IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NO D390/08

In the matter between:

FAWU obo Vickers B	Applicant
And	
Commission for Conciliation,	
Mediation and Arbitration	1st Respondent
Commissioner Hilda Grobler	2nd Respondent
Clover SA (PTY) LTD	3rd Respondent

JUDGMENT

GUSH J

1. In this matter the applicant seeks to review and have set aside the award of the second respondent who found that "*the applicant's dismissal was not unfair*" and accordingly dismissed the applicant's application at the arbitration.

2. The review application was opposed by the third respondent.

3. The background facts are that the applicant had been found guilty of misconduct by the 3rd respondent and had been dismissed

4. The misconduct of which the applicant had been charged and found guilty was that she had refused to carry out a specific, reasonable and legitimate instruction to conduct an induction programme.

5. The facts are set out in detail in the second respondent's award at pages 11 to 34 of the review application and I do not intend to repeat them in the same detail in this judgment. Suffice to say that the second respondent dealt with the background, the facts and the evidence thoroughly in her award.

6. The applicant was employed by the 3rd respondent as a safety health and environment officer (SHE). Her duties included induction training for newly appointed employees and follow up training for existing employees. Some time before the incident which lead to her dismissal the applicant's job description had been changed which entailed inter alia that the responsibility for identifying the employees who were to be trained was given to the 3rd respondent's various heads of department.

7. The applicant became disgruntled over this change and the matter was the subject of a dispute. The applicant was adamant that she would not accept the change and manifested itself in her refusing to train newly appointed staff together with staff who were doing follow up training (which the parties referred to as mixed groups). There had been occasions prior to the incident in question were the applicant had sent trainees out of the training sessions for reasons that she was not prepared to train mixed groups.

8. This appears to have been the cause of some friction between the applicant and her seniors which culminated in the incident which lead to her dismissal. On the day of the incident in question the applicant was specifically instructed to conduct an induction training session for a mixed group and she had refused to comply with this instruction. Her refusal lead to the disciplinary hearing, following which she was dismissed.

9. The second respondent found that the third respondent had given the

applicant a reasonable instruction and the applicant had had no valid grounds to refuse to comply. On the basis that the applicant's actions were unlawful, serious, deliberate and a serious challenge to the third respondent's authority the second respondent found that the dismissal was not unfair.

10. The applicant, unfortunately, in her grounds of review sought to review the second respondent's decision based on the decision in the *Carephone* case. The grounds of review are set out on page 9 of the founding affidavit. The grounds are based on the law as it was prior to the decision in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2007 28 ILJ 2405 (CC)(*Sidumo*). Despite this issue being raised by the third respondent in its answering affidavits the applicant did not supplement her papers nor attempt to deal with the decision in *Sidumo*.

11. It is also important to note that the applicant did not see fit to expand on its grounds of review once the record of the arbitration had been made available. The applicant's Rule 7A notice simply states: "*The applicant stands by its notice of motion*"

12. The third respondent argued that the applicant's case should stand or fall on its papers and, given that the applicant was not relying on the *Sidumo* matter, but the law as it was prior to the *Sidumo* matter, her application should be dismissed with costs.

13. The applicants grounds of review as set out in the founding affidavit are that the Award:

    a. is vitiated by a defect in that the 2nd respondent committed a gross irregularity and/or exceeded her powers;

b. is not rationally justifiable in the relation to the reasons given for it

in that:

c. there was no evidence of the breakdown in the employment relationship;

d. the finding that a witness "Ntuntela" was not an expert was not justified;

e. the "*finding that the elements of wilfulness, seriousness, deliberateness and serious challenge to the respondent's authority existed in the applicant's conduct is without basis*"; and

f. "*the second respondent's decision to reject the applicant's evidence was not justifiable having regard to her stated reasons and/or the material properly before her*"

14. The applicant however goes no further than this in the founding affidavit and does not elaborate on why or how these averments have no "basis".

15. The applicant in the founding affidavit then states that "*these grounds of review will be elaborated upon in the applicant's supplementary affidavit, once the record of the proceedings before the 1st respondent has been made available to the applicant*". Unfortunately the applicant neither elaborates on nor refers to the record after filing it. In fact the applicant makes no effort or attempt whatsoever to show, by reference to the record or to the second respondent's award to show why or for what reason the applicant deems the award reviewable and why it should be set aside.

16. Assuming, for argument's sake, and for the purpose of considering this matter, that the Court despite the applicants pleadings and the absence of any pleaded grounds of review, is entitled to consider whether or not the decision of the second respondent is reviewable on the basis of the test

enunciated in *Sidumo* the position is this. The test as enunciated by the Constitutional Court is:

> *"[110] To summarise, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair. ...*
>
> *[119] To my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner.*"

17. In order to succeed with a review it must be shown that the decision made by the arbitrator, or the second respondent in this matter, is a decision that a reasonable decision maker could not reach taking into account the material placed before her.

I am not satisfied that the applicant has succeeded in doing so. The averments made in the applicant's affidavit are simply bold statements to the effect that the conclusions reached by the 2nd respondent are baseless. The applicant's pleadings do not make out a case justifying her application that the award be reviewed and set aside The

applicant does not appear to have even considered the record or the award with reference to the record and relies only on the bare averments in the affidavit that the conclusions drawn by the applicant have no basis.

18. I am satisfied that applying the test, namely whether the decision reached by the second respondent is one that a reasonable decision-maker could not make, that as was held in *Sidumo,* I am unable "*to find that the commissioner ignored any material fact in evaluating the fairness or otherwise of the sanction imposed by the employer. In the result I cannot say that the employee did not have a fair trial before the commissioner with the result that a gross irregularity in the proceedings occurred, nor can I, in all the circumstances of this case, conclude that the award made by the commissioner was manifestly unfair to the employer. It follows from the conclusions that the commissioner did not exceed his powers under the LRA, nor can I say that the commissioner committed a misconduct.*"

19. In this matter I am also satisfied, that there is "*no indication that the commissioner ignored any material fact in evaluating the fairness or otherwise of the sanction and I cannot say either that the applicant in this matter did not have a fair trial before the commissioner*."

20. In the circumstances the applicant has not shown that the award of the second respondent is reviewable and I accordingly dismiss the application with costs.

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Gush J

DATE OF HEARING : 04 DECEMBER 2009

DATE OF JUDGMENT : 04 DECEMBER 2009

5 **APPEARANCES**

FOR APPLICANT : Mr V LANDU of FAWU

FOR RESPONDENT : Adv H GERBER

Instructed by : KOCKS AND DREYER ATTORNEYS