



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA1/13

In the matter between:

LEAR SEWING (PTY) LTD PORT ELIZABETH

Appellant

and

MARTIN KOORTS N.O.

First Respondent

DISPUTE RESOLUTION CENTRE

OF THE MOTOR INDUSTRY

BARGAINING COUNCIL

Second Respondent

NATIONAL UNION OF METAL WORKERS OF

SOUTH AFRICA obo ARETHA WHITEBOOI

Third Respondent

Heard: 28 November 2013

Delivered: 13 February 2015

Summary: Review of arbitration award - employer contending that the commissioner in utilising the content of a previous inconsistent statement in making an adverse credibility finding and rejecting its witness' evidence as unreliable, breached the *audi alteram partem* rule, consequently, the commissioner committed an irregularity which rendered the arbitration award susceptible to review – the court finding that the first respondent's failure to put the content of a previous inconsistent statement to the employer's witness not necessarily breaching the *audi alteram* rule because the commissioner in reaching his primary adverse credibility finding had regard to the totality of the evidential material including the appellant's previous witness' inconsistent

statement alluded to in the arbitration by the appellant's representative, consequently, the commissioner's primary decision falls within a range of reasonable decisions a commissioner would have reached having regard to the totality of the evidence – the appeal is dismissed.

Coram: Tlaletsi DJP, Musi AJA and Mokgoatlheng AJA

JUDGMENT

MOKGOATLHENG AJA

Introduction

- [1] This is an appeal against the judgment of the Labour Court (Lallie AJ) in terms whereof that court dismissed the appellant's review application against the arbitration award issued by the first respondent (the commissioner acting under the auspices of the second respondent) in which he determined that the appellant's dismissal of its employee (Aretha Whitebooi, who is a member of the third respondent (a registered trade union) from her employment was substantively unfair and directed that she be retrospectively reinstated with full emoluments. The appeal is with the leave of the *court a quo*.

The Factual Matrix

- [2] The appellant is a manufacturer of automotive electrical components. Aretha Whitebooi (hereinafter referred to as the employee) was employed by the appellant as a production line cell leader at its plant situated at Port Elizabeth. She was also a shop steward of the third respondent. A certain Glenston Potberg (Potberg) was employed by the appellant as a labourer in the packaging area. He was however not a member of the third respondent. During September 2010, the third respondent embarked on a strike action in the automotive component industry. The third respondent's members in the appellant's employment heeded the call and joined the strike action. Potberg

was amongst the contingent of the appellant's employees who did not join the strike.

- [3] It is the appellant's case that the strike was interspersed with incidents of intimidation and violence against non-striking employees. On 3 September 2010 at the appellant's premises, Potberg witnessed the third respondent's members violently attacking a non-striking employee reporting for duty.
- [4] After knocking off work on 3 September 2010, Potberg on his way home met the employee at the Cleary Park Shopping Centre. The employee engaged him in a discussion and told him that: "*we are coming for you*". Potberg understood the employee's utterance to be a threat. The following day, Potberg reported the incident to the appellant's management. However, the employee's version differs from that of Potberg in that she alleges that she said to Potberg: "*Hey Pottie they are coming after you.*" She stated that her intention was to warn Potberg of persons who wanted to harm him. She did not intend to threaten Potberg.
- [5] As a consequence of Potberg's statement, the appellant charged the employee with intimidating Potberg to join the strike. Pursuant to a disciplinary enquiry, she was found guilty and was dismissed from her employment. The third respondent acting on behalf of the employee referred a dispute of unfair dismissal to the second respondent for conciliation. The dispute could not be resolved through conciliation and was referred to arbitration by the first respondent.

The Arbitration

- [6] Potberg testified on behalf of the appellant, and the employee on behalf of the third respondent. The first respondent found that Potberg's evidence was contradictory and unreliable. He held that in contrast to Potberg's evidence, the employee's evidence was consistent and reliable. He also found that the employee's dismissal was substantively unfair and as pointed out above, he retrospectively reinstated her with full emoluments.

- [7] The first respondent found that in the context of the incident, on a balance of probabilities, the employee did not use the words “*we are coming to get you*” instead he must have said “*they are coming to get you*”. The first respondent also found that Potberg had misinterpreted the employee’s warning as a threat because of the prevailing strike violence. The first respondent found further that on the probabilities the employee’s use of the word “*they*”, was indicative that she excluded herself from persons who intended to harm Potberg.

The Review

- [8] In its review application, the appellant contended that the first respondent committed a latent gross irregularity in that he had failed to apply his mind to the material facts and had as a result misdirected himself by concluding that the employee had not threaten Potberg but had intended to warn him.
- [9] The *court a quo* upheld the first respondent’s award and found that it had considered Potberg’s written statement because it formed part of the evidence presented at the arbitration. Further the *court a quo* found that the first respondent’s conclusion that Potberg’s evidence was contradictory, and unreliable was a reasonable conclusion a reasonable commissioner could reach on the evidence presented at the arbitration.

The Application for Leave to Appeal

- [10] The appellant contended that the first respondent committed a latent gross irregularity by finding that the employee did not threaten Potberg, and as a consequent thereof made a conclusion finding a reasonable commissioner would not have reached having regard to the evidence before him.
- [11] Further the appellant contended that the first respondent committed a patent gross irregularity in discrediting Potberg’s evidence as inconsistent, contradictory and unreliable by relying for this finding on Potberg’s previous inconsistent statement which was not raised during the arbitration nor its contents put to Potberg to elicit his response, comment or explanation.

- [12] The *court a quo* acceded to the appellant's contention that there was a possibility that this Court may find that the first respondent had committed a patent gross irregularity by having relied on a previous inconsistent statement for discrediting Potberg's evidence as unreliable, when such statement was not raised or put to him during the arbitration. For its decision, the *court a quo* relied on the judgment of *Portnet (a division of Transnet Ltd) v Finnemore and Others*.¹
- [13] The *court a quo* reasoned that despite the fact that the first respondent's failure to put Potberg's previous inconsistent statement to him for his comment or explanation was neither pleaded nor raised during the review proceedings, there was a reasonable possibility that this Court may find that the first respondent's omission to do so before discrediting Potberg's evidence may have rendered the arbitration award susceptible to review.

The Appeal

- [14] The appellant's counsel argued that the patent gross irregularity committed by the first respondent amounted to an act of procedural unfairness against the appellant in that because the irregularity appeared *ex facie* on record, the *court a quo* was obliged to have raised the irregularity *mero motu* despite it not having been pleaded or argued, in the premises there was no legal bar against to the appellant raising this legal point on appeal.
- [15] In support of his argument that the *court a quo* had misdirected itself in not *mero motu* raising the said legal point the appellant's counsel cited the case of *Tao Ying Metal Industries and Others*² where O'Regan J in the minority judgment held as follows:

*'Where a material irregularity or other defect appears on the face of the record before the reviewing court, which defect would mean that the proceedings before the tribunal were either unlawful or procedurally unfair or unreasonable, the reviewing court is not obliged to overlook that defect.'*³

¹ [1999] 2 BLLR 151 (LC).

² 2009 (2) 2004 (CC); (2008) 28 ILJ 2461 (CC) at para 131.

³ Ibid.

[16] The appellant's counsel submitted that the first respondent by relying on Potberg's previous inconsistent statement not raised in the arbitration in rejecting his evidence as unreliable and contradictory, gave the employee the benefit of an unarticulated defence which resulted in the first respondent deciding the matter on the basis of a negative credibility finding arising from a previous inconsistent statement made by Potberg not referred to during the arbitration. In support of this argument counsel cited the case of *Mutual & Federal Insurance Co Ltd v Commission for Conciliation Mediation & Arbitration and Others*⁴ where Jali AJ (as he then was) held:

*'Where a witness has made a previous statement which tends to be inconsistent with a statement which is made at a hearing, the best known method of impeaching his credibility is to draw the witness's attention to the statement which he made previously and provide him with an opportunity to give an explanation. This would enable counsel and the court to establish whether the witness is telling the truth or not. In the circumstances, the failure or refusal by the commissioner to give the representative an opportunity to put the different or contradictory versions to the other sides witness should be regarded as a gross irregularity.'*⁵

Further the appellant's counsel also referred to the case of *Portnet* (supra)⁶ and the judgment of the Labour Court (per Ntsebeza AJ) in *Minister of Safety & Security v Mashego and Others*.⁷

[17] The third respondent's counsel objected to the appellant raising the alleged patent gross irregularity allegedly committed by the first respondent by having relied on Potberg's previous inconsistent statement in concluding that his evidence was contradictory and unreliable because this legal point was neither pleaded nor argued in the *court a quo*, consequently, it was impermissible for the appellant to raise this legal issue at appeal. I demur. There is no legal impediment barring a litigant from raising a point of law on appeal.

⁴ [1997] 12 BLLR 1610 (LC) at para 1614J – 1615A.

⁵ Ibid.

⁶ At paras 14 and 16.

⁷ C

- [18] Counsel further argued that at best the first respondent's failure to put Potberg's previous inconsistent statement to him for an explanation amounted to an inconsequential omission which had no direct bearing on the validity of the first respondent's award.
- [19] In any event, the third respondent's counsel argued that O'Regan J in her minority judgment in *Tao Ying Metal Industries* (supra) referred to the commission of a "material irregularity" which could possibly render the arbitration proceedings unlawful, procedurally unfair or unreasonable. The inconsequential omission the first respondent allegedly committed is certainly not a material irregularity as envisaged by O'Regan J counsel submitted. The third respondent's counsel further submitted that the appellant's reliance on the judgment of O'Regan J in *Tao Ying* (supra) was misconceived because Ngcobo J writing on behalf of the majority of the court in the same matter held differently as follows:

'[67] Subject to what is stated in the following paragraph, the role of reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not appeal or raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.

[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the commissioner's jurisdiction and to enquire argument

thereon. However, as well be shown below, on a proper analysis of the record, the arbitration proceedings in fact did not reach the stage where the question of jurisdiction came into play.'

The Analysis and Evaluation of the Evidence

[20] The fact of the matter is that although there are differences in Potberg's previous inconsistent statement when compared with his evidence at the arbitration, the first respondent did not solely rely on the content of Potberg's previous inconsistent statement in discrediting Potberg's evidence as inconsistent, contradictory and unreliable

[21] To properly understand the full import of the first respondent's award, it is apposite to cite the salient features thereof. I quote same verbatim:

'It is my view that the evidence before me has not established on a balance of probabilities that the employee was guilty of the alleged misconduct, if inter alia the following is considered:

The evidence of the single Employer witness was in my view not consistent. He changed his statement on crucial evidence a number of times. His explanation that "they" and "we" is one of the same thing is in my view not correct if I consider the context in which the incident occurred. During the arbitration hearing it was evident to me that Potberg stated "we" which could only be an attempt to implicate the employee. He never stated "we" in his statement but "they" and it was also clear to me that the employer's version was that the employee used the word "they". It is further my view that if the word "we" was used by the employee it could be viewed as intimidation but not if the word "they" was used. It is my interpretation that "they" in the context before me indicates to me that the employee excluded herself from the people who intended to harm Potberg and shows on a balance of probabilities that that she meant to warn Potberg and not threaten him...'

[22] At the arbitration, Potberg testified that the employee said to him "they were coming for me". Later he contradicted himself and stated that the employee had said: "We are coming for you." He further stated that he understood these

utterances as a threat because the employee was a shop steward. Under cross-examination Potberg testified that the statement “*they are coming for you*” and “*we are coming for you*” to him meant the same thing.

- [23] When the third respondent’s representative put it to Potberg that he was not sure whether the employee had used “*they*” or “*we*”, he responded that “*ek is seker that “they” and “we” is the same.*” When asked which word the employee had used before the word “*coming*”, was it “*they*” or “*we*”? Potberg responded “*she (the employee) said they are coming for you*”.
- [24] From this analysis, it follows that the first respondent’s adverse primary finding in rejecting Potberg’s evidence as contradictory, inconsistent and unreliable is primarily based on the first respondent’s evaluation of Potberg’s viva voce evidence tendered at the arbitration.
- [25] The first respondent’s secondary finding that Potberg was an unreliable witness is based on the differences the first respondent identified between the content of Potberg’s previous inconsistent statement and his testimony at the arbitration.
- [26] Later in his award the first respondent states:

‘In Mr Potberg’s statement as contained in the bundle he held that the employee said to him “on Monday 6 September they will come for me, they will hurt me”. There are major differences if the statement is compared with what Potberg stated at this arbitration hearing.

Potberg goes further in his statement and says that he then responded telling the employee that “they must come for me I am not afraid”. At this arbitration hearing Potberg never mentioned this and testified that he phoned his wife and informed her about what the employee had said to him.

In the premises I find that Potberg is not a reliable witness and I cannot rely on his evidence.

This arbitration hearing is a fresh hearing and the onus is on the employer to prove the employee’s guilt on a balance of probabilities; Potberg was the only witness who testified on behalf of the employer.

If I consider the employee's evidence I am of the view that her version was consistent on material issues and she was consistent in her version that she used the word "they".

- [27] The appellant's representative in the arbitration referred Potberg to his statement by putting the assertion that the discussion Potberg had with the employee at the Cleary Park Shopping Centre, indicated that his *viva voce* evidence at the arbitration was consistent with the written statement he made to the appellant in that his evidence confirmed that the words the employee had uttered to him were *"they are coming for you"*.
- [28] The secondary adverse credibility finding made by the first respondent in rejecting Potberg's evidence as unreliable is also based on the conclusion he drew that Potberg did not testify about certain allegations set out in his previous inconsistent statement at the arbitration. Further the first respondent found that Potberg also did not testify that when the employee said to him *"they will hurt me"*, he had responded; *"they can come I am not afraid."*
- [29] In my view, having regard to the appellant's representative's assertion regarding the content of Potberg's previous inconsistent statement, the first respondent was entitled to have recourse to such statement to verify whether the assertions put to him by the appellant's representative accorded with what Potberg had testified or what the contents in his written statement were.
- [30] In my view, the first respondent was referring to this portion of Potberg's previous inconsistent statement in his secondary adverse finding in discrediting Potberg's evidence and rejected it as contradictory and unreliable.
- [31] In *SA Commercial Catering & Allied Workers Union and Others v Pick 'n Pay Retailers (Pty) Ltd and Others*,⁸ Van Niekerk J, stated the following:

'The applicants rely solely on the ground of review of a (latent) gross irregularity. In order for there to be gross irregularity warranting interference on review, two conditions must be met: firstly, the omission of the part of the arbitrator must involve him or her having misconceived the nature of the enquiry of his or her duties in connection with the enquiry, and thus result in

⁸ [2012] 1 BLLR 71 (LC) at para 8.

him preventing a fair trial of the matter. Secondly, there must not exist material that would serve to justify the arbitrator's decision, because 'if there was material before the [arbitrator], justifying the action taken, the court would not be entitled to interfere even if an irregularity had been committed.' Put differently, if an arbitrator was caused by inappropriate means to reach one conclusion whereas if he had adopted appropriate means he might have reached another conclusion favourable to the applicant, then the award is reviewable.' [Footnote omitted]

- [32] The gravamen of the matter is that, the first respondent is enjoined to consider and evaluate the totality of the evidential material before him, including the contents of Potberg's previous inconsistent statement because these were referred to by the appellant's representative in leading Potberg's evidence in chief. It is indisputable that the first respondent in reaching his primary and secondary decisions had recourse to the totality of the evidence before him.
- [33] The question is whether the first respondent's primary decision to reject Potberg's evidence as inconsistent and contradictory based on his *viva voce* is *susceptible to* be reviewed because it was unreasonable and unlawful having regard to the evidential material before him. In my view, the answer is in the negative. Secondly, the further question is whether the first respondent's primary decision is one that a reasonable commissioner could not have reached having regard to the evidential material before him. In my view, the answer is in the affirmative.
- [34] In reaffirming the test enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁹ this Court in *Fidelity Cash Management Services v CCMA and Others*¹⁰ expressed the following view:

'It will often happen that, in assessing the reasonable or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision of finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in

⁹ (2007) 12 BLLR 1097 (CC).

¹⁰ [2008] 3 BLLR 197 (LAC) para 98.

*terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently. Obviously, this does not, in any way, mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.*¹¹

- [35] In my view, the award the first respondent made was a reasonable award in accordance to the test enunciated in *Herholdt v Nedbank Ltd*¹² where Wallis JA regarding the review of CCMA awards stated:

*'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145 (2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not have reached on all 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.'*¹³

- [36] The approach is to consider whether a gross irregularity has occurred regarding the conduct of the arbitration, the second part of the enquiry is whether the outcome reached by the commissioner is unreasonable having regard to the totality of the evidence.

- [37] This approach has been followed by Waglay JP in a recent judgment in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v The Commission Conciliation Mediation and Arbitration and arbitration*¹⁴ paragraph 14 the learned judge states:

'Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation a

¹¹ Ibid.

¹² (2013) 34 ILJ 2795 (SCA).

¹³ At para 25..

¹⁴ [2014] 1 BLLR 20 (LAC).

determination of the reasonableness of the decision arrived at. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relation Act continued to be determined under section 145, but the Constitutions standard of reasonableness is suffused in the application for review sought on the grounds of misconduct, gross irregularity and the conduct of the arbitration proceedings and/or excess powers, will not lead automatically to the setting aside of the award if any of the above grounds are found to be present. In other words in a case such as the present where a gross irregularity in the proceedings is alleged, the inquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was reasonable, or put another way, whether the decision that the arbitrator arrived a reasonable decision-maker could come on the available material.’ [footnote omitted]

- [38] The Learned Judge President has elaborated further on what Wallis JA held in *Herholdt* (supra) and stated at paragraph 16 that: *“In short, a review Court must ascertain whether the arbitrator considered the principle issue before him or her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decision he or she arrived at.”*
- [39] In considering a gross irregularity, the learned Judge President states at paragraph 20 of the judgment: *“That would mean that the award is open to be set aside where an arbitrator; (i) fails to mention a material fact; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (ii) commits an error in respect of the evaluation and consideration of the facts presented at the arbitration.”*
- [40] Consequently, in accordance with the test enunciated in *Sidumo* (supra) and *Herholdt* (supra) and *Goldfields Mining South Africa (Pty) Ltd* (supra), on the totality of the evidence before the first respondent the decision he reached is a reasonable decision, consequently, his award is not susceptible to be reviewed and set aside

The Order

- [41] (i) The appeal is dismissed.

- (ii) There is no order as to costs.

Mokgoatlheng AJA

TLALETSI DJP and MUSI JA concur in the judgment of MOKGOATLHENG AJA.

APPERANCES:

FOR THE APPELLANT:

Mr Myburgh S.C.

Instructed by Kaplan Blumberg Attorneys

FOR THE THIRD RESPONDENT:

Mr Niehaus

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