IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER JR 746/09

In the matter between:

PUBLIC SERVANTS ASSOCIATION obo S M D MAMABOLO	Applicant
and	
P KIRSTEIN	First Respondent
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent
THE DEPARTMENT OF HOME AFFAIRS	Fourth Respondent

JUDGMENT

BHOOLA J

Introduction

[1] This is an application in terms of section 145 (2) of the Labour Relations Act, 66 of 1995 ("the LRA"), in which the applicant seeks a partial review and set aside or correction of the arbitration award issued by the first respondent ("the arbitrator") under the auspices of the second respondent. The third and fourth respondents ("the respondents") oppose the review and have filed an application for counter review and seek condonation for the late filing of the counter review.

The facts

[2] The applicant was employed by the fourth respondent as Director: Identity Documents from 1 December 1997. In this position he was *inter alia:*

a) in charge of a National Key Point (the offices of the fourth respondent where the National Population Register is housed);
b) in charge of the National Population Register and able to amend, insert or remove entries in the Register;

responsible for issuing South African identity documents;
provided with access to classified information.

[3] In terms of the applicant's position, public service regulations[1] and his contract of employment, he was required to obtain security clearance from the National Intelligence Agency ("NIA"). Clearance at the appropriate security level would appear to have been issued when he commenced employment[2].

[4] The security clearance procedure applicable at the fourth respondent required the applicant to complete a vetting form, which he did in 2003 and following which he was subjected to screening by the NIA under the National Strategic Intelligence Act, 39 of 1994 ("the NSIA")[3], which included polygraph testing as well as accessing personal records and relevant information.

[5] Following the appointment of Mavuso Msimang ("Msimang") as Director General of the fourth respondent in 2007, he took steps to deal with the prevailing corruption at the fourth respondent. One of the tasks he undertook was to ensure that that all senior personnel had the necessary security clearance. As a result of this process, it transpired that the applicant's security clearance had been declined. The decision of the NIA to decline the applicant security clearance at the level of top secret ("the NIA decision") was communicated in writing to Msimang on 8 May 2008. Thereafter Msimang obtained verbal assurance from the Director-General of the NIA confirming

1 Part VII: Procedure for Appointment, Promotions and Termination of Service, Government Gazette volume 427 number 21951, 5 January 2001.
2 This was the applicant's evidence at the arbitration although he stated that it had been retained by the NIA.
3 Section 2A(6) of the NSIA empowers the head of the NIA to "after evaluating the information gathered during the security screening investigation, issue, degrade, withdraw or refuse a security clearance".

the decision.

[6] On 28 May 2008 Msimang advised the applicant in writing that he had formed the *prima facie* view, based on the NIA decision, that the applicant could not be trusted and that his services should be terminated. He invited the applicant to a meeting to discuss the matter. Following correspondence from the applicant's attorneys he was again invited to meet with Msimang, and his attorneys also requested information on which the *prima facie* decision (as they understood it) to dismiss had been taken. This was provided to the applicant and he was again urged to make representations to Msimang. The parties met on 2 June 2008 following which the applicant was again urged to respond to the concerns that he was a security risk and concerns about the trust relationship. He denied that he was a security risk and objected to the security clearance vetting process, which he had previously formally objected to. Further correspondence between the parties ensued and on 17 June 2008 the applicant was dismissed.

[7] The applicant's dismissal was effected by way of a termination letter in which Msimang informed him, *inter alia,* as follows:

> *"The Department requires all its senior employees to be in possession of security clearances. Without it you cannot perform duties as a director. In addition, you are a very senior employee and as a director, would always require some form of security clearance. Without it, I cannot trust you. If I cannot trust you in your current position, I cannot trust you in other positions."*

[8] At the time of his dismissal disciplinary proceedings against the applicant on charges involving misconduct were pending, but were terminated as a result of his dismissal[4].

[9] Thereafter the applicant lodged an unsuccessful appeal against the NIA decision in terms of section 2A (8) of NSIA. This was followed by an

4 The report of the chairperson of the disciplinary hearing is instructive in setting out the circumstances applicable to the termination of the disciplinary proceedings, which the arbitrator undoubtedly had regard to.

unfair dismissal dispute and in the award issued on 30 January 2009 the arbitrator held the dismissal of the applicant to be substantively and procedurally unfair, but declined to reinstate him. Instead, the employer was ordered to pay him compensation equivalent to 7 months' remuneration.

The grounds of review

[10] The arbitrator failed to apply his mind properly and reached a conclusion which a reasonable decision maker could not have reached in that:

(a) he attached weight to the applicant's failure not to review the NIA decision;

(b) he found that reinstatement was not appropriate in the circumstances because of the NIA decision;
(c) he found that the dismissal on the grounds of lack of a security clearance was substantively unfair;
(d) he failed to properly consider that the applicant had been performing his work satisfactorily for many years and could have been accommodated in an alternative position.

[11] The arbitrator considered irrelevant considerations, or conjured up considerations in deciding not to reinstate the applicant in that:

(a) no evidence was led demonstrating that the hearsay allegations underpinning the refusal of top secret security clearance in respect of the applicant were true;

(b) no consideration was given to the applicant's reinstatement and possible placement in an alternative position in the public service;
(c) he failed to attach proper weight to the fact that no evidence was advanced in respect of the breakdown of the trust relationship between employer and employee, and that on the contrary there was uncontested evidence that the applicant's relationship with Msimang had not "soured".

[12] The arbitrator did not properly apply his mind, alternatively came to a conclusion which a reasonable arbitrator could not have reached, when he concluded that reinstatement would not be practical in the light of the following uncontested evidence:

(a) the security clearance issue was merely a recommendation from the NIA;

(b) the recommendation was based on rumours and untested allegations

concerning workplace conduct rather than matters of national security;
(c) Msimang's decision to dismiss the applicant was based purely on this recommendation;
(d) none of the rumours, suspicions or allegations on which the recommendation was based had been properly tested;
(e) there was no factual basis upon which it could be said that reinstatement would be impractical.

[13] The arbitrator acted unlawfully or unreasonably in failing to order reinstatement so that a disciplinary proceedings into the alleged misconduct of the applicant could be conducted, or a proper process based on dismissal for operational requirements could be undertaken, which may have resulted in his alternative placement in the public service.

[14] The arbitrator failed to take into account that in terms of section 210 of the LRA the applicant's right not to have been unfairly dismissed trumped any right of the employer to dismiss based on the security clearance issue.

[15] The arbitrator exceeded his powers in not properly understanding and applying section 193(2) of the LRA (which required him to reinstate unless the factors specified in the sub section existed), and in so doing he committed misconduct in his duties and this rendered the proceedings defective.

[16] The arbitrator committed misconduct or committed a gross irregularity in the conduct of the arbitration by not properly applying his mind to the evidence and arguments before him and by considering irrelevant matter or conjuring up unproven considerations.

[17] In the alternative, the award is reviewable because the arbitrator came to a conclusion which a reasonable arbitrator could not have reached in terms of the *Sidumo* test[5].

The third and fourth respondents' opposing submissions

[18] The respondents made the following submissions in opposing the

5 See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC).

review:

(a) The arbitrator correctly placed weight on the fact that the applicant chose not to seek judicial review of the NIA decision, as a result of which he had no jurisdiction in respect of the reasons for the decision. Moreover the NIA was not a party to the arbitration, and the only means by which the applicant could have challenged the decision was by way of judicial review, which he had elected not to do.

(b) The arbitrator was correct in finding that reinstatement was not an option. The applicant admitted that security clearance was a requirement for the continued performance of his employment responsibilities. His length of employment was not relevant in that his position required him to access classified information for which a security clearance was required and such clearance had been declined. Once this occurred he could no longer have continued to perform the job for which he had been employed.

(c) The arbitrator was correct in finding that redeployment was not a possibility in that the applicant admitted there were no alternative positions available to him in the event he failed to obtain security clearance.

(d) The denial of security clearance was self evident proof that the trust relationship between the employer and employee had broken down in that the employer could not be expected to trust a senior employee with sensitive and confidential information in these circumstances. In any event, once the applicant had failed to obtain a security clearance his continued employment with the fourth respondent was no longer possible.

(e) The submission that the arbitrator should have ordered reinstatement to enable a full hearing into alleged misconduct is untenable and the only avenue available to the applicant to challenge this was by way of review, which he had not pursued. The fourth respondent had no authority to investigate the reasons for the NIA's decision and was empowered only to act on it.

The third and fourth respondents' counter review

[19] The counter review is based on the following grounds:
(a) the arbitrator erroneously concluded that the applicant's dismissal was based on misconduct and not his failure to obtain the required security clearance;

(b) the arbitrator erred in finding that the dismissal was unfair as a result of the delay on behalf of the NIA in completing the security clearance vetting process;

(c) the arbitrator erroneously concluded that the NIA decision constituted a recommendation and not a final and binding decision, and that Msimang was not obliged to accept the decision unconditionally;

(d) the arbitrator erroneously concluded that there was no prescribed security level for the applicant's position when in fact top secret security clearance was required;

(e) in all the circumstances the arbitrator erroneously concluded that the dismissal was unfair;

(f) the arbitrator erred in finding that the fourth respondent had no substantiation for the allegations that led to the failure to grant the security clearance, and that the fourth respondent was required to obtain such substantiation;

(g) the arbitrator erred in finding that the fourth respondent had refused the applicant an opportunity to respond to the NIA decision; and

(h) the arbitrator erred in assuming that a duty rested on the fourth respondent to review the NIA's decision.

Condonation

[20] Before dealing with the merits of the counter review it is necessary to deal with the application for condonation of late filing of the counter review. The applicant opposes the granting of condonation. In my view good cause exists for granting of condonation in that the explanation for the delay, given that the public purse is involved, constitutes a satisfactory explanation and the period of the delay is moreover not excessive. Furthermore there would appear to be some prospect of success (see *Universal Product Network (Pty) Ltd v Mabaso* [2006] 3 BLLR 274 (LAC) at [48]) and the interests of justice would support condonation. Lastly, the applicant could not legitimately claim to be prejudiced by a decision to dispose of the counter review and the review simultaneously.

The review standard

[21] It is by now trite that the test on review is as articulated in *Sidumo* (supra) and is whether the decision is one that a reasonable decision maker could not reach. Navsa AJ articulated this as follows:

> "*[110] To summarize, 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."*

[22] In relation to the test to be applied by an arbitrator in these circumstances, Ngcobo J[6] affirmed the following:

> "There can be no question that the ultimate test that a commissioner

6 Sidumo supra at para [168] and [172].

must apply is one of fairness. This test is foreshadowed both in section 23 of the Constitution[7] *and section 188 of the LRA.*[8] *All the parties accepted this. And this is the effect of the judgment of the Supreme Court of Appeal and the decisions of the Labour Appeal Court which have had the occasion to consider the test to be applied by commissioners".*

And further:

> *"It is manifest from the very conception of fairness that the commissioner must hold the balance evenly between the worker and the employer. And fairness to both workers and their employers means the absence of bias in favour of either. The LRA makes it quite clear that the ultimate test that the commissioner must apply is one of fairness. This is apparent from section 188 of the LRA. The question however is whether there are any constraints on the exercise of the power to determine fairness".*

[23] In considering the reasonable decision maker test as articulated above, Sangoni AJA stated as follows in *Edcon Ltd v Pillemer NO* & *Others* (2008) 29 ILJ 614 (LAC)[9]:

> "*If the commissioner made a decision that a reasonable decision maker could not reach, he/she would have acted unreasonably which could then result in interference with the award. This, in my view, boils down to saying the decision of the commissioner is to be reasonable. To my understanding the dictum in Sidumo is not about shifting from the 'reasonable employer test' in favour of the so-called reasonable*

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7 Section 23(1) of the Constitution provides:

> "Everyone has the right to fair labour practices."

8 Section 188 of the LRA provides:

> "(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—
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> (a) that the reason for dismissal is a fair reason—
>
> (i) related to the employee' s conduct or capacity; or
>
> (ii) based on the employer' s operational requirements; and
>
> (b) that the dismissal was effected in accordance with a fair procedure.
>
> (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act."

9 At para 21.

employee test. Instead, meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as the decision maker at the arbitration whose function it is to weigh up all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof".

Merits of the review

[24] In considering the appropriate remedy the arbitrator acknowledged that since the applicant sought reinstatement he was mandated by section 193 (2) of the LRA to order reinstatement unless the provisions of section 193 (2) (a) to (d) were applicable. He found that notwithstanding lack of proof that top secret security clearance was a requirement for the applicant's position, he was obliged to accept the validity of the NIA decision in the absence of a challenge. Accordingly, he determined that a reinstatement order would not be practical until the NIA decision (also referred to as the "negative security clearance") had been reviewed and set aside. Given that the applicant failed to exercise his remedies in this regard he found that the maximum compensation in terms of section 194 of the LRA was not appropriate, and that if the applicant were to succeed in a review he would in any event have a contractual claim for reinstatement. He therefore found that but for the negative security clearance, reinstatement would have been appropriate, and awarded compensation equal to 7 months' remuneration as being just and equitable in the circumstances (being the period from the date of dismissal (17 June 2008) until finalisation of the arbitration (14 January 2009)).

[25] In my view this is an eminently sensible and reasonable approach when regard is had to the evidence and in particular to the nature of the applicant's position and the circumstances surrounding the NIA decision.

[26] It is trite that commissioners have a wide discretion in regard to

remedy, and the courts are reluctant to interfere with this unless the decision is manifestly unreasonable and irrational: see *Boxer Superstores (Pty) Ltd v Zuma* & *Others* (2008) 29 ILJ 2680 (LAC). In my view the arbitrator provided sufficient reasons for his decision to order compensation instead of the default remedy and his reasoning (even in the absence of specific reference to the requirements of section 193 (2) (c)) cannot be faulted as being a reviewable irregularity.

Merits of the counter-review

[27] The respondents' counter review is based essentially on two main grounds. Firstly, the arbitrator made a finding which no reasonable decision maker could have reached and this justifies setting aside the award; and secondly, in enquiring into the correctness of the NIA decision the arbitrator exceeded his powers.

[28] In regard to the first main ground of review the respondents contend that the arbitrator correctly found that he could not interfere with the validity of the security clearance. Once he made this finding, they submit, he could not properly have found that the dismissal was substantively unfair or that failure to investigate the reasons behind the NIA decision constituted procedural unfairness. Nevertheless he proceeded to make these contradictory findings and furthermore sought to investigate the correctness of the NIA decision. This resulted in a material misdirection and accordingly he reached a finding that no reasonable decision maker could have reached on the evidence before him.

[29] No reasonable decision maker could have concluded that the decision of the NIA was anything other than a binding decision; and no reasonable decision maker could have concluded that the fourth respondent was not bound by that decision in circumstances where the exception provided for in Chapter 5, paragraph 10(2) of the MISS[10] had not been satisfied. On this basis the respondents submitted that the applicant failed to satisfy the

10 This is discussed below in the section on the arbitration award.

Sidumo test for review. As the NIA's decision was binding and the fourth respondent was obliged to act in accordance with it, the decision not to reinstate the applicant was clearly reasonable in instances in which he could no longer perform his functions.

[30] In relation to the ground of review based on section 145 (2) (a) (iii) that the arbitrator exceeded his powers, the respondents submitted that this ground had been satisfied in that the arbitrator sought to determine whether or not the NIA decision was correct. He had no jurisdiction to do so. The only basis on which the NIA decision could have been challenged was by way of administrative review which the applicant elected not to seek. The arbitrator's approach in essence amounted to a review of the NIA's decision and in so doing he exceeded his powers.

[31] The respondents, relying on *Council for Scientific and Industrial Research v Fijen* 1996 (2) SA 1 (A), submitted that the reason for the applicant's dismissal arose from his breach of a material term of his employment, and was lawful. Alternatively, the failure to obtain the necessary security clearance rendered the applicant incapable of performing his functions. The respondents were at pains to submit that the dismissal was for a fair reason and there was accordingly no need for the respondent to classify it as either an incapacity or operational requirements dismissal – in the circumstances all that the arbitrator was required to do was to assess whether the dismissal was for a fair reason, as was held in *SABC v CCMA* [2006] 6 BLLR (LC). The arbitrator's conclusion therefore that the dismissal should have been categorised as an operational requirements dismissal was incorrect. In this regard it was contended (contrary in my view to the submission made above that the arbitrator erroneously found that he had been dismissed for misconduct) that he had been dismissed for incapacity in that the failure to obtain security clearance rendered the applicant unfit to perform the functions required of his position. Moreover, without the security clearance he could not have been alternatively deployed.

[32] In regard to procedural fairness the respondents submitted that the

applicant had been given an opportunity to make verbal representations, as well as two opportunities to make written representations, rendering his dismissal procedurally fair. In finding that the applicant had not been given an opportunity to respond to the allegations underlying the NIA decision the arbitrator "*erred grossly for the fourth respondent was neither able nor obliged to investigate the reasons behind the security clearance refusal; it was merely required to act on the basis of that decision*". The arbitrator's finding that the NIA merely made a recommendation and it was for the fourth respondent to make a decision based on the recommendation, was incorrect.

[33] The arbitrator's reliance on Msimang's failure to investigate the reasons that underpinned the NIA decision resulted in his unsupported conclusion that its "*unconditional acceptance*" of the decision created the "*perception that the respondent attempted to find a shortcut to terminate the applicant's services".* The approach of the arbitrator was flawed - he could not have expected the fourth respondent to investigate the work done by the NIA and any suggestion to this extent is ludicrous. In so finding he committed a gross error that rendered his award so unreasonable that no reasonable decision maker could have made that decision, alternatively committed a gross irregularity, or alternatively exceeded his powers. However, he went further and also purported to make a finding as to the correctness of the NIA decision in that he recorded his agreement with the applicant's submission that the NIA's reasons appear to relate to workplace misconduct rather than national security. By so finding and relying on this finding to suggest that the NIA decision was not based on sufficient grounds to justify the termination of the applicant's employment, which finding included the assumption that the decision of the NIA may have been flawed, he exceeded his powers, and this renders his award reviewable.

[34] In addition to the above the respondents' heads of argument raised a number of irrelevant issues which I am not required to deal with.

The arbitration award

[35] In analysing the evidence led the arbitrator stated that the fact that a negative security clearance was issued was not in dispute and had to be accepted as valid until overturned on review. He therefore accepted that he had no jurisdiction in respect of the validity of the NIA decision, and proceeded to identify the issue to be determined as being whether the dismissal for the lack of a security clearance was fair.

[36] He then had regard to the various statutes and policies applicable to

security clearances, including the Minimum Information Security Standards ("MISS") approved by Cabinet in December 1996, paragraph 9 of which provides for the screening authority (the NIA in this instance) to investigate and advise on the security competence of a person on the basis of prescribed guidelines. Thereafter the screening authority "*will merely make a recommendation regarding the security competence of the person concerned to the head of the requesting institution, and this should in no way be seen as a final testimonial as far as the utilisation of the person is concerned*"[11].

The policy provides further as follows:

> *"10.1 The head of an institution or his delegate must make a decision and issue a clearance after receiving the recommendation made by the screening institution, and in accordance with circumstances/information at his/her disposal.*
>
> *10.2 Notwithstanding a negative recommendation from the screening authority, for whatever reason, the head of the institution may still, after careful consideration and with full responsibility, use the person concerned in a post where he/she has access to classified matters if he/she is of the opinion that the use of the person is essential in the interest of the RSA or his/her institution, on the understanding that a person satisfying the clearance requirements is not available".*

[37] The arbitrator then referred to section 17 of the Public Service Act[12], which expressly requires dismissals to be conducted in accordance with the LRA. On behalf of the fourth respondent it was submitted that if the applicant's conduct was required to be categorised as a dismissal it should be categorised as a dismissal due to incapacity. However, the arbitrator concluded that since section 17 (2) of the Public Service Act describes incapacity as arising only from health or injury and/or poor work performance, none of which are applicable to the applicant, his dismissal should be more appropriately categorised as an operational requirements dismissal. Accordingly, the peremptory requirement to comply with the LRA required the

11 Paragraph 9.2.
12 1994, as amended by the Public Service Amendment Act, 30 of 1997.

fourth respondent to take into consideration all relevant factors prior to making the decision to terminate the applicant's services.

[38] The arbitrator found that no evidence was presented why the applicant in his position required a security clearance at the level of top-secret. The Internal Security Policy of the fourth respondent referred simply to three levels of clearance and Msimang had made reference only to "*some form of security clearance"* being required. Furthermore, there was no indication that an objective analysis had been undertaken to determine the level of security clearance required for the applicant's position.

Conclusion

[39] In my view the arbitrator's conclusion, particularly in regard to the hastiness in which the summary termination of the applicant occurred and its implications for procedural and substantive fairness, cannot be faulted on the *Sidumo* test. His conclusion appears to emanate from a careful consideration of the material presented to him at the arbitration. In this regard the arbitrator took into account the following relevant facts : the applicant had been employed in the same capacity dealing with classified information for 11 years; he had received praise from Msimang; he had been granted an initial security clearance on commencement of his employment; the second vetting process embarked upon in 2003 appears to have been conducted over an extended period at least until 2006; if indeed top-secret clearance was required it raised the question why the NIA failed to inform the fourth respondent as soon as possible of the negative security clearance (it was only after an enquiry was made in this regard in 2008 that the response was forthcoming two days after the request). In these circumstances his finding that Msimang was entitled to and should have treated the negative security clearance as a mere recommendation and that his unconditional acceptance was unjustified, cannot be said to be unreasonable. This is particularly so in the light of the facts that the NIA decision appears to have surfaced at a time

that was coincidentally convenient to the respondents at the stage at which they had led evidence at the disciplinary proceedings and had to make a decision as to the future course. The arbitrator also took into account the fact that although the disciplinary proceedings arose from charges of misconduct, the NIA decision appeared to be based mainly on issues involving misconduct rather than national security (which would more properly be its domain). The arbitrator accordingly, in my view, was justified in finding that the unconditional acceptance of the NIA decision created the perception that the fourth respondent attempted to find a shortcut to terminate the applicant's services. It is for this reason that the arbitrator determined that the dismissal of the applicant was substantively unfair, and his reasoning and conclusion in this regard cannot be faulted.

[40] In regard to procedural unfairness, the arbitrator found that the applicant had been afforded the opportunity to make representations regarding his negative security clearance. The applicant's response was that the allegations stated as reasons for the decision were unfounded. On Msimang's own version, he had not seen any substantiation of the alleged reasons given for the negative security clearance, and there was no justifiable basis for him to reject the applicant's request to have the opportunity to respond to the allegations. The allegations moreover lacked factual substance and the applicant could accordingly not have responded to them as such. In these circumstances the conclusion that the dismissal of the applicant was procedurally unfair cannot be said to be unreasonable.

[41] A number of the submissions made by the applicant in the counter review are more apposite to an appeal, although scrutiny of the merits on the *Sidumo* standard blurs the distinction, as was envisaged by the Constitutional Court in the following terms[13]:

> "Review for reasonableness, as explained by Professor Hoexter, does threaten the distinction between review and appeal. The Labour Court

13 Sidumo supra at para 109.

> in reviewing the awards of commissioners inevitably deals with the merits of the matter. This does tend to blur the distinction between appeal and review. She points out that it does so in the limited sense that it necessarily entails scrutiny of the merits of administrative decisions. She states that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions." This Court in *Bato Star recognised that danger. A judge's task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.*

[42] In my view the first main ground of the counter review, that the arbitrator's findings were erroneous and therefore unreasonable, cannot be sustained. Even if it is correct that he made incorrect findings on the facts before him, the respondent would have to establish that these errors are so gross as to constitute misconduct (in the form of a failure to apply his mind or another material misdirection) or gross irregularity (in respect of either the process or the outcome), and this submission, in my view, cannot be sustained on the evidence led in the arbitration.

[43] The review on the second main ground is in my view similarly unfounded. At no point does it emerge that the arbitrator effectively reviewed or investigated the NIA decision. He simply reinforced the principle that an employer cannot act arbitrarily and unfairly in accepting a decision based on misconduct allegations without affording the employee his statutory rights to procedural and substantive fairness. This is a fundamental precept of our labour law. In accepting the validity of the NIA decision, but requiring the employer to comply with these basic precepts he did not review the correctness of the decision, but simply reiterated the need for compliance with the requirements of a fair dismissal. This reinforced the requirement that the employer should have applied its mind not to the validity of the NIA decision but to whether it on its own constituted a valid reason for dismissal, and in addition whether the applicant should have been afforded a meaningful

opportunity to state his case. It cannot therefore be said that there was a manifest failure by the arbitrator to apply his mind to the evidence or that he otherwise misdirected himself. Nor can be said that that his conclusion or the process were tainted by gross irregularity or excess of power. Therefore, in the light of the reasoning of the arbitrator based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach.

Order

[44] In the premises I make the following order:

1) The application for partial review is dismissed, with costs.

2) Condonation is granted for the late filing of the counter review.

3) The counter-review application is dismissed, with costs.

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Bhoola J
Judge of the Labour Court of South Africa

Date of hearing: 2 June 2010
Date of judgment: 2 July 2010

Appearance:

For the Applicant: Advocate F van der Merwe instructed by Bouwers (Roodepoort) Inc
For the Third and Fourth Respondents: Ms K Savage, Bowman Gilfillan