that having reviewed and set aside the Commissioner's award the court should determine that the applicant's dismissal was unfair. The first respondent is opposing the application.

[2] The applicant was employed by the respondent as a Coordinator on the 16 October 1981 and a year later became an Industrial Engineer. He was dismissed by the first respondent on 21 September 2004 after a disciplinary hearing. He was convicted and dismissed on allegations that he circulated a racially offensive e-mail using company resources (a computer). The said distribution was against company policy.

[3] The decision to dismiss the applicant was confirmed on appeal on the 20th January 2005. He referred the dispute concerning the unfair dismissal to the CCMA and arbitration hearing was held on the 24th November 2005 and the award was issued on the 20th February 2006. In the award the second respondent confirmed the guilt finding and the dismissal.

THE FACTS

[4] On the 25th June 2004, applicant's manager, Mr. Basil Ramon and Emmanuel Killian, Human Resource Manager, informed the applicant about an e-mail which was found at a printer on the premises shared by about 80 people. He was accused of

circulating the e-mail and was suspended.

[5] It appears that at the disciplinary hearing two e-mails were at issue. Initially the respondent relied on an e-mail sent out at 18h46 pm and later during the cause of the hearing it introduced the one sent at 19h29 and it is this e-mail that led to his conviction and dismissal.

[6] The said e-mail was sent by the applicant to one Julies at the e-mail julies@bell.co.za and contained the following:

> *"Subject: A BLACK GUY AND A WHITE MAN WERE SITTING IN THE PARK.*
> *A black guy and a white man were sitting in the park.*
> *The white man had a pet monkey and a black guy was selling bananas.*
> *So the black guy said Mr. can u look after my bananas I am going to the toilet?*
> *"O yes go on ahead" said the white guy. When the black guy came back there were no more bananas and he is like "Where are my bananas?"*
> *The white guy says ask your brother, pointing at his monkey.*
> *The black guy just chilled. Then the white guy said, can u check out for your brother I am going to the toilet.*
> *The black guy says, its cool. When the white guy came back the monkey was dead and he is furious like what happened to my monkey!!!*
> *The black dude says "Mr. don't get involved it was a family affair!!"*

[7] As was indicated above he was found guilty and dismissed hence, the referral to the CCMA.

[8] At the Arbitration hearing the applicant's defense had three legs:

8.1 He had not sent it.

8.2 The e-mail was not offensive.

8.3 The First Respondent was not consistent in it's

application of discipline in the workplace.

[9] The second respondent found that the applicant had sent the e-mail and that it was racially offensive and confirmed the guilty finding and the dismissal of the applicant.

[10] The applicant in his Heads of Argument abandoned the defense as contained in paragraph [8.1] above, namely *"I had not sent it".*

GROUNDS OF REVIEW

[11] The applicant in it's review papers raise the following criticism of the second respondent's award in more specific form:

11.1 Contrary to the evidence before him, second respondent found that applicant was the only person present and failed to show that any other person would have been able to send the e-mails at that place and at the relevant time. This was raised against the background of the defense, *"I did not send the e-mail"*, as captured under paragraph [8.1] above. It was indicated above that the Applicant has abandoned this defense and I shall not deal with it for purpose of a finding.

11.2 The second respondent ignored the fact that the real cause of the complaint that Is, the discovery of a hard copy of the e-mail by a shop steward, had nothing to do with him.

11.3 Second respondent failed to address the numerous

procedural issues placed before him and failed to give any reasons for rejecting same.

11.4 The second respondent ignored all the evidence relating to the issue of consistency as in the case of Mr. Ndlovu.

[11.5] The second respondent failed to *"examine"* the joke – was it racially offensive? If so, what race should be offended? The black race (comparison to monkey), or the white race (considered to be bigots)? Or both races?

[11.6] The second respondent failed to consider the further factors, namely:

- Whether the communication is racially offensive,
- Whether such communication is acceptable in the public domain.
- If not, whether, the offense is such that a dismissal should follow,
- The intention of the person sending the communication,
- To whom the e-mail was sent,
- The harm, if any, the communication caused,
- Any other relevant factors.

[12] The applicant submits that by acting in the aforesaid manner:

12.1 The second respondent failed to comply with the provisions of the Act pertaining to the conducting of a fair, valid and proper Arbitration proceedings in terms of the Act;

12.2 Factual findings made by the second respondent did not

correspond with the evidence properly before him;

12.3 The second respondent exceeded his powers in terms of the Act;

12.4 The second respondent did not properly, rationally and justifiably apply his mind to the facts in or the law in this instance lending weight to the first respondent's versions which were tainted with improbabilities and inconsistencies;

12.5 The second respondent failed to properly apply the provisions of the Constitution of the Republic of South Africa in this instance;

12.6 The second respondent failed to afford the applicant a fair and proper hearing in the circumstances and failed to properly conduct the Arbitration proceedings in the circumstances;

12.7 The award of the second respondent is not justifiable in relation to the reasons given for such Award and such Award is not rational or justifiable in its merit or outcome.

EVALUATION

[13] The test for review has been laid out in the well known case of *Sidumo & Another v Rustenburg Platinum mines Ltd and Other [2007] 12 BLLR 1097 [CC].* The court therein held that the provisions of *Section 145 of the Labour Relations Act 1995 ("the Act")* were suffused by the Constitutional standard of reasonableness. This is arrived at by answering the question which was formulated in *Bato Star fishing (Pty) Ltd v minister of*

Environmental Affairs and Others [2004] 7 BLLR 687 [CC] as follows: *Is the decision reached by the Commissioner one that a reasonable decision maker could not reach?*

[14] To succeed in the application the applicant must therefore satisfy this court that the second respondent's decision is one that a reasonable arbitrator could not have reached.

[15] I have refrained from dealing with grounds of review as captured under paragraph 11.1 and 11.2 above as they hang on the defense the applicant pursued at the arbitration namely *"I did not sent it".* Since the applicant does not contend the finding that he was the one who sent the e-mail it will serve no purpose to comment further on this.

[16] The applicant complains that the second respondent failed to address the numerous procedural issues placed before him and failed to give any reason for rejecting same. However, nowhere in his papers does the applicant list these complaints. Further that the applicant's Heads of Argument also failed to address this criticism. I therefore do not find any irregularity on the part of the Commissioner.

[17] The applicant further criticizes the Commissioner for ignoring all the evidence relating to the issue of consistency in particular about Mr. Ndlovu.

[18] In *Mashiane v Dolie No and Others [2010] 4 BLLR 422 [LC] at paragraph 17, Molahlehi J* said the following in so far as gross irregularity is a ground of review:

> *"The test for gross irregularity as was articulated in Goldfields Investment Ltd and another v City Council of Johannesburg and Another 1938 TPD 551 is summarized in Sidumo by Ncgobo J as he then was (at 1178 F) as follows:*
>
> > *"Patent irregularities; that is, those irregularities that take place openly as part of the conduct of proceedings, on the one hand, and latent irregularities, that is irregularities that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by the decision maker."*

[19] He went further at paragraph 18 to say that Labour Court has previously held that the crucial enquiry in determining the existence of gross irregularity is whether the conduct of the decision maker complained of prevented a fair trial of issues. Where it was found that the Commissioner failed to apply his or her mind to a matter material to the determination of the dispute, this was held to be a gross irregularity.

[20] At the Arbitration the applicant raised the issue of consistency in that one Ndlovu, a team leader, was charged of a misconduct for referring to a team member, a (black) person a baboon, which the employer categorized as category 3 offense which the first respondent says it is distinguishable from category 4

misconduct of which the applicant was charged of. Mr. Posit Ndlovu was given a final written warning for this misconduct. Further that, there was also the issue of Mr. Nigel ward and Mr. Henry Pretorius who were convicted for *"abuse of company e-mail facility….by distributing gender insensitive material"* but were not dismissed.

[21] Nowhere in the award of the second respondent is this matter given attention at all and it is central to the issue of the fairness of the sanction and whether or not all the elements of the substantive dismissal have been complied with. Schedule 8 of the Labour Relations Act of 1995, item 7 provides that:

> "Any person who is determining whether a dismissal for misconduct is unfair should consider…
> (a),
> (b) if a rule or standard was contravened , whether or not –
> (i),…….
> (ii)……
> (iii) the rule or standard has been consistently applied by the employer……."

This is even more so where the issue of consistency was raised during the cause of the proceedings.

In line with this code of practice and the authorities mentioned above there is no doubt this amounts to a gross irregularity.

[22] The ground of review as captured under 11.5 and 11.6 will be dealt together as they are intertwined. Herein the second respondent is essentially criticized for failing to examine

whether the contents of the relevant e-mail amounted to a 'joke' or not. The applicant set out a number of factors which should have been looked into by the second respondent.

[23] The commissioner accepted that the applicant and his representative have admitted that the said e-mail was racially offensive. Based on this and the evidence of the other witnesses, especially for the first respondent, the commissioner concluded that it is racially offensive. The applicant through his Counsel contested that the said admission should not be regarded as an admission but was at pains to justify such a conclusion.

[24] At the disciplinary hearing the evidence went as follows:

"Mr. Venter : Thank you, what is your opinion of this e-mail?

Mr. Van Niekerk : Mr. Chairman, it's common cause that these are racial things. We do not argue that, it is not necessary to go through that.

Chairman : Well. Let's proceed, Mr. Venter, I think that it's common cause, but let's proceed."

[25] Further that, the applicant himself testified as follows at the disciplinary hearing:

"Mr. van Niekerk : Do you have you ever circulated racially offensive?:

Mr. Chetty : No

Mr. Van Niekerk : Why not?

Mr. Chetty : Well, people get upset and that's the policy of the company to do that.

Mr. van Niekerk : You find it offensive?

Mr. Chetty : Yes

Mr. Van Niekerk : Have you even seen this, have you seen this e-mail on your computer?

Mr. Chetty : No

Mr. van Niekerk : When did you first time see this e-mail?"

[26] Clearly, it is mind boggling for anyone to suggest that the above does not amount to an admission, clearly the intention of which was to put the matter beyond dispute. This admission is consistent with the line of defence pursuit by the applicant, namely, that he did not send the said e-mail. Now that he admits to sending the e-mail he seeks to disown the admission. It can't be.

[27] The Commissioner accepted the above evidence together with the other evidence put before him and concluded rightly so that the e-mail is racially offensive. She need not do more. In any event looking at the e-mail I'm of the view that any reasonable man in the position of the commissioner would conclude that the e-mail is racially offensive. Therefore I find that no irregularity was committed by the commissioner on this ground.

[28] Having found in paragraph 21 above that the commissioner committed an irregularity in so far as the issue of consistency is concerned I make the following order:

1. The award issued by the commissioner dated 20 February 2006 under case no KMDB2348-05 is reviewed and set aside,
2. The dispute is referred back to the Third Respondent to be arbitrated by a commissioner other than the Second Respondent.
3. I make no order as to costs.

_____

SHAI, AJ

DATE OF HEARING	:	04 February 2011
DATE OF JUDGMENT	:	18 February 2011

APPEARANCES

FOR THE APPLICANT	:	Adv T SEERY
Instructed by	:	JAY REDDY ATTORNEYS
FOR THE RESPONDENT	:	V.M OOSTHUIZEN of SHEPSTONE & WYLIE ATTORNEYS