



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA107/13

In the matter between:

MALESELA TAIHAN ELECTRIC CABLE

(PTY) LTD t/a M-TEC

Appellant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

KHABO MAMBA N.O

Second Respondent

M.V.N LEBONA

Third Respondent

Heard: 10 March 2015

Delivered: 5 October 2015

Summary: Review of arbitration award – employee claiming payment for the surplus of his pension fund accrued at his former employment – Fund erroneously paying accumulated amount during his current employment – employer dismissing employee for dishonestly claiming his pension fund – employee’s undisputed evidence was that he was claiming the surplus of his pension fund accrued at his former employment – arbitrator’s finding that dismissal substantively unfair falling within the band of reasonableness. Appeal dismissed.

Coram: Waglay JP, Davis JA and Mngqibisa-Thusi AJA

JUDGMENT

MNGQIBISA-THUSI AJA

- [1] This is an appeal with leave of the Labour Court against its judgment and order (Moshoana AJ) handed down on 19 September 2013, upholding the award issued by Mr Khabo Mamba (the arbitrator) on 28 June 2011, acting under the auspices of the Metal and Engineering Industries Bargaining Council (MEIBC or the first respondent) .
- [2] The appellant also applies for condonation for the late filing of the notice of appeal. There are no reasons why condonation should not be granted, and is so granted.

Factual background

- [3] The facts leading to this dispute are largely common cause and are as follows. The appellant is an employer within the metal and engineering sector falling within the MEIBC's jurisdiction. The third respondent was employed by the appellant on 18 August 1997 as a laboratory technician until he was dismissed in October 2010. Before his employment with the appellant, the third respondent had been employed by Metal Box, another employer within the metal and engineering sector. When third respondent resigned from Metal Box in 1995; he applied for and received his pension. During his employment with Metal Box, and whilst in the employ of the appellant up to 2007, the third respondent was a member of the Engineering Industries Pension Fund (the Fund) administered by the first respondent.
- [4] However, in April 2007, the third respondent left the Fund and joined the DJ & A pension fund (DJ & A). On 20 November 2009, the third respondent applied to the Fund for a refund of his pension contributions. Pursuant to his

application for a refund, the Fund sent the third respondent a form titled "Application for the payment of Benefits on Resignation, Retrenchment or Retirement" which he completed, signed, and returned to the Fund. On the said form, the third respondent indicated that he was retrenched by Metal Box and that, at the time of application, he was unemployed. On 26 February 2010, the Fund paid the third respondent his contributions, which also included contributions (approximately 6.6% of the appellant's monthly contributions to the pension fund) made by the appellant up to the date of him joining DJ & A.

- [5] During September 2010, the third respondent inquired from the appellant's payroll clerk, Odile Van der Westhuizen, about the status of his DJ & A pension. On inquiry to DJ & A, appellant discovered that the third respondent was registered as a new member in April 2007 and no transfer of his contributions from the Fund to DJ & A was made when he joined DJ & A. On further inquiry, the appellant discovered that the third respondent was paid out his pension contributions in February 2010. It appears that in terms of the rules of the Fund, contributions cannot be withdrawn as long as an employee is still employed within the metal and engineering industry.
- [6] As a result, the third respondent was charged with: i) dishonesty – where a dishonest or fraudulent act is committed by an employee; and ii) breach of trust – infringement or violation of confidence placed in an employee in a specific position by the employer. The charges levelled against the third respondent were based on the ground that the third respondent misconducted himself in claiming his provident fund contributions from the Fund whilst still in the employ of the appellant and that he did not disclose his current employment with the appellant on the claim form. Subsequent to the charges, a disciplinary inquiry was convened and the third respondent was found guilty on both counts and dismissed.

Arbitration

- [7] Aggrieved by his dismissal, the third respondent lodged an unfair dismissal dispute with the MEIBC on the ground that his dismissal was procedurally and

substantively unfair. The allegation of the procedural unfairness relates to the fact that at the disciplinary hearing, the chairperson did not allow the third respondent to be represented by a union official who was not an employee of the appellant as provided for in the appellant's disciplinary code.

[8] At the arbitration hearing, the appellant's contended that the third respondent had dishonestly withdrawn his pension contributions from the Fund because the rules of the Fund prohibited employees still employed within the metal and engineering industry from withdrawing their pension contributions. It was further contended by the appellant that in order to achieve his aim, the third respondent had misrepresented in his withdrawal application form that he had been retrenched by Metal Box and was unemployed. Furthermore, it was the appellant's contention that the third respondent was aware of the appellant's rules that if any withdrawal from a pension fund was to be made, it had to be done through the appellant's human resources department, which procedure the third respondent did not adhere to. The appellant contended that the Fund had paid the third respondent not only what might have been outstanding in terms of his contributions whilst working with metal Box, but also contributions made by the appellant to the Fund up to April 2007 when the third respondent joined DJ & A. The appellant lastly argued that taking into account the position occupied by the third respondent (which entailed verification of tests done and on which the appellant relies in the further processes of its production line), the trust relationship had been broken down because the third respondent misrepresented information in his effort to withdraw his pension funds.

[9] The third respondent denied the allegation of dishonesty. He testified that when he resigned from Metal Box, his pension was paid to him and that the application he lodged was for the surplus funds remaining from his contributions whilst still working at Metal Box. The third respondent contended that the fault lied with the Fund's administrators for sending him the wrong application form, he having requested the form to claim surplus funds. When asked about him giving the reason for obtaining his contribution, that of being retrenched by Metal Box, the third respondent conceded that he was not retrenched by Metal Box but had resigned.

[10] The arbitrator found the dismissal of the third respondent to be procedurally unfair in that he had previously been allowed to be represented by an official from Solidarity who was not an employee of the appellant in a salary dispute. She then awarded the third respondent 12 months compensation. The arbitrator further found the third respondent's dismissal to be substantively unfair. In this regard, she stated that:

'It is also established law that Fraud consists in unlawfully making with intent to defraud, a misrepresentation, which causes actual prejudice or which is potentially prejudicial; to another. One of the essential elements of Fraud is that the employee must intend, when making the misrepresentation, to cause the employer some loss. This means that the employee must know, at the time of making the misrepresentation, that they are making a misrepresentation and that such misrepresentation will cause loss or has potential to cause loss. The mental element is essential. It follows therefore that in the absence of intent, where for example, the misrepresentation is made under a mistaken belief with no intention to defraud, there can be no Fraud.¹'

...

I am of the view that the error in completing and submitting the form, in the absence of any contrary evidence, cannot be visited upon the Applicant alone. There was no evidence before me showing that the applicant ought to have known which form to complete. I cannot simply assume this. The onus is not on the applicant to prove that he did not know, the onus is on the Respondent to prove that on the balance of probability he knew or ought to have known and I am of the firm view that the Respondent has failed to discharge this onus².

Labour Court

[11] The appellant launched review proceedings in the court *a quo* in terms of section 145 of the Labour Relations Act³ (LRA) for the review and setting aside of the arbitrator's award on the grounds that the arbitrator had exceeded her powers in her duties as arbitrator and that the award is unreasonable.

¹ Page 102 of the record at lines 15 – 23.

² Page 103 of the record at lines 6-11.

³ 66 of 1995.

[12] The court *a quo* dismissed the review application and concluded that:

[4] In matters of this nature, the court, hearing an application for a review, sit (*sic*) as a court of review and not of appeal. By so saying, I mean to say that even if the court may not like the decision arrived at by the commissioner, the test is whether that decision falls within the bounds of reasonableness. The commissioner in this matter sought to decide the matter based on the state of mind of the third respondent at the time. She stated certain factor (*sic*) that she took into account to establish the state of mind of the third respondent at the time. In particular, she took into account the UIF forms and the inquiries that were lodged by the third respondent to the applicant.

...

[6] Under the circumstances, it is not appropriate for a court of review to interfere with an award that is well-reasoned, even if the court might have come to a different conclusion. As I have pointed out, the test is if an award falls within the bounds of reasonableness then the court's hands are tied.'

[13] The court *a quo* further upheld the arbitrator's decision that the third respondent's dismissal was procedurally unfair.

[14] The appellant contends before this Court that the court *a quo* erred:

14.1 in finding that the arbitration award was reasonable;

14.2 in not finding that the arbitrator failed to apply her mind to the issue to be determined by failing to take into account relevant facts and miscategorising the offence with which the third respondent was charged with as fraud; and

14.3 in upholding the arbitrator's conclusion that the third respondent's dismissal was procedurally unfair.

[15] In determining whether an arbitration award is reviewable, one is guided by the test enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*.⁴ The question to be asked is whether the arbitrator's decision is one that a reasonable decision-maker could reach on the available

⁴ 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC).

material. Endorsing *Sidumo*, this Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,⁵ held that:

[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act⁶ (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct,⁷ gross irregularity in the conduct of the arbitration proceedings,⁸ and/or excess of powers⁹ will not lead automatically to a 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 unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material.¹⁰

[16] With regard to procedural fairness, I am of the view that the decision of the arbitrator is reviewable and ought to be set aside for the following reasons. The third respondent was aware that at the disciplinary hearing, he could only be represented by a shop steward or a fellow employee employed by the appellant. His contention that an official from Solidarity previously represented him cannot be sustained because that representation was not related to a disciplinary hearing but to a salary negotiation where Solidarity as a trade union could negotiate at the appellant on behalf of employees. Moreover, the appellant’s disciplinary code only allows for an employee to be represented by someone working with the appellant. It follows that the chairperson committed

⁵ [2014] 1 BLLR 20 (LAC).

⁶ 66 of 1995.

⁷ S 145(2)(a)(i) of the LRA.

⁸ S 145(2)(a)(ii) of the LRA.

⁹ S 145(2)(a)(iii) of the LRA.

¹⁰ At para 14.

no procedural irregularity in disallowing the third respondent's request which was in clear violation of the disciplinary code.

[17] Concerning, the substantive fairness of the dismissal, the appellant contended that the arbitrator misconstrued the issue to be determined in concluding that the appellant had not proven that the third respondent had committed a fraud, as the mental element of intent was not proven. It was submitted on behalf of the appellant that the third respondent had been dishonest when he completed the claim form for payment of his pension contributions. Such dishonesty, the appellant submits, is destructive of the trust relationship between the appellant and the third respondent even if the dishonesty was not directed at the appellant *per se*, if one takes into account his position in the appellant. It was argued that the third respondent was wilfully dishonest and had shown no remorse.

[18] On behalf of the third respondent, it was submitted that the issue of the payment of contributions had nothing to do with the appellant, as it was an issue between the third respondent and the Fund. Further, it was argued that it was the Fund, which had caused the mistake by sending the third respondent the incorrect form even though he had indicated to the Fund that he was claiming his surplus for the period he was with Metal Box.

[19] Item 7 of the Code of Good Practice: Dismissal reads as follows:

'Any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

- (iii) the rule or standard has been consistently applied by the employer; and
- (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.'

[20] The third respondent was charged with being dishonest for claiming that he was retrenched by Metal Box and that he was unemployed at the time of submitting his claim. In terms of clause 3.7 of the disciplinary code, dishonesty is described as "a dishonest or fraudulent act committed by an employee". Even though the arbitrator concentrated on the element of fraud, there is a thin line distinguishing "dishonesty" and "fraud". Both have an element of gain. However, dishonesty unlike fraud does not necessarily involve deceit. However and regardless of the distinction between dishonesty and fraud, the appellant did not pursue this contention and nothing therefore turns on the allegation that the arbitrator misconstrued the offence with which the third respondent was charged with. Nevertheless, what remains crucial is whether the arbitrator's conclusion is one that a reasonable decision-maker would reach with the available evidence. The appellant did not present any evidence to the effect that the third respondent was aware of the fact that whilst still employed within the metal and engineering industry, he could not withdraw his pension contributions. The third respondent's evidence which remains uncontradicted is that he was applying for refund of the surplus of his contributions when he was employed at Metal Box since his pension had already been paid out when he resigned from Metal Box. Further, there was no evidence contrary to the fact that he had communicated with the Fund on numerous occasions inquiring about the payment of his surplus which accrued during his employment at Metal Box. It is apposite to point out that after the third respondent had resigned from Metal Box in 1995, there is nothing evincing that he remained employed within the metal and engineering sector until he was employed by the appellant in 1997. In the absence of any evidence that the third respondent remained employed within the metal and engineering sector after he had left Metal Box, he was entitled to withdraw his pension contributions.

[21] It is common cause that the third respondent falsely indicated that he was retrenched and did not disclose his current employer. However, when it was pointed out to him that he should not have claimed his contributions, his evidence was that he was only claiming his surplus while employed at Metal Box and that the Fund was at fault to pay the contributions made by the appellant. In any event, the third respondent and the Fund came to an agreement that he would pay back what was paid to him. I am of the view that the false statements made by the third respondent could not have seriously damaged the employment relationship, particularly if one accepts that the third respondent thought he was applying for his surplus

[22] I am therefore of the view that the award with regard to the dismissal of the third respondent is one a reasonable decision-maker could make with the material before her and is therefore not reviewable.

[23] With regard to costs, there is no reason on the basis of equity to make any order in respect of costs.

[24] Accordingly, the following order is made:

The appeal is dismissed.

I agree

Mngqibisa-Thusi AJA

Waglay JP

I agree

Davis JA

APPEARANCES:

FOR THE APPELLANT:

Adv GA Fourie

Instructed by Cliffe Dekker Hofmeyr Inc

FOR THE RESPONDENT:

Mr Ngobeni

Instructed by Ngobeni Attorneys