IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR865/21

In the matter between:

SPHINX ACRYLIC BATHROOM WARE (PTY) LTD **Applicant**

And

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

REFILOE NONYANE *N.O.* **Second Respondent**

ADZIAMBEI VICTOR NGOBELI **Third Respondent**

Heard: 6 March 2024

Delivered: 12 March 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 12 March 2024

JUDGMENT

MAKHURA, J

Introduction

[1] On 21 April 2021, the second respondent (commissioner) issued an award declaring that the dismissal of the third respondent (employee) by the applicant (company) was substantively unfair and ordered retrospective reinstatement from the date of the employee's dismissal. Aggrieved by the commissioner's decision, the company launched these proceedings in terms of section 145 of the Labour Relations Act[1] (LRA), to review and set aside the award and substitute it with an order that the dismissal was substantively fair. The employee opposes the application.

Material facts

[2] The company produces sanitaryware such as toilets, cisterns and basins. It operates 24-hour shifts, 7 days a week. The employee was employed as a Sanwright in the Clay Preparations department and was responsible for, inter *alia* maintaining machinery and ensuring that the area underneath the mills was clean. He supervises about four employees, who are employed as Process Controllers. The Process Controllers are responsible for inter *alia* carrying out the actual work of cleaning around and underneath the mills and general housekeeping functions.

[3] On 17 February 2020, the company issued the employee with a written warning, in accordance with its disciplinary code. The employee was alleged to have failed

[1] Act 66 of 1995, as amended.

to obey a fair and reasonable request to clean underneath mills 1 to 4. The written warning specified that a second or further transgression will attract a sanction of final written warning or dismissal. The disciplinary code provides that a second transgression would attract a sanction of a final written warning. The disciplinary code does not set out the period of validity of the written warning. The written warning issued against the employee did not stipulate the period of validity. However, the company said that the written warning was valid for 12 months.

[4] On Friday, 6 November 2020, the employee reported for duty and knocked off at 14h00.

[5] On Saturday, 7 November 2020, the company's Senior Factory Manager, Gerard Maartens (Maartens), reported at the company at approximately 7h30. He took photographs of the area and instructed Siphamandla Ngubane (Ngubane), the employee's line manager, to investigate the incident. There is no evidence to suggest that the investigation was conducted.

[6] On Monday, 9 November 2020, the employee was issued with a charge sheet and called to a disciplinary hearing on 11 November 2020. He faced the following allegation of misconduct:

> 'F1 Creating / contributing to poor safety / health / housekeeping or loss control conditions.'

[7] The nature of the incident giving rise to the above charge was set out as follows:

> 'On the 07/11/2020 at 07h37 Housekeeping underneath the mills was not up to standard as Mr Ngobeli has agreed from his last warning to keep the place clean at all times.'

[8] The disciplinary hearing was scheduled for 11 November 2020. During the disciplinary hearing, the employee stated that he ensures that he cleans when he performs maintenance on the mills. The employee also invited the chairperson

and/or company to call one of the Process Controllers to ask about the housekeeping rules. The employee informed the disciplinary hearing that when he knocked off at 14h00 on 6 November 2020, the area was clean.

[9] The company dismissed the employee on 12 November 2020. The employee declared an unfair dismissal dispute and referred it to the Commission for Conciliation, Mediation and Arbitration (CCMA).

<u>The arbitration proceedings and award</u>

[10] At the CCMA, the company called Maartens and Ngubane. The company's case was that it was impossible for the area to have deteriorated to the state in which Maartens found it at 7h37 on 7 November 2020 in the preceding 17 hours (from 14h00 on Friday to 7h00 on Saturday). In essence, the company's argument was that based on the condition Maartens found the area in on 7 November 2020, it could not have deteriorated to that level if the area had been cleaned before the employee knocked off the previous day. The company contended that it could have taken over a week for the area to deteriorate to that condition.

[11] The employee maintained his evidence from the disciplinary hearing that when he left at 14h00 on Friday, the area was clean. The employee also relied on the company's disciplinary code that he should not have been dismissed as this was his second offence. He argued that the company should have instead sanctioned him with a final written warning, in accordance with the disciplinary code.

[12] The commissioner found the version of the employee that he left the area clean to be probable. She proceeded:

> 'When the applicant knocked off, he would have handed over to someone on a daily basis, which could have been noticed on a spot that the handover was not in accordance with the expectation of the company. The applicant's manager could have noticed on the spot if the environment was not in proper condition. The respondent's witnesses testified that it could have taken over a week for the environment to be that dirty, the

> question would be why the company failed to address it at that stage and waited for the applicant to be off to notice it. The applicant submitted that, he would not be released if the conditions of the environment were not in proper condition and that managers were in when he knocked off.'

[13] The commissioner continued to find that the sanction of dismissal was inappropriate and harsh. She found that the appropriate sanction would be a final written warning and that dismissal was not in accordance with the disciplinary code. She concluded:

> 'The Code of Conduct was there as a guideline to ensure that there was consistency in dealing with the employees. The applicant was issued with the second written warning for his first offence. Therefore, the next sanction could have been a final written warning and not a dismissal.'

<u>Grounds for review</u>

[14] The company advances three grounds for review.

[15] First, the company contends that the commissioner was confronted with two conflicting versions and has failed to engage in a credibility enquiry as set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and others.*[2]

[16] Second, the company contends that the commissioner's reasons for preferring the employee's version were unreasonable. It states that the reasons were not rationally connected to the evidence and were procedurally unfair.

[17] Third, the company attacked the conclusion that dismissal was not appropriate.

<u>Analysis</u>

[2] [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 34.

[18] The test to review an award is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[3] The commissioner's award is reviewable if it is *"one that a reasonable decision maker could not reach"*.[4] The Labour Appeal Court (LAC) held that this is a stringent test that will ensure that arbitration awards are not lightly interfered with.[5]

[19] Numerous judgments subsequently expanded on this test.[6] In *Head of the Department of Education v Mofokeng and Others (Mofokeng)*,[7] the LAC held that:

> '[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to "defects" as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result

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[3] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).
[4] Ibid at para 110.
[5] *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.
[6] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] ZASCA 97 at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at paras 16 – 20; *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC) at paras 31 – 33; *South African Rugby Union v Watson and Others* [2018] ZALAC 57; (2019) 40 ILJ 1052 (LAC).
[7] (2015) 36 ILJ 2802 (LAC).

in a misconceived enquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'[8]

[8] *Mofokeng* at paras 32 – 33.

[20] Most recently, in *Makuleni v Standard Bank of South Africa Ltd and Others*,[9] the LAC, reaffirming the *Mofokeng* decision above, also reminded the reviewing court not to act as a court sitting on appeal:

> '[4] … The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

[21] These judgments remind us that errors of law or fact are insufficient for the court to review and set aside an award. The error must be material and for it to be considered material, it must result in the commissioner reaching a decision which she otherwise would not have reached had she not committed that error. Therefore, where a review applicant seeks an award to be set aside on the basis of errors or irregularities, he must, in addition, establish the materiality of the error and/or irregularity and how the error and/or irregularity resulted in a decision reached by the commissioner.

[22] The company's argument regarding the alleged two contradictory versions is that its evidence established, at least by inference, that the area was not cleaned over a period of time. The argument continues that the company, through Maartens' evidence, testified extensively and proved that the area could not have deteriorated to the condition Maartens found it in the preceding 17 hours. This, so the company continued to argue, was disputed by the employee who only testified that when he left at 14h00 on 6 November 2020 the area was clean. The company concludes that by accepting the employee's version as more probable

[9] [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC).

and without findings on the credibility of the witnesses, the commissioner failed to apply her mind to the evidence and her decision is unreasonable.

[23] The company sought to prove the allegation of misconduct by inference and/or opinion. There is no evidence that it investigated the incident. Had it done so, it would have interviewed the Process Controllers on duty until 14h00 or any other employee/s who works in and around the mills or who observed the area. These employees and Process Controllers would have, in all probabilities, been able to provide direct evidence of the condition of the area prior to 14h00 on 6 November 2020.

[24] Ms Lewis, appearing for the respondent, submitted that the evidence of the Process Controllers was not necessary. This is consistent with the company's election and its approach.

[25] Ultimately, the commissioner was only faced with the evidence of Maartens, who arrived at the scene 17 hours after the employee knocked off, and the direct evidence of the employee that the area, 17 hours prior to Maartens' , was clean. The employee did not dispute that when Maartens arrived at the company, the area was dirty as depicted in the photographs. He could not have seriously disputed that because he was not at the company premises. Equally, the company could not seriously dispute the employee's direct evidence that the area was clean when he knocked off, other than expressing what it thought the area would have looked like on 6 November 2020. There are no conflicting versions here. There was no need for the commissioner to make an assessment of the credibility of witnesses where there were no conflicting versions. That the commissioner found the version of the company improbable is a different way of saying that the company failed to prove the allegation of misconduct and that she accepted that the area was clean when the employee knocked off. The company failed to discharge its onus to prove that the area was not clean prior to the employee knocking off at 14h00 on 6 November 2020.

[26] The company further argued that there is an inherent contradiction in the employee's evidence. It is alleged in the founding papers that because the employee suggested that he should be issued with a final written warning, this inherently contradicts his version that he was not guilty of the misconduct. This argument was not seriously pursued in the company's heads of argument and during the hearing. The argument falls to be rejected outright. The employee always maintained that his innocence. His argument that he should be issued a final written warning can only be understood to be advanced in the event that he was found guilty of the misconduct.

[27] The second review ground is directed at paragraph 50 of the award, where the commissioner provides reasons for rejecting the company's case or version. There is no doubt that the commissioner is dealing with the version of whether the area was clean at the time the employee knocked off at 14h00 on 6 November 2020. The commissioner provided various reasons why she could not accept the company's version that the area was not clean and that it was not cleaned in a period of about a week.

[28] These reasons are - (1) when the employee knocked off, he would have handed over to someone on a daily basis, which could have been noticed on the spot that the area was not in proper condition, (2) the employee's manager could have noticed on the spot if the area was not in proper condition, (3) the company should have addressed the issue earlier and not wait until the employee was off, and (4) the employee said that he would not have been allowed to knock off if the area was not in proper condition. The company contends, firstly, that the four reasons mentioned by the commissioner are not rationally connected to the evidence. Secondly, the company contends that the propositions that formed the basis of these reasons were not put to the company's witnesses and the reasons are therefore "procedurally unfair" and "unreasonable".

[29] I have already decided that the case did not call for a credibility assessment of the witnesses. Therefore, these reasons are not material and do not have any

distorting effect on the ultimate decision reached by the commissioner. Indeed, the company did not show the materiality of these alleged errors and/or irregularities and how they led the commissioner to misconceive the enquiry and reach an outcome that is unreasonable. Therefore, the second ground for review fails.

[30] Properly conceived, the third ground is a complaint against an award of reinstatement. In light of the finding that the employee is not guilty of misconduct, this ground is irrelevant. In any event, even if the employee is guilty of the charge, I find that the commissioner's decision that the dismissal was substantively unfair falls within the bands of reasonableness for the reasons that follow, some of which have been captured by the commissioner in her award. First, the company did not comply with its own disciplinary code in dismissing the employee. Second, it failed to adduce exceptional circumstances for deviating from its own disciplinary policy. Third, it led no evidence at all regarding the continued employment relationship - why it was intolerable to continue with the employment relationship and/or why it was not reasonably practicable.[10] In *South African Commercial, Catering and Allied Workers Union and Others v Woolworths (Pty) Limited*[11], the Constitutional Court reaffirmed the principle that reinstatement is the primary remedy that follows a finding of substantively unfair dismissal.[12]

[31] Ms Lewis made the following submission in her heads of argument:

> '[The employee's] evidence during the disciplinary enquiry, that the area was clean when he went off duty on 6 November 2020, was untrue. [The employee's] evidence in the CCMA, that Mr Maartens had conspired (and attempted to bribe an employee) to have him dismissed was untrue.
>
> The relationship of trust between the [company] and [the employee] is therefore broken.'

[10] Section 193(2) of the LRA.
[11] [2018] ZACC 44; (2019) 40 ILJ 87 (CC).
[12] Ibid at para 46.

[32] This submission was pursued during the hearing. Ms Lewis contended that if the employee is found to have been untruthful about the area being clean on 6 November 2020 when he knocked off, then that meant that he was dishonest and he should be dismissed on that basis. This submission is inconsistent with the established legal principle that the fairness or otherwise of the dismissal must be determined on the basis of the reasons for dismissal given by the employer at the time of the dismissal.[13] The employee was dismissed for an allegation of negligence, not dishonesty.

[33] The following paragraph of the Constitutional Court in *Booi v Amathole District Municipality and others*[14] is apposite:

> 'There are good reasons that reinstatement is lauded as the primary and commonplace remedy that accompanies findings of substantively unfair dismissals. It would be wholly unpalatable to our Constitution's commitment to the right to fair labour practices if employers were permitted to unfairly dismiss their employees, exonerated of allegations of misconduct, via the back door of disingenuous and last-minute allegations pertaining to an intolerability of a continued employment relationship. It is incumbent on employers to follow proper procedures and respect the labour rights of their employees…'[15]

[34] Accordingly, the third ground for review fails because the employee is not guilty of misconduct and must be reinstated. Alternatively, even if he is guilty, the disciplinary code provides for a final written warning for the misconduct, further alternatively, the company failed to lead evidence on the factors that make a continued relationship intolerable or reasonably impracticable as a result of the misconduct allegedly committed.

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[13] *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* (supra); *Samancor Chrome Ltd (Eastern Chrome Mines) v Commission for Conciliation, Mediation and Arbitration and others* [202] ZALAC 17; (2020) 41 ILJ 2129 (LAC); *Pioneer Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2023] ZALCCT 39; (2023) 44 ILJ 2281 (LC).
[14] [2021] ZACC 36; (2022) 43 ILJ 91 (CC).
[15] Ibid at para 62.

[35] None of the contentions advanced by the company are capable of assailing the commissioner's decision. It is accordingly my view that the award is unassailable and the review application therefore stands to fail.

[36] In the premises, the following order is made:

<u>Order</u>

1. The review application is dismissed.

2. There is no order as to costs.

M. Makhura
Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Adv. N. Lewis

Instructed by : Brian Bleazard Attorneys

For the Third Respondent : Mr. G. Leshaba of MM Mitti Attorneys