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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: **C314/2000**

In the matter between:

TEDCO PLASTICS (PTY) LIMITED

Applicant

And

**NATIONAL UNION OF METALWORKERS OF SOUTH
AFRICAN (“NUMSA”)**

First
Respondent

LENNOX MATIWANE

Second
Respondent

**COMMISSION FOR CONCILIATION, MEDIATION &
ARBITRATION (“CCMA”)**

Third
Respondent

DAVID FRED MIAS N.O.

Fourth
Respondent

JUDGMENT

STELZNER AJ

1. This was an application for a review of the arbitration award handed down by the fourth respondent which application is brought in terms of section 145 of the Labour Relations Act, 66 of 1995 (“the Act”). The second respondent was dismissed from the applicant’s employ after being found guilty of assault on a fellow employee, Ms Thotho (hereinafter referred to as “Thotho”). The nature of the assault was that the second respondent had repeatedly struck Thotho on the back with a metal pipe weighing between 4 and 5 kilograms. It emerged in the course of the evidence before me that Thotho was also subjected to discipline arising from the same incident and received a penalty of a final written warning. What was not apparent from the evidence was the exact nature of the offence with which Thotho had been charged.

2. The second respondent disputed the fairness of his dismissal and referred the matter to arbitration before the CCMA. At the CCMA it was only substantive fairness which was in issue. The arbitration proceedings took place before the fourth respondent and an award was handed down on or about 4 March 2000. The fourth respondent found that the second respondent did strike Thotho as alleged. However, he also found that Thotho had “*admitted provocation*”. Nevertheless, he found that the assault by the second respondent was “*an entirely excessive response to whatever verbal or physical attack he faced from Thotho.*” He found further that the second respondent “*seems to have decided to take the law into his own hands and about teaching her a lesson albeit in anger*” (sic). The union representative argued before the fourth respondent that in the circumstances dismissal was not appropriate and suggested that suspension for a month or two would have been more appropriate. The fourth respondent’s finding in that regard was as follows: “*I agree that suspension would have been more appropriate. However, [the second respondent’s] response to strike a female co-employee with a hydraulic pipe is excessive.*” The fourth respondent goes on to make the following award:

- “1. *In all the circumstances the dismissal is found to have been unfair and is substituted by a final written warning valid for 12 months as from the date of this award.*
2. *The employee is reinstated in his employment with effect from 13 March 2000.*”
3. It is the aforementioned award which the applicant seeks to have reviewed and set aside on the basis that it is vitiated by defects in the sense of certain gross irregularities in the conduct of the arbitration proceedings as contemplated by the provisions of section 145(2)(a)(ii) of the Act. The review was opposed by the first and second respondents on whose behalf it was submitted that the application amounted to an appeal under the guise of a review, that the fourth respondent could not be found to have committed a gross irregularity as contemplated by the provisions of the aforesaid section of the Act and, finally, that the fourth respondent’s finding was justifiable in relation to the reasons given for it.

4. The thrust of the applicant's argument in support of the contention of gross irregularity in the conduct of the proceedings was threefold. In the first instance it was submitted that the fourth respondent's award was premised on certain factual findings, primarily the finding of provocation on the part of Thotho. The fourth respondent found that Thotho had admitted provocation. It was submitted that this finding was not justified on the evidence. It was also submitted that in the absence of being able to conclude that Thotho admitted provocation, the issue which the fourth respondent had to consider was whether the facts sustained a finding that there was provocation by Thotho. It was contended that the fourth respondent failed to weigh up the evidence of Thotho and the second respondent. If he had done so he would have been constrained to accept the version of Thotho in preference to that of second respondent and would have had to conclude that no provocation had in fact taken place.
5. The second leg of the case on applicant's behalf was that the fourth respondent demonstrated an erroneous understanding of the legal effect of provocation.
6. Thirdly, it was submitted that the fourth respondent had interfered with the sanction imposed by the applicant in circumstances where the substitution of a different sanction was arbitrary and induced a sense of shock.
7. Counsel for the applicant conceded, correctly in my view, that in the ordinary course an error of fact or law is not sufficient to constitute a gross irregularity for the purposes of section 145 of the Act. However, it was submitted that there are situations where errors in the reasoning process adopted by the decision-maker can render an award reviewable. The circumstances in which the reasoning process by an arbitrator will be subject to review are detailed in the decision of *Toyota South Africa Motors (Pty) Ltd v Radebe & others* (2000) 21 ILJ 340 (LAC) at 351F – 352A, per Nicholson JA:

“Mr Van Niekerk, who appeared for the appellant, submitted that a reasoning process can be so flawed and conclusions be drawn which are so unsound that such constitutes a gross irregularity. Schreiner J, as he

then was, stated the following in *Goldfields Investment Ltd & another v City Council of Johannesburg & another* 1938 TPD 551 at p560

“It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial – they might be called patent irregularities – and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent ... Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice ... The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. In matters relating to the merits the Magistrate may err by taking a wrong one of several possible views or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say the Magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court’s not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.”

This case has been followed in a long line of cases ...”

8. Furthermore, in *Matthews v Hutchinson & others* (1998) 19 ILJ 1512 (LC), Landman J listed a large number of “misdirections” committed by the Commissioner with regard to his treatment of the evidence before him. These included drawing conclusions not supported by the evidence (at 1514C-D), ignoring material evidence (at 1515A-B) and relying on unreliable hearsay evidence (at 1515B-C). Landman J then went on to state as follows (at 1515E-F):

“In the result the cumulative effect of the misdirections amount to a gross irregularity and failure of justice. The Commissioner did not apply his mind to the evidence and the subtle nuances of the evidence. He misunderstood the import of the evidence and attributed motives to the applicant which could not reasonably be drawn. He relied on suspect evidence.”

9. It would also seem that it is a logical consequence of the approach in the *Matthews* decision that where there has been only one serious misdirection, but it is central or fundamental to the entire award, that in itself can give rise to the same result ie a finding that there has been a failure of justice.
10. In this instance it was submitted on behalf of the applicant that the lynchpin of the fourth respondent's award was the finding of provocation. The legal representative who appeared for the first and second respondents submitted that provocation was merely one of the factors which compelled the conclusions reached by the fourth respondent. On a reading of the record and the award I find myself unable to agree with the submission in this regard. Although, prior to surveying the evidence, the fourth respondent identified the issues before him in the following terms: *“The employee alleged provocation and admitted the assault. The dismissal is attacked on the basis that it was appropriate in the circumstances of the provocation and that it was also inconsistent with the employer's application of discipline in other matters”*, he appears to make no finding of inconsistency, but rather hinges his decision entirely on a finding of provocation. Indeed, I am satisfied on a reading of the record that while there was an averment by the union official in his opening statement on the issue of inconsistency no evidence was placed before the fourth respondent on which he could have made a finding that the applicant's decision to dismiss was vitiated by reason of inconsistency.
11. That being the case I am satisfied that unless the finding of provocation by the fourth respondent is sustainable on the facts before him he has committed a misdirection so serious that it amounts to a gross irregularity in the proceedings.

12. The evidence before the fourth respondent consisted only of the testimony of Thotho and that of the second respondent. A reading of this evidence indicates that Thotho admitted that when she initially approached the second respondent she spoke with a loud voice and that this “started” the incident. She also admitted use of a spanner which she said she employed to protect herself against the aggressive response of the second respondent. The fourth respondent, in concluding that Thotho admitted provocation, does not specify precisely what actions of Thotho amounted to provocation. It appears that the only admissions she made were those outlined above and I am not satisfied that those admissions were such that they can be construed as an admission of provocation. Addressing the second respondent in a loud voice cannot reasonably have provoked the assault with the pipe which followed, which was not the immediate consequence of these words. Furthermore, an act of self defence against an aggressive act cannot reasonably be construed as provocation of subsequent more violent assault by the original aggressor. If the finding that Thotho admitted provocation is based on the fact that she was disciplined and issued with a final written warning which she “accepted”, this is also not sustainable on the facts as there was no evidence as to the nature of the offence for which Thotho was charged and therefore no evidence that the charge for which she was disciplined could be equated to provocation such as would be relevant to the present dispute. The extent of Thotho’s evidence in regard to her disciplinary enquiry was that she had done “*something wrong*”.
13. Leaving aside whether Thotho can be said to have admitted provocation, which I have found not to be the case, the question arises whether there was, on the evidence, any basis to have concluded that provocation actually occurred. Counsel for the applicant submitted that the only basis upon which the fourth respondent could have drawn the factual conclusion that Thotho provoked the assault would have been to accept the second respondent’s version over hers. In his award the fourth respondent at no stage indicates that he accepts the second respondent’s version in preference to that of Thotho and it would appear therefore that no such finding was made. In any event, if the evidence of the two is compared, it is my view that the evidence of Thotho would have to be preferred for the following reasons. The second respondent

contradicted himself with regard to where he found the pipe and to whom it belonged. The second respondent's evidence on the origin of the pipe differed from that which he had given in the disciplinary enquiry. The second respondent's evidence that he struck Thotho in the course of a "*fight*" is inconsistent with the fact that she had seven visible wounds on her back. The evidence was, on the contrary, consistent with Thotho's version, that she was leaving the scene when she was assaulted. In the circumstances I am of the view that the fourth respondent would have been constrained to accept Thotho's version of events, which is that once she started speaking to the second respondent, he immediately threatened to hit her. She thereafter took off her shoes as she was scared she would "*fall off*" (on the evidence she was wearing platform shoes at the time). The second respondent then hurled his fist against her face and to this she responded by pushing the second respondent's hand away using a spanner. She also tried to hit him with the spanner, on her version in self defence. The second respondent then left the scene, she turned away to get changed and he returned to assault her with the pipe which he had retrieved from the vicinity of his locker, as she was walking away.

14. In the circumstances neither the express finding that Thotho admitted provocation, nor the implied finding that provocation in fact occurred, can be supported on the evidence. The fourth respondent's summation to the effect that there was provocation, thus, constituted a misdirection in the assessment of the evidence. As already stated, I am satisfied that the finding of provocation was the lynchpin sustaining the fourth respondent's decision. It was the finding of provocation that suggested to him that the sanction of dismissal imposed by the applicant was inappropriate and which allowed him to mitigate the sanction. In such circumstances, if the finding of provocation falls away, so must the entire outcome. I am satisfied, therefore, that the fourth respondent's error in regard to the presence of provocation was sufficiently gross as to result in the failure of justice and the award stands to be set aside on that ground.
15. Further, and in any event, I am satisfied that the fourth respondent's award reveals a failure on his part to understand and apply the law relating to provocation. His references to provocation do not include giving any specific legal content to the term. Provocation is recognised in our criminal law and law of delict as a

basis for excusing or mitigating the consequences of what would otherwise clearly be criminal or delictual conduct. The debate has not been settled as to whether provocation removes the unlawfulness of the conduct, or merely mitigates (or extinguishes) the punishment or damages arising therefrom. (See: Neethling Potgieter & Visser *Law of Delict* 3 ed at 91-92 and Snyman CR *Criminal Law* 2 ed at 183ff). Whatever the correct legal categorisation, however, the very fact that a person's actions were a reaction to the conduct of another does not mean that the law will come to their aid. Certainly, in the case of delictual liability, it appears that two requirements will have to be met, namely, that the provocative conduct must be such that the reaction to it by way of physical assault was reasonable, ie would a reasonable person in the position of the person have acted as he did in the face of the provocation; and, that the conduct must be an immediate and reasonable retaliation, ie it must follow immediately on the provocation and not be out of proportion to the nature and degree of the provocative behaviour. (Neethling et al (*supra*) at 94).

16. Had the fourth respondent considered the foregoing principles he would not have been able to come to the conclusion, even on the second respondent's version, that the assault with the pipe had in fact been "provoked". This is so because, in the first instance, the assault followed Thotho's attempt to ward off his fist and her unsuccessful attempt to hit the second respondent was a spanner, which conduct should in the circumstances have been viewed not as aggressive but defensive. In the second instance, the response followed after a period of time in which the second respondent left the scene of the prior incident and then returned with a weapon, having decided to take the law into his own hands (apparently as a result of applicant's inaction in dealing with Thotho despite his having raised a complaint about her on two previous occasions). His response was thus not immediate and the decision to return to the scene with the weapon commenced a new sequence of events. In the third and final instance, the level of violence of the assault far outweighed anything that Thotho might have done. It was completely out of proportion to the spanner incident, in which the second respondent was not actually hit. Indeed, the fourth respondent in his award himself concludes that the assault was "*an entirely excessive response to whatever verbal or physical attack he faced from Thotho*". Furthermore, the fourth respondent found that the second respondent had taken the

law into his own hands. This finding postulates a rational decision to retaliate and excludes the possibility of arguing that his response was immediate and somehow less serious.

17. In all the circumstances it is clear that the factors which would have justified reliance on provocation to reduce the sanction were simply not present, nor indeed were they found to be present by the fourth respondent. The fourth respondent's reliance upon "provocation", in such circumstances, to alter the sanction therefore displays a complete misconstruction of the legal nature and effect of the defence of provocation. In that respect the fourth respondent's reasoning process was vitiated by an error sufficiently fundamental as to allow the conclusion that a gross irregularity took place.
18. The third review ground concerns the fourth respondent's decision to replace the sanction of dismissal imposed by the applicant with a lesser sanction. In view of the conclusions which I have already reached on the earlier grounds it is not necessary for me to make a finding or to decide the matter with reference to this ground. I do note, however, that since I have found an absence of evidence to sustain a finding of provocation and since the assault by the second respondent therefore has to be viewed as having been unprovoked, one is inclined to conclude that the second respondent's conduct so grossly exceeded the bounds of acceptable behaviour and should be regarded as so excessive that any sanction short of dismissal should shock and alarm this Court. For the reasons stated, however, it is not necessary for me to make a finding in this regard.
19. I turn, finally, to deal with the question of relief. The applicant seeks an order not only that the award be reviewed and set aside but that this Court substitute the decision of the fourth respondent with a decision dismissing the second respondent's application. The powers of this Court as set out in section 145(4) of the Act are widely cast and allow this Court either to refer the matter back for a fresh determination, or to resolve the dispute itself on the papers before it. In an earlier decision in the matter of *Emcape Thermopack (Pty) Ltd v Chemical Energy Paper Printing Wood & Allied Workers Union* (unreported judgment of the Labour Court under case number C509/99, dated 29 February 2000, a decision to which both parties

referred me in this matter) I set out in full the factors which this court ought to take into account in considering whether a matter ought to be referred back for a fresh determination or be resolved by this Court itself. (See paragraphs 15, 16 and 17 of the judgment). In summary, a court is permitted to correct a decision rather than refer it back in the following circumstances:

- 19.1 where the end result is in any event a foregone conclusion and it would merely be a waste of time to order that tribunal or functionary to reconsider the matter;
- 19.2 where a further delay would cause unjustifiable prejudice to the applicant;
- 19.3 where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; or
- 19.4 where the court is in as good a position as the administrative body to make the decision itself.

20. Counsel on behalf of the applicant submitted that I ought to substitute my decision for that of the fourth respondent in this matter because this Court is in a position to decide the matter on the basis of the facts and the record before it, in other words, is in as good a position as the administrative body (the CCMA in this case) to make the decision. I am not satisfied in the circumstances of this matter that that is indeed the case. In particular, I accept the submissions made to me by Mr Steenkamp, who appeared for the first and second respondent, to the effect that the transcript of the record was extremely poor, there being a number of areas in which the recording was indistinct or where there were gaps in the recording. Furthermore, this Court has not had the benefit of hearing the evidence or of seeing the demeanour of the witnesses. As it is apparent that a finding of whether or not provocation took place is crucial to this matter and requires a consideration of the materially different versions of Thotho and the second respondent, I am of the view that this is the kind of matter where it would be appropriate to remit the matter back to the CCMA for consideration by a Commissioner other than the fourth respondent.

21. There seems no reason why the normal consequences in regard to costs should not apply in this case, in

respect of the first and second respondents who elected to oppose the application.

22. In the circumstances I make the following order:

- 22.1 The arbitration award of the fourth respondent under case number WE27821 on or about 4 March 2000 is hereby reviewed and set aside.
- 22.2 The dispute is referred back to the third respondent for consideration afresh by a Commissioner other than the fourth respondent.
- 22.3 The first and second respondents are ordered to pay the costs of this application.

S STELZNER

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 11 SEPTEMBER 2000

DATE OF JUDGMENT: 15 SEPTEMBER 2000

APPEARANCE FOR APPLICANT: Mr M W Janisch (instructed by Cliffe Dekker Fuller Moore Inc)

APPEARANCE FOR 1ST AND 2ND
RESPONDENTS: