DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

20/05/2020
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 666/18

In the matter between:

VENTKASAMY NAIDOO **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

MOHAU NTAOPANE N.O. **Second Respondent**

LEWIS STORES (PTY) LTD **Third Respondent**

Heard: 16 January 2020

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by email on 20 May 2020

Summary: Review of Arbitration Award – Misconduct – Employee Dismissed for unbecoming conduct, insolence and gross disrespect – Condonation opposed for the Late filing of the Application, Records and Replying Affidavit – Condonation granted – Award reviewed and set aside – Applicant reinstated retrospectively to date of dismissal and awarded costs.

JUDGMENT

RAMDAW, AJ

Introduction

[1] This is a review application brought by the Applicant (Mr Naidoo) in terms of section 145 (1) of the Labour Relations Act[1] (LRA). The Third Respondent (Lewis Stores) opposes this review application. Mr Naidoo also seeks condonation for the late delivery of the review application, the record, and the replying affidavit. The condonation applications are all opposed by Lewis Stores the Third Respondent herein.

Factual Background

[2] Mr Naidoo was employed by Lewis Stores as the Regional Controller with responsibility for Lewis Stores' Paul Kruger branch. Following a disciplinary enquiry, Mr Naidoo was dismissed on 5 June 2018, for the following misconduct:

> "**Charge 1**
> Conduct unbecoming in that you on 6 March 2017 falsely accused your DGM of inciting grievances from staff against you which is not true as you contacted the DGM secretary to inform her of these allegations. The staff referred to above are the following: Rueben Sitoe and Alice Sedie from branch 1011 Garankuwa, Mandla Hlatswayo and Jane Baloyi from Branch 574 Mabopane and further mentioned this to Corne van Greune, the DGM's Secretary.
>
> **Charge 2**
> Insolence and gross disrespect in that on 6 March 2017 you used vulgar words and was grossly disrespectful towards your DGM when she confronted you about the performance of your Region. This constitutes a serious misconduct as it places the employment relationship in jeopardy. You specifically said the DGM was talking "*shit, whatever she is doing is nonsense, God will never*

[1] No. 66 of 1995, as amended.

forgive her and that she must look at herself in the mirror" which is totally unacceptable".[2]

[3] Following his dismissal, Mr Naidoo referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 2 July 2017. The dispute was arbitrated by the Second Respondent who found that the dismissal was procedurally and substantively fair.

[4] On 20 April 2018, the Applicant launched an application in terms of section 145(1) of the LRA for the reviewing and setting aside of the Arbitration Award issued under case number GATW9529-17 (Review Application).

[5] A series of condonation applications relating to the Review Application were belatedly made by Mr Naidoo, which are dealt with below. The Third Respondent opposed these applications for condonation and these objections are dealt with as a *point in limine* as raised.

Condonation

[6] In terms of section 145 (1A) of the LRA and Rule 12 of the Rules for the Conduct of Proceedings in the Labour Court (Labour Court Rules), the Labour Court may on good cause shown condone the late filing of a review application and may extend or abridge any period prescribed by the Labour Court Rules.

[7] It is trite that condonation of the non-observance of statutory time limits is by no means a mere formality and that it is incumbent upon the Applicant for condonation to satisfy the court that there is indeed sufficient cause to excuse this non-compliance.[3]

[8] The Third Respondent opposes this application vigorously and spent most of the closing arguments on the issue of condonation arguing as to why this Court

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[2] Founding Affidavit annexure "A1"
[3] *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (A)

should not grant the same. This aspect needs to be considered first before going into the merits of the application as it constitutes a *point in limine*. If condonation is refused1 then there will be no need to go into the merits of the application.

Analysis

[9] The test for condonation has been clearly set out in *Malelane v Santam Insurance Co. Ltd*[4] and confirmed in various other decisions of this Court. The primary object of the LRA is to ensure the effective and expeditious resolution of labour disputes.

[10] The Third Respondent argued that condonation for the late filing of certain pleadings should be refused and as there is no proper grounds made out for the review of the arbitration award this application should be dismissed with costs

[11] The review application was delivered or served 6 days out of time but was issued timeously on 12 April 2018 as per section 145 (1) of the LRA. The conduct of the Applicant shows that he had every intention to pursue the review application. The delay is inordinate and the merits, if proved, shows to have good prospects of success. Further, there would be no prejudice to the other party as the delay is only six days and was issued timeously . Therefore, the late filing of the review application ought to be condoned.

[12] As for the delay in filing the record, the explanation of the Applicant is a reasonable one. Further the Third Respondent did not bring any rule 11 application for the dismissal of the application for want of prosecution or non-compliance with the Rules and/or the Practice Manual of this Court. The dispute occurred in June 2017, some 3 years ago. The Applicant is currently unemployed and requests this matter be disposed of. It is in the interest of equity and fairness that condonation to the extent necessary be granted as the

[4] *Malelane v Santam Insurance Co. Ltd 1962 (4) SA 531(A)*

delays are not outrageous, nor prejudicial to the Third Respondent and acceptable reasons have been advanced for the delay.

[13] The refusal of condonation would tantamount to the dismissal of this review application for want of diligent prosecution which is no doubt a drastic remedy which can only be granted when the delay is so unreasonable that it cannot be condoned. This application did not lapse or was archived or ought to have been struck off the roll for non - compliance with the rules and/or practice directives of this Court. Condonation in respect of all 3 applications are granted to the extent necessary and this court will proceed to consider the merits of the review application.

Review application

[14] The Applicant was charged with two counts of misconduct which occurred on 6 March 2017. The Applicant was placed on precautionary suspension on 27 March 2017. On 28 March 2017 the branch where he was stationed closed its doors for operational reasons.

[15] The Applicant accepted his letter of suspension which read that an investigation was being conducted and that a charge sheet will be served on him, which was then served on him on the same day. He initially refused to accept service of the same and raised an objection thereto.

[16] He raised a grievance to the effect that proper disciplinary procedure was not being followed as per the disciplinary code in place. He objected to the charges claiming them as being vague and lacking clarity.

[17] He also filed a formal request for further particulars to the charges in the form of a formal application in terms of the Promotion of Access to Information Act[5] (PAIA). Nothing appears on record whether this request had been complied with or not.

[5] Act 2 of 2000

[18] The charges were amended and a second charge sheet was served on the Applicant which materially altered the first charge sheet. The names of the persons were inserted in respect of Count 1 and the words allegedly used were expanded to include the words *"talking shit"* in Count 2.

[19] The applicant attended the disciplinary enquiry. The complainant, Ms Berato Banda, the DGM was the complainant and initiator who testified against him. The chairperson was Mr Patrick M Mabuza, who became the employer representative at the arbitration. He delivered his findings after the parties submitted both mitigating and aggravating circumstances and made the following comment in his findings at the disciplinary enquiry:

> "As I have already found you guilty on both charges, so it is not necessary to report the reasons made for my findings"

He therefore gave no proper reason in his ruling for finding the Applicant guilty.

[20] As referred to above the applicant referred the matter to the First Respondent and the resultant award is the subject matter of the review. The Applicant raised various grounds for review which may be summarized as follows:

20.1 He raised the issue of his request for legal representation and the failure of the Second Respondent to apply his mind to this issue before turning down this request.

20.2 He stated that the Second Respondent failed to appreciate that a policy existed for abusive and offensive language[6] which stipulated a final written warning for a first offence.

20.3 That the charges are for insolence and disrespect which is totally different to the offences of threats or intimidation.

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[6] See: Page 27 of bundle

20.4 That the Second Respondent failed to apply his mind to the fact that no further charges were brought on the allegation of continued misbehaviour which justified the suspension. Furthermore, that an adverse inference is to be drawn, especially in view of the evidence that followed, *vis-à-vis*, the closing of the store the next day after the service of the notice of suspension and charge sheet.

20.5 That it must be rationally conceivable that the suspension, given its timing, gives rise to a question of a predetermined outcome.

[21] The evidence of Ms Lerato Banda, the DGM, was criticized in detail and so were the findings reached by the Second Respondent. The Applicant argued that he did contest her evidence and showed that she was not speaking the truth despite the Second Respondent's finding to the contrary.

[22] The Third Respondent defends the award and contends that the Second Respondent did not commit gross misconduct by failing to apply his mind to the material before him nor did he fail to evaluate the evidence properly. Further that his decision to refuse legal representation was correct and it did not lead to an inappropriate assessment of the evidence before the commissioner. Lastly they argued that the Second Respondent was not biased in favour of Lewis Stores. Therefore, they contend that the decision of the Second Respondent is one that a reasonable decision maker could make.

Legal representation

[23] This Court endorses the view that the Second Respondent has a discretion with regards to allowing legal representation which discretion must be exercised properly and in the best interest of both parties. The Applicant was not legally qualified and so was the Third Respondent's representative. However, the refusal of legal representative brings with it an added responsibility for the Second Respondent to ensure that the Applicant is not prejudiced in any

respects and understands the arbitration procedure as well rules of evidence to conduct his case properly.

[24] After perusal of the records and the transcript it is quite evident that the Second Respondent failed in his duty and treated the Applicant rather shabbily. He exceeded his powers as an arbitrator by entering the arena unnecessarily, making unfounded and irrelevant comments and curbing the Applicant's cross examination on crucial issues e.g. inconsistencies as well as victimization which created a perception of biasness towards the Third Respondent This thread flowed throughout the entire arbitration proceedings impacting on the Second Respondent's final decision which suggests that he misconstrued the nature of the enquiry before him and committed misconduct as per section 145 (2) of the LRA.

Test for Review

[25] The test for review applied by the courts was laid out by the Constitutional Court in the matter of *Sidumo v Rustenburg Platinum Mines*[7], and determines that the test for review is based in fairness, that if a "reasonable decision-maker" would have arrived at the same finding opposed to that if the question of a reasonable employer would have imposed the sanction of dismissal.[8] In this case it is thus clear that the issue to consider: "*is whether a reasonable decision-maker, based on the evidence and the material before him or her, would have arrived at a different decision*".[9]

[26] With specific regard to review or arbitration awards under section 145(2)(a) Ncobo J stated the following:

> "The grounds of review in Section 145(2)(a) provide cause of action for the review of Commissioners' awards by the Labour Court. Whether an arbitral

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[7] *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).
[8] Ibid at para 110
[9] *Sidumo* (id fn 9) at para 254. See also: *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and others* [2008] 3 B LLR 241 (LC) at p. 245 at [31]

award should be interfered with under the provisions of Section 146(2)(1). It is therefore for a party alleging a defect in the arbitration proceedings to show that the facts alleged constitute gross irregularity or misconduct or show that the power conferred has been exceeded, as the case may be. This will require litigants to specify the grounds of review relied upon and the facts alleged as constituting the grounds of review relied upon".[10]

[27] Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The Court in *Sidumo* was at pains to state that arbitration awards made under the LRA continue to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.

[28] In bringing a review application it is necessary to observe the facts of the matter holistically, having regard to the grounds as listed in section 145 of the LRA the evidence before the relevant Commissioner, the reasons listed in the arbitration award as well as the result of the award, against a background of fairness as envisaged in the *Sidumo* test.

[29] It is therefore trite that a Court must be convinced that a reasonable decision-maker, based on the evidence and the material before him or her, would have

[10] Id fn 9 at para 254.

arrived at a different decision. In assessing this review question, the court should engage in a holistic analysis of all the evidence.

[30] It is a trite principle of law that for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(c) of the LRA the arbitrator must have misconceived the nature of the enquiry and arrived at an unreasonable result or arrived at a decision which no reasonable decision maker could reach on all the material that was before him or her.

Burden of Proof

[31] As it was common cause that there was a dismissal, the duty to adduce evidence first and the burden of proof was on the Third Respondent to show that the dismissal was for a fair reason after following a fair procedure.

[32] An arbitration is a hearing *de novo*. The Second Respondent exercised his discretion and refused the Applicant legal representation. This prejudiced the Applicant in the presentation of his case but it does appear that the Applicant fared reasonably well in his cross examination and arguments. As the records are available this Court will look at the said prejudices and deal with the arbitration award in its totality.

[33] Ms L[redacted]o Banda in the disciplinary enquiry stated the following with regards to Co[redacted]t 2:

> "You must stop your nonsense, stop your rubbish. God will never forgive you because of your rubbish you are doing".

[34] At the arbitration her evidence in chief was:

> "When he speaks to me and he would be very, very, very much harsh to me when I speak to him about the relevant things of the work. And Sugen (the

applicant) was a very emotional person when he speaks after some few hours or what so ever he would come back to me and would apologise". [11]

"Then Sugen called me and he started shouting to me, he is not satisfied with me and he is not ever trusting me that I will be his leader ....

I don't respect him and therefore I called myself a person of God that was his words to me. You call yourself a person of God and you are speaking bad things about me, you are talking nonsense about me. You talk rubbish about me. You must stop your nonsense. If you stop your nonsense then I will start to listen to you." [12].

"So on the 7th or the 6th March because I knew already that Sugen is one of those people that he talks like that. I was hoping and I was trusting that Sugen will come back to me like he normally does and say sorry to me. I was feeling bad or (indistinct) he told me that he is taking a treatment and some time when he took a treatment he loses control. That is what he was saying to me."
"Para 13 – Page 65 of the transcript[13]"

[35] She then testified that the Applicant told her

"....Not the kind of shit and nonsense that you are doing"

[36] The word "shit" has many meanings including "*nonsense, foolishness, something of little value or quality, trivial and usually bashful or inaccurate talk*".[14] If ever, if it was used, as the Applicant denies using the word, it could only mean that Ms Banda was talking nonsense or that she is giving an inaccurate talk. The reference of "*shit*" was to the nonsense the Applicant accused Ms Banda of doing. The Applicant never called Ms Banda a "*shit*" and reference was made on what she was doing. The crux of this could only refer to Count 1 of inciting grievances from staff against the Applicant which upset him. This confirms that Count 1 and Count 2 are inter-related and deal with the

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[11] See: Para 20 – Page 629 transcript on Page 67 of Record
[12] Para 20 – Page 639 of transcript to Para 1 – Page 64
[13] Para 13 – Page 65 of transcript
[14] Definition of 'shit' as per Wikipedia.

same event *albeit* on different occasions. The issue about seeing yourself in the mirror could only mean "*self-reflection*" and to God meaning soul searching or that you will be punished for what you are doing. These words considered in context do not amount to vulgar, rude, crude words that constitute serious misconduct which placed the employment relationship in jeopardy.

[37] No proper evidence was led by the Third Respondent about the effect of this behaviour on the overall employment relationship with the Applicant within the Third Respondent's Group. The reference to poor performance issues are dealt with differently per the disciplinary code and guidelines of the Third Respondent. There was no counselling, nor any recorded attempts by senior management to resolve this personality conflict between the applicant and Ms Banda, who would have let matters lie if the Applicant apologised to her which she expected him to do. If the Applicant had an anger management problem then the Third Respondent was obliged to deal with the same appropriately .

[38] This telephonic conversation took place on 6 March 2017 and the only two active participants were the Applicant and Ms L Banda. The Applicant called two witnesses who overheard the conversation and confirmed that no vulgar words were used by the Applicant whom they could hear speaking on the phone.

[39] The evidence of Ms Banda is in fact the evidence of a single witness and the cautionary rules of evidence should apply as she was the complainant, investigator, the initiator at the disciplinary enquiry, the person who served the suspension notice and immediately thereafter served the charge sheet. In other words, she had every motive to implicate the Applicant in wrong doings and to get him dismissed. She conceded that this exchange of harsh, even vulgar or rude words was a normal or usual occurrence at their work place, especially between the Applicant and herself. She expected him to apologise and three weeks later decided to charge him. She decided that on 25 March 2017, after he repeated this "*offensive*" behaviour, that she will have to take disciplinary action which she promptly did and spearheaded this by suspending

and charging him. There was no investigation report done with any input from the Applicant, nor was a copy handed to him before he was served with a disciplinary notice. He objected to same being vague and lacking clarity to enable him to understand what the allegations against him were. He on the 31 March 2017 lodged a formal grievance against the manner in which he was being treated. He was advised that this will be dealt with by the Chairperson at the disciplinary enquiry who never did so. He argued that the disciplinary enquiry was merely a farce given the manner it was conducted hence his referral of a dispute to the CCMA. It is quite clear that there has been a gross abuse of power and authority on Ms Banda side in the manner in which she went about charging the applicant for misconduct.

[40] The Applicant made a formal request for further particulars in accordance with PAIA to which he never received a response. Instead the charge sheet was amended twice and to his surprise names of personnel were inserted in Count 1 which he denied mentioning to anyone.

[41] Insolence at the work place is defined primarily as non-compliance with direct orders from a supervisor. Insolence can further be defined as harassing, wilful behaviour, bragging about non-compliance and using foul or abusive language. Insolence involves being imprudent, disrespectful or rude behaviour whilst insubordination is being disobedient and challenging authority. Mere disrespect for the employer being insolence, imprudence or rudeness cannot by itself constitute insubordination or be an outright challenge to authority. Insubordination must contain the element of resistance to authority and must be deliberate or wilful to constitute serious misconduct.

[42] However, unless the insubordination is so gross that a dismissal without a warning is justifiable, the same without any formal warnings will be unfair. Discipline has to be progressive with dismissal reserved for serious and deliberate misconduct being a sanction of last resort. The Third Respondent's disciplinary code recommends a final written warning for the offences the Applicant was found guilty of and not a sanction of dismissal unless it

constituted threats or intimidation . He was never charged for making threats or for intimidation.

[42] In *Plastic Wrap, a division of CTP Ltd v The Statutory Council for the Printing, Newspaper and Packaging Industry and Others*[15] Rabkin-Naicker J ordered 8 months' compensation to be paid to the employee after he was dismissed for misconduct involving insolence and the using of vulgar language against his subordinates. The Employee was on a final warning for a similar offence and was not dismissed but compensated.

[43] Judge AC Basson in *Lihotech Manufacturing Cape v Statutory Council for Printing and Others*[16] stated:

> "It should also be pointed out that the mere fact that abusive or strong language is used by an employee in the workplace does not per se justify dismissing an employee. All the circumstances must be considered. I therefore conclude that dismissal is inappropriate in the present circumstances."

[44] In other jurisdictions namely Australia, in Smith v Aussie Waste Management 2015 FWC, Mr Smith a garbage truck driver, had his employment terminated after saying to his Manager in a heated telephone discussion:

> "You dribble shit! You always dribble fucking shit!"

[45] In the face of this outburst it looks sufficient to justify dismissal. However, the Fair Workers Commission, the equivalent of our CCMA, found that there were mitigating factors which rendered the employers' decision to dismiss unfair. Mr Smith had previous warnings relating to his swearing at the workplace.

[46] As per the Third Respondent's Disciplinary Code, the following is an offence:

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[15] (2012) 33 ILJ 2668 (LC).
[16] [2010] 6 BLLR 652 (LC) at para 27.

"Disrespect towards others or demonstration of abusive and offensive language, insolent behaviour at the workplace"

[47] The aforesaid is a Category C offence which carries a sanction of a final warning for a first offender. Intimidation or threats is a Category D offence which carries a sanction of dismissal. The Applicant was never charged for this nor did his conduct amount to a threat of intimidation which is serious and deliberate misconduct.

[48] The charges were unbecoming conduct relating to falsely accusing the DGM Ms Banda re: inciting staff grievances and insolence as well as gross disrespect which constitutes a serious misconduct as it places the employment relationship in jeopardy. Even if the Third Respondent's version is to be accepted, dismissal was too a harsh sanction and is not justifiable.

[49] Conduct unbecoming, in-obedience and gross disrespect are not misconduct which justified dismissal for a first offender. There was no finding made that they were serious and deliberate acts of misconduct. The Applicant gave Ms Banda the ultimatum to stop her nonsensical behaviour of inciting staff grievances against him and then only will he listen to her. Much was made of calling Ms Banda a "*so-called DGM*" whilst she addressed him as "*Meneer*". These are post facto and does not take the matter any further but appears to have some influence on the Second Respondent's findings that the applicant continues to be disrespectful towards Ms Banda his manager. Ms Banda testified that the Applicant's behaviour was inconsistent with the behavioural code in terms of which intimidation and threats are dismissible offences.

[50] "*Intimidation and threat*" carries dismissal as a sanction for even a first offender. The behavioural code merely sets out the standards of conduct acceptable at Lewis Stores and is a guideline to be read with the disciplinary code as well as the Code of Good Conduct to the LRA. There was no evidence of threats or intimidation led nor evidence that the Applicants further presence at the work

place will pose such a threat or that the relationship of trust, the core of the employment relationship has been rendered intolerable or has broken down irretrievably that dismissal is justifiable for the misconduct committed.

[51] The test that is applicable whether dismissal is too harsh a sanction has been set down in *Sidumo.* An important evaluation of *Sidumo* and its implications on the Labour Court's power of review is contained in the judgment of Zondo JP *(*as he then was) in the case of *Fidelity Cash Management Services v CCMA and Others*[17] and in *Edcon Ltd v Pillemer and Others*[18] .

[52] No proper evidence was led save the evidence of the complainant, Ms Banda. It is obvious that there was a great deal of animosity between the Applicant and Ms Banda. She testified that the Applicant had a short temper and makes verbal outbursts. The Applicant testified about the incident of Ms Banda giving false evidence at the CCMA stating that the Applicant was shot with rubber bullets and she even saw his injuries. Furthermore, that he was facing disciplinary charges for poor work performance which was untrue. This dents Ms Banda's credibility and confirms that she has a tendency to fabricate issues especially when it came to the Applicant. She does appear to be a drama queen and tends to exaggerate which is evident per the records. It may be possible that the word "*shit*" was never used and is being fabricated to aggravate the word nonsense.

[53] In the CCMA case of *M E Malope v Lewis Stores (Pty) Ltd*[19], used by the Third Respondent in its arguments, an employee was dismissed by the Third Respondent for dishonest conduct and for using the word "*shit*" at work. He was charged with dishonest conduct and gross insubordination . This case was flouted around at both the disciplinary enquiry and at the arbitration as some sort of justification for the Applicant's dismissal based on consistency. The allegations of misconduct in that case are totally different to what the Applicant faced and each case is to be decided on its own merit.

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[17] (2008) 29 ILJ 964 (LAC)
[18] [2010] 1 BLLR 1 (SCA) at para
[19] *ME Malope/Lewis Stores (Pty) Ltd, Case Number LP4215/14, 25/8/14*

[55] It surprises the Court that Ms Banda the DGM did not know that the Applicant's store was closing its doors on 28 March 2017, a day after the Applicant was suspended and served a charge sheet as per her testimony. This once again dents her credibility, something the Second Respondent never commented on nor took into consideration when assessing the two mutually contradictory versions before him. The Applicant testified that this was nothing but a well-orchestrated and clever plan to get rid of him rather than to have him retrenched. The court notes that the manner in which the Applicant was investigated, suspended, charged, treated at the disciplinary enquiry and then dismissed leaves much to be desired. There has been a blatant disregard and non-adherence with the Third Respondent's disciplinary code confirming a thread of unfairness running through the entire disciplinary process. The Second Respondent failed to take all this into consideration when making his final findings as contained in his arbitration award.

[56] The Applicant was denied legal representation and the Second Respondent curtailed the Applicant's evidence as well as arguments on inconsistency and being victimized at the work place . The issues as raised did not constitute discrimination and this prejudiced the Applicant in the presentation of his defence. It is quite clear that the Second Respondent exceeded his powers as a Commissioner and misconstrued his role as an Arbitrator which are grounds for review per section 145 (2) of the LRA.

[57] It is my view that the Second Respondent misconducted himself in the conduct of the arbitration proceeding and in respect of his duties as an arbitrator to such an extent that he actually deprived the Applicant of a fair and proper hearing which vitiated the entire arbitration proceeding as outlined herein. It is quite clear that he misconstrued the nature of the enquiry before him, failed to apply the proper tests for the evaluation of evidence, acted capriciously or upon the wrong principles and gave the impression of being bias in favour of the Third Respondent. The Third Respondent had to show that the Applicant's dismissal was for a fair reason after following a fair procedure which it failed to do on the

evidence placed before the Second Respondent, yet the Second Respondent confirmed the dismissal as being fair.

[58] The Applicant has over 30 years' experience in the furniture retail trade in various roles. He has a clean disciplinary record with the Third Respondent with some two and a half years' service. If he was indeed a rude, arrogant or an abusive person he would have been disciplined some time ago. Even if the Applicant and Ms Banda had a very tumultuous relationship this could have been sorted out with proper counselling and guidance or getting to the root of the problem. It is quite clear that Ms Banda has some gripe against the Applicant and this boiled over. It does not stand to reason why the Applicant will call Ms Banda's secretary Ms Van Greune , complain to her about Ms Banda and why Ms Van Greune will say that she has a duty to report this to her seniors, where after the Applicant will say to her that she can do so.

[59] This smack of a well-orchestrated campaign against the Applicant to ensure that a "*watertight*" case is made against him so that he is found guilty and dismissed as other employees using similar words were. Numerous other counts of misconduct could be preferred against the Applicant but this was not done. Miss Van Greune's evidence does not appear to be very convincing and after all she is the complainant's Ms Banda's secretary who owes her allegiance to her to remain in her job. The Second Respondent failed to evaluate all this under the banner of survey of evidence in his arbitration award.

[60] Even if the Third Respondent's version is to be preferred that the Applicant did utter these words then dismissal is too harsh a sanction for the offence. The Applicant can be placed in any other branch or division or area within the group and it cannot be said that the employment relationship has broken down irretrievably. Ms Banda has also contributed to these verbal outbursts if indeed it did take place and may have provoked the Applicant and baited him so that there will be a verbal outburst. Ms Banda stated that an apology like on previous occasions would have sorted the problem out and that on 25 March 2017 there

was another incident which prompted her to take the disciplinary action which she then took.

[61] However, the Applicant is not charged for this and for almost 3 weeks from 25 March 2017 to 24 March 2017 there were no further incidents which if it occurred would have been reflected in the charge sheet. If the incident of the 6 March 2017 was so serious then the Applicant would have been suspended and served with a disciplinary notice much earlier as Ms Banda was running the process. This entire episode is nothing but a well-orchestrated campaign to discredit the Applicant which the Second Respondent did not see through or reflect in his arbitration award .As such the award cannot be the decision of a reasonable decision maker given the evidential material before the Second Respondent.

[62] When the Court looks at and considers the Second Respondent's arbitration award the following extracts are very relevant. In his award the Second Respondent states that the evidentiary burden of a defence falls on the employee to establish and he states:

> "beyond that the Applicant did not successfully challenge the testimony of Ms Banda" [20]

This is incorrect as the Applicant extensively cross-examined Ms Banda and her evidence was discredited by the Applicant on numerous occasions.

[63] At para 29[21] of the Award he goes on to state:

> "On this analysis it my view that the Respondent proved on a balance of probabilities that the Applicant was disrespectful towards his DGM and that he likely used unsavoury language in his dealings with her."

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[20] See: para 28 of the arbitration award. Testimony of Ms Banda
[21] See: Para 29

[64] In para 30[22] of the Award he states:

> "Ms Banda, however, submitted that the Applicant would not have been charged had his behaviour not persisted. She also testified that the Applicant has behaved in this manner towards her before and had come back to apologize to her."

[65] The Second Respondent in para 30[23] of his award conclude as follows:

> "It is my view that the Applicant was dismissed in this instance for making false allegations to his Manager and to the Manager's secretary about his Manager. This goes beyond mere disrespect and insolence as it is done in the presence of other employees, the Applicant openly showing defiance for authority. The Applicant's behaviour towards the Manager also followed an enquiry by her into his work. By "publicly" declaring he does not intend to listen to his Manager or to respect her, the Applicant displayed more than insolence but insubordinate behaviour. Such behaviour that persists was found to justify dismissal in *Wasteman Group v SAMWU* and *SAMWU and Another v Rand Water and Others.* The dismissal of the Applicant is therefore found to have been substantively fair."
> (Footnotes omitted)

[66] The Second Respondent misconstrued the relevance of these cited case law and misconstrued the meaning of "such behaviour that persists." The analysis of the above case law as cited by the Second Respondent above points to a deliberate attitude of wilful insubordination by the employee. The Labour Appeal Court in *Wasteman Group v SAMWU*[24]stated:

> "Dismissal generally is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable."

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[22] See: Para 30
[23] See: Para 30
[24] [2012] 8 BLLR 778 (LAC).

[67] The LAC dismissed the Application and the decision of Steenkamp J who found that the actions of the employee amounted to insubordination but not so gross of a nature to justify dismissal was upheld

[68] The Second Respondent in his summing up of the guilt of the Applicant makes numerous incorrect submissions which renders his award reviewable using the reasonable decision maker test .

[69] The justification by the Second Respondent per his decision to impose dismissal as a sanction is not a decision of a reasonable decision maker as he made incorrect findings, more so that the Applicant was not charged for insubordination and justified his reasons with incorrect case law.

[70] A case of relevance *in casu* is the matter of *Lithotech Manufacturing*[25] wherein the employee had been dismissed after being found guilty of directing abusive language towards a superior. The arbitrator found that the employee had, in fact, sworn at his superior. However, taking in to account the surrounding circumstances, the arbitrator found the employee's dismissal sanction to be too harsh and awarded the employee a lesser sanction (effectively reinstating the employee).

[71] This decision went on review to the Labour Court, which took in to account the employee's long service at the company and the fact that the employee would reach retirement age soon. Further, that the objectionable words were not directed at the superior but were (needlessly) descriptive of the situation. Evidence was also led that there were no previous cases where an employee had been disciplined for using similar language in the workplace.

[72] The Labour Court recognised that swearing in the workplace was common and that a dismissal was inappropriate under the circumstances. The employee was subsequently reinstated with a final written warning.

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[25] Id fn 20.

[73] This case lent credence to the idea that the seriousness of the offence was directly related to the target of the offensive language. By order of ascending magnitude, it therefore becomes important to distinguish whether:

73.1 Swear words are simply being used in a general, non-specific way and in place of everyday adjectives

73.2 Swear words are being used to describe specific inanimate objects or broad concepts so as to highlight an objectionable situation; or

73.3 Directed towards or used to describe a particular person.

[74] The specific objectionable words and their meaning, together with the context wherein they were said as well as the audience (if any) who witnessed them said may be additional ad important factors in determining the seriousness of the offence.

[75] Therefore, based on all the above, it becomes clear that the existence of policies that regulates such language are of the utmost importance when considering disciplining staff.

Conclusion

[76] The Applicant never threatened nor intimidated Ms Banda in any way with harm or otherwise. The Second respondent speaks of "*Guidelines to the Code of Conduct to the LRA*" but disregarded the same totally. He merely rubber stamped the decision of the Third Respondent who imposed a sanction of dismissal whilst the same was not justifiable given the evidence as well as the offences committed.

[77] The Applicant in his founding affidavit set out his personal circumstances since being dismissed, which includes the death of his mother, his mother in law and him suffering a stroke. He gives details of his long service in the industry, his age almost reaching retirement and the hardships he had to endure since his dismissal.

[78] The Application to review and set aside the arbitration award of the Second Respondent must succeed for the reasons as outlined herein. Given the history of this matter this Court is in a position to finalize the same rather than to remit this matter to the First Respondent to be heard *de novo* by an arbitrator other than the Second Respondent. This court has before it the necessary evidential material to finalise this matter and to grant an appropriate relief.

[79] The primary statutory remedy for a substantively unfair dismissal is reinstatement of the dismissed employee unless the Applicant does not wish to be re-instated (which is not the case herein) or if the provisions of Section 193(2)(c) of the LRA is applicable. It reads as follows:

> "The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless- ...
> (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee."

[80] The Constitutional Court (CC) in the matter of *SACCAWU v Woolworths (Pty) Ltd*[26] stated that:

> "An employee must lead evidence as to why re-instatement is not reasonably practicable and the onus is on that employer to demonstrate to the Court that re-instatement is not reasonably practicable."

[81] The LRA does not define the terms "reasonably practicable", therefore the CC in *SACCAWU supra* when defining the term quoted with approval the Labour Appeal Court (LAC) decision of *Xtrata South Africa (Pty) Ltd (Lydenburg) Alloy Works v National Union of Mineworkers obo Masha*[27] where the LAC held that:

> "The object of section 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the job no longer exists, or the employer is facing liquidation or

[26] (2019) 40 ILJ 87 (CC).
[27] (2016) 37 ILJ 2313 (LAC) at para 11.

relocation or the like. The term 'not reasonably practicable' in section 193(2)(c) does not equate with term 'practical', as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."

[81] No evidence has been led by the Third Respondent which makes reinstatement inappropriate or not reasonably practicable nor did its counsel address the Court on this issue.

Costs

[82] The Court has in terms of section 162 of the LRA a discretion in awarding costs and the Applicant will be entitled to his costs.

[83] In the premises the following order is made:

Order

1. The arbitration award dated the 25th February 2017 issued by the Second Respondent is reviewed and set aside and substituted the following:

"The dismissal of the Applicant is substantively unfair."

2. The Third Respondent is ordered to reinstate the Applicant on the same or similar terms and conditions of employment he enjoyed at the time of dismissal.

3. The Third Respondent is to pay the costs of the Application.

A. Ramdaw

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. L E M Morland, Instructed by: Witz Calicchio, Isakow and Shapiro Inc

For the First Respondent: Ms N Abader Attorney : Edward Nathan Sonnenberg Inc