REPUBLIC OF SOUTH AFRICA

Reportable

# THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

## JUDGMENT

Case no: P 703/10

In the matter between:

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| **SA BREWERIES LIMITED** | **Applicant** |
| And | |
| **THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **First Respondent** |
| **COMMISSIONER THEODORUS POTGIETER** | **Second Respondent** |
| **JARROD VAUGHAN CLARK** | **Third Respondent** |

**Heard**: **22 February 2012**

**Delivered**: **10 May 2012**

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**JUDGMENT**

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BHOOLA J

Introduction

1] This is an application to review the second respondent's arbitration award under case number ECPE 3146/10 dated 7 November 2010, in which he concluded that the dismissal of the third respondent ("the employee") was procedurally and substantively unfair and reinstated him retrospectively with an order of four months' compensation.

Background facts

2] The facts are largely common cause. The employee was a sales manager at the applicant and was dismissed on 28 June 2010 following charges of dishonesty, gross misconduct and bringing the applicant into disrepute.

3] The first and second charges, which are the most relevant to this review, were formulated as follows :

> Charge 1: Dishonesty in that you instructed the credit department on the 20th of May to transfer the outstanding balance of Tapa's debt to your cost centre in order to clear his balance with SAB. It is further alleged that this was done in order to influence the outcome of a recruitment decision that had been vetoed as the incumbent owed us money.
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> Charge 2 : Gross misconduct in that you wilfully transgressed the recruitment policy and procedure by attempting to send Donovan Doyle, the previous owner of Tapas, a former customer of ours, for psychometrics after being informed by the HRS that:
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> a) we had not yet advertised the position;
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> b) the candidate was not suitable for employment with SAB as he owed us and various customers in the trade money;
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> c) we could not send him for assessment as he had not yet completed the interview process.

4] Charges three and four related to the employee's conduct in bringing the applicant's name into disrepute by (a) placing orders with a supplier without making arrangements to settle the outstanding amount and (b) by promising marketing funds and support to SAMDB without attending meetings, answering correspondence, and other conduct.

5] The employee was found guilty of these charges following a disciplinary enquiry and an internal appeal. He was dismissed on 28 June 2010 and referred a dispute to the first respondent which was arbitrated by the second respondent ("the arbitrator"). The arbitrator found that his dismissal was procedurally and substantively unfair.

Grounds of review

6] The applicant relies in its heads of argument on the ground of review that the arbitrator unreasonably and unjustifiably failed to consider the evidence before him. In amplification of this ground the applicant alleges that the arbitrator failed to have proper regard to the evidence pertaining to the following :

6.1 Heather Muniz (one of the applicant's witnesses) initially testified during cross examination that everybody knew about the outstanding Tapa's debt that was transferred to the employee's cost centre. However in cross examination she clarified this by testifying that only the Finance Department knew about this.

6.2 The email in which the employee gave instructions to transfer the outstanding Tapa's debt to his cost centre (dated 20 May 2010) was only forwarded to the credit clerk and not to other employees.

6.3 Muniz testified that the amount transferred to the employee's cost centre was slightly less than R10 000.00 and the employee only had authority to request debts of less than R10 000.00 to be transferred to his cost centre.

6.4 Muniz did not concede that nothing was done deceitfully because "everybody knew" about the transfer. She initially testified that everyone was aware and then conceded that this was not the case.

6.5 Theresa Davidson testified that she was not informed about the transfer, that the employee attempted to circumvent her and that he could accordingly not be trusted.

6.6 The employee instructed the credit department to transfer only R9800.00 of the debt to his cost centre. All transactions of over R10 000.00 had to be authorised by his supervisor.

6.7 The employee did not follow the correct procedure when he attempted to recruit Doyle.

6.8 The applicant did not have a “fail forward policy” that applied to recruiting employees.

6.9 The steps in the recruitment policy were not always strictly adhered to, as admitted by Virginia Solomons, although at the end of the day all the steps were all generally followed as required by the recruitment policy.

6.10 There was no available position for Doyle at the applicant. The employee had been informed that Doyle could not be appointed into a training position as it was a dedicated affirmative action position.

6.11 Psychometric tests were always arranged by the applicant’s human resources department and not by the employee.

6.12 Davidson testified that the employee did not act in good faith towards the applicant in relation to all the charges.

7] The applicant supplemented the above averments in its supplementary affidavit in terms of Rule 7A(8) by including the following evidence that the arbitrator did not have regard to:

7.1 Solomons testified that it was company procedure to follow the applicant’s recruitment policy when an employee is recruited. The employee always intended to avoid the procedure by having arranged for Doyle to go for psychometric testing before he was even interviewed through the correct procedure. The employee was persistent in sending Doyle for testing despite her informing him that the applicant could not recruit him.

7.2 Muniz testified that it was rather strange that the employee copied Solomons on his email informing her of the writing off. This reflected his intention to get Doyle recruited. She said there was no reason for employee to have the debt transferred to his cost centre as it was not a case where the applicant owed him money. The applicant's witnesses testified that bad debts were normally only written off after a customer who did not want to pay was handed over to the attorney for recovery.

7.3 Davidson confirmed that it was not common practice to settle the accounts of customers. Her uncontested evidence was that the employee never informed her of the transfer of the debt to his cost centre. She would have taken issue with the arrangement had she been copied on the emails. Since the amount was less than R10 000.00 she would not have known about the arrangement as she only got involved in amounts in excess of this. The employee, despite having had an opportunity to do so when she told him to cancel the psychometric test, failed to inform her about the transfer and was not transparent in what he was doing. He did not want to follow the instruction issued by Solomons to cancel the test and only did so when she instructed him. The employee always attempted to circumvent her. As District Manager of the employee she was deceived by his actions to transfer the debt. She was not aware of a "fail forward policy" that the employee was relying on.

7.4 In relation to the third and fourth charges Davidson testified that there were steps the employee could have taken to avoid them but he failed to do so. If he had run the events professionally there would have been no complaints.

8] The applicant submits, in its written heads of argument, that the clear import of the allegation of dishonesty was that the employee had acted less than transparently and in circumstances where he had placed the interests of the customer above that of the applicant. The record of the proceedings makes it clear that he has to date not put up a credible explanation for releasing Doyle from the debt, which in essence constituted a gift to him of just under R10, 000.00. In these circumstances not only did the commissioner fundamentally misconstrue the substance of the allegations preferred against him, he also made no endeavour to analyse the facts with a view to determining the probabilities, and more importantly, whether or not the employee was motivated by ulterior purpose. He failed moreover to consider the important credibility issues that arose.

Submissions made by the parties

9] Mr Grogan submitted that the applicant had relied in its original heads of argument on an erroneous statement made in an unsigned pre-trial minute that the employee and Doyle were "house friends". In the supplementary heads it was conceded that the reliance on this fact was misplaced. The main ground of review, he submitted, is whether the arbitrator had regard to the material facts. This is a process-based review which he submitted involves considering, on the authority of *Gaga v Anglo Platinum Ltd & others*[1] whether the commissioner applied too narrow a definition or overlooked certain considerations and made a material error that denied the applicant a full and fair determination of the issues, thereby committing an irregularity or misconduct. Mr Grogan submitted that if regard is had to the facts the first and notable fact is that the third respondent was a senior manager. Doyle operated a liquor outlet and for various reasons ran up a debt of just under R10 000.00 with the applicant. In February 2010 he was interviewed for a position as Events Representative with the applicant and on 16 February 2010 was shortlisted with one other preferred candidate. This was not a job in the employee's department. He was scheduled for a psychometric test but when it came to the attention of the Human Resources department that he was indebted to the applicant and to some customers, it was considered to be invidious that he should represent the applicant to persons to whom he owed money, and the test was cancelled. He was informed that as long as he remained indebted to the applicant there was no prospect of employment. In the meantime the employee and Doyle had been in contact with a view to employing Doyle in the

1 (2012) 33 ILJ 329 (LAC) at [41].

employee's department, and in May 2010 the employee approached Ms Solomons in the Human Resources department and simply requested her to arrange a psychometric test for Doyle, despite the applicant's recruitment policy requiring a 24-stage recruitment and selection procedure. Solomons refused to schedule the test and informed him that as long as Doyle owed the applicant money there was no prospect of him being employed by it and there was thus no purpose to holding a psychometric test. The employee persisted and explored the possibility of paying for the test from his cost centre and booked the test. Ultimately Solomons informed Davidson (who is the employee's immediate superior and also Divisional Manager) who instructed him not to proceed with the psychometric test. He then cancelled the test. A day or two later the debt owed by Doyle was paid off by crediting it to the employee's cost centre. The employee informed Solomons on 17 May 2010 that Doyle had in fact paid off his outstanding debts to the applicant. Davidson's evidence was that she telephoned the employee on 18 May 2010 and informed him that at no stage would Doyle pass the credit checks required in the recruitment process because of the debt he owed to the applicant. At no stage did he inform her that he intended sorting out the debt. She subsequently found out that the debt had been written off and that Doyle had ceased trading. There was no explanation as to why the employee went to the lengths he did to write off the debt.

10] This is where the patently dishonest conduct becomes apparent, Mr Grogan, submitted. What the arbitrator is required to do is to examine the facts in light of the charges and determine whether the employee is guilty of the charges. What he did instead was to set out all the evidence in his award and then address the issue of whether the applicant had led sufficient evidence on the charges. On this approach he found that none of the facts proved any dishonesty on the part of the employee. Mr Grogan submitted accordingly that this reflects a failure of his duty to subject the charges to proper analysis.

11] Mr Grogan submitted that in this context it was common cause that the employee cleared the debt and that this was done two days after the cancelled psychometric test. This creates a *prima facie* assumption of dishonesty i.e. that the writing off of the debt was done to influence the outcome of the recruitment decision, and obliged him to provide a credible explanation. His motive becomes critical and this is the fundamental issue the arbitrator failed to apply his mind to. Instead what he did was to simply focus on the literal meaning of the word dishonesty and this led to the finding that since the writing off was done openly there was no proof of dishonesty. This is the first basis for the finding that he did not act dishonestly. The arbitrator's second reason is that since the writing off was done in accordance with the credit controller's instructions, it was not dishonest. Mr Grogan submitted that if the arbitrator had actually considered the two points instead of simply stating them, he would have had to rule that the communication between the parties, which he found indicated openness, all occurred around February to March 2010 – and all related to an attempt by the credit control department to get someone to take responsibility for Doyle's debt. This was in fact two months before the final date on which the employee decided to subsume the debt (May 2010), which coincided with the date on which he was making arrangements to recruit Doyle. His conduct had nothing to do with Muniz's request that someone should offer to assist Doyle. He was therefore the initiator of the scheme to write off the debt and the person who should have informed Davidson of his intention to do so. As sales and marketing manager he had a discretion to incur debts of up to R10 000.00 and to charge them to his cost centre, and he knew that anything over and above that amount would require approval from Davidson. Doyle's debt was more than R10 000.00 because it had been handed over to the applicant's attorneys for collection and therefore included legal and collection fees. The employee had conveniently arranged with Doyle for his cost centre to pay R9800.00 and for Doyle to pay the legal fees and costs himself. This quite adroitly brought the debt within his level of authority. Davidson's evidence was that writing off of debts ordinarily fell within the made of the applicant's board of directors. She only became aware of the arrangement at a later stage, testified that it was highly irregular and she was not kept abreast of developments. Her evidence was that she would most certainly have taken steps to address the issue had she been made aware of it.

12] Mr Grogan submitted that the arbitrator made much of the concession by Muniz that the employee was not deceitful. However, this ignored the fact that Muniz also said it was dishonest to use the applicant's money to pay a debt the customer should have paid. It was not for Muniz to determine the employee's state of mind but for the arbitrator to make this determination based on the facts but his level of analysis is a mere acceptance of the employee's *ipse dixit* to the effect that if he intended to deceive he would not have sent the email to the finance department disclosing the writing off.

13] For these reasons, Mr Grogan submitted that the arbitrator adopted a piecemeal approach in that he failed to see the link between the first and second charge. He therefore failed to draw the necessary conclusions from the conduct of writing off the debt and the strenuous attempts to expedite the appointment of Doyle. If he had taken account of the totality of the circumstances and facts he would have examined the notion of deceit in this context and would have concluded differently.

14] Furthermore, in evaluating the arbitrator's approach to the employee's conduct Mr Grogan urged this Court to have regard to his discussion on the meaning of dishonesty that precedes his analysis of the evidence and argument. Despite discussing the meaning of the term he fails to appreciate that the employee was charged with being less than straightforward with Davidson and Solomons. The effect of all of this on the employment relationship is critical. In this regard Mr Grogan cited as authority *Carter v Value Truck Rental (Pty) Ltd* [2] which held that dishonesty in the employment context involves deceit which occurs by omission or commission. It is the conduct by omission that is relevant in *casu.*

15] Mr Grogan submitted that in relation to charge two the arbitrator relies simply on the fact that the psychometric test was cancelled by the employee when he was instructed by Davidson to do so, and that prior

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2 [2005] 1 BLLR 88 at para [44].

thereto he had informed Solomons that he had arranged for the test. The arbitrator found that such conduct in itself did not constitute "gross misconduct" and that he had no malicious intent (which presumably meant that he did not intend to harm his employer).

16] Insofar as the arbitrator relied on the erroneous fact that the motive for his conduct was that he and Doyle were "house friends", Doyle had in fact confirmed in the disciplinary enquiry that they had been close friends for many years. However, Mr Grogan submitted that even if the employee genuinely believed (as he testified) that employing Doyle would have benefited the applicant, this would in any event have been insufficient to justify his conduct at all.

17] The other notable omission alluded to by Mr Grogan is the arbitrator's manifest failure to consider the effects of the employee's conduct on the employment relationship. He simply found that Davidson's views were based on her perception of dishonesty and that she did not say she had been deceived. The employee then resorted to the standard conspiracy theory and accuses her of being part of a clique, but the arbitrator fails to note that this was not put to her at all.

18] Mr Le Roux, representing the employee, submitted that the applicant had not remotely met the stringent test set out in *Fidelity Cash Management Service v CCMA and Others.*[3] In fact, he submitted, the evidence of dishonesty is so remote that it requires stringent forensic analysis of the award. The starting point as established in *Fidelity Cash* (*supra* at page 479) is to look at what the employee was charged with. What is significant in regard to charge one is that *at the time the debt was cancelled* the employee's decision to recruit Doyle had been vetoed. Muniz had said - without any qualifiers – that there was nothing inherently wrong with the writing off of the debt. She saw it as a moral and budgetary issue. The mere act of writing off the debt could not in itself be an act of misconduct although it may for associated reasons become misconduct. But then however, there would have to be a demonstrated factual matrix which would support impugning an otherwise innocent act. The arbitrator

3 (2008) 29 ILJ 964 (LAC).

therefore cannot be faulted for asking the question (about the transfer of the debt to his division), "but did he do it under cover of darkness" and finding otherwise since he had communicated quite openly to Rian Killian, Solomons and Muniz. It is also accepted in the applicant's supplementary heads that there was no hope of concealment and the transaction would eventually have come to Davidson's attention in due course. This dispenses with the notion that there was any dishonesty involved on the part of the employee. His evidence was that he did not see the need to be a "*snot neus"* manager who runs to his superior for every little decision, and in fact the "fail forward policy" encouraged managers to be robust in making decisions. Therefore, Mr le Roux submitted, the applicant failed to prove that dishonesty had been established and the arbitrator had not had regard to this. It now seeks to rely on the fact that he failed to inform Davidson that he was sorting out Doyle's indebtedness. Davidson's complaint is that when she instructed him on 18 May 2010 to cancel the psychometric test and said that one of the reasons Doyle could not be employed was that he was indebted to the applicant, he should have said he was in the process of sorting this out. His evidence was however that he had been communicating with Killian about who would subsume the legal costs and only decided to cover part of the debt a*fter* his discussion with Davidson (on 20 May 2010). Secondly, there was no reason for him to inform Davidson that he was intending to write off the debt in order to make Doyle recruitable, because at the time he wrote off the debt he could not have had this purpose in mind. The writing off could clearly on the evidence not have been for that purpose. His evidence was furthermore that had he intended to deceive Davidson he would have split the debt up into two amounts in order to disguise it. Davidson was in essence saying that he should have informed her that he intended to execute an act that fell within his authority. His evidence was that he was not required to inform her of each and every act he performs that is within his authority. Muniz has a different impression of where the dishonesty came in as her evidence was that her concern was that there was no budget to write off debts. She had in fact sought assistance for Doyle in mid- March when she communicated that the applicant was about to litigate against him for the outstanding sums and she asked if someone is “going to bail him out because we have no hope of recovering this debt”. In fact her evidence was that when the debt was incurred there was an understanding that the employee would stand for it. The employee also testified that Muniz had informed him the debt would revert to his cost centre as he had provided the stock to Doyle and would be liable in any event to make good on it.

19] The employee in any event provided a reasonable explanation, Mr Le Roux submitted, for the time lapse between the email from Muniz in March 2010 and the decision in May to write off the debt. This related to the applicant’s suggestion that there was nothing on the evidence that suggested that the debt was more recoverable in May and the employee should have refrained from taking the steps he did. When it was put to him that there was a gap he explained that it was financial year end and he was very busy and only on 17 March it was brought to his attention that the debt would be put to his cost centre if it was not paid. There can therefore be no suggestion that it was linked to a recruitment decision or that he was otherwise dishonest.

20] Mr Le Roux submitted that another attempt made by the applicant to try to identify the dishonesty, and which was simply a red herring and which it now accepts was a *bona fide* error, was the suggestion that his conduct was motivated by them being “house friends”. This is the only motive at the applicant’s disposal to prove the charge. In the absence of this fact it is now suggested in the applicant’s supplementary heads that his motive remains a mystery. However, if his motive is unknown it could hardly be argued to have been established that his motive was improper, let alone that it was one involving an attempt to influence a recruitment decision. The latter is utterly insupportable on the evidence. The evidence clearly establishes that as per the email from Solomons by 18 May 2010, two days prior to the transaction, the decision to recruit him had already been vetoed. Solomons in fact suggested[4] that there was another position for which Doyle could be considered when the debt issue was sorted out. She also pointed out that there was no doubt in her mind he could be an asset

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4 Bundle, page 403.

to the applicant. This rebuts the submission by the applicant that the employee was the only one who considered there to be some merit in recruiting him.

21] It was clear that the debt owed by Doyle to the applicant was just one of the impediments to his recruitment, and that the payment of his debt to the applicant would still not have resolved the problem. The email from the Events Manager, Russell Hunt of 19 February 2010 makes this clear. [5] Mr Le Roux submitted it is clear from the context of the discussion that the employee could not have rendered him eligible for recruitment by the applicant by settling that debt on its own.

22] Thirdly, the evidence indicates that the employee had given up on having Doyle recruited. This supposed scheme, that he would later resuscitate his efforts to recruit Doyle, was never put to him and it was clear on the evidence that he never made such further efforts.

23] Mr le Roux accepted that perceptions of relationships could arise but none of it is material to the decision. Moreover, it was never even suggested to the employee that he and Doyle were friends and the disciplinary enquiry evidence on this issue does not assist the applicant.

24] Furthermore, Mr le Roux submitted, the applicant’s “fail forward policy” implies that there is a level of robustness about the applicant’s operations and about recruitment decisions. It was not in dispute that this was the case and the arbitrator therefore placed some reliance on it. The worst for the employee was therefore that he could have been accused of taking the steps advocated in the recruitment policy out of sequence. Even Solomons conceded that she sometimes combined some of the steps in the policy and this cannot come close to being a dismissible offence. It was not the evidence that employer’s culture was that compliance with policy was cast in stone and that it was an offence to do anything out of sequence.

25] Mr Le Roux submitted therefore that the review constitutes a valiant

5 Bundle, page 400.

attempt to create an elephant in the room and say that the arbitrator failed to notice it. The applicant had initially relied on unreasonableness but is now trying to repackage the review as a process related irregularity. Mr Le Roux submitted therefore that in the circumstances it is clear the arbitrator asked the correct question, i.e. what are the hallmarks of dishonesty? He correctly pointed out that it requires active deviance and a failure to communicate. It cannot be said that no reasonable arbitrator could have concluded that there is no clear evidence of the dishonesty. The applicant now seeks to argue a process-related review and seeks remittal to the first respondent instead of substitution. However, he submitted, on either a reasonableness based on outcome or unreasonableness resulting from gross procedural irregularity there are no prospects of success. The evidentiary material is completely consistent with the outcome but the applicant is now trying to persuade this court that there are a multitude of other options that the arbitrator should have been alert to and which could have changed the outcome of the arbitration. He submitted that in circumstances where there was disclosure to the finance department (i.e. open communication about an act that it is common cause is within his level of authority) it was unlikely that the employee was trying to hide something and was dishonest. The inference cannot even be drawn on the evidentiary material. The essence of the dispute is that the employee stepped out of line in scheduling the psychometric test and his superior told him to step back and he did. The award is therefore unassailable on any of the grounds of review relied upon.

26] In reply Mr Grogan submitted that it is apparent that the employee "did something wrong and got caught out". The arbitrator failed to consider connection between the two incidents (i.e. the psychometric test and the write off), treated them as separate events and this results in a fundamental omission as was delineated in *Maepe v CCMA & Others.* [6] The applicant is therefore justified in seeking review and remittal for a hearing *de novo*.

<u>Analysis of the award and submissions</u>

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6 [2008] 8 BLLR 723 (LAC).

27] The arbitrator commenced his award by defining dishonesty with reference to the authorities. In his analysis of evidence he records the evidence of the employee, which was supported by the concessions made by Muniz, that the transfer to his cost centre was done openly and that Solomons was copied with the relevant correspondence. Furthermore, the employee also testified that he gave instructions for the transfer of the amount on Muniz's instructions as she said that allocating money initially was not a good decision as Tapa's was a risk due to previous payment history and that the employee would have to take responsibility if they defaulted. The arbitrator concluded on this evidence that:

> "Muniz said that what the applicant did was not right morally. She conceded that the applicant did not act dishonestly as everyone was informed by email. She then conceded further that nothing was done deceitfully as everybody knew. She also testified that she could not comment on the recruitment decision part of the dishonesty charge."

28] In dealing with Davidson's evidence the arbitrator concluded as follows :

> "Davidson testified regarding this charge that she was not informed regarding the correspondence with credit control and stated that the applicant's failure to inform meant that the applicant was dishonest and could not be trusted because the applicant circumvented her. She testified that all transactions over R10 000.00 had to go past her desk. The applicant instructed the credit department to allocate R9800-00 of the Tapa's account to his cost centre and Tapa's would pay the legal fees as is clear from the correspondence contained in the respondent's bundle (bundle B page 156 to 158). The applicant testified when cross examined that he did not have any intention to deceive – he would not have sent the emails if he intended to deceive. It is clear to my mind that from all evidence tendered and the fact that Solomons was copied with correspondence and the transfer done openly that no lies were involved and no deceit was shown. I find that the applicant did not act dishonestly."

29] Solomons conceded in relation to the charge of gross misconduct involving transgression of the recruitment policy and procedure that the policy was not strictly adhered to step by step even by her. The arbitrator found that the employee's evidence that he acted in accordance with the "fail forward policy" went uncontested. He concluded that there are two conflicting policies in place (recruitment and fail forward), and that the employee had no malicious intent and did not make himself guilty of gross misconduct.

30] In determining the appropriate relief the arbitrator had regard to the evidence of Ngwane to the effect that the employee could not be trusted and held, relying on *Kemp t/a Centralmed v M M Rawlins* [7] that the mere *ipse dixit* of an employer to the effect that the relationship has broken down is insufficient to avoid reinstatement. Davidson's view was that the employee could not be trusted because of her perception that he acted dishonestly. The evidence in fact, the arbitrator found, pointed the other way. He explained his reason as follows :

> "I say this because the applicant heeded a direct instruction from Davidson to cancel psychometric testing with Doyle, thus showing that he can be trusted to execute Davidson, his superior's instructions. I find that the respondent did not show that the circumstances surrounding the applicant's dismissal was such that a continued employment relationship would be intolerable. No evidence was tendered that it would not be reasonably practicable for the applicant to be reinstated."

31] Although the pleadings cited a number of grounds of review relating to the failure of the arbitrator to apply his mind to the evidence and make appropriate rulings on the probabilities, many of these were proven to be without substance when regard was had to the evidence. The applicant correctly persisted only with the submission that the arbitrator's piecemeal approach to the main charges led to his failure to take account of the totality of the circumstances and therefore to determine that there had been dishonesty. Furthermore, although the review is pleaded as a review based on an unreasonable outcome, the case as argued by Mr Grogan was based on a latent gross irregularity in the procedure. The difference between the two approaches has been delineated by Anton Myburgh in his recent article[8]. In my view however, neither an outcome or procedure

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7 [2009] 30 *ILJ* 2677 (LAC).

8 Anton Myburgh "Reviewing the Review Test: Recent judgments and developments", paper presented to SASLAW 21 June 2011.

based review can be sustained on the evidence presented to the arbitration. It is clear from the arbitrator's reasoning and conclusions on the facts and circumstances, as well as his reasoning on the probabilities, that the charges were not proven. In this regard it cannot be contended that he committed a gross irregularity of such magnitude that the applicant was denied a fair hearing, or indeed that the award was unreasonable. Mr Le Roux submitted that in essence if the award and the process requires detailed forensic scrutiny in an effort to find the flaws then the issue is rather self-evident. Mr Grogan was unfortunately constrained by being brought into the matter at the eleventh hour and without any prior involvement in the drafting of the pleadings or the applicant's heads of argument. In my view it is clear that on any construction of the evidence the award or process cannot be assailed on the *Sidumo* test.[9] The review therefore falls to be dismissed. I have not been addressed on any reasons why the ordinary rule that the costs follow the result should not apply.

Order

32] Therefore, I make the following order :

The review application is dismissed with costs.

Bhoola J

Judge of the Labour Court of South Africa

APPLICANT: Dr J Grogan SC

9 *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 at para [110].

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| | Instructed by Joubert Galpin Searle, Port Elizabeth |
| THIRD RESPONDENT: | Mr F Le Roux, Francois Le Roux Attorneys, Port Elizabeth. |