IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 282 OF 2014

BETWEEN

ALAF LIMITED..... APPLICANT

VERSUS

ASULWISYE MWALUPANI.....RESPONDENT

(ORIGINAL/CMA/DSM/TEM/323/2010)

JUDGMENT

15/07/2016 & 29/07/2016

Mipawa, J.

This is a revision application filed by ALAF LIMITED[1] herein after referred to as the applicant against the Respondent namely Asulwisye Mwalupani[2] in which the applicant was dissatisfied with the award of the CMA[3] herein the Commission[4].

The revision has been initiated by way of a notice of application and chamber summons supported by an affidavit of one Hussein Mfaume Simba, Human Resources Manager of the Applicant.

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[1] ALAF connotes Aluminum Africa Limited (Respondent in CMA)

[2] Complainant in the CMA

[3] CMA refers to the Commission for Mediation and Arbitration established under Section 12 of the Labour Institution Act No. 7 of 2004 Cap. 300 R.E. 2009

[4] In Trade Dispute CMA/DSM/TEM/323/2010 Massay, Esq. Arbitrator

In his affidavit the applicant had alleged the following against the arbitrator in the Commission that:-

1. *There was misconduct on the part of the arbitrator who had also acted illegally in the exercise of his jurisdiction and* ***with material*** *irregularity*[5].
2. *The arbitrator used his discretionary powers injudiciously and the award was* ***improperly procured***[6].
3. *The Rules of natural justice were not adhered to by the arbitrator who had interfered with the oral evidence given by the complainant. He told the complainants to change their statements and deliberately supplied answers to the cross-examination questions put to the complainants. The arbitrator was openly* ***biased*** *in favour of the complainants*[7].
4. *The arbitrator had inordinately delayed issuing the award. The decision/award had been fixed for the 17th of January 2014...The award was adjourned many times until it was adjourned sine die and then the award ...was eventually issued without notice*[8].

Now in order to comprehend what transpired in the Commission a brief background of the matter is necessary.

The Respondent was employed by the applicant in 1985 as an Engineer Trainee. He was elevated to the position of Deputy Works Manager until his termination. The Respondent employee was responsible

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[5] Applicant's affidavit in Revision No. 282 of 2014
[6] *ibid*
[7] *ibid*
[8] CMA arbitration award in CMA/DSM/TEM/323/2010 at p. 2

for supervision of production at Galco Division, Roliformers and Ridging Machines[9]. The respondent employee was on 22nd September, 2010 suspended from work after the applicant's technical report had revealed that there was some shortage of iron sheets "*mabati*" the charges placed under the bed of the respondent employee along with other fellow co-employees were:-

(i) *Failure to maintain proper records, that is the monthly technical reports to account for roofing sheets stock (resulted into roofing sheets shortage and lack of stock records)*[10].

(ii) *Failure to transfer finished goods from the shop floor to the warehouse despite instructions from the Chief Operating Officer (that resulted into roofing sheets being stolen from the shop floor)*[11].

The applicant proved his case[12], in the CMA by calling a witness one Hussein Mfaume Simba, a Human Resources Manager who told the Commission that the Chief Operating Officer (COO) was not happy with the way the complainant, now respondent, and his colleagues Mr. Azania Mgina, Mr. Aloyce Mgimwa and Mr. Appolinary Malima who had left the finished goods lying on the shop floor without being transferred to the warehouse for safe custody and sale as per the company regulations[13].

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[9] *ibid*

[10] *Ibid* first offence as seen in the charge sheet

[11] *Ibid* second offence as seen in the charge sheet

[12] Rule 24 of Labour Institutions (Mediation and Arbitration) Rules GN. 67 of 2007 the employer is duty bound to prove that termination of the employee was fair

[13] *op. cit* note 9 page 3 and 4

In the meeting he conveyed the Chief Operating Officer (C.O.O.) had directed the respondent and others to make sure that all the finished goods which were on the shop floor be immediately transferred to the warehouse. That the respondents and his fellow assured the Chief Operating Officer that they will perform as directed[14].

Nevertheless, the respondent and his colleagues failed to execute the said duty by the end of August, 2010 as a result of which 991 MT of the corrugated iron sheets were stolen causing huge financial loss to the company[15].

That the respondent and his colleagues admitted on that loss and were taken to be responsible. The records shows that the witness confirmed the respondent to have been accorded the full benefit of hearing while his fellows resigned from the service to avoid the unpleasant consequences of being associated with the theft of the company property.

The respondent employee on his part told the Commission that, on 30th July, 2010 inter office communication was issued with instructions meant to cover the month of August. According to the inter office communication, packing and dispatches on the daily basis of the bundles of mix sheets and ridges were specifically assigned to Malima and Joseph. That further instructions regarding the transfer of material was assigned to one Rukiza in the following words; "*...please insure availability of the truck for the transferring the material on daily basis...*" that according to the

[14] *op. cit* note 9 page 4
[15] *op. cit* note 9 page 4

inter office communication he (respondent) was not assigned the task of transferring finished goods from the shop floor to warehouse or anywhere else.

The respondent further told the CMA that the stock taking was duly carried out on production floors in September 1st 2010 as instructed and an interim report thereof was submitted to the internal audit officer on 2nd September, 2010. Physical stocktaking was conducted at shop/production floor of which it was found the loss of 991 MT.

The respondent argued that he was forced to sign the resignation letter but refused because he believed that he was not concerned with the loss or theft of the 991 MT. The act of the respondent angered and *"chilled"* the management which as the result it suspended him. He further stated that at the disciplinary hearing committee, the committee's findings did not specify or state how and or to what extent he had neglected his duties leading to loss of material.

He concluded that it was not true that he had assured at any meeting that he will be transferring any finished goods from the shop floor. The management, he said, had specifically instructed other members of staff to undertake transfer of, not only raw material to the production floors, but also transfer of finished goods to the warehouse. As to the loss or theft of the finished goods 991 MT of corrugated iron sheets he never admitted liability.

As regards to the rules of natural justice the same were not adhered because Kolapan who was operations manager production sat as a member of the hearing committee inspite of the fact that he was one of the accused and had admitted the liability and responsibility by signing the resignation letter. Therefore a person cannot be a judge of the fellow accused nor can his evidence or admission/confession be relied upon to convict co-accused.

In its award the Commission found that (after considering both parties evidence) the respondent was charged and dismissed from service for failure to maintain proper records that is monthly technical reports for roofing sheets stocks and failure to transfer finished goods from the shop floor to the warehouse despite instructions from the C.O.O. (Chief Operating Officer). However evidence showed that the preparation of the monthly technical reports for the month of June, July and August, 2010 were signed by the Senior Works Manager, Mr. Mgimwa, Deputy Works Manager Maintenance, Deputy Works Manager Electrical/Senior Electrical Engineer and Operations Manager, an indication and evident that the preparation of the technical reports was not the duty of the respondent. The respondent only signed the technical report of May, 2010 because Mgimwa the concerned was on leave. There was no evidence that the May 2010 technical report had any short comings:-

> *...There is no evidence to the effect that the May 2010 technical report had the short comings. Respondent did not pin point any specific area to fault the technical*

report for May 2010. For that observation the first ground of termination lacked basis...[16]

The CMA on the offence for failure to transfer finished goods from the shop floor to the warehouse, the learned arbitrator found that the inter office communication which was tendered before the Commission indicated that the complainant was directed to:-

> *...Ensure production and cutting plan of domestic should be as per above planning. It should be around 154 MT per day in all profile machines excluding export and colour material and circulate the report for same....*[17]

The learned arbitrator further found that on the offence of failure to transfer finished goods from the shop floor to the warehouse:-

> *...The inter office communication directed Malima and Joseph to "**ensure packing and dispatches on daily basis**" and Rukiza was assigned to "**ensure availability of the truck for transferring the material on daily basis**" this shows that the complainant was not assigned to transfer the finished goods from the shop floor to the warehouse...*[18]

Rejecting the applicant's evidence the Commission concluded that the respondent (in CMA), who is now the applicant in this revision, his oral instructions that he directed the respondent employee to transfer those

[16] CMA award *op. cit* see pages 8 and 9
[17] The inter office communication as quoted by the Commission at page 9 of the arbitration award
[18] *ibid*

goods contradicts the inter office communication[19]. The learned arbitrator therefore found that termination was substantively unfair[20].

As regards to the procedural fairness the learned arbitrator found that the record in the disciplinary hearing did not reflect the evidence of witnesse (s) who supported the charges against the respondent as per Rule 13 (5) of the Code of Good Practice Rules[21], which requires the presentation of evidence in support of the allegations.

The Commission also found that the respondent was denied an opportunity to hear and cross-examine the applicant's witness contrary to Rule 13 (4) of the Code of Good Practice[22].

The learned arbitrator in the Commission further found that the hearing committee was chaired by Christopher Mumanyi who is not in the employment of the respondent but rather as a legal officer in the employment of HR Solutions Limited. The approach which contravened Rule 13 (4) of the Code of Good Practice which requires the disciplinary hearing be chaired by a sufficiently senior management representative who shall not have been involved in the circumstances giving rise to the case[23].

In the final analysis the Commission found that the respondent was by and large substantively and procedurally unfairly terminated and hence ordered for reinstatement of the respondent employee without loss of

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[19] *op. cit* note 16 page 9
[20] *op. cit*
[21] GN No. 42 of 2007 "...the employee shall be given a proper opportunity at the hearing to respond to the allegations, question witnesses called by the employer and call witnesses if necessary..."
[22] Employment and Labour Relations (Code of Good Practice) GN. No. 64 of 2007
[23] *ibid*

remuneration as per Section 40 of the Act No. 6 of 2004[24]. Hence the present revision.

The hearing of the revision application before this Court was not ***viva voce*** (by live voice) but by way of written submissions. The applicant was represented by M/S Sheikh Advocate while the respondent enjoyed the services of Mr. Msafiri Learned Counsel. Both parties submitted their written submission timely as ordered by the Court[25].

In his very long submission about 32 typed pages ***vis-à-vis*** the arbitration award of about 11 pages typed, the learned counsel for the applicant argued in support of the revision that the application for revision is based on the following grounds (though the learned counsel did not argue the points or grounds in good order and it is difficult to follow one after another (***un unautre***) the grounds of the application are as follows:-

(a) The decision/ruling of the arbitrator is problematic as it is in conflict with the findings and it is also contrary to the law.

(b) The arbitrator erred in fact and in law in holding that the respondents were not properly terminated.

(c) The arbitrator's decision and award are problematic.

(d) The arbitrator's decision was irrational and biased.

[24] Section 40 (1) a of the Employment and Labour Relations Act No. 6 of 2004 Cap. 366 R.E. 2009
[25] Order of this Court in Revision No. 282 of 2014 of 17/02/2016 by Mipawa, J.

(e) *There was **misconduct** on the part of the arbitrator who also acted in the exercise of his jurisdiction illegally and with material irregularity.*

(f) *There has been an **error material** to the merits of the subject matter **in the arbitration proceedings** involving and resulting injustice to the applicant.*

(g) *The arbitrator used his discretionary powers injudiciously and the award was **improperly procured**.*

(h) *The arbitrator had deliberately manipulated the arbitration proceedings to arrive at the decision he wanted.*

(i) *The arbitrator had been influenced by the proceedings in Dispute No. CMA/DSM/TEM/323/2010.*

(j) *The arbitrator had taken into account extraneous matters which had not been mentioned in the pleadings, proceedings or adduced in evidence in this arbitration.*

(k) *The awards were by far in excess of what is provided for under law (an alternative ground and without prejudice to the above grounds)*[26].

Submitting the learned counsel confessed that most of the grounds on which this application for revision is based specifically grounds no. (i), (iii), (iv), (v), (vii), (viii), (ix) and (x) are concerned with the way that the

[26] Applicant's written submissions in Revision No. 282 of 2014 at p. 2

arbitrator had deliberately conducted the arbitration proceedings irregularly, injudiciously and against the tenements of the principle of natural justice[27].

Now following the above confession by the learned counsel for applicant in her written submission and having ***in ex-abundant cautela*** (with extreme eye of caution) read the submissions of both parties between the lines, I find it prudent to put the grounds of revision in the following cluster since they all revolve in the issues which I have adopted hereunder:-

(a) Whether or not the respondent employee was substantively and procedurally unfairly terminated by the applicant employer.

(b) Whether there was misconduct in relation to the duties of an arbitrator.

(c) Whether there was gross irregularity in the conduct of the arbitration proceedings.

(d) Did the arbitrator acted in excess of his powers (i.e. exceeded his powers).

(e) Whether the award was improperly procured.

In his submissions which I will brief summarize the learned counsel for the applicant submitted that, the arbitrator had deliberately conducted the arbitration proceedings irregularly, injudiciously and against the tenements of the principle of natural justice.

[27] *ibid* at p. 3

She gave an example of paragraph F at page 12 of the supporting affidavit of Hussein Mfaume Simba DW1 that the arbitrator went so far as to tell the complainant respondent to change his oral evidence and also supplied answers to the cross examination questions, as if the arbitrator himself was the witness under cross-examination.

The arbitrator had adjourned issuing the award many times; he issued the award without notice to the applicant. She submitted that what is perplexing is the respondent (then complainant in the CMA) had received the award before it was registered at the CMA registry.

The learned counsel further submitted that the applicant through her counsel had made many objections to the misconduct of the arbitration proceedings, including the fact that it seemed that Hon. Massay had a monopoly of being appointed as the arbitrator of all disputes involving ALAF Limited even though he is at Ilala Zone of CMA and ALAF Limited falls under Temeke Zone of CMA.

She gave examples of Dispute No. CMA/DSM/KIN/R. 60/13/142[28] and Dispute No. CMA/DSM/KIN-ILA/367/2007[29].

She alleged that the arbitrator had a peep on evidence in one case before it was tendered in another case and worse still in the award the arbitrator took into account extraneous matters which had not been part of the proceedings adduced in evidence or even mentioned in the pleadings. As such the arbitrator had breached the rule against "*bias*" during the

[28] Azaria Mgina and 2 others V. Chief Executive Officer ALAF Limited
[29] Jovin Lubuva and 7 others V. ALAF Limited

proceedings and so could not conduct a fair and independent hearing of the issues in the dispute that under the rules of natural justice the arbitrator was required in making the decision not to take into account any extraneous considerations, thus the above are enough to vitiate the said arbitration proceedings and award.[30]

The applicant further submitted on substantive fairness of termination of the respondent that the termination was valid or substantively fair for reason of the employee's gross misconduct and negligence or/and disobedience of repeated lawful and reasonable orders of the employer, which has caused a huge loss to the employer.

She submitted that the offence for which the respondent was terminated were (a) gross negligence which in law is the breach of duty by the respondent (b), **his indifference to obeying lawful orders of his superiors** an omission that had caused a serious loss to the employer.

The respondent had also committed gross insubordination which was the disobedience to the **lawful and reasonable orders** of his superiors, that what both the respondent and then the arbitrator failed to realize was that, the very refusal of the respondent (the complainant) to obey an order which the Chief Operations Officer, a Superior Officer was entitled to give and be obeyed amounts to insubordination. Therefore whether the respondent was guilty of falsifying/negligent in preparing the technical reports or not, he readily admitted that he had willfully refused or omitted from obeying the Chief Operations Officer's order to ensure the finished

[30] CMA award *op. cit* note 9 at page 4

goods lying on the shop (factory floor) be removed to the warehouse for safe storage. The applicant relied on the case of **Magnus Assenga V. Director Automobile Limited**[31], in which the High Court Labour Court Division held as insubordination where:-

> *(i) The employee refused to perform lawful instructions.*
>
> *(ii) The employee disobeys lawful orders (in this case not removing the finished goods on the shop floor storage)*[32].

The applicant submitted further that the respondent was held responsible for the disappeared goods because he was one of the production managers. That Mr. Mwalupani (the respondent) had also falsified technical report of the month of May, 2010.

That the respondent (and his other colleagues) had deliberately falsified the technical reports (of the months of May, June, July and August, 2010) by filing them with the wrong information on stocks and inventories to hide the loss of good in the shop/factory floor, the reports were collectively tendered as exhibits 'D2'. She added that the falsification of the technical reports was such a serious misconduct that alone would have justified the termination.

That according to the respondent, he had prepared only the technical report of the month of May which he alleges was correct and therefore he was not guilty of falsifying any technical reports. However, he (respondent)

[31] Revision No. 122 of 2008 HCLD (unreported)
[32] *ibid* as quoted by the applicant in her written submission at page 15

admits that the technical reports of each month was calculated from and depended on the figures of the previous months. As it was not in dispute that the reports of June, July were faulted which means that the figures of the May reports must have been faulty[33].

The applicant further submitted that the fact that the month of may technical report had been counter signed (passed) by the Superior Officers Mr. Kolapan is no guarantee that report was correct or absolve the respondent. After all Mr. Kolapan admitted to have passed and signed those technical reports because he had believed the words of the officers who had filled in the reports[34].

As regards to procedural fairness the applicant submitted that the rules of natural justice and the provisions of the code were adhered to:-

(i) *There had been a full investigation by the internal audit committee and a team of the other managers and staff of the factory division*[35].

(ii) *The respondent was notified in writing of the hearing the notification contained sufficient information about the alleged misconduct and the respondent was given sufficient time to prepare for hearing*[36].

(iii) *The respondent first replied in writing to defend himself.*

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[33] *op. cit* note 9 at p. 17
[34] *op. cit* note at p. 17
[35] GN. No. 42 of Code of Good Practice Rule 13
[36] *ibid* Rule 13

(iv) *The respondent had more than 48 hours to prepare for the hearing*[37].

(v) *The disciplinary committee had been chaired by a Senior Lawyer with Human Resources experience*[38].

(vi) *The composition of the committee included Mr. Kolapan Operations Manager production who was the Head of the Production section.*

(vii) *He was represented by two TUICO - ALAF Branch representatives appointed by the respondent himself*[39].

(viii) *Respondent was given a full opportunity to defend himself which he did*[40].

(ix) *According to the respondent except for being explained the charges against him none of the other members of the committee spoke or any witness was brought to give evidence against him so the opportunity of cross-examination was not utilized by the respondent himself.*

In his reply submission the respondent's counsel submitted that the accusation leveled to the arbitrator by the applicant are baseless, the applicant had not pinpointed any specific incidence of the arbitrator "*coaching*" the complainant to change his answers to questions put across during cross-examination. The accusations are mere afterthought aimed at

[37] *ibid* Rule 13
[38] *ibid* Rule 13
[39] *ibid* Rule 13
[40] *ibid* Rule 13

unfairly mudslinging the arbitrator. It was not true that the matter in the CMA was adjourned ***sine die*** the arbitrator kept on fixing dates to the parties to appear and collect the award[41]. That the applicant herself lost the track of the matter for her own reasons. He submitted further that[42]:-

> *...The applicant is accusing the arbitrator of having peeped in evidence of one case and applying it to the other...the applicant is merely raising fanciful accusation against the arbitration. The record is clear in that all evidence in chief was tendered in form of sworn affidavits written by the parties. The arbitrator was not therefore in a position to source any evidence from the parties or cannot be blamed of omitting any evidence in chief as he was not the author or recorder[43].*

The respondent further submitted that it is absolutely not true that the respondent had any time admitted that the chief operating officer had given repeated instructions to him not to leave finished products lying on the factory floor[44].

On the valid cause of termination alleged by the applicant that the respondent had committed gross negligence[45] and gross insubordination[46], the respondent submitted that there was no proof that the respondent was directed, but failed to discharge the responsibility (the duties) he was

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[41] Respondent's written submission is Revision No. 282 of 2014
[42] *ibid*
[43] *ibid*
[44] *ibid*
[45] Gross negligence See Code of Good Practice GN. No. 42 of 2007 Rule 12 (3) (d)
[46] Gross insubordination *ibid* Rule 12 (3) (f)

assigned:-

> *...In respect to the preparation of monthly technical reports for the month of June, July and August 2010 were signed by the Senior Works Managers Mr. Mgimwa, Deputy Works Manager Maintenance, Deputy Works Manager Electrical, Senior Electrical Engineer and Operations Manager. This suggests that primarily preparation of the technical reports is not the duty of the complainant...Respondent applicant in this revision did not pinpoint any specific area to fault the technical report for May, 2010...*[47]

On the reason for failure to transfer finished goods from the shop/factory floor to the warehouse the respondent submitted by quoting the arbitrators findings that:-

> *...The inter office communication directed Malima and Joseph to ensure availability of truck for transferring the material on daily basis. This show that the complainant was not assigned to transfer the finished goods from the shop floor to the warehouse...*[48]

He submitted further that the respondent evidence that there was oral instruction to the effect that the complainant was directed to transfer those goods contradicts the inter office communication memo directive, and in any event the Commission was not prepared to accept that evidence

[47] *op. cit* note 39
[48] *op. cit*

because it was not supported by any other evidence[49]. He further alleged that at page 10 of the award, it was stated that:-

> *...The Commission went through the records of the disciplinary hearing tendered as evidence. After going through it, the Commission has noted that the record does not reflect the evidence of witnesses who supported the charges against the complainant at the disciplinary hearing committee...*[50]

He added that the records of the disciplinary hearing tendered before the Commission does not reflect or disclose the evidence of the respondent's witnesses at the hearing. The Commission found that such evidence which lead to the termination of the complainant was never adduced before the complainant during the disciplinary hearing[51]:-

> *...This means that the complainant was denied an opportunity to hear and cross-examine the respondent witnesses contrary to Rule 13 (4) of the Code of Good Practice. The Commission therefore finds that the complainant was found guilty to the charges without any evidence presented by the respondent in support of the charges at the disciplinary hearing committee...*[52]

Submitting further on the procedural aspect, the respondent argued that, Mr. Kolapan heard and determined the charge against respondent

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[49] *op. cit*
[50] CMA arbitral award page 9 - 10
[51] *ibid* at p. 6 of 9
[52] *ibid* see also Rule 13 (4) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007

while Mr. Kolapan being a member of the committee, had admitted occasioning loss to the employer and had signed a resignation letter. It was highly inappropriate for him to be a judge of the case against a co-accused. If the applicant wanted to benefit anything from him, Mr. Kolapan could have been summoned as a witness[53]. Further that:-

> *...The applicant had not called Mr. Hussein Mfaume Simba Human Resources Officer as a witness before the disciplinary committee. He was rather a member of the committee responsible to hear and determine the charge in a capacity as a decision maker; no witness was called by applicant at all...*[54]

The respondent concluded in his reply submission that the applicant has submitted that the arbitrator had based his decision on extraneous matters and made specific reference to page 12 of the award "*...it was submitted on behalf of the complainant that the complainant was denied an opportunity to put forth mitigating factors...*". The respondent submitted in the closing arguments. It was submitted at p. 12 para 3 that:-

> *...It is our humble submission that the breach of Rule extended even to the breach of provision or Rule 13 (7) of the Rules in that ...complainant was found guilty (in the Committee) albert mistakenly.*
>
> *It was incumbent upon respondent to give the complainant an opportunity to put forward any mitigating factors before a decision was made...*

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[53] *ibid* p. 7 of 8
[54] *ibid*

I have carefully heeded to the submission of both parties and duly considered the record of the CMA with an extreme caution (***in ex-abundant cautela***). I will now determine the following issues in a "*clockwise style*" starting with the first question:-

> *...Whether or not the respondent employee was substantively and procedurally unfairly terminated by the applicant employer...*

It should be recalled ***in limine*** (at the outset) that the respondent had faced charges of misconduct as indicated in the judgment (supra) i.e. failure to maintain proper records and failure to transfer finished goods from the shop floor to the warehouse. Thence the respondent was also accused of gross negligence and gross insubordination. Section 37 (1) (2) of the Employment and Labour Relations Act[55], prohibits the termination of an employee without a **valid reason** (s) and a **fair procedure**:-

> *(1) ...It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove:-*
>
> *(a) That the reason for termination is valid.*
>
> *(b) That the reason is a fair reason:-*
>
> *(i) Related to the employee's conduct, capacity or compatibility or*
>
> *(ii) Based on operational requirements of the employer and that.*

[55] Act No. 6 of 2004 Cap 366 R.E. 2009

(c) That the employment was terminated in accordance with a fair procedure[56].

Therefore in considering whether or not the termination of an employee was unfair or not an arbitrator, employer or judge in terms of the Employment and Labour Relations (Code of Good Practice) is required to consider the following:-

(a) Whether or not the employee contravened a rule or standard regulating conduct relating to employment.

(b) If the rule or standard was contravened whether or not:-

(i) It is reasonable.

(ii) It is clear and unambiguous.

(iii) The employee was aware of it or could reasonably have been aware of it.

(iv) It has been consistently applied by the employer.

(v) Termination is an appropriate sanction for contravening the rule[57].

The respondent in the instant case as the record shows, and clearly found by the learned arbitrator was not concerned with the offences as charged, **first**; the failure to maintain proper records, that is, the monthly technical reports to account for roofing sheets stock, which resulted into roofing sheets shortage and lack of stock record. This has rightly pointed by the arbitrator, was signed by Mr. Mgimwa Deputy Works Manager Maintenance, Deputy Works Manager Electrical which indicated that the

[56] *ibid*

[57] *op. cit* note 33 (GN 42 of 2007)

preparation of the monthly technical report was not a duty of the respondent.

The record only showed that the respondent signed the report of May, 2010 because the concerned Mr. Mgimwa was on leave and as rightly pointed by the learned arbitrator, there was no evidence put forward in the CMA to show that the month of May 2010 technical report had any short comings. I entirely and respectfully agree with the findings of the learned arbitrator that:-

> *...There is no evidence to the effect that the May, 2010 technical report had the short comings. The respondent did not pinpoint any specific area to fault the technical report for May, 2010. For that observation the first ground of termination lacked basis...*[58]

Secondly the learned arbitrator who had the opportunity to hear the parties was in a good position to find that the offence of failure to transfer finished goods from the shop floor to the warehouse was not the concern of the respondent. In other words the inter office communication tendered in the Commission as exhibit, directed the duty to transfer finished goods from shop floor to warehouse to other employees. I agree with the Commission which held that:-

> *...The inter office communication directed Malima and Joseph to "ensure" packing and dispatches on daily basis and Rukiza was assigned to ensure availability of the truck for transferring the material on daily basis.*

[58] *op. cit* note 16 (CMA award)

This shows that the complainant was not assigned to transfer the finished goods from the shop to the warehouse...[59]

I rightly think that since the respondent was by and large (had) been directed to do other duties as per the inter office communication i.e.:-

...Ensure production and cutting plan of domestic should be as per above planning, it should be around 154 MT per day in all profile machines excluding export and colour material and circulate the report for same...

Then if there were other oral instructions as alleged by the applicant which directed the respondent employee to transfer those finished goods from shop floor to warehouse which was not his function or duty as per the inter office communication; then the order of the applicant to the respondent by ordering or superimposing the duty he had instructed to other staffs, Malima and Joseph i.e. the duty of transferring the finished goods, (packing and dispatching on daily basis) it is my considered view that the instruction or order of the applicant employer to the respondent was **unreasonable** in the circumstances (if at all there was such an instruction or order without due regard to the inter office communications), and as rightly pointed out by the arbitrator the oral instructions or orders contradicted the inter office communication of the applicant employer himself. This Court held in **Hashim J. Mbughi V. TANESCO,** (2014) at

[59] *op. cit* note 17

Sumbawanga that:-

> *...If an employer's order to an employee is unreasonable and illegal in the circumstances then the sanction of termination to the employee who disobeyed the order will be too harsh and severe, and alternative sanction and not termination could be imposed by the employer...*[60]

In the same vein I entirely and respectfully subscribe to the wisdom of Dr. Emil Strydom in her article titled "***Dismissal for misconduct. The statutory requirements for a fair Dismissal for misconduct***" that:-

> *...Dismissal of the employee for refusing to obey a superior's orders may be too severe a penalty if the superior's orders were unreasonable and illegal...*[61]

The arbitrator was in my view correct to interfere with the unreasonable and unfair decision of the employer applicant to terminate the respondent employee over the offences he was not concerned and had **not breached** or contravene any **rule** or **standard** regulating conduct relating to employment as the evidence clearly showed in the Commission. The duty of the arbitrator therefore means that:-

> *...The arbitrator must take into account the totality of circumstances including the purpose and importance of the rule that had been breached...the reason the employer imposed the sanction of dismissal, the harm*

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[60] Revision No. 16 of 2014 HCLD Sumbawanga unreported per Mipawa, J.

[61] Dr. Emil Strydom (LLM) (LLD) University of South Africa contributing article in Prof. Basson et al Essential Labour Law Vol. 3 [2002] Dr. Strydom is Industrial relations manager in the chamber of mines of South Africa. She is Attorney of the High Court of South Africa

caused by the employee's conduct... the effect of dismissal on the employee and the employee's service record... (Sidumo V. Rustenburg Platinum Mines Ltd. [2007] Constitution Court of South Africa)...[62]

Nevertheless the factors as listed in the case above by the Constitutional Court of South Africa are not exhaustive and an arbitrator when considering the appropriateness of the termination/dismissal must; (to quote Du Toit et al **Labour Relations Law a comprehensive guide 2015** Durban South Africa[63] (I entirely and respectfully agree):-

*...The arbitrator must make a value judgment based on the Commissioner's own sense of fairness also taking into account the provisions of the **Code of Good Practice** and the fact that the burden to prove the fairness of a dismissal rests with the employer...*[64]

In the instant matter I agree with the learned arbitrator who found as fair that the respondent employee was not concerned with the two offences charged and hence he (employee) was not negligent and did not commit any gross insubordination, let alone insubordination itself. To borrow the wisdom of Judge TIP, in a South Africa Case of

[62] [2007] 12 BLLR 1097 (CC) Constitutional Court in Du Toit et al. Labour Relations Law a comprehensive guide 6th ed. 2015. Nexis Lexis Durban South Africa

[63] *ibid*

[64] See also GN. No. 42 of 2007 Code of Good Practice Tanzania where the burden of proof for fairness rests with the employer

Theewaterskloof Municipality V. **SALGA**[65]. Who held ***interalia*** that:-

> *...(T) he core inquiry to be made by a Commission will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee's challenge of it. That requires a proper understanding of both, which must then be weighed together with all other relevant factors in order to determine whether the employer's decision was fair...*[66]

In my view the learned arbitrator in the present case had in the Commission weighed together the testimonies of both parties and their exhibits with all other relevant factors as clearly pointed out by the arbitrator and came out with a value decision that the termination of the respondent by the applicant was **not fair**. (i.e. unfair termination) I agree with the arbitrator.

There was no clear evidence found by the learned arbitrator that the respondent had contravened any rule or regulation of the applicant's company. There was no clear evidence which by and large pinpointed on the balance of probabilities that the respondent's report of May 2010 which he signed when Mr. Mgimwa was on leave had any short comings.

The learned arbitrator weighed the inter office communication admitted in the Commission which had instructed who had to do what at place of work concerning the products of the applicant. The respondent

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[65] [2010] 10 BLLR 12 16 (LC) 1223 as quoted by Tammy Cohen article titled "unfair Dismissal Tammy Cohen BA LLB (UND) Ph D (UKZN) associate professor of Law University of Kwazulu Natal

[66] Du Toit et al Labour Relations Law: A comprehensive guide 6th Edition [2015] Durban Lexis Nexis at page 452

was instructed through the inter office communication to do other duties as explained above in the evidence and the duties of transferring the finished products from the store floor to warehouse *"...packing and dispatching on daily basis and ensuring availability of the truck for transferring material on daily basis..."* were instructed to be performed by other employees who were named as Malima and Joseph.

If there was any other instruction to the respondent by the applicant to perform the disputed duties then the same was not proved on the balance of probabilities that, indeed such an instruction was issued. There was no such instructions orally made by the applicant as rightly pointed out by the respondent in the Commission and correctly concluded by the arbitrator in his finding that; *"...if at all there was an oral instructions by the applicant to the respondent to perform the disputed duty then it contradicted the inter office communication issued by the applicant himself..."* However the oral instruction was not proved by the applicant as correctly found by the arbitrator in the Commission because:-

> *...In arbitration proceedings the arbitrator must decide on the evidence presented, whether the employee's dismissal (termination) was justified by* ***a fair reason*** *founded on* ***a valid ground****. It is ultimately the arbitrator's assessment and not the employer's view that will be decisive... The arbitration constitutes a fresh hearing to determine the fairness of the dismissal. (See* ***County Fair Food (Pty) Ltd. V. CCMA*** *[1999] 11*

BLLR 1117 (LAC) Labour Appeal Court of South Africa)[67]*...*

To conclude on the substantive fairness I entirely and respectfully agree with the learned arbitrator that the termination of the respondent was unfair. To add I would say that the employee's termination was not justified by **a fair** and **valid reason** founded on **a valid ground** and thence the arbitrator was right to interfere with the employer's decision which was unfair and unreasonable in the circumstances. In a South Africa case of **Nampak Corrugated Wade Ville V. Khoza [1999]**[68] the Labour Appeal Court had this to say (to borrow the wisdom):-

> *...The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However this discretion must be exercised fairly. A Court should therefore not rightly interfere with the sanction imposed by the employer* ***unless the employer acted unfairly in imposing the sanction.*** *The question is not whether the Court would impose the sanction imposed by the employer but whether in the circumstances of the case the sanction was reasonable...*[69]*(See Prof. Annal Basson et al. Essential Labour Law Vol. I Third Edition [2002] Houghton South Africa.*

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[67] Du Toit et al *op. cit* page 442 In Tommy Cohen Ph D article "unfair Dismissal Tommy Cohen an associate

[68] See Edward Onyango V. African Barrick Pangea Minerals HCLD at Shinyanga Revision No. 29 of 2012 at p. 19 -20

[69] Nampark Corrugated Wade Ville V. Khoza [1999] 20 ILJ 578 [LAC] as quoted by Professor Annal Basson et al Essential Labour Law Vol. 3rd Ed. 2002

It is therefore clear that the decision to terminate lies squarely with the employer but the arbitrator or Court may interfere with the employers decision if on the totality of the circumstances of the case the employer had acted unfairly and or unreasonable. In the instant case at hand it is not without any flicker of doubt that the employer on imposing the sanction of termination to the respondent acted unfairly and unreasonable. The supreme Court of Appeal of South Africa in **Rustenburg Platinum Mines Ltd. V. CCMA**[70] sealed the position by accepting that (I subscribe):-

> *(a) The discretion to dismiss lies primarily with the employer.*
>
> *(b) The discretion must be exercised fairly; and*
>
> *(c) Interference should not lightly be contemplated.*
>
> *(d) The Commissioner should use their powers of intervention with "caution"...*[71]

Nevertheless the above two cases of **Nampak Corrugated Wade Ville V. Khoza [1999]** by Labour Appeal Court of South Africa and **Rustenburg Platinum Mines Ltd. V. CCMA [2006]** by the supreme Court of Appeal of South Africa have been overruled by the Constitution Court (CC) of South Africa (which is the Highest Court) and the "*reasonable employer's test*" is no longer a good law.

[70] [2006] 11 BLLR 1021 (SCA) Quoted by Du Toit et al *op. cit* p. 451
[71] *ibid*

It should be recalled that the "reasonable employers test" was borrowed from English Law in **British Ley Land UK Ltd. V. Swift** [1981] per Lord Denning MR. that:-

> *...was it reasonable for the employer to dismiss? If no reasonable employer would have dismissed him then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair [1981] 1 RLR 91.*

Rejecting the "*reasonable employer's test*" the constitutional Court of South Africa (CC) in **Sidumo V. Rustenburg Platinum Limited** [2007] 12 BLLR 1097 (CC) placed the noble task of determining fairness of a dismissal to the arbitrator when it held that:-

> *...There is nothing in the **constitution** and **statutory scheme** that suggests that in determining the fairness of a dismissal a Commissioner (or arbitrator) **must approach the matter from the prospective of the employer**. All the indication are to the contrary. A plain reading of all **relevant provisions** compels the conclusion that the Commissioner is to determine the dismissal dispute as an impartial adjudicator...*

I entirely and respectfully subscribe to the above holding of the highly persuasive case law and take the same to apply in our jurisprudence that the "*reasonable employer test*" in fairness of dismissal is now bad law

On the procedural fairness before terminating the respondent, the learned counsel for the applicant submitted that the employer followed the

relevant rules (see the submission of the applicant above on fairness of the procedure) as per the Employment and Labour Relations (Code of Good Practice) Rules that[72]:-

- *There had been a full investigation Rule 13 (1)[73].*
- *The respondent was notified of the allegations Rule 13 (2)[74].*
- *The respondent was given a reasonable time to prepare his defence more than 48 hours and was assisted by (TUICO - ALAF) a trade union representative. Rule 13 (3)[75].*
- *The hearing was chaired by a Senior Management representative (Senior Lawyer with Human Resources experience Rule 13 (4)[76].*
- *The employer shall communicate the decision to the employee with written notification of decision and brief reason (this was not mentioned by the applicant)[77].*
- *The right of appeal (not mentioned by applicant)[78].*

The respondent employee however had contended that the applicant employer did not comply with the Code of Good Practice because no

[72] GN. No. 42 of 2007
[73] *ibid Rule 13 (1)*
[74] *ibid Rule 13 (2)*
[75] *ibid Rule 13 (3)*
[76] *ibid Rule 13 (4)*
[77] *ibid Rule* 13 (8)
[78] *ibid Rule* 13 (10)

witness was called by the applicant and further that:-

- *He (respondent) was denied an opportunity to put mitigating factors as required by Rule 13 (7)*[79] *of the Code of Good Practice.*
- *Mr. Kolapan heard and determined the charge against the respondent while Mr. Kolapan being a member of the Committee had admitted occasioning loss to the employer and had signed the resignation letter. It was inappropriate for him to be Judge of the case against a co-accused*[80].

Perhaps on procedural fairness ***in limine*** (at the outset) I would start with the arbitrator's findings (as well as the respondent employee's allegation) that the applicant employer did not follow a fair procedure:-

1. *The disciplinary hearing committee record did not reflect the evidence of witnesses who supported the charges against the respondent as per Rule 13 (5) of the Code of Good Practice Rules which requires the presentation of evidence in support of the allegations.*
2. *The Commission also found that the respondent was denied an opportunity to hear and cross – examine the applicant's witnesses contrary to Rule 13 (4) of the Code of Good Practice.*
3. *That the hearing committee was chaired by Christopher Mumanyi who is not in the employment*

[79] Applicant's written submission *op. cit* note 26
[80] *ibid*

of the respondent rather a senior legal officer in the employment of HR Solutions Limited. The approach which contravened Rule 13 (4) of the Code of Good Practice.

I will start with the last finding of the Commission on procedural fairness which I have identified it as **no. (3)**. It must be understood that the person hearing the allegations against the employee in the disciplinary hearing committee who is referred to as a chairperson should be free from bias against the employee concerned, he must keep an open mind before making any decision. The chairperson should have the following qualification or characteristics:-

- *The chairperson should be one who was not involved in the incident giving rise to the disciplinary allegations.*
- *He must be relatively senior and equal or superior to the complainant and the employee concerned and*
- *Should have no personal interest in the outcome or personal or family relationship with the complainant other than interest in the proper conduct of the employer's enterprise.*

The appointment of an outside (outside party) to preside the disciplinary hearing committee during an investigation does not necessarily create a perception of bias and it is not prohibited if the chairperson qualifies to the above ingredients. The above position was also held in a South Africa case of **Khula Enterprise Finance Ltd. V. Madinane**

[2004] 4 BLLR 366 LC,[81] in which the Labour Court of South Africa reiterated the position that it is not "*a sin*" to have an outsider to preside as a chairperson. In my view the senior legal officer Mr. Christopher Mumanyi was capable and fit for the chairmanship. There were no perceptions or indication of **bias** that had been put to Mr. Mumanyi by the respondent employee. Bias may come like this:-

> *...Indication of bias include uttering an obscenity when discussing the issue of representation (**Coin Security Group (Pty) Ltd. V. TGWU** [1997] 10 BLLR 126 (LAC) (Labour Appeal Court of South Africa)...or making statements anticipating the outcome of the hearing...*[82]

In any event the employee has no right to participate in the selection and appointment of the presiding officer of an Enquiry in the Disciplinary Hearing Committee.

On the procedural fairness findings by the Commission noted as **no. (i) and (ii) above**, it must be kept in mind that the Code of Good Practice Rules GN. No. 42 of 2007 **is not the codification of the law**, save that it is **a guide to good practice**. It is not "**a check list**" of obligatory formal steps. According to Dr. Tamara Cohen "***Unfair Dismissal***"[83], (the position I subscribe) he comments that:-

> *...(The Code of Good Practice) although it states that an employer should normally investigate to determine if there are grounds for dismissal. It also states that*

[81] Tamara Cohen 'Ph D' "*Unfair Dismissal*" contributing article in Du Toit et al Labour Relations Law: A comprehensive guide 2015

[82] *ibid*

[83] *op. cit* note 79

investigation need not be a formal enquiry. Essentially, ***the employer is required to apply the principle of natural justice.*** *The main principle are that* ***an employee suspected of breaching a work place rule has a right to be heard and that the decision maker must keep an open mind...***[84]

The Code of Good Practice therefore sets forth certain minimum requirements that should be met or followed. Nevertheless, when assessing compliance with the Code of Good Practice[85], arbitrators must:-

*...Guide against a "**check list approach**". It does not follow that an employer who failed to comply with one or more of its recommendation has acted unfairly. The test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to rebut the allegations of misconduct and bring to the attention of the employer a relevant information before a final decision is taken...*[86] *[see Dr. Tamara Cohen article titled "Unfair Dismissal" in Prof. Du Toit et al Labour Relations Law: A Comprehensive Guide 2015 6th Ed. P.452 Lexis Nexis Durban South Africa]...*[87]

The respondent's contention that he was denied an opportunity to put mitigating factors under Rule 13 (7) of the Code alone is a

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[84] *op. cit*

[85] Employment and Labour Relations Code of Good Practice Rules (GN) Government Notice No. 42 of 2007

[86] Dr. Tamara Cohen *op. cit* note 79

[87] Darcy Du Toit (Managing Editor) BA LLB (UCT) LLD (Leiden) Emeritus Professor of Law, Senior Arbitrator South Africa

"*mechanical*" **check list** approach so to speak. Under Rule 13 (2) of the Code of Good Practice GN. 42 of 2007 for example the code requires that "*... where a hearing is to be held, the employer shall notify the employee of the allegation using a form and language that the employee can reasonably understand...*". It has been held in certain circumstances that though the employee was not given the details of the offence charged as per the Code of Good Practice, where the employee understood the nature and import of the allegations before him, the employer never acted unfairly for failure to provide details of the allegations. In **Mutual Construction Co. TV1 (Pty) V. Ntombela** (2010) the Labour Appeal Court of South Africa noted that:-

> *...Although the employee had not been provided with precise details of the fraudulent entries he was accused of making, the court was satisfied that he had understood the nature and import of the allegations against him...*[88]

I fully subscribe to the above highly persuasive case law authority.

On the above discussion about the procedural fairness, I entirely and respectfully agree with the learned counsel for the applicant that procedure was followed by the employer before terminating the employee respondent. The learned arbitrator was wrong to hold in the circumstances that procedure was not followed. Therefore the respondent employee was

[88] Dr. Cohen op. cit note 79, Dr. Cohen BA, LLB, LLM (UND) PhD (UKZN) a Professor School of Law of University of Kwazulu Natal

only unfairly terminated substantively, but procedure was followed by the employer Applicant.

The **second issue** for this court to determine is **whether there was misconduct in relation to the duties of an arbitrator**. The learned Counsel for the applicant accused the arbitrator of misconduct in relation to the duties but unfortunately she did not pin point what misconduct the arbitrator actually committed in course of his duties. May be, I think rightly that the concept of **misconduct** in relations to the duties of the arbitrator is not well understood. What does the concept misconduct mean?

> *...Misconduct denotes some moral wrong doing. Gross negligence may indicate misconduct, as might a gross mistake of law or fact. But an error of law is not enough to make a decision reviewable*[89] *(or revisable)...*

The above was reached in the decision of the supreme Court of Appeal (South Africa) in **Num V. Samancor Ltd.** [2011] II BLLR 1041 (SCA)[90].

Further in the recent case; the Supreme Court of Appeal of South Africa added more **jurisprudential value** in **Herholdt V. Nedbank Ltd.** 2013[91]. In which the court held; (***note bien*** our Labour Laws and Labour

[89] See Judge Steenkamp of the Labour Court of South Africa in his article titled "Dispute Resolution" in Du Toit et al Labour Relations Law: A Comprehensive Guide 6th Ed. 2015. Lexis Nexis South Africa Durban

[90] *ibid*

[91] *ibid*

Laws of South Africa are ***in parimateria***):-

> *...Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable...*[92]

Now since misconduct also includes bias, the test for bias is not only whether the presiding officer was in fact biased but whether the conduct complained of would lead to a reasonable litigant to doubt the impartiality of the presiding officer. (See Labour Relations Law: A comprehensive Guide (eds). 6th Ed. ([2015] Durban). The misconduct in relation to the duties of the arbitrator (i.e. conduct of Proceedings) must be viewed in the light of the question ***whether it led to an unreasonable result.*** Example of the misconduct in relation to the duties of the arbitrator are as follows:-

> *(i) Misconstruction of evidence.*
> *(ii) Failure to guide lay parties on evidence to be presented or advise them of the need to call witnesses for proving documents.*
> *(iii) Applying the criminal law test of proof beyond reasonable doubt in arbitration proceedings.*
> *(iv) Deferring to the employer's view and ignoring mitigating evidence [stander V. Education Labour Relations Council [2011] II BLLR. 411 (LC)] (Labour Court of South Africa).*

[92] *ibid*

(v) Failure to conduct arbitration proceedings in a fair manner.

(vi) Holding that an employee was constructively dismissed in circumstances where no employment relationship existed [MEC Department of Health Eastern Cape V. Odendaal [2009] 5 BLL 470 (LC) Labour Court of South Africa][93].

(vii) Failing to take into account new regulations laws and amendments etc. [National Commissioner of the SAPS V. Cohen [2009] 3 BLLR 239 (LC) Labour Court South Africa][94].

The list is not exhaustive so to speak.

In her submission in support of the revision the learned counsel for the applicant employer has failed to show the misconduct in relations to the duties of the arbitrator in view of the above discussion. I will conclude that "***while the concept of misconduct is broad, clear evidence of the conduct complained of is essential***". Thus **"*unsubstantiated claims of impropriety*" against Commissioners (arbitrators) have been dismissed as "*border (ing) on contempt*[95]** (To borrow Judge Steenkamp words, in his article "*Dispute Resolution*" in Du Toit et al. Labour Relations Law: A Comprehensive Guide 6th Ed. 2015).

The **third issue** for determination **is whether there was gross irregularity in the conduct of the arbitration proceedings in the**

[93] *ibid* p. 199 Du Toit et al
[94] *ibid* p. 200 Du Toit et al
[95] *ibid* p. 200 Du Toit et al

Commission for Mediation and Arbitration (CMA). The learned counsel for the applicant M/S Sheikh has equally attacked that there was gross irregularity in the conduct of the arbitration proceeding in the (CMA) Commission for Mediation and Arbitration.

Gross irregularity as the phrase speaks connotes that not all irregularity is "***gross***" but the test to established "***gross***" irregularity is whether the irregularity was material and precluded a proper and fair hearing. A further development has however been put in respect of what would be regarded as gross **irregularity in the conduct of the arbitration Proceedings**; that:-

> *... a defect in the conduct of arbitration proceedings will be regarded as a gross irregularity if the arbitrator misconceived the nature of the inquiry or arrived at an unreasonable result. (See Supreme Court of Appeal of South Africa in **Herholdit V. Nedbank Ltd**. [2013] 11 BLLR 1074 (SCA)[96].*

I entirely and respectfully subscribe to the above highly persuasive decision of the Supreme Court of South Africa. This Court further follows as a result therefore the emphasis as put by the Labour Appeal Court of South Africa, that there are two fold nature of the inquiry; that, it is not only "*whether the arbitrator misconceived the nature of proceedings*" but also *whether the result was unreasonable* [**Gold Fields Mining SA (Pty)**

[96] *op. cit* note 90 Steenkamp, J. Labour Court Judge of South Africa

Ltd. V. CCMA][97]**,** [to borrow to wisdom of the Labour Appeal Court of South Africa in Gold Field Mining SA (Pty)].

There was nothing in the entire submissions of the learned Counsel for the applicant to convince this Court to believe that there was **gross irregularity in the conduct of the arbitration proceedings**. Though the term irregularity is broad and wide enough to cover a range of improper or incorrect actions; the following have been regarded as an example of **conduct grossly irregular**; (see Judge Steenkamp in Du Toit et al. Labour Relations Law: A Comprehensive Guide 6th Ed. 2015 Durban):-

(i) Granting legal representation inappropriately [Ndlovu V. CCMA Commissioner Mullins [1999] 3 BLLR 231 [LC] Labour Court[98]*.*

*(ii) Creating a reasonable impression of bias, [**NUSOG V. Minister of Health and Social Services (Western Cape**) [2005] 4 BLLR 373 (LC) Labour Court*[99]*.*

An arbitrator for example who showed deference to employers witness and **aggressively** questioning employees has been regarded as an irregular conduct which is gross in the arbitration proceedings as the Labour Court in **Minister of Health and social services Western Cape**

[97] [2014] 1 BLLR 20 (LAC) Labour Appeal Court as quoted by Judge Steenkamp of the Labour Court of South Africa in his article Dispute Resolution in Du Toit et al. Labour Relations Law: A Comprehensive Guide 6th Edition 2015 Lexis Nexis Durban South Africa p. 197

[98] *op. cit* Du Toit et al

[99] *op. cit*

above held. Other acts regarded as example of conduct grossly irregular are:-

(iii) Refusing to grant (adjournment) postponement where postponement was appropriate.

(iv) Conciliating (mediating) a dispute at arbitration stage without the consent of both parties. (Topic (Pty) Ltd V. CCMA [1998] 10 BLLR 1071 (LC) Labour Court).

(v) Misconstruing jurisdiction.

(vi) Failing to determine the dispute.

(vii) Undermining a party's right to lead evidence on the substantive issues in dispute.

(viii) Refusing a party the right to cross-examine.

(ix) Hearing evidence from witnesses in the absence of both parties without their consent (Kansten V. CCMA [2001] 22 ILJ 449 (LC)

(x) Failing to advise a lay representative of the consequences of not challenging the other party's evidence.

(xi) Basing an award on the documents not admitted as evidence.

(xii) *Making findings not justified on the evidence*[100].

I entirely and respectfully subscribe to the above examples of conducts that the Labour Court of South Africa regarded as grossly irregular and apply the same in our instant case in which after considering

[100] *op. cit note 89*

the lengthy submission of the learned counsel for the applicant who had contended and accused that there was gross irregularity in the conduct of the arbitration proceedings, I found, in the view of the above discussion that the applicant Counsel has failed to substantiate her allegations.

As regard to the **fourth issue which is whether the arbitrator acted in excess of his powers. (i.e. exceeded his powers**)., Though the applicant's counsel had challenged the jurisdiction of the CMA Ilala Zone to determine a case from CMA Temeke Zone, it was righty pointed by the respondent that the parties had agreed that the matter be heard at CMA Head office and this was not further challenged worthy by the applicant in her submission.

I found no other valuable arguments by the learned counsel for the applicant on the issue of excess of power which this Court can set aside the arbitration award. Suffice it to say here that an arbitrator exceeds his power or acts **ultravires** by making an award which he or she did not have power to make ... To borrow the wisdom of Ngcobo, J. (the position I subscribe) of the Constitutional Court of South Africa (the Highest Court) in **Sidumo V. Rustenburg Platinum Mines Ltd**. [2007] 12 BLLR 1097 (CC)[101]; that:-

> *...As public officials who exercise public powers, Commissioners may only make those awards, which are consistent with their obligation under the LRA (equal to the ELRA Tanzania] and the constitution. Where a Commissioner renders an award that is inconsistent*

[101] *ibid* p. 201 Steenkamp, J. *op. cit*

with his or her powers conferred on a Commissioner by the Labour Relations Act, (like the Employment and Labour Relations Act in Tanzania) in my view, the Commissioner exceeds his or her powers and the award falls to be reviewed and set aside ... an award which is manifestly unfair to either the employer or employee can hardly be said to be consistent with the powers conferred upon a Commissioner to made an award that is fair ... if a Commissioner fails to determine the dispute fairly he or she is in breach of the statute that is the source of his or her powers to conduct the arbitration and is also in breach of the doctrine of legality which is a constitutional constraint upon the exercise of his or her powers ...[102] *(words in brackets mine).*

To conclude, I will now determine the last or **fifth issue** which is; **whether the award was improperly obtained.** The learned counsel had also challenged that the CMA award was **improperly obtained**, but what is it? The term or phrase improperly obtained refers mainly to **impropriety** by a party in contrast to "***misconduct***" "***gross irregularity***" or "***excess of power***" on the party of the arbitrator[103]. The vivid or exact examples of the phrase or term "the award was improperly obtained is that there had been a resorting to **bribery** or

[102] *ibid op. cit*
[103] Steenkamp "Dispute Resolution" in Du Toit et al. *op. cit*

fraudulently representations to obtain an award by the successful party[104].

I must confess here that nothing had been substantiated by the learned Counsel for the applicant that there was some kind of resorting to bribery or fraudulent representation to obtain the award which is challenged by the applicant. The applicant did not establish on the balance of probabilities that the successful party had resorted to bribery and fraudulent representation to obtain the CMA award (the impugned award), so as this Court to hold that the award was improperly obtained or procured[105]. In the event the revision applications is dismissed in its entirely and the Commission award (CMA) is upheld.

I.S. Mipawa
JUDGE
29/07/2016

[104] *ibid*

[105] Improperly obtained award eg. through bribe has been termed as *"unsubstantiated claims of impropriety"* against arbitrators have been dismissed as bordering on contempt

Appearance:-

1. Applicant: Absent (served)
2. Respondent: Present in person

Court: Judgment has been read today in the presence of the respondent but in the absence of the applicant who was informed on the date of Judgment.

I.S. Mipawa
JUDGE
29/07/2016