



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA20/2013

In the matter between:

TRANSNET RAIL ENGINEERING

Applicant

and

RICHARD PATRICK MIENIES

First Respondent

TRANSNET BARGAINING COUNCIL

Second Respondent

COMMISSIONER: JOY FISH

Third Respondent

Heard: 11 September 2014

Delivered: 18 June 2015

Summary: Review of arbitration award – Employee dismissed for gross negligence – arbitrator upholding dismissal –employee having conflicting relationship with supervisor and as a result suffering from depression – medical and counselling reports advising that employee be transferred to another depot - arbitrator ignoring this relevant evidence – arbitrator

**committing a reviewable irregularity rendering the award unreasonable –
Labour Court’s judgment upheld – appeal dismissed**

Coram: Tlaetsi DJP, Hlophe et Dlodlo AJJA

JUDGMENT

DLODLO AJA

Introduction

- [1] This is an appeal against the whole judgment and order of the Labour Court (Rabkin-Naicker J) handed down on 23 August 2013. The First Respondent (Mr Mienies) had been dismissed by Transnet for gross negligence following a disciplinary process. There was no challenge to the fairness of the procedure followed. But Mr Mienies contended that there had been no fair reason for his dismissal.
- [2] The Arbitrator, in her award, found that there was a fair reason for the dismissal. The review application pleaded in broad terms was based on the contention that the arbitrator had committed a gross irregularity or misconduct because she had failed to attach sufficient weight to various aspects of the evidence before her and had made erroneous findings of facts in various respects. The Court *a quo* found that the arbitrator had reached a conclusion that could not reasonably have been reached on the evidence presented before her. The court *a quo* singled out two specific contentions in the review application which I set out *infra*.
- [3] The Court *a quo* found that the arbitrator had “*not referred to*” evidence of alleged victimisation or concerning the mental well-being of Mienies, or compatibility problems and recommendations that he be “*transferred to another depot*.” The Court *a quo* then concluded that the arbitrator’s decision was “*one that a reasonable decision-maker could not make in that she failed to take relevant evidence into account when considering the substantive fairness of the dismissal*.” It was also found that it was “*not evident from her*

award that [the arbitrator] considered the personal circumstances of Applicant or his years of service in coming to her decision that the dismissal was substantively fair.” The Court *a quo* thus set aside the arbitration award and substituted it with an order that Mr Mienies be reinstated with retrospective effect.

A brief factual matrix

- [4] Mr Mienies had a troubled employment history with Transnet. He had previously been dismissed but reinstated by an arbitrator in April 2008. Some 18 months later, he was again found guilty of serious misconduct involving malicious damages, negligence and dishonesty and was issued with a final written warning letter valid until 12 January 2010.
- [5] In 2011, Mr Mienies was transferred to Transnet’s employee wellness programme (EWP) by management to receive counselling for absenteeism. Mr Mienies had on-going problems with his immediate supervisor, one Mr Kisten. In the latter regard, Mr Mienies had referred a number of grievances against Mr Kisten. Both Mr Kisten and his Manager, Mr Nel were of the view that Mr Mienies had established a pattern of responding to disciplinary action against himself by referring a grievance.
- [6] Even in the instance of misconduct currently under discussion *in casu* Mr Mienies did lodge a grievance against Mr Kisten. According to the record of proceedings, the latter grievance was investigated and was found to be without merits. It is important to mention that at the time of his dismissal (according to record of proceedings), Mr Mienies was facing a range of other complaints of misconduct which were overtaken by his dismissal.
- [7] The misconduct that led to Mr Mienies’ dismissal involved two separate incidents in which he had installed window panes allegedly negligently. In the first instance (11 July 2011), he had installed four window panes in the “back panes” – three of these fell out the following day. Mr Mienies told the Area Manager, Mr Waja that the window panes had fallen out because of poor

quality putty. At arbitration, Mr Mienies stated that he had fastened the windows securely with wire to allow the putty to dry and that there were other people working in the area who could have caused the damage.

[8] Mr Kisten's evidence was that: Mr Mienies had failed to "activate" the putty by mixing it according to instructions given on the putty package; that Mr Mienies had failed to secure the windows properly; and had failed to put up signage indicating that the window panes were recently installed and the putty drying. Mr Mienies asserted that he had never previously installed windows and could not reasonably be expected to know how to do so and that installing windows was not part of his job. Needless to state that there was evidence presented on behalf of the employer to counter both contentions advanced by Mr Mienies.

[9] In the second instance of misconduct (31 August 2011), Mr Mienies was instructed to install a window in the "new shed". This was high up and required him to use a forklift stand. According to the evidence, the job was not properly completed in that the putty was badly finished and the glass pane dirty and full of marks. Transnet's witness and Mr Mienies gave conflicting versions of why this was so. Mr Dramat and Mr Nel both testified to the impact of Mr Mienies' negligence on Transnet's business and workplace. Mr Nel gave evidence on the question of consistency and on Transnet's approach to progressive discipline.

[10] Mr Mienies in his founding affidavit alleges that the arbitrator failed to "*attach sufficient weight to the fact that I advised Mr Waja that the putty was of bad quality*". In fairness to Mr Waja, he did testify that Mr Mienies told him that the putty had been of bad quality. Evidence established that fitting windows was a straightforward task that could easily be performed and was performed by skilled artisans (Millwrights included) and that the task could also be performed by less skilled employees.

The application of the relevant legal principles

- [11] It is of importance that it be borne in mind that for a defect in the conduct of arbitration proceedings to amount to a gross irregularity contemplated by section 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 (LRA) on the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ grounds, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.² Of course the effect of *Sidumo* is that the arbitrator's decision must fall within a range of decisions that a reasonable arbitrator could make. The distinction between review and appeal must at all times be preserved.³
- [12] Evidence must at all times be scrutinised in order to determine whether the outcome was reasonable. But a reviewing court must be alert to remind itself to avoid (in the words of the Constitutional Court) "*judicial overzealousness in setting aside administrative decisions that do not coincide with the Judge's own opinions.*"⁴ The test is indeed stringent, the purpose being to ensure that Commission for Conciliation, Mediation and Arbitration's awards are not lightly interfered with.
- [13] Evidently there are reasons in this matter that do not support the arbitrator's decision. Notably a doctor's report dated 12/10/2009 raised in cross-examination of Mr Kisten. The report reads in part:

'RE: RICHARD MIENIES

D.O.B. [.....]

...He was diagnosed with a major Depressive Disorder precipitated by worsening work stress over the last year...He has developed worsening

¹ [2007] 12 BLLR 1097 (CC) (*Sidumo*).

² *Sidumo* at para 108 and applied in *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

³ *Sidumo supra* at para 108.

⁴ *Sidumo* at para 109.

depressive symptoms over the last year with depressed mood, insomnia, anhedonia, fatigue, poor concentration and memory, low self-esteem and psychomotor slowing. I have started him on antidepressant Fluoxetine 20mg daily and will continue individual psychotherapy until his depression resolves. He would benefit from an urgent transfer to Portnet to prevent worsening of his depression. If he continues in his current post he will develop increasing impairment of his mental, emotional and physical function with worsening work performance. Please attend to his transfer urgently.'

- [14] There is also in the record of proceedings a report from the Employee Wellness Programme (EWP) addressed to the supervisor and it reads *inter alia* as follows:

'The wellbeing practitioner expressed the view that Richard Mienies was upset by conditions at work, which places continuous strain on his emotional and physical health and that the conflict between him and his supervisor creates stress beyond his coping capacity all of which negatively impacts his attendance and work performance...'

The EWP recommended to the Management that:

- (i) They provide an unbiased facilitator to mediate between Mr Mienies and his Manager so as to resolve their difference in a constructive manner,
- (ii) Consider Mr Mienies' request for a transfer to another depot as a possible solution to the problem.

- [15] It is true as the Court *a quo* found that the arbitrator did not refer to the evidence of alleged victimisation or that pertaining to the mental condition of Mr Mienies. There is hardly a reference to the compatibility problems that surfaced and the recommendations that Mr Mienies be transferred to another depot. The arbitrator did not also refer to the EWP report's recommendations when deciding on whether the sanction of dismissal was fair. Clearly, relevant evidence or material placed before the arbitrator was ignored completely. Clearly, Mr Mienies was dismissed because he did not possess mental or attitudinal wherewithal (through no fault on his part) to perform his duties

properly. The question is whether Mr Mienies failed to meet the standard expected by the employer. The evidence led before the Commissioner while sufficient to pronounce a finding of guilt, did not provide a rational justification for the decision to dismiss Mr Mienies.

[16] I agree with the view expressed by the Supreme court of Appeal that if employees display shortcomings in the performance of their duties, fairness requires that those employees should not only be informed that their performance is deficient and in what respects, but also that the employees should be given an opportunity to improve.⁵ Mr Mienies should have been given an opportunity to improve his performance. One such way to help him would have been to have regard to the doctor's report namely to transfer him to Portnet in order to prevent the worsening of his diagnosed depression. It is difficult to understand how the doctor's warning in this regard was ignored. The doctor warned in the report quoted above that if Mr Mienies continues in the post he *"will develop increasing impairment of his mental emotional and physical function with worsening work performance."*

[17] As John Grogan explains: *"This is where substantive and procedural aspects of dismissals for poor work performance begin to merge. ...The procedure for dismissals for poor work performance requires that the employee should be counselled, monitored and offered assistance before the contract is terminated. This self-evidently implies that the employee must be given an opportunity to improve."*⁶

[18] In *Herholdt v Nedbank Limited*(*Herholdt*),⁷ the Supreme Court of Appeal in deprecating the process-related approach emphasised that the proper approach in reviews was to examine the "outcome" of the award and consider whether the result was unreasonable. In fact, in *Herholdt*, the test was set out as follows:

'...For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s145(2)(ii), the arbitrator must have

⁵ *Unilong Freight Distribution (Pty) Ltd v Muller* (1998) 19 ILJ 229 (SCA) at 238 A-G.

⁶ Grogan J *Dismissal* (Juta 2011) at 322-323.

⁷ (2013) 34 ILJ 2795 (SCA).

*misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequences if their effect is to render the outcome unreasonable.*⁸
(Underlining added).

It is important to bear in mind that the conclusion reached must account for all the evidence adduced. No evidence may simply be ignored.⁹ If both the Doctor's report and the report by EWP were considered by the arbitrator at all, the punishment meted out on Mr Mienies would have been a sanction short of dismissal.

[19] Dismissal must always be an action of last resort. Indeed, dismissal becomes unnecessary if, given a reasonable opportunity and reasonable assistance, the employee can meet the required standard. Obviously dismissal would not be necessary at all if Mr Mienies in the instant matter was, and could have been moved to another position or another depot as the EWP report recommended. Thus, failure to take relevant evidence into account when considering the fairness of the dismissal in this matter renders the arbitrator's decision susceptible to being reviewed and set aside. I am of the view that the arbitrator's decision in the instant matter is one that a reasonable decision-maker could not make.

[20] In labour matters, the Labour Court may make orders for the payment of costs according to the requirements of the law and fairness. Considerations the Court is obligated to take into account when deciding whether to award costs are set out in section 162(2) of the LRA. The conduct of the parties is relevant where considerations of fairness are concerned.¹⁰ I am mindful that the Appellant was entitled to appeal the judgment of the Court *a quo*. In view of the conclusion reached on appeal, Mr Mienies will still be the Appellant's

⁸ At para 25.

⁹ *S v Van Aswegen* 2001(2) SACR 97 (SCA).

¹⁰ *NUM v East Rand Gold and Uranium Co. Ltd* (1991) 12 ILJ 1221 (A) at 1241 J-1243 B.

employee. An order of costs may affect the relationship between the two. Perhaps it is just and equitable that no order is made as to costs.

[21] In the circumstances, I make the following order:

- (a) The appeal is dismissed.
- (b) There is no order as to costs.

Dlodlo AJA

Tlaletsi DJP and Hlophe AJA concur in the judgment of Dlodlo AJA

APPEARANCES:

FOR THE APPELLANT:

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Instructed by Bowman Gilfillan

FOR THE FIRST RESPONDENT:

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LABOUR APPEAL COURT