REPUBLIC OF NAMIBIA ***REPORTABLE***

LABOUR COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LC 172/2013

In the matter between:

SHOPRITE NAMIBIA (PTY) LTD t/a SHOPRITE CHECKERS (OTJWARONGO BRANCH) **APPLICANT**

and

CHRISTOHINE N. HAMUTELE **FIRST RESPONDENT**

OBED W. HAI-O-SEB **SECOND RESPONDENT**

Neutral citation: *Shoprite Namibia (Pty) Ltd v Hamutele* (LC 172/2013) [2014] NALCMD 43 (20 October 2014)

Coram: ANGULA A.J

Heard: **24 September 2014**

Delivered: **20 October 2014**

Flynote: Labour law - Service of the review application – Whether the review application was properly served on the second respondent as contemplated by Rule 5.

Labour Law – Application to review and set aside the award made by the first respondent in terms of Section 89(4) and (5).

Labour Law – ground for review is misconduct and gross irregularities alternatively failure by the first respondent to apply her mind. Applicable principle re-itterated.

Summary: The review application was served at the offices of the trade union of which the second respondent was member. The general secretary of the trade union represented the second respondent at the arbitration proceeding. The applicant contending that the service of the application on the trade union constituted proper service in terms of Rule 5(3)(c).

The review application brought on the grounds that the first respondent refused to admit the video footage into evidence and to rely thereon; that such conduct constitute misconduct or irregularity on the part of the first respondent. Furthermore that the finding by the first respondent that the sanction of dismissal after the second respondent had been found guilty of misconduct of theft and negligence, was too harsh and substituting it with an award of re-instatement of the second respondent is an indication that the first respondent did not apply her mind to the issues of sanction and as such, constituted a defect within the meaning of sub-section 89(4).

Held that there had not been a proper service of the application on the second respondent because the trade union was not authorised by the second respondent to accept service of the application on his behalf as required by Rule 5(2) of the Labour Court Rules. The application is dismissed for that reason.

Held further that it appears from the award that the video footage was admitted in evidence and considered.

Held further that the first respondent's decision not rely on the video footage alone when she considered the charge of theft, whether right or wrong is not misconduct.

Held further that the review proceedings are not concerned with the correctness of the decision of the functionary and that an appropriate procedure in this matter would have been an appeal and not a review against such decision.

Held further that it appears from the award that the first respondent applied her mind to the issues before her. Review application dismissed.

ORDER

The review application is dismissed.

JUDGMENT

ANGULA, AJ:

[1] I have before me a review application ('the application') by the applicant in which it seeks for an order in the following terms:

1. 'Reviewing and setting aside of the First Respondent's arbitration award dated the 17 September 2013, under arbitration case number CROT 139-12;

2. Granting such further and/ or further relief as the above Honourable Court deems appropriate.'

[2] The application is opposed by the second respondent. The first respondent is for obvious reasons, I think, not opposing the application.

Background

[3] The second respondent was employed by the applicant at its Otjiwarongo branch. He was dismissed on 23 July 2012, following a disciplinary hearing at which he was found guilty of misconduct of theft of the applicants properties and gross negligent by failing to comply with applicant's procedures to secure the applicant's properties. Subsequent to his conviction and dismissal second respondent filed an application for arbitration with the Labour Commissioner's office. At the arbitration proceedings the second respondent was represented by the General Secretary of Namibia Wholesale and Retail Worker ('the trade union') of which the second respondent was a member. At the end of the arbitration proceedings the first respondent made an award in favour of the second respondent whereby the applicant was ordered to re-instate the second respondent. It is that order which the applicant seeks to be set aside in these proceedings.

The second respondent's grounds of opposition

[4] The second respondent states in his answering affidavit that he only opposes the application on two points of law. Firstly, that the service of the application was not compliant with rule 5(2) of the Labour Court in that the applicant served the application at trade union's offices; that the trade union is not his legal representative of record, nor did he had authorized the trade union to accept the application papers on his behalf. The second point of opposition is that the applicant failed to comply with the provisions s 89(4) and 5(*a*) and 5(*b*) of the Labour Act, 2007, ('the Act') in that the alleged decision by the first respondent not to admit a video footage tendered by the applicant into evidence,

is a question of law and thus subject to appeal and not to review in terms of s 89(4) and (5) of the Act.

The applicant's points in limine to the second respondent's opposition

[5] The applicant raised two points *in limine* against the second respondent's opposition. It is therefore necessary to first deal with these points *in limine*. The first point is that the second respondent did not file a power of attorney authorising his legal representative of record to act on his behalf. The second point in *limine* is that the second respondent filed his notice to oppose outside the time period prescribed by the rules of the Labour Court ('the rules'). Counsel for the second respondent correctly, in my view, points out these points in *limine* were not raised in the replying affidavit but are being raised for the first time in the heads of arguments. I agree with the submission by counsel for the second respondent that this is not permissible. An applicant is required to make out his/her case in the founding affidavit and deal with issues raised by the respondent in the answering affidavit in his/her replying affidavit. The applicant should have raised those points in its replying affidavit.

No Power of Attorney filed.

[6] For sake of completeness I will in any event deal with the two points *in limine*. With regard to the first point regarding the alleged failure to file a power of attorney in application proceedings, counsel for the applicant did not cite any Rule or case law in support of this point. Even if the point was properly taken I do not think there is merit in this point. It has long been held that the rules do not contain a provision that a power of attorney is required in application proceedings.[1] The rational for the absence of the requirement to file a power of attorney in application proceedings appears to be that unlike in action proceedings where the pleadings are drafted and signed by the legal representative for the party, in application proceedings the supporting or opposing affidavit is deposed to by the applicant or respondent himself or herself; or in the event of an artificial person by a person authorised by a resolution adopted by the board of such artificial person which is a party to the proceedings, authoring such deponent to act on behalf of the artificial person to depose to the supporting or opposing affidavit. Thus there is no need of proof of authority on the part of the legal representative that he/she has been authorised to act on behalf of such party to the application.[2] For those reasons, this point is dismissed.

Notice to oppose filed late

[7] The applicant's second point in *limine* is that the second respondent failed to file his notice of intention to oppose within the time prescribed by the rules. This point is intertwined with the second respondent's point that the application was not served on him. In the view I take with regard to the service of the application on the second respondent, as it will appear later in this judgment, it is not necessary for me to deal with or make a finding on this point.

Was the Application served as prescribed by rule 5?

[1] Edmund Woodhouse (Pty) Ltd v Britz 1967(4) SA 318.
[2] Ex Parte De Villiers 1973(2) SA 396.

[8] I now proceed to deal with the issue whether there had been proper service of the application on the second respondent. It is common cause that the application was served at the trade union's offices in Windhoek; that the second respondent was a member of the trade union at the time the arbitration proceedings were held; and that the trade union cannot represent a member in review proceedings in the Labour Court.

[9] Rule 5(2) reads as follows:

> '*(2) Service of any process may be effected in one or other of the following manners namely-*
>
> (a) *by handling a copy of the process to –*
>
> (i) *the person concerned;*
>
> (ii) *a representative authorised by the other person to accept service* on behalf of that person*;*
>
> (iii) *a person who appears to be at least 16 years old and in charge of the person's place of residence, business or place of employment premises at the time;*
>
> (iv) *subject to subparagraph (iii), a person identified in subrule (3);*
>
> (b) *by leaving a copy of the process at –*
>
> (i) *an address chosen by the person to receive service;*
>
> (ii) *any premises in accordance with sub-rule (4)*
>
> (c) *if the person to be served is represented by a legal practitioner of record, by delivery thereof at the address appointed in such legal practitioners notice of representation or to a person apparently not less than 16 years of age employed at his or her office.*
>
> (d) *By faxing a copy of the process to the person's fax number or a fax number chosen by the person to receive service; or*
>
> (e) *By sending a copy of the process by registered post to the last known address of the party or an address chosen by the party to receive*

service in which case the process is presumed, until the contrary is proved, to have been received by the person to whom it was sent within the period contemplated in section 129(3) of the Act, but in any case within seven days after it was posted.' (my underlining for emphasis).

[10] Rule 5(3) reads as follows:

'(3) Process may also be served –

(a) *on a company or other body corporate, by handing a copy of the process to a responsible employee of the company or body at its registered offices, its principal place of business in Namibia or its main place of business within the magisterial district in which the dispute first arose;*

(b) *on an employer, by handing a copy of the process to a responsible employee of the employer at the workplace where the employees involved in the dispute ordinarily work or worked;*

(c) *on a trade union or employers' organization, by handing a copy of the process to a responsible employee or official at the main office of the union or employers' organization or its office in the place where the dispute arose;*

(d) *on a partnership, firm or association, by handing a copy of the process to a responsible employee or official at the place of business of the partnership, firm or association or, if it has no place of business, by serving a copy of the process on a partner, the owner of the firm or the chairperson or secretary of the managing or other controlling body of the partnership, firm or association, as the case may be;*

(e) *on a local authority, by serving a copy of the process on the town clerk or chief executive officer or any person acting on behalf of that person;*

(f) *on a statutory body, by handing a copy to the secretary or similar officer of that body, or any person acting on behalf of that person; and*

(g) *on the State, a Regional Council, or a Minister, Deputy Minister or other official of the State in his or her official capacity, by handing a copy to a responsible employee at the offices of the Government Attorney, Regional Council, or the relevant Ministry or organ of the State respectively.'* (my underlining for emphasis).

[11] It is necessary to point out why service of the process on the correct party is important to the commencement of legal proceedings. It has been held that effective service of process initiating legal proceedings upon a correct party to the proceedings is fundamental to the commencement of such legal proceedings, failing which it will lead to the nullification of such proceedings.

[12] Damaseb JP in the case of *Eric Knouwds v Nicolaus Cornelius Josua & Another* at 798A-E explained the importance of proper service upon a party to the proceedings as follows:

> *'[19] Rule 6(5)(a) of the rules of this court requires that true copies of the notice of motion and all annexures to it must be served on the affected party. 'Service' normally includes an explanation of the nature and meaning of the process (Botha NO v Botha 1965 (3) SA 128 (E) at 130F - G; Herbstein and Van Winsen The Civil J Practice of the Supreme Court of South Africa 4 ed at 279).*
>
> *[22] 'Service' of process is the all-important first step which sets a legal proceeding in train. Without service, can there really be any argument that proceedings are extant against a party? Speaking of 'short service', the learned authors Herbstein and Van Winsen" The Civil Practice of the Supreme Court of South Africa 4 ed comment at p 283:*
>
> > *"If the defendant or respondent has not been allowed sufficient time, the service will be bad and fresh service will have to be made. In two cases, Brussels & Co v Barnard & another and Cole & others v Wilmot, the courts condoned short service but no reasons are given in*

> *the reports. If these cases lay down the principle that it is in the discretion of the court to condone short service, they are, with respect, wrongly decided. It has been suggested C that the test the court should apply is whether the defendant has suffered any prejudice through the short service. In later cases, however, the courts have not accepted that it is necessary for the defendant to show either that he has been prejudiced or that he has a good defence to the action, and in Salkinder v Magistrate of De Aar & another short service was held to be a fatal irregularity. In another case the court granted provisional sentence but reserved leave to the defendant to move the court to set aside the order on the ground of short service." (footnotes omitted).*

> *[23] If short service is fatal, a fortiori, non-service cannot be otherwise. Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding which has taken place without service is a nullity and it is not competent for a court to condone it.'* [3]

Counsel's respective submissions

[13] Counsel for the applicant submits that the meaning of '*may also'* in rule 5 (3) (*c*) means '*in the alternative to*' or '*in the place of'* servicing the processes as prescribed in rule 5(2). Accordingly, service of the application on the trade union's office of which the second respondent was a member constitutes proper service. Counsel for the second respondent on the other hand submits that rule 5(2) is aimed at service on natural persons or any other person authorized by such natural person whereas rule 5(3) is meant for service on artificial or legal *personae s*uch as a company, a trade union, a partnership, local authority and/or a statutory body. Counsel further argued that rule 5 (3) (c) is meant for service on the trade union where such trade union is a party, as respondent, to the proceedings. Accordingly, service of the application on the trade union's office

[3] 2007 (2) NR 792 (HC) at 296 H – J and 798 A - E

which is not a party to the proceedings and which was not authorised by the second respondent to accept service on his behalf was not proper service.

[14] It would appear that the resolution of the dispute between the two opposing views hinges on which ss 5(2) or 5(3) was applicable for services of the application on the second respondent in these proceedings.

[15] I do not agree with the interpretation counsel for the applicant seeks to place on the words *'may also'* in rule 5(3). My reading of rule 5(3) is that the '*also'* serves as an elaboration of the manners how service may be effected in terms of rule 5(3) and not an alternative to service in terms of rule 5(2), as contended by counsel for the Applicant. In this context it is important to note that the service in term of rule 5(2) is directed at 'the *person*'.[4] I agree with the interpretation of rule 5(3) as contended by counsel for the second respondent namely that this sub-rule deal with service on artificial persons whereas sub-rule (2) deals with service on natural persons.

[16] Counsel for the applicant argues that in terms of s 86(12) (*a*) read with s 59(1) (*a*) of the Act, a registered trade union is entitled to represent its member at the arbitration proceedings. Counsel further points out that at the proceedings which form the subject matter of these review proceedings, the second respondent was represented by the General Secretary of the trade union of which the second respondent was a member. Accordingly, so the argument goes, the applicant was entitled to serve the application at the offices of the trade union. Counsel for the second respondent points out that he has no qualms with the fact that the second respondent was represented by the General Secretary at the arbitration proceedings however his qualms is that the General Secretary's mandate came to an end once the arbitration proceedings were finalised; that

[4] (See, Rule 5(2) (a) *"(i) "the person"; (ii) "a representative authorized by other the person" to accept service on behalf of that person;* (iii) *on a person in charge of the person's place of residence, business…(b)(i) leaving a copy at the address chosen by the person; (c) if the person to be served is represented by a legal practitioner of record,……; (d) "by faxing a copy of the process to the person's fax number or a fax number chosen by the person to receive service.")*

when the applicant commenced with these review proceedings, it constitutes new or fresh proceedings. I agree with the submissions by counsel for the second respondent. The review proceedings are not a continuation of the arbitration proceedings nor are they interlocutory proceedings within the arbitration proceedings. They are new proceedings instituted afresh in a different forum, namely the Labour Court. It therefore follows that the service of the application has to take place in compliance with of rule 5 of the Labour Court. Proper service could only have taken place if the second respondent had authorized the trade union to accept service of the application on the trade union on his behalf.

[17] According to the second respondent, he had not authorized the trade union to accept the service of the application on his behalf. This contention by the second respondent is not disputed by the applicant. I have considered the provisions of rule 5(3) against rule 5(2) and find myself in agreement with the submissions by counsel for the second respondent, firstly, that rule 5(3) (*c*) is meant for service where the trade union is a party to the proceedings, as a respondent, in which case the process have to be served on the *'main office of the Union or its office in the place where the dispute arose'.* It is to be noted that the whole sub-rule (3) (except sub-rule (3)(*b*)) where any of those entities is a party to the proceedings, in each case, the person to be served with the process is identified eg a 'responsible employee', or 'official' of that entity.

[18] The trade union is not a party to this review proceedings; the trade union cannot represent a member in review proceedings; the trade union was not authorised by the second respondent to accept service of the process on its behalf. Proper service upon the second respondent should have taken place in terms of rule 5(2).

[19] In the result, I have arrived at the conclusion that there has not been proper or service at all, of the application on the second respondent as required

by rule 5(2) of this court. The application thus stands to be dismissed on that ground alone.

[20] I now proceed to deal with the Applicant's points on merits in the event that I am wrong with regard to the above conclusion.

Applicant's contention that first respondent committed misconduct or gross irregularity alternatively failed to apply her mind

[21] The basis for these contentions are captured in paragraphs 16-17.1, 17.2 and 17.3 of the applicant's founding affidavit which reads as follows:

> '16.
>
> *It is my understanding as conveyed to me by Mr Arend Kellerman that the arbitrator did not accept the copy of the digital recording in evidence, although such evidence was presented and submitted under oath, which is in the arbitration proceedings, in that she failed to comply with her duties as arbitrator as she had a duty to accept and receive the digital evidence after it was presented and view during the arbitration proceedings.*
>
> *17.*
>
> *17.1 In her arbitration award the First Respondent (i.e the arbitrator) states that in paragraph 45. 'The video footage was the only evidence the respondent relied on and the video footage in my view cannot talk by itself and could nor be cross examined'*
>
> *17.2 The digital recording was submitted under oath by a witness and the witness was crossed examined and the Applicant also relied on documentary evidence and viva voce evidence that second respondent indicated he received tall the stock delivered , but in fact*

were short and he returned some of the stock by pushing it back into the truck.

17.3 I respectfully submit that an arbitrator has a duty to apply his/her mind to the facts at the arbitration proceedings and failure to do so constitutes misconduct and results in a gross irregularity.'

Counsel's submissions in this regard

[22] Counsel for the applicant submits that there is no factual or legal basis for the conclusion arrived at by the first respondent that the video footage was the only evidence the respondent relied on and that the video footage cannot talk and could not be cross-examined and that such findings constitutes gross irregularity and/or misconduct as envisaged by s 89 (4) and (5) of the Labour Act, resulting in a defect in the arbitration proceedings; that the first respondent failed to apply her mind in that a reasonable arbitrator, considering the same facts, would not have arrived at the same conclusion. Counsel for the second respondent submits on the other hand that argument on behalf of the applicant boils down to the fact that the first respondent erred in law by deciding not to rely on the video footage; that she applied wrong legal principles, and failed to accord adequate weight to other evidence. Before dealing with the submissions on behalf of the applicant it is appropriate to quote the sub-sections relied upon by the applicant.

[23] Sub-section 89 (4) reads as follows:

'*A party to a dispute who alleges a defect in any arbitration proceedings in terms of this part, may apply to the Labour Court for an order reviewing and section aside the award'.* (my underlining for emphasis)

[24] Sub-section 89 (5) reads as follows:

'A defect referred in subsection (4) means-

(a) that the arbitrator –

(i) committed misconduct in relation to the duties of an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(b) that the award has been improperly obtained'.

[25] The meaning of 'misconduct' or 'gross irregularity' by an arbitrator as contemplated by s 89(4) and (5) was explained by Ueitele, J in the case of *Strauss v Namibia Institute of Mining & Technology* at paras (32) to (35) as follows[5]:

'Misconduct

[32] The meaning of the term 'misconduct' in relation to arbitration proceedings was considered some ninety eight years ago in the matter of Dickenson and Brown v Fisher's Executors[6]. In that case the Appellate Division of the Supreme Court of Appeal of South Africa was concerned with the question whether it could set aside an award made in terms of the Natal Arbitration Act 24 of 1898. Section 18 of the Natal Act 24 of 1898 provided that, "Where an arbitrator or umpire has misconducted himself or where an arbitration award has been improperly procured, the Court may set the appointment or award aside." Solomon JA who delivered the Court's judgment said[7]:

"*Now I do not propose to give any definition of the word 'misconduct' for it is a word which explains itself. And if it is used in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question…Now if the word misconduct is to be construed in its ordinary sense it seem to me impossible to hold that a bona fide mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a judge can be said to have misconducted himself if he gives an erroneous decision on a point of law…Cases may no doubt arise where…'the mistake is so gross or*

5 (LC 94-2012)[2013]NALCMD 38 (06 November 2013).

6 1915 AD 166.

7 At 175-176.

manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator'…But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact."

Gross Irregularity

[35] The term 'gross irregularity' has been discussed in a number of reported cases (South African) which I find persuasive. In the case of Bester v Easigas (Pty) Ltd and Another[8] *Brand, AJ said:*

"From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase [i.e. gross irregularity] relates to the conduct of the proceedings and not the result thereof… But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined. Secondly it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined." ' (My underlining for emphasis)

[26] In order to put the applicant's allegations and its counsel's submissions on this point in perspective, it is necessary to refer in some detail to the findings made by the first respondent with regard to the two counts of theft and gross negligence with which the second respondent was charged.

[27] It is not correct as stated in the applicants founding affidavit, (quite apart from the fact the statement constitutes hear-say evidence) that 'the *arbitrator did not accept the copy of the digital evidence in evidence'.* The digital video was

[8] 1993 (1) SA 30 (C).

admitted into evidence by the first respondent, by agreement between the parties as it appears from the following extract from paragraph 45 of the award made by the first respondent:

'*In viewing the video footage together with the parties as per the agreement, it was evident that some bags of chickens (sic) were returned into the truck and were loaded by the driver and the security guard as submitted by the (sic) Mr Amunyela. However the figures appeared were not corresponding as the quantity also reduced from 16 to 15 and last to 14 bags of chickens (sic) and the quantity also reduced from 450 to 434.'* (my understanding).

[28] It is clear that this statement is based on her observation from viewing the video footage. The fact that the video was admitted in evidence is furthermore borne out by the written submission made by counsel for the applicant namely that:

'*In this regard that during the proceedings a close circuit television recording was viewed and the first responded was satisfied that stock (bags of chicken) was returned into the truck under supervision and control, of the second respondent, resulting in the allegation against the second respondent and causing the First Respondent to conclude that that the second respondent was guilty of gross negligence'.*

[29] My understanding of this statement by counsel for the applicant is that it supports the first respondent's finding, relying on the video footage, to convict the second respondent on the charge of negligence. However the first respondent was not prepared to give more weight to the video footage to convict the second respondent on the charge of theft by relying on the video footage alone. This is clear from the following statement by the first respondent when she dealt with the charge of theft, in paragraph 45 of the award:

'It is my view that we cannot trust the video footage as there was no concrete evidence that can proof (sic) the quantity of the bags that were loaded back into the truck or bags that were received by the shop apart from the invoice submitted. The video footage was the only evidence the respondent relied on and the video footage in my respective view cannot talk by itself and could not be cross examined.'

[30] And in paragraph 48 of the award when she stated as follows:

'*I have carefully considered the version before me and on the balance of probabilities, the respondent's version were (sic) not plausible. I do not find any merit in the argument of the respondent as he failed to prove that the applicant was guilty of theft'.*

[31] The first respondent then dealt with the evidence relating to the charge of negligence in paragraphs 49 and 51 of the award as follows:

'[49]The second charge leveled against the applicant was negligence. I now turn to the issues of negligence……[51] I accept the evidence of the respondent representative, Mr Kelleman and his second witness Mr. Irion as credible with regard to the existing rules, and find the applicants argument to be baseless. It is my respective view that the applicant's action by returning the stock without proper consultation constituted gross (negligence)'

[32] As can be seen from the statements quoted above the first respondent weighted the two versions before her and found on the balance of probabilities the respondent's version (applicant) not plausible. Secondly, she made a credibility finding in respect of the two witnesses who testified for the respondent applicant). In my view, the conclusions reached by the first respondent in respect of both charges clearly illustrate that she was alive to the issues before her and applied her mind and thus performed her functions as an arbitrator. The first respondent's decision not to rely on the video footage alone when she

considered the charge of theft, whether right or wrong is not misconduct. The following observation by the court is opposite:

'It bears repeating that a review is not concerned with the correctness of the decision made by a functionary but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second–guess his evaluation. The role of the court is no more than to ensure that the decision-maker has performed the function with which he was entrusted'.[9]

[33] Counsel for the second respondent submits that the decision by the first respondent in this respect, is a question law; that the applicant is attacking the result of the arbitration and not the process leading to the result which is dealt by way of appeal and not review. I agree. There is nothing in the record or from the award that suggests that the first respondent improperly conducted herself or acted wrongfully. As clearly spelt out in the *Strauss* judgment, a mistake of law is not misconduct no matter how gross. In the result the applicant's point in this respect is dismissed.

<u>The allegation that the first respondent failed to apply her mind with respect to the sanction</u>

[34] I now turn to deal with the applicant's ground of review set out in paragraph 17.3 of its founding affidavit quoted in paragraph 21 of this judgment. Before considering the statement it is again necessary to set out the legal principles applicable when considering this ground of review as propounded by our courts.

[35] What is meant when somebody alleges that a functionary has failed to apply his/her mind was explained in the often quoted passage by Corbett, JA, *as*

[9] MEC for Environmental Affairs and Development Planning v Clairison's CC (408/2012) [2013]ZASCA 82

he was then, in the matter of *Johannesburg Stock Exchange and Another v Witwatersrand, Nigel Ltd and Another,* where the learned judge expressed himself at 152A-E as follows:[10]

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F - G; Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895B - C; Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) at 14F - G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8D - G; Goldberg and Others v Minister of Prisons and Others (supra at 48D - H); Suliman and Others v Minister of Community Development 1981 (1) SA 1108 (A) at 1123A.) Some of these grounds tend to overlap'.

[36] The applicant's ground for review in this respect is that the finding by the first respondent that the sanction of dismissal was too harsh was not justified on the facts and as such constitutes either a misconduct or gross irregularity or both in that, had the first respondent applied her mind to the factual conclusion, she would not have arrived at the conclusion that the sanction was too harsh. The statement upon which this ground of review is based is paragraph 52 of the award where the first respondent expressed herself as follows:

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[10] 1988 (3) SA 132 (A) at 152 A - E

'[52] *In this case I believe the applicant could and should have been disciplined for his failure to report immediately the incident to the superior. However, in the circumstances of this case I believe the dismissal was too harsh sanction. It is my view that the applicant should have been given a lesser offence (sanction?) rather than the dismissal. In this circumstance a written warning should have been appropriate. My reasons to say that is because that applicant has worked for eleven (11) years for the respondent with a clean service record [53] I find the sanction imposed against the applicant not an appropriate sanction. I therefore, find the dismissal of the applicant was accordingly substantive unfair'*

[37] Applying the principles in the *Johannesburg Stock Exchange* matter, to the facts in this matter it is clear that it has not been established by the applicant that the first respondent acted arbitrarily, capriciously, or in bad faith in furtherance of an ulterior or improper motive or that she misconceived the nature of her power.

[38] I find it difficult to comprehend how the applicant can say that the First Respondent failed to apply her mind. If there is one thing which is clear from the statement referred above is that the first respondent pertinently took into account relevant facts and indeed applied her mind; she reasoned that the sanction was too harsh and gave her reason for her view namely that the second respondent had worked for the applicant for some 11 years with a clean service record. The applicant's complaint is that the factors referred to by the first respondent ought to have counted in its favour whereas the first respondent weighed them against the applicant and in favour of the second respondent: that is to question the correctness of the decision and not whether the first respondent applied her mind to the facts before her.

[39] In this connection Baxter says the following with regard to this kind of review ground:

'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to

each consideration, for to do so could constitute a usurpation of the decision-maker's discretion. This is aptly illustrated by the dictum of Watermeyer CJ in a case concerning the assessment of a 'reasonable rent': 'How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of the discretion entrusted to it and, so long as it acts bona fide, a Court of law cannot interfere.'[11]

[40] It is clear from what has been quoted above that the first respondent applied her mind to the question whether the sanction was appropriate on not. She would not have made that statement if she had not applied her mind to the facts before her. It is for those reasons that she came to the conclusion that the dismissal was not an appropriate sanction and that, on the facts of the case before her, a written warning was appropriate. It is a different consideration all together whether or not her conclusion that the sanction was too harsh, is wrong. It is not misconduct or an irregularity let alone gross irregularity for the first respondent to have arrived at the conclusion that dismissal of the second respondent was substantively unfair. The law has vested her with that power and discretion to alter the sanction. Her decision is based on reasons and it is not arbitrary or capricious.

[41] For all the reasons stated above, the applicant's ground for review in this respect is similarly dismissed.

[42] The second respondent asks that the application be dismissed with costs. Having considered the provisions of s 118 of the Labour Act in the context of this case, I am not persuaded that an order of costs is warranted in this case.

Order

[43] In the result, I make the following order:

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[11] Baxter, L .1984. *Administrative Law*, 1st edition, Capetown: Juta &Co, p 505.

The application is dismissed.

H Angula

Acting Judge

APPEARANCES

APPLICANT:	P J De Beer
Instructed by:	Du Plessis, Roux, De Wet & Partners
SECOND RESPONDENT:	P S Muluti
	Of Muluti & Partners