



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 104/13

In the matter between:

**QUEST FLEXIBLE STAFFING SOLUTIONS (PTY) LTD**

**(A division of ADCORP FULFILMENT SERVICES (PTY) LTD) Appellant**

and

**Abram Legobate**

**Respondent**

**Heard: 18 September 2014**

**Delivered: 21 October 2014**

**Summary: Review of arbitration awards - Employee dismissed for misconduct - commissioner finding dismissal fair. Labour Court finding dismissal not appropriate sanction- Labour setting aside award- Appeal. Review test and distinction between appeal and review restated-review test a two stage enquiry – Labour Court failing to deal with the second leg of enquiry as to whether the commissioner failure to apply his mind affected the outcome of the proceedings thus rendering the award unreasonable- commissioner considering all factors into the appropriateness of the sanction- award reasonable. Labour Court's judgment set aside- Appeal upheld.**

**Coram: Musi JA, Murphy and Kathree-Setiloane AJJA**

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**JUDGMENT**

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**KATHREE-SETILOANE AJA**

- [1] Quest Flexible Staffing Solutions (Pty) Ltd (“the appellant”) appeals against the judgment of the Labour Court (Molahlehi J) in which it granted a review application brought by the respondent, and substituted the award of the Commissioner with an order that the respondent’s dismissal by the appellant was substantively unfair and that he be reinstated.
- [2] The basis for the appeal as contended for by the appellant is that, the Labour Court misapplied the review test as enunciated by the Constitutional Court in *Sidumo*,<sup>1</sup> by adopting a test akin to an appeal and far less stringent than that endorsed by the Supreme Court of Appeal (“SCA”) in *Herholdt*<sup>2</sup> and by this Court in *Gold Fields*.<sup>3</sup> The appellant contends that but for its error in the application of the review test, the Labour Court would not have granted the review application. For this reason, it submits, the appeal should be upheld.
- [3] The factual background that gave rise to this dispute is largely common cause. The appellant is a Temporary Employment Service provider (“a TES”). On 11 May 2011, it employed the respondent on a limited duration contract and placed him as a call centre representative with its client, namely Multichoice in its inbound Call Centre. The appellant had, by that stage, placed approximately 360 temporary employees with Multichoice. On 14 May 2011, the respondent sent an e-mail to the general manager of Multichoice complaining about access to the premises, the manner in which overtime work was distributed, and that temporary staff in the Call Centre were being treated like “meerkats”. Multichoice brought the e-mail to the attention of Ms Nortje, the appellant’s accounts manager responsible for the Multichoice account. Ms Nortje called the respondent to a meeting where she discussed the issue with him. She explained to him that grievances had to be raised with the appellant directly, and not through Multichoice. She also instructed him not to send e-mails to Multichoice in the future.
- [4] Some two weeks later, on 2 June 2011, the respondent responded to an invitation from Multichoice on its intranet to comment on the meaning of the

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<sup>1</sup> *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para 110.

<sup>2</sup> *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] 11 BLLR 1074 (SCA).

<sup>3</sup> *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).

term “mutual respect”. This was part of an on-going weekly company initiative to apprise staff of Multichoice’s values. The respondent commented as follows:

‘I’m asking this because most values has to be practice in the Call Centre, but we as CSRs<sup>44</sup> we don’t get that respect from our management. I feel we being treated like sheep waiting to be slaughtered for a certain ceremony, when talking Respect what is it? what do you know about Respect... ?

Our management they swop us around as they please, they don’t care, all they know is that, we gonna work for their R4000.00 or go around with your CV looking for greener pasture, they move US around without consulting US, Billing Tech, Activation or Xtra view, we really don’t know and confused as our management as which Segment do really fit on, as they keep moving US like Hillbrow Tenants month end...

So before you mention Respect, get your acts together and STOP harassing US, we all have families to support, u also promised US DRIFTERS, that we will c them on World War 29.

RESPECT, RESPECT, RESPECT, U need DECENCY...Amen.’

- [5] The respondent’s comment was posted on Multichoice’s intranet and was accessible to the entire Naspers Group, as well as by employees of other staffing companies placed at Multichoice. As with the first e-mail, Multichoice brought the respondent’s comment to the attention of Ms Nortje, who together with the Call Centre manager called the respondent to a meeting in order to ascertain from him the “meaning” of his comment. The respondent indicated that the comment represented his “opinion”. During the course of the meeting, it became clear to Ms Nortje and the Call Centre manager that the respondent did not appreciate the seriousness of his actions as he showed no remorse.

- [6] On 3 June 2011, and arising from the respondent’s comment, the respondent was charged with *inter alia* “serious disrespect” and called upon to attend a disciplinary inquiry. On 9 June 2011, following the disciplinary inquiry at which he was found guilty as charged, the respondent was dismissed.

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<sup>44</sup> CSR is the acronym for call centre representative.

- [7] Dissatisfied with the outcome of the disciplinary enquiry, the respondent referred an unfair dismissal dispute in terms of s 185 of the Labour Relations Act<sup>5</sup> (“the LRA”), to the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) for conciliation and arbitration. The conciliation failed, and the dispute was arbitrated by the Commissioner. At the arbitration, the substantive and procedural fairness of the respondent’s dismissal was placed in dispute. The Commissioner found that the respondent was guilty of misconduct in the form of disrespect, and that his dismissal was both substantively and procedurally<sup>6</sup> fair.
- [8] As to the respondent’s understanding of the invitation to comment on the term “mutual respect”, and his awareness that his comment would be seen by staff and management alike, the Commissioner found as follows:

‘It was common cause that on the 2<sup>nd</sup> of June 2011 Mr Legobate posted a message on the intranet in response to a request to provide views on mutual respect. During the arbitration it was clear that Mr Legobate understood the request. I accept that he may not have been aware that the message was seen by the sister companies. However, he was aware that his colleagues and managers would see the message.’

- [9] In addition, the Commissioner found that during the arbitration hearing, the respondent had acknowledged that his message amounted to a grievance and that he was aware of the escalation procedure, which had been discussed with him on 14 May 2011. Despite such knowledge, however, the respondent chose to post the message, but failed to provide a satisfactory explanation for not following the grievance procedure. In relation to the standard of respect which management is entitled to from employees, the Commissioner observed as follows:

‘Our common law holds that there is an obligation between the employer and employee to show each other the same degree of dignity and respect. Moreover even though an employee is subordinated to the employer, the employer is enjoined to act fairly.’

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<sup>5</sup> 66 of 1995.

<sup>6</sup> Although the Commissioner found the respondent’s dismissal to be procedurally fair, this is not an issue in the appeal.

[10] The Commissioner observed in relation to the disrespectful nature of the respondent's comment, that, although the respondent had stated at the arbitration hearing that he was not angry when he wrote the comment, it was apparent therefrom that he was deeply bitter and resentful towards management, and accused them of treating employees with "disrespect" and "disdain". The Commissioner found the respondent's suggestion in the comment that employees were moved around without consultation, to be false as, in his view, it was clear from Ms Nortje's testimony at the arbitration hearing that the respondent was aware that the call centre representatives were consulted before they were moved to different segments but, due to the operational requirements of the business, they would sometimes be given short notice. In considering the substance of the offence the Commissioner found that:

'By making these allegations Mr Legobate was indeed throwing the gauntlet down management. He knew that this message was a list of complaints but elected to proceed to post it. He cannot then say that he believed that this was an open forum where he could air his opinions. This is in stark contrast to his evidence that he had a meeting with Ms Nortje and she explained the escalation procedure. Further this meeting addressed some of his concerns and he was requested not to send any emails. A reasonable man in Mr Legobate's position would have at the very least been aware that given this caution he should not post anything inflammatory on the intranet.

This message is disrespectful and cannot be seen in any other light. By posting such a challenging message on the intranet Mr Legobate brought the company's name into disrepute as this was as open forum for all employees. As a result of his behaviour he potentially jeopardised Quest's contract with the client.'

As a final point, the Commissioner found that the respondent expressed no remorse for his actions during the arbitration.

[11] Aggrieved, the respondent launched an application to review and set aside the award. As indicated, the Labour Court granted the review application, and substituted the award with an order that the respondent's dismissal was unfair

and that he should be reinstated. There are two aspects of the judgment of the Labour Court that warrant emphasis. The first is that the Labour Court apparently accepted that the respondent was guilty of misconduct, but found that the sanction of dismissal was inappropriate; and the second is that the Labour Court did not find that the award was unreasonable, but rather that (in its opinion) the Commissioner ought to have found that the sanction of dismissal was inappropriate. This finding, in my view, signals a cardinal error in the approach of the Labour Court to the review of the Commissioner's award which, to my mind, is ostensibly more akin to an appeal than a review.

[12] The test that the Labour Court is required to apply in a review of an arbitrator's award is this: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"<sup>7</sup> Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.<sup>8</sup>

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review. However, a survey of the judgment of the Labour Court reveals that it reviewed and set aside the Commissioner's award without finding that the result of the award was unreasonable. Nowhere in its reasons did the Labour Court find expressly or by implication that the decision is one that could not reasonably be reached.

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<sup>7</sup> *Sidumo* at para 110.

<sup>8</sup> *Herholdt* at paras 12 and 13.

[14] In arriving at the conclusion that dismissal was not an appropriate sanction in respect of the respondent's conduct, the Labour Court essentially accepted that the respondent was guilty of misconduct by acting in a seriously disrespectful manner towards Multichoice when he posted his comment on 2 June 2011 on its intranet. The focus of its enquiry was, therefore, on the question of the appropriateness of the sanction imposed by the appellant. The Labour Court found in this regard that if the Commissioner had considered and applied his mind to the totality of the facts and circumstances of the case, he ought to have found that dismissal was not an appropriate sanction. The facts and circumstances which the Labour Court found the Commissioner to have failed to apply his mind to are primarily these:

‘After a lengthy questioning,...the applicant conceded that this statement could be read as a grievance. He, however, testified in response to further questioning by the commissioner that at the time of writing the statement, he did not think about it in that particular manner.

At the hearing of this matter, the legal representative of the [appellant] conceded that the problem was created by the client, in inviting employees to post their views regarding mutual respect on the intranet. It was the client that set in motion the process that led to the applicant posting his views on the intranet. If anything it would appear that the invitation was ill-conceived by the client in that the risk associated with such an invitation was not considered.

There is nothing in the invitation by client that set out the parameters of the comments which were expected from the employees. The invitation did not prescribe the format and the contents of the comment about the employees' views. It is apparent from the reading of the various submissions by other employees that some presented a theoretical analysis of the concept "respect". The approach adopted by the applicant unlike those of the others is descriptive and based on his perception and the situational experience he seems to have had with management. He did that in the context where he was invited by the client to submit his views on the intranet. The invitation does not indicate that the expectation was that positive comments would be made about management neither does it indicate that employees should not formulate their views in a form of a grievance or in a negative manner. There

is also no warning to the employees that any negative comments about management could result in discipline and loss of jobs.’

[15] However, having identified the misdirection committed by the Commissioner, namely his failure to consider and apply his mind to the totality of the facts and circumstances of the case, the Labour Court failed to progress to the second stage of the enquiry by asking whether, despite the failure to consider and apply his mind to the totality of the facts and circumstances of the case, the result of the award was one which a reasonable Commissioner could reach. In so doing, the Labour Court adopted a piecemeal approach to the review test which is fundamentally at odds with *Sidumo* as endorsed in both *Herholdt* and *Gold Fields*.

[16] In *Gold Fields*, this Court rejected the piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it “assumes the form of an appeal” and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. To evaluate every factor individually and independently, it observed, is to defeat the requirements in s 138 of the LRA in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly.<sup>9</sup> On this approach, therefore, the failure of a commissioner “to mention a material fact in his or her award”, or “to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute”, or “commits an error in respect of the evaluation or consideration of facts presented at the arbitration”<sup>10</sup> would not, in itself, render the award reviewable.<sup>11</sup>

[17] It follows that the Commissioner’s failure to have regard *inter alia* to the concession made by the appellant’s counsel that it created “the problem” by

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<sup>9</sup> *Gold Fields* at paras 18-21.

<sup>10</sup> *Gold Fields* at para 20.

<sup>11</sup> Anton Myburgh SC “The test for review of CCMA arbitration awards: an update” (2013) 23 (4) *Contemporary Law* 31.



inviting employees to post their views regarding mutual respect on the intranet, and that the invitation did not set out the parameters of the comments which were expected from employees, are not sufficient grounds for interference by a reviewing court, and cannot by themselves render the decision reached one that a reasonable decision-maker could not have reached. By elevating the Commissioner's purported failure to consider and apply his mind to certain facts and circumstances to a reviewable irregularity without first assessing whether such failure rendered the result of the award unreasonable, the Labour Court failed in the final analysis to ask whether the Commissioner considered the principle issue before him; evaluated the facts presented at the hearing, and came to a conclusion that is reasonable?<sup>12</sup>

[18] Similarly, instead of asking if the award is one that a reasonable decision-maker in the position of the Commissioner could not reach, the Labour Court asked is the sanction imposed by the employer the appropriate sanction. In doing so, it effectively enquired into the correctness of the Commissioner's decision on the fairness of the sanction, thus elevating the enquiry from a review to an appeal. Even if the Labour Court was of the view that the sanction was inappropriate, it failed to appreciate the very circumscribed basis upon which it was entitled to interfere with the Commissioner's award.<sup>13</sup> This, in the context of a review of an award of a Commissioner under the LRA is a significant error, which constitutes a valid ground for setting aside the decision on appeal.

[19] In *Sidumo*, the Constitutional Court held that a Commissioner is not empowered to establish afresh what the appropriate sanction is, but rather to decide whether the employer's decision to dismiss is fair. In making this determination, the commissioner should not defer to the decision of the employer but should weigh up all the relevant factors, including the importance of the rule that has been breached, the reason the employer imposed the sanction of dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the

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<sup>12</sup> *Gold Fields* at para 16.

<sup>13</sup> *NUM and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] 11 BLLR 1041 (SCA) para 5.

employee not repeating the misconduct, the effect of the dismissal on the employee, and the employee's service record. These factors are, however, not considered by the Constitutional Court to be an exhaustive list.<sup>14</sup> Hence, other relevant factors that may warrant consideration in assessing the fairness of a sanction include the seriousness of the misconduct, the effect of such conduct on the continuation of the employment relationship, the nature of the job and the circumstances of the infringement<sup>15</sup>.

[20] In line with his limited mandate to decide whether the sanction imposed by the appellant was fair (as opposed to what sanction he would impose), the Commissioner, in his award, formulated the issue for determination concerning sanction as "whether the sanction was fair?" Then in considering the fairness of the sanction imposed by the appellant, and determining that it was indeed a fair and appropriate sanction in the circumstances, the Commissioner had due regard to a series of relevant factors including that:

- (a) the respondent's comment was both disrespectful to Multichoice and inflammatory.
- (b) Ms Nortje testified at the arbitration that the comment brought the appellant into disrepute and potentially jeopardised its contract with Multichoice.
- (c) Ms Nortje testified at the arbitration that the comment was objectively inaccurate in claiming that management moved staff around without consultation. As much was conceded by the respondent in his testimony at the arbitration when he said that there was no substance to the complaint, raised in his comment, that staff were moved around by management without consultation, as they were in fact consulted by management before they were moved to a different sector.
- (d) the respondent testified at the arbitration that he was aware that his comment would be seen by his colleagues and managers.

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<sup>14</sup> *Sidumo* at paras 78-79.

<sup>15</sup> *Samancor Chrome Ltd (Tubatse Ferrochrome) v MEIBC* (2011) 32 ILJ 1057 (LAC).

- (e) the respondent acknowledged during the arbitration that his comment amounted to a grievance, and that he was aware of the escalation process as Ms Nortje had made him aware of it on 17 May 2011, yet he proceeded to post it on Multichoice's intranet.
- (f) When asked at the arbitration why he did not follow the grievance procedure, he said because the appellant "would do nothing". The Commissioner found this explanation to be unsatisfactory.
- (g) The respondent had escalated a grievance directly to Multichoice on 14 May 2011 by e-mailing the Call Centre manager. On 17 May 2011, Ms Nortje had cautioned him against doing that in the future and explained the escalation process to him. She, moreover, specifically instructed him not to send e-mails of the nature in question to Multichoice, and
- (h) The respondent showed no remorse prior to or during the disciplinary hearing or at the arbitration hearing.

[21] Although not expressly relied upon by the Commissioner in his award, there are several other factors, that are revealed on the evidence, which justify the conclusion that the sanction of dismissal imposed by the appellant was fair and reasonable in the circumstances. The first is that the respondent undertook in his contract of employment to do everything in his power to promote and develop the business of both the appellant and its client; but instead brought the appellant into disrepute by being seriously disrespectful to, and disdainful of Multichoice. As such, his conduct almost jeopardized the appellant's contract with Multichoice. This was the second occasion on which the respondent escalated a grievance directly to Multichoice, which contained a disrespectful and challenging tone. Multichoice was, therefore, justified in instructing Ms Nortje to take him off its account. It is of particular relevance, in this regard, that the appellant is a TES, and the respondent was a temporary employee placed on assignment with its client, who no longer wanted him on the assignment due to his misconduct.

[22] In addition, the appellant regarded seriously disrespectful conduct, of the nature committed by the respondent, as an offence that warranted dismissal

on the first occasion. Its code of conduct provides as much. In failing or refusing to demonstrate any acceptance of wrongdoing or remorse, the respondent rendered the continued employment relationship with the appellant intolerable, and undermined the applicability of corrective or progressive discipline.

- [23] Accordingly, I am of the view that the Labour Court erred in failing to factor into its assessment of sanction the numerous material findings made by the Commissioner, including, most importantly that the respondent showed no remorse thus rendering the employment relationship intolerable, and the need for corrective measures pointless. The Labour Court also erred in its factual findings upon which it came to the conclusion that the sanction of dismissal was inappropriate. The respondent ultimately conceded that he ought to have pursued a grievance; and he had been cautioned against sending inflammatory e-mails to Multichoice. This, in effect, trumps all of the Labour Court's factual findings.
- [24] Furthermore, even if the Commissioner's award is open to some criticism, it clearly passes the test for reasonableness set out in *Herholdt* in that, it cannot be said to be entirely disconnected with, or unsupported by the evidence. The evidence led at the arbitration clearly bears out the fairness and reasonableness of the sanction of dismissal imposed by the appellant.
- [25] In light of these considerations, while it can be accepted that the decision of the appellant to dismiss the respondent may well have been harsh, it does not in my view, fall outside of a range of reasonable responses to the respondent's misconduct. Having due regard to the reasoning of the Commissioner on the evidence before him at the arbitration, I am unable to conclude that his decision was one that a reasonable decision-maker could not reach. The determination of whether a sanction is fair entails making a value judgment<sup>16</sup> over which reasonable decision-makers will often differ. This matter, in the words of *Sidumo* "is one of those cases where decision-makers acting reasonably may reach different conclusions"<sup>17</sup>—signifying just how far

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<sup>16</sup> *Samancor* (2011) 32 ILJ 1057 (LAC).

<sup>17</sup> *Sidumo* at para 119.

the elastic of reasonableness must be stretched in a “penalty review” such as this – before it snaps and gives rise to a review.

[26] For these reasons, the Labour Court erred in reviewing and setting aside the award of the Commissioner. In the result, the appeal must be upheld. Taking into account the requirements of justice and equity, I consider this to be a matter in which there should be no costs order.

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

- (1) The appeal is upheld with no order as to costs.
- (2) The order of the Labour Court in the review application is set aside and replaced with the following order:

“The application is dismissed with costs”

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F Kathree-Setiloane

APPEARANCES:

FOR THE APPELLANT:

A Myburgh SC

Instructed by Kirchmanns Inc

FOR THE RESPONDENT:

In person