

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD IN JOHANNESBURG

Reportable  
Case No: JR 896/10

In the matter between:

KARAN BEEF (PTY) LTD

Applicant

and

N MBELENGWA N.O

1<sup>ST</sup> Respondent

CCMA

2<sup>ND</sup> Respondent

BONGANI SIBIYA

3<sup>RD</sup> Respondent

Date of Hearing : 31 March 2011

Date of Judgment : 07 June 2011

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JUDGMENT

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Molahlehi J

*Introduction*

[1] This is an application to review and set aside the arbitration award issued by the first respondent (the Commissioner) under case number GATB 16595/09 dated 19<sup>th</sup> February 2010. In terms of the arbitration award, the Commissioner found the dismissal of the third respondent (employee) to have been procedurally fair but substantively unfair.

*Background*

[2] The applicant runs the business of processing and distributing meat products which are distributed nationally to various food markets. The applicant achieves its business objectives by employing amongst others a number of drivers to drive trucks

for the purposes of distribution of its product.

[3] The employee was employed as a driver and responsible to deliver meat to the various business facilities.

[4] The applicant contended during the arbitration hearing that because one of the business imperative was that the trucks must be clean, the employee as the driver thereof had the responsibility of making sure that it is at all times clean.

[5] On 16 April 2009, the employee was required by one of the managers to clean his truck at the time when he was on delivery at the Balfour facility. According to the applicant, the employee refused to obey the instructions to clean the truck and was for that reason disciplined for insubordination, which resulted in his dismissal.

[6] At the arbitration hearing, the applicant called a number of witnesses to support its version that the dismissal of the employee was for a fair reason. The first witness was Mr Karan the assistant manager testified that on the day in question, he instructed the employee who had gone to collect meat at the Balfour facility to wash his truck.

[7] After a few minutes of giving the instruction, Mr Karen returned to find the employee busy on the cell phone and when he enquired of him why he was not washing the truck, he told him that it was not part of his job and that he was a driver. Mr Karan then repeated the instruction to the employee to wash the truck. Again the employee did not heed the instruction and Mr Karan assisted by two other employees proceeded to wash the truck.

[8] The second witness of the applicant testified about the procedure followed in conducting the disciplinary hearing and how he came to the conclusion that the employee had failed to obey a reasonable instruction.

[9] The third witness testified about the responsibility of the drivers to clean the trucks and how, in certain circumstances there is a team of cleaners who may assist in the cleaning of the trucks.

[10] In short, the case of the employee is that he was sent to Balfour facility to collect meat. He contended that his responsibility was to drive the truck and not to wash it and that he was not told by his manager at City Deep that his duties would change when he arrived at Balfour to include washing the truck.

*Grounds for review and the award*

[11] The applicant in challenging the arbitration award contends that the Commissioner committed a gross irregularity and reached a decision which a reasonable decision maker could not reach. The applicant says that the arbitration award is unreasonable because the Commissioner in making the findings and reaching the conclusion as he did, approached the matter from an incorrect premises and also adopted a highly technical approach in resolving the dispute.

[12] The applicant says that the Commissioner's award is grossly irregular and unreasonable because in arriving at his decision concerning the substantive fairness of the dismissal, the Commissioner failed to consider the following questions:

*"28.1 Did the employee commit misconduct?*

*28.2 If the Employee did commit the misconduct was the  
dismissal appropriate sanction?"*

[13] The other questions which the applicant contends that the Commissioner failed to answer were the following:

*“29.1 Was there a workplace rule regarding the conduct complained of?*

*29.2 Was the employee aware or could reasonably have been expected to have been aware of the rule?*

*29.3 Did the employee breach the rule?”*

[14] The applicant contends further that the instruction given to the employee was reasonable in that it was in line with his duties as provided for in the Driver’s Standard Operating Procedures (the policy) which provides at clause 4 thereof that

*“The loading compartment must be cleaned at all times before loading commences.”*

[15] And clause 5 of the policy provides as follows:

*“The driver is responsible for the cleaning of the cab, the exterior and the wheels of the vehicle.”*

[16] The Commissioner in arriving at the conclusion that the dismissal was unfair reasoned that the applicant had failed to discharge the *onus* of showing that the dismissal of the employee was for a valid and fair reason. The Commissioner found in this respect that the instruction of Mr Karan was unlawful because it was not the responsibility of the employee to wash the truck, but that of the cleaners. As concerning the procedure the Commissioner found that the applicant followed a fair procedure in dismissing the employee.

### *Evaluation*

[17] The test to apply in considering whether or not the decision of the Commissioner should be interfered with on review is that of a reasonable decision maker test. The test was set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,<sup>1</sup> as being *whether the decision reached by the commissioner is one which a reasonable decision maker could not reach*. In applying the test, the court

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<sup>1</sup> 2007 28 ILJ 2405 (CC).

would *have regard to* the reasoning of the commissioner based on the material which was placed before him or her during the arbitration hearing. The court also in that judgement indicated what would be expected of the commissioner in assessing the fairness or otherwise of the dismissal.

[18] The Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*<sup>2</sup> summarised at paragraph [94] what the Constitutional Court said was required of the commissioner in determining the fairness or otherwise of the dismissal as follows:

- “(a) “take into account the totality of circumstances” (par 78);
- (b) “consider the importance of the rule that had been breached” (par 78);
- (c) “consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal” (par 78);
- (d) consider “the harm caused by the employee’s conduct” (par 78);
- (e) consider “whether additional training and instruction may result in the employee not repeating the misconduct”
- (f) consider “the effect of dismissal on the employee” (par 78);”

[19] The Labour Appeal Court went further to say that it is the commissioner who must ultimately determine the fairness or otherwise of the dismissal. As concerning the reasoning of the commissioner, the Court held that the reviewing Court does not have to limit its assessment whether or not to review the award to the reasons as stated in the award but may have regard to other reasons that may appear from the material that was before the Commissioner. In this respect, the Court had the following to say:

“... there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner’s decision

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2 (2008) 29 ILJ 964 (LAC) at para 94.

does not depend – at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision”.<sup>3</sup>

[20] The Labour Appeal Court went further to say:

“... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award”.<sup>4</sup>

[21] As concerning the allegation of gross irregularity, the principle governing that issue was set by Ngcobo J, as he then was, in *Sidumo*<sup>5</sup> and quoting with approval what was held in *Ellis v Morgan*<sup>6</sup>, where the court said:

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<sup>3</sup> Id at para 102.

<sup>4</sup> Id at para

<sup>5</sup> Above n: 1 at para 262.  
61909 TS 576.

*“But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.”*

[22] The key issue in determining whether the conduct of the commissioner amounted to gross irregularity that would vitiate his or her decision is stated by the Constitutional Court quoting from *Golfields Investment and Another v City of Johannesburg and Another*<sup>7</sup>(at paragraph 263) as follows:

*“The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.”*<sup>8</sup>

[23] The Learned Judge went further to say that:

*“The decisions of Ellis and Goldfields were recently endorsed by the Supreme Court of Appeal in the context of the Arbitration Act in Telcordia Technologies.<sup>194</sup> Both Ellis and Goldfields make it plain that the crucial enquiry is whether the conduct of the decision-maker complained of prevented a fair trial of issues. The complaint must be directed at the method or conduct and not the result of the proceedings. And the reasoning of the decision-maker must not be confused with the conduct of the proceedings. There is a fine line between reasoning and the conduct of the proceedings, and at times it may be difficult to draw the line; there is nevertheless an important difference. Determining whether the commissioner has committed a gross irregularity will inevitably require the reviewing court to examine the reasons given for the award. In doing so the reviewing court must be mindful of the fact that it is examining the reasons not to determine whether the conclusion reached by the commissioner is correct but whether the commissioner has committed a gross*

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<sup>7</sup> *Golfields Investment and Another v City of Johannesburg and Another* 1938 TPD 551.

<sup>8</sup> Above n: 1 at para 263.

*irregularity in the conduct of the proceedings.”<sup>9</sup> (footnotes not included)*

[24] In the present instance, it may well be that the Commissioner committed an error in as far as the facts which were put before him are concerned. In my view, that error is not of such a nature that it can be said that the applicant was denied a fair hearing.

[25] Turning to the issue of the reasonableness of the Commissioner’s decision, and applying the principles enunciated in *Fidelity Cash*, I am of the view that the decision of the Commissioner is not one which a reasonable decision maker could not reach. It is apparent from the reading of the material that was before the Commissioner that the sanction of dismissal was too harsh in view of the circumstances of this case, because the employee did not outrightly disobey the instruction of Mr Karan. He refused to perform the task in terms of the instruction on the basis that it was not part of his duties. The employee may well have been incorrect in his interpretation of what constituted his duties but his *bona fide* belief in what it was, was never put in doubt during the arbitration hearing. The employee believed that the responsibility of washing the truck was that of the cleaners. Whilst his refusal to perform the task as was required by Mr Karan may have not been justifiable regard being had to the provisions of the policy, it was not of such a nature in the circumstances that it could be said to be total defiance of his authority. There is no dispute that upon receiving the instruction, the employee contacted the City Deep branch of the applicant where his immediate supervisor was based and sought clarity about the extent of his duties.

[26] It seems to me that in the circumstances of this case, the applicant hastily

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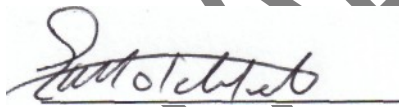
<sup>9</sup> Above note: 1 at para 265.



instituted disciplinary proceedings and came to the unfair conclusion that dismissal was appropriate. In my view, had the applicant applied progressive discipline, it may have found that the behaviour of the employee may have been corrected and that he was not likely to repeat the same in the future.

[27] In the circumstances, I am of the view that the applicant's application stands to fail. I see no reason in both law and fairness why the costs should be allowed to follow the results.

[28] In the premises, the applicant's application to review and set aside the decision of the first respondent is dismissed with no order as to costs,



Molahlehi J

Judge of the Labour Court of South Africa

Representation:

For the applicant: Mr D Masher of Bell Dewar and Hall Attorneys.

For the respondent: M R Mokgalabone.- SASLAW PRO BONO