

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Not reportable
Case no: J 1260/2010

In the matter between:

DUNLOP BELTING PRODUCTS (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER MS RAFFEE N.O

Second Respondent

CEPPAWU obo KENNETH QALAZA

Third Respondent

Date of hearing : 05 July 2011

Date of judgment : 08 July 2011

JUDGMENT

FOURIE AJ

Introduction

[1] The third respondent (the employee) was employed by the applicant (Dunlop) as a qualified fitter. Dunlop manufactures conveyer belts for the mining industry.

During the nightshift on 18 August 2009, the employee and the duty electrician were instructed to investigate a malfunction on a machine known as the Euler Press (the press).

[2] The electrician could not find any electrical faults on the machine. The employee made certain adjustments to the hydraulic system of the press, after which the press worked normally. The following morning, when the manager (van der Merwe) arrived at the premises, the press was leaking oil and overheating, and this situation potentially endangered lives and property.

[3] An expert technician from a company that Dunlop had engaged to service the hydraulic equipment on its machines attended to repair the press. He later sent an email to Dunlop (titled 'Service Report') in which he reported that the damage was caused by unauthorised tinkering with the hydraulics system. The costs to repair the press were substantial.

[4] The employee was suspended and charged with misconduct described as 'Gross negligence / dereliction of duties, breach of safety and breach of trust'. The gist of the complaint was that fitters were prohibited from working on hydraulic systems on any machines as they were not qualified to do so, that the employee was aware of this rule, and that his conduct (in making adjustments to the hydraulics

system) created a serious safety risk and resulted in substantial losses to Dunlop.

[5] A disciplinary inquiry was convened. The employee elected to be represented by a supervisor, but the employer refused, on the grounds that the supervisor formed part of Dunlop's management team, and a shop steward was appointed to represent him.

[6] Various witnesses, including the technician that inspected and repaired the press, presented evidence at the inquiry. The employee was found guilty of misconduct and was dismissed. An internal appeal failed. The employee referred a dispute of unfair dismissal to the CCMA, and the second respondent (the arbitrator) was duly appointed to arbitrate the dismissal dispute.

[7] At the arbitration, Dunlop presented the evidence of Van der Merwe (the manager) and Markgraaf (the electrician). Dunlop did not call any other witnesses, and its representative did not mention that any witnesses were unavailable. The employee testified, and called two other fitters employed by Dunlop.

[8] Both parties submitted bundles of documents. It appears that no attempts were made to reach agreement on the status of documents. No pre-arbitration minute was filed, and the transcript does not reflect any agreement or debate on the status of

documents.

[9] The crux of the dispute at the arbitration was whether fitters were prohibited from working on hydraulics systems. Van der Merwe testified that he joined Dunlop in March 2009, and soon thereafter he put a stop to the existing practice of fitters working on hydraulics systems. He appointed an outside company with expertise in hydraulics to attend to maintenance and repairs. The company was available to dispatch a qualified technician to Dunlop at any time should a problem arise. Van der Merwe communicated the new rule to all the fitters verbally during various staff meetings.

[10] The employee testified that there was no general prohibition on fitters carrying out adjustments and minor repairs to hydraulics systems. The prohibition was only in respect of a particular machine (not the press in question) as it was under warranty. The employee called two other fitters currently employed by Dunlop to confirm his version. Reference was also made to log records kept by the fitters, which indicated that they would on occasion work on hydraulic equipment. The fitters testified that management were quite aware of this practice.

[11] Faced with a material dispute as to the existence of a rule prohibiting fitters working on hydraulic equipment, the arbitrator, after assessing the credibility of

witnesses and the probabilities, reached the conclusion that the version attested to by the employee and the other fitters was more probable than that of van der Merwe.

[12] The arbitrator found that the employee's dismissal was substantively unfair, as no clear prohibition was proved (and thus no violation). In addition, the arbitrator held that the refusal by the chairperson of the disciplinary inquiry to allow the employee to choose a representative of his choice from Dunlop's staff, and the failure to postpone the matter to allow the new representative time to consult and prepare, rendered the dismissal procedurally unfair

[13] The arbitrator ordered that the employee be retrospectively reinstated with backpay.

[14] Dunlop subsequently launched review proceedings in which it seeks to review and set aside the arbitration award. The review application is unopposed. Various grounds of review are raised in the founding and supplementary affidavits. With the exception of one alleged defect which falls under section 14(2)(a) of the Labour Relations Act (LRA),¹ and which will be dealt with separately, Dunlop's review is based on an attack on the reasonableness of the result.

¹ 66 of 1995.

Reviewing for ‘reasonableness’ – general principles

[15] The Supreme Court of Appeal summarised this type of review in the recent judgment of *Samancor*²:

“It is trite that an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere. Section 145 of the Labour Relations Act 66 of 1995 permits the Labour Court to set aside an award for one or other defect stated in s 145(2) – none of which are now applicable. But it was recognised in *Sidumo v Rustenburg Platinum Mines Ltd*, adopting what was held in *Carephone (Pty) Ltd v Marcus NO*, that an award may also be set aside if it is one that ‘a reasonable decision-maker could not reach’, and it was on that basis that *Samancor* sought to have the award set aside. Thus the question that was before the Labour Court – and subsequently before the Labour Appeal Court – was whether the award in this case was so defective as to fall within that category.”(footnote omitted).

[16] In a recent paper³, Anton Myburgh SC summarizes the review test to be applied as prescribed in *Sidumo*, and as interpreted by the Labour Appeal Court and Supreme Court of Appeal (most recently in *Samancor*⁴) as follows:

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² *National Union of Mineworkers v Samancor Ltd* (625/10) [2011] ZASCA 74 (25 May 2011) para 5.

³ Reviewing the Review Test: Recent Judgments and Developments (not yet published)

⁴ *National Union of Mineworkers v Samancor Ltd* (625/10) [2011] ZASCA 74 (25 May 2011).

- the *Sidumo* test is a result-based test, which test the reasonableness of the result / outcome of the award;
- in order to assail an award on the basis of the *Sidumo* test, the applicant must thus assail not only the commissioner's reasons, but also the result of the award;
- the reasonableness of the result of the award stands to be determined on all the material that was before the commissioner (with the result that the award can be sustained for reasons not considered by the commissioner);
- the focus is on whether the result of the award falls within a range of reasonable outcomes, as opposed to whether it was correct (this so as to maintain the distinction between a review and an appeal); and
- seen in the context of the above, the fact that a commissioner (as occurred in *Samancor*) commits an error in the process of his reasoning will not result in the *Sidumo* test being met, unless the result of the award is incapable of justification on all the material before the commissioner."

[17] Recently, the LAC in *Bestel v Astral Operations Ltd and Others* [⁵ worded the test as follows:

"It is important to emphasise...that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected." (My emphasis).

⁵ *Bestel* 2011] 2 BLLR 129 (LAC) at para 18.

Material properly before the arbitrator

[18] Many of the complaints raised by Dunlop in the review papers relate to the arbitrator's failure to consider and attach proper weight to evidence presented at the internal disciplinary inquiry, but not repeated at the arbitration. On behalf of Dunlop it was argued that the arbitrator should have scrutinized the content of the documents contained in Dunlop's bundle of documents, regardless of whether this evidence was referred to or repeated at the arbitration.

[19] For instance, the failure by the expert to present evidence at the arbitration does not, according to counsel for Dunlop, preclude the arbitrator from considering this evidence, as documents in the bundle contain a summary of the expert's evidence presented at the inquiry, in the form of an email, and the summarised minute of the disciplinary proceedings. In a similar vein, it was argued that evidence at the disciplinary inquiry presented by management witnesses as to the existence of the prohibition, should be taken into consideration when assessing the credibility of the employee and his witnesses, despite the fact that the witnesses were not called to testify at the arbitration.

[20] To determine whether this submission has merit, it is necessary to consider

the role of the arbitrator in statutory arbitrations in terms of the LRA. Section 138 of the LRA states:

“(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the *dispute* may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.”

[21] The Courts have interpreted this provision in various decisions. Briefly, the arbitrator’s primary duty entails determining whether the decision to dismiss was fair⁶. As explained by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*⁷:

“Consistent with the objectives of the LRA, commissioners are required to ‘deal with the substantial merits of the dispute with the minimum of legal formalities’. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of

⁶ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 79.

⁷ [2009] 1 BLLR 1 (CC) at para 65-66.

latitude in the performance of their functions. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate' But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

A commissioner must, as the LRA requires, 'deal with the substantial merits of the dispute'. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in." (footnote omitted).

[22] In *Scheme Data Services (Pty) Ltd v Myhill NO and Others*⁸ Ngalwana AJ explained the injunction to deal with the dispute ‘with a minimum of legal formalities’ as follows:

“The scheme of the LRA is such that employment-related disputes must be conciliated and arbitrated by the CCMA or bargaining council with the minimum of legal formalities (section 138(1) of the LRA). The idea is that such disputes must be resolved reasonably expeditiously, equitably and with minimum fuss and posturing that sometimes goes with litigation in the higher courts. The effect is that indigent parties are not non-suited or otherwise prejudiced simply because they cannot afford a lawyer; and disputes are brought to finality much quicker than would be the case in the ordinary courts.”

[23] In *Naraindath v CCMA and Others*,⁹ the arbitrator elected to take into account evidence presented at the disciplinary inquiry in rejecting the veracity of a version before him. On review, the applicant complained that the arbitrator’s conduct in basing the finding on hearsay evidence amounted to a reviewable irregularity. Wallis AJ undertook a detailed analysis of the duties of arbitrators in conducting statutory arbitrations in terms of the LRA, and held that:

“It would stultify the entire purpose of the legislation if this Court were, in the face of such clearly stated intentions, to insist on arbitrators appointed by the CCMA to resolve

⁸ [2009] 4 BLLR 381 (LC) at para 22.

⁹ [2000] 6 BLLR 716 (LC) at para 26 and 27.

unfair dismissal disputes conducting those proceedings in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts. Such an approach is in my view contrary to the express provisions of the LRA. Section 138(1) is the decisive provision in this regard. It empowers the commissioner to conduct the arbitration in such manner that the commissioner considers appropriate in order to determine the dispute both fairly and quickly. Lest the commissioner is under any misapprehension as to what is required the section goes on to direct that he or she discharges his or her functions “with the minimum of legal formalities”.

In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed.”

[24] It is clear that an arbitrator has a discretion to admit hearsay evidence, and to attach to it the appropriate weight, as he or she sees fit. The exercise of this discretion will rarely be cause for a successful review. This is in effect what Dunlop seeks to attack in the present review. While an arbitrator may elect (*meru motu* or otherwise) to take into account the contents of documents placed before him or her, the failure or refusal to do so does not in itself amount to a reviewable irregularity. To find otherwise would frustrate the entire purpose and content of section 138 of the LRA.

[25] By way of analogy, even in conventional civil litigation, a litigant cannot merely attach documents to an affidavit and expect a court to take cognisance of the content thereof.¹⁰ If this approach doesn't even pass muster in civil litigation, it is unlikely to ever achieve success in review proceedings.

Complaint of interference in cross-examination

[26] Dunlop complains that the arbitrator committed misconduct in his duties as arbitrator, in that he interfered with cross-examination of the employee. During cross-examination, the employee disputed the accuracy of the minutes of the inquiry, where it was recorded that the employee acknowledged the general prohibition on fitters working on hydraulic equipment. When the cross-examiner complained to the arbitrator that 'that is his opinion but it is not true', the arbitrator advised him to put the question directly to the witness. The representative moved on to another topic.¹¹

[27] Later during the cross-examination, it was put to the employee that he had fabricated the logbook entry. The employee denied this, and the cross-examiner responded with the comment that 'it is very surprising to hear that you are now bringing up a new dispute that you are now disputing the correctness of the minutes issued'. The arbitrator then said 'That you can reserve for your argument. Put your next question please', to which Dunlop's representative responded 'I do not have any

¹⁰ *Swissborough Diamond Mines v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T).

¹¹ Transcript, bundle p186.

further questions'.¹²

[28] This hardly amounts to misconduct by the arbitrator, or interference with cross-examination to the point of unfairness to a party. The employee's version throughout the arbitration was to deny the general prohibition on working on hydraulics. This was made clear in the opening address. This was confirmed by documentary evidence (in the form of logbooks) and by two other witnesses, who were not challenged in cross-examination on this point.

[29] There is no merit to this ground of review.

Conclusion

[30] The manner in which the arbitrator dealt with the evidence before him is in my view entirely consistent with his powers and duties as an arbitrator.

[31] The arbitrator correctly identified the real dispute (existence of a prohibition), recognised that he was faced with conflicting versions, and proceeded to make findings on credibility of witnesses and versions, and on the overall probabilities, with reference to relevant evidence. Having decided the probabilities in favour of the employee, the arbitrator concluded that the dismissal was substantively unfair. He

¹² Transcript, bundle p189.

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then applied the primary remedy prescribed by the LRA, namely restoration of the employment contract (reinstatement with backpay).

[32] In summary, the arbitrator's award is one that a reasonable arbitrator could reach, the process followed in reaching the award was consistent with the arbitrator's powers, and none of the grounds of review in section 145(2)(a) of the LRA were established.

[33] The review application is dismissed, with no order as to costs.

Greg Fourie

Acting Judge of the Labour Court

Appearances:

For the applicant: Adv W Hutchinson, instructed by Fluxmans Attorneys

For the respondents: No appearance for any respondents