



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J1353 / 06

In the matter between:

INDEPENDENT NEWSPAPERS (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

MTHETWA S N.O

Second Respondent

MEDIA WORKERS ASSOCIATION

OF SOUTH AFRICA

Third Respondent

MAKHALE E.T

Fourth Respondent

Heard: 19 October 2011

Delivered: 2 December 2011

Summary : Review - test not unreasonableness *per se* but whether the finding could not have been made by a reasonable decision-maker – application dismissed.

JUDGMENT

BHoola J

Introduction

- 1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (the Act), for the review and setting aside of the arbitration award issued by the second respondent (the arbitrator) dated 11 May 2006 under case number GAJB 17035-05.
- 2] Various preliminary points are made in the pleadings relating to condonation applications by both parties. The applicant seeks condonation for the late filing of its review, application for condonation, the record and its replying affidavit and the fourth respondent seeks condonation for the late failing of her answering affidavit. At the hearing the parties agreed to proceed with the merits and further agreed that the condonation applications should be determined only insofar as they bear relevance to the costs of these proceedings.

Background facts

- 3] The respondent was employed by the applicant, a newspaper publishing company, on 2 January 1995 as a telephone sales consultant. She was required to sell advertising space to potential clients and received a month's training on her duties at the commencement of employment.
- 4] All sales consultants are subject to sales targets determined by the applicant and are expected to contribute to the overall sales volumes and revenues of the applicant's newspapers.
- 5] The applicant was dissatisfied with the fourth respondent's work performance and in April, May and October 2003 held discussions were held with her in this regard. Following each discussion a letter was issued to her confirming her poor performance.

- 6] On 13 November 2003 the respondent received a recorded warning for poor work performance after she typed an advertisement for the *in memoriam* section of the classifieds incorrectly, causing the applicant embarrassment as well as some financial loss.
- 7] In April 2004 the fourth respondent was again counselled and warned that she would be subjected to a disciplinary process if she failed to improve her performance. She received further letters about her performance in following this meeting and again in May 2004.
- 8] On 24 June 2004 she was issued with a final written warning valid for 12 months for “poor work performance – placing a pets sale advert in the Deaths column and not achieving target since July 2003.”
- 9] The fourth respondent was moved from the general classifieds advertising division to the property advertising division around February 2005.
- 10] On 5 May 2005 the fourth respondent was issued with a notice to attend a disciplinary enquiry at which she was charged as follows : “[p]oor work performance in that you have not met your contractual obligations to the company by not achieving your targets since July 2003”. She was found guilty and dismissed on 19 May 2005. She referred a dispute concerning her unfair dismissal to the first respondent, which was arbitrated on 9 May 2006.

Grounds of review

- 11] The applicant relies on the grounds of review discussed below and submits that the award is unreasonable and that the arbitrator committed misconduct by failing to apply her mind to the evidence.
- 12] The arbitrator’s finding that the applicant ought to have complied strictly with its disciplinary code is unreasonable. Mr Botes submitted that it was the high water mark of the fourth respondent’s case that the interventions to which she was subjected did not constitute performance counselling as envisaged in the Act. However, the applicant submitted that the intention of the Act was to ensure that an employee is not taken by surprise but

should be cautioned to improve her performance failing which adverse consequences could result. It cannot be disputed that this is in essence what the applicant did. In this regard the applicant submits in its heads of argument that despite not labelling the discussions it held with the respondent as “counselling sessions” and despite not complying to the letter with its disciplinary code, it nevertheless followed a process. In substance what the applicant did was to counsel her in the sense that the content of the discussions was precisely what it would have been had they been formal counselling sessions in line with the disciplinary code. The applicant had no less than five discussions about the respondent’s performance with her, and a letter was issued to her following each discussion. It was not disputed that the applicant had set performance standards and that the respondent was aware of these. This constituted substantial compliance with the disciplinary code in that the applicant did what it was required to do i.e. follow some process whereby the fourth respondent was made aware of her failure to perform, and given adequate training and an opportunity to address the problem. The applicant assessed her performance over a period of at least two years and found it to be poor notwithstanding training afforded to her, an opportunity to improve, an invitation to approach management with suggestions, and a transfer to a different division with sufficient opportunity to meet the performance standards in the new division. The applicant gave her more than three months to adjust even though she continued to perform the generic duties involving in selling advertising space. There was no further training that could have assisted her to do a job her peers had no difficulty with. There was no evidence moreover that the respondent was prejudiced by being unrepresented during the discussions. She did not dispute her failure to perform nor did she seek representation at the discussions at any stage. Moreover, there is no obligation on the applicant to inform her about her procedural rights and she had not prior to her dismissal raised this issue. Therefore, the failure to comply strictly with the disciplinary code, it was submitted on behalf of the applicant, is not finally determinative of the issue of procedural fairness. The arbitrator’s finding in the circumstances that a fair procedure was not followed is unreasonable

and is not sustainable on the evidence before her.

- 13] The finding that the fourth respondent's failure to perform was due to circumstances beyond her control is unreasonable. The applicant submits that even though the fourth respondent refused to deal with the adult content adverts on account of her religious beliefs, Mrs Lambert, the Classifieds Manager at the Gauteng Region of the applicant, testified that these adverts accounted for only 15-20% of her sales target. She had achieved only 40% of her target, resulting in loss of revenue and for the period June 2004 to April 2005 she averaged only 68% of her target. Despite her move to the property division she still failed to reach her targets. Lambert conceded that where other employees failed to meet their targets (as in the case of Damian Willet), they did not fail by the same margin as the fourth respondent. Since there was no evidence that the performance standard was irrational or unfair, it was unreasonable of the arbitrator to substitute her own judgment for that of the applicant. Mr Botes submitted on behalf of the applicant that in considering the arbitrator's finding on the issue of whether the fourth respondent was given a sufficient opportunity to meet the performance standard, the applicant submitted that she could have been under no misapprehension that her performance was being monitored. She was informed on each occasion that she could seek assistance on any issue but did not avail herself of the opportunity to do so. She also received training at the commencement of her employment, and simply took no proactive steps to address her poor performance. Even at the time of her transfer to the new division in January 2005 she was aware of the standard she would be measured against but continued to fail to meet performance targets for a period of three months, not marginally but grossly so when compared to her peers. Indeed Mr Botes submitted that if the arbitrator had applied her mind to this evidence she would have found that the fourth respondent was in fact guilty of gross misconduct.
- 14] The finding that the applicant had been inconsistent in the application of the standard since Damian Willet had not been disciplined for failing to meet the performance standard, is unreasonable. The applicant submits

that the finding of inconsistency could not be reached since a number of factors differentiate the fourth respondent from Willet and although his performance also fell short, this was not to the same extent as the fourth respondent's. The arbitrator essentially reached a conclusion without having regard to the facts, which were that Willet had not been in employment for the same length of time, nor had he been repeatedly disciplined as the fourth respondent was. She respondent had not been performing to the required standards since 2002 and was on a final written warning at the time she was dismissed. A reasonable commissioner considering the clear grounds of differentiation between the employees to which the fourth respondent was compared could not have reached this conclusion.

- 15] The finding that the fourth respondent's failure to perform was influenced in part by illness caused by pressure to perform, is entirely unsupported by any evidence and accordingly unreasonable. Mr Botes submitted that it was unjustified for the arbitrator have placed as much emphasis as she did on the evidence concerning the alleged stress-induced illness of the respondent. This conclusion appears to be based entirely on a remark she made during her examination in chief and did not formally form part of her case. There was accordingly no evidence before the arbitrator on the basis of which she could reasonably have concluded that her non-performance was due to a stress related illness.

Merits of the review

- 16] Mr Goldberg submitted on behalf of the respondent that she had already been penalised by effectively losing four years' salary as a result of the applicant being ordered to re-employ instead of reinstate her with full retrospective effect. The arbitrator ruled that although her dismissal was both procedurally and substantively unfair, the fourth respondent was not entirely blameless in her conduct.
- 17] Mr Goldberg submitted in relation to the first ground of review that the only evidence at the arbitration was that of the fourth respondent to the effect that she was not counselled, and that she was not informed of the

discussions in advance to afford her the opportunity to prepare nor was she advised that she could be represented. Mrs Lambert, who was the applicant's only witness, admittedly played no role in these meetings. The applicant merely alludes to the fact that the possibility of further action following the meetings was contained in the letters issued to her. No reference is made to any steps regarding training, mentoring or other processes to correct her performance emanating from the meetings. In fact the fourth respondent's evidence at the arbitration was that she was informed that if she did not meet targets she would be issued with another letter. This was not challenged. The letters themselves appear in fact to be *pro forma* letters issued to employees in these circumstances and do not reflect any action plan or monitoring process. The arbitrator correctly concluded therefore that there was no compliance with the disciplinary code which required the applicant to, during a counselling session "attempt to identify possible solutions to the issues giving rise to the incapacity and establish an action plan and monitoring process". The letters simply stated, as the arbitrator found, that "we will continue to monitor your performance". The arbitrator correctly concluded, citing as authority *Highveld District Council v CCMA & another*¹, that the applicant had failed to follow its own disciplinary code and procedure.

- 18] Notwithstanding the disciplinary code issue however, Mr Goldberg submitted that once the respondent was moved to the new division in February 2005 (the original move had been envisaged to be in January 2005), the applicant should have assessed her performance anew. The final written warning was in the circumstances no longer relevant. The last counselling session, even were it to qualify as such, had taken place in 2004 and the charges she faced in 2005 (almost a year later) related to the same misconduct for which she had already received the final written warning i.e. non-performance and misplacing of an advert. The warning was in itself imposed unfairly as it had not been preceded by a hearing nor had her union been notified of her disciplinary process despite the fact that she was a shop steward. The applicant's reliance therefore on the final written warning was misplaced and should be considered to be simply a

¹ (2003) 24 ILJ 517 (LAC).

red herring introduced by the applicant. The evidence before the arbitrator was that the fourth respondent did not receive training at the behest of the applicant – it was common cause that the only training she had at the applicant's behest was one month's training prior to the commencement of her employment in 1995, i.e. ten years prior to her dismissal. In addition, despite being ill for more than two months just after her transfer to the new division she still achieved 93% of her sales target in the month immediately following her move (i.e. March 2005). She was also away on training (at her own request) for five days out of a twelve day period in which she was absent the next month. Mrs Lambert admitted in her evidence that absence on leave and on account of illness were taken into account in assessing the extent to which employees met their targets. The fourth respondent's evidence that the beginning of the year was generally slow for property sales was not challenged.

- 19] I agree with the submission that the arbitrator properly had regard to the evidence on non-compliance with the disciplinary code as well as whether the procedure that was followed was fair. The finding therefore that the applicant should have given her the opportunity to prove herself in the new division and the failure to comply with the disciplinary code cannot be faulted as one that could not have been made by a reasonable decision-maker could have made.
- 20] Mr Goldberg submitted that the arbitrator's conclusion on the second ground of review follows from the summary of evidence in respect of the short period of just over two months when the respondent had moved to the new division. Her move to the new division had in fact been recommended by the applicant's own doctor. She did not however receive any training in relation to the new division prior to the move. This prompted the finding that she was not afforded "enough time (after her transfer to the property advertising section" to prove herself. The applicant admitted that her move was an attempt to address the performance issues, but despite this no effort was made to train her or to counsel her for the period 26 May 2004 to April 2005, a period of almost one year. Furthermore, the evidence of the respondent that the targets in the new division were

unattainable at the time and she received no support in this regard. She was required in a matter of eight days to sell advertising space worth R11 031.00 per day and this created enormous pressure since the early months of the year are slow months. This was not challenged at the arbitration. Mrs Lambert's evidence was that in relation to employees who are not performing that "(i)f they don't achieve targets we still give them the opportunity to meet the targets and whatever help (they) needed. There was nothing more we could do". This evidence confirms that the applicant was obliged to afford the respondent a proper opportunity to improve and it failed to do so. In the circumstances the arbitrator's conclusion cannot be said to have been one that a reasonable decision maker could not make.

- 21] Mr Goldberg urged this Court to find that even if the arbitrator committed misconduct, the conclusion that the fourth respondent's dismissal was procedurally and substantively fair was ultimately one that could on the evidence have been made by a reasonable decision maker. The applicant had conceded that all sales consultants are subject to targets set by it. The applicant had not proven that the dismissal was a last resort nor did it convene an incapacity hearing – instead it held a disciplinary enquiry into misconduct despite the fact that she had achieved 93% of her target and evidence was led of her illness in mitigation. The applicant did not afford her a reasonable period of time for improvement although it makes the concession in the heads of argument that this is a requirement prior to dismissing an employee for poor work performance. It further concedes that on the authorities a final consideration by the employer is whether it is possible to remedy the employee's non-performance in any way short of dismissal by way of adapting the job or finding an alternative position for the employee concerned. However, despite these submissions in the applicant's heads, it led no evidence to the effect that the performance of the fourth respondent was assessed consistently over a period of at least two years, that it was found to be too poor despite her being given training, an opportunity to improve, invitation to approach management with suggestions, and a transfer to a different division. Nor was there evidence that she was, as the applicant asserts, given ample time to meet her

performance standard in the new division. In this regard the applicant asserts that no employer should be required to allow an employee more than three months to adjust to a new division, particularly where her duties were precisely the same in both divisions. However there was no evidence that she was given more than three months to adjust. There was quite simply, the applicant states, “no other relevant training which could assist her to do the job that other persons in her position were managing to do”. It was not disputed that compared to the fourth respondent Willett did not meet the standards at all, moreover failed to reach his targets on 22 occasions out of 24, but no disciplinary action was taken against him. In any event the applicant’s case at the arbitration was based entirely on a comparison between the respondent and the top performing employee in the property division, Mr Rahman, who had been transferred there months prior to her, and the comparison with Willett for the purposes of showing inconsistency was not as vigorously challenged by the applicant as it now does on review. In any event, as Mr Goldberg submitted, the challenge on this ground by the applicant is more akin to an appeal than a review. The applicant’s concern is in essence that the arbitrator erred in reaching the conclusion regarding parity on the facts.

- 22] Mr Goldberg also takes issue with the ground of review that her failure to perform was influenced in part by illness caused by the pressure to perform is entirely unsupported by any evidence whatsoever and accordingly unreasonable. He submitted that the discipline meted out to her should be considered anew from the time of her arrival in the new division in February 2005. She achieves 93% of her target that month, and the following month she works six days only prior to being prematurely dismissed. There is no evidence that she was told that she faced possible dismissal. On the contrary she thought the issue of her previous performance issues had been resolved by her starting afresh as a new employee in a new department. She in any event never received training in property which is different from classifieds, although the applicant submitted that the job is generic. The applicant did not dispute the evidence moreover that the fourth respondent had been one of the top performers in the motoring classified section from 1995 to 1999 and had

moved to general classifieds for a new challenge.

- 23] I agree with the submissions made by Mr Goldberg that certain grounds of review can more appropriately be said to be grounds of appeal. Moreover the applicant appears to rely primarily on unreasonableness in the sense that the arbitrator failed to apply her mind to the evidence before her. In any event the test is not unreasonableness *per se*, but it is as follows: “[110] To summarize, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.²” However even if this Court should find that the arbitrator committed a reviewable defect, it would not as a matter of course follow that the award should be reviewed and set aside. This result will not ensue where, in the context of reasonableness review, the applicant is unable to establish that the result of the award falls outside a range of reasonableness. In *Sidumo* the Constitutional Court held that an arbitration award will be unreasonable and thus reviewable if it is a decision ‘that a reasonable decision-maker could not reach’. In applying this test Navsa J emphasised that it was necessary to weigh all the relevant factors together, and that in a reasonableness review, the applicant must establish that the result of the award falls outside the range of reasonableness. In this regard, the Court held as follows: ‘[t]o my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given

2 *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para [110]

that decision-making power to a commissioner.’³

24] The applicant has not succeeded in persuading me that the outcome, or indeed any of the findings made by the arbitrator, fall to be set aside on this test. Indeed on its own submissions, applying the facts to the standards applicable to dismissal for poor work performance as set out in its heads of argument, the review cannot succeed. The arbitrator delineates the law applicable and in the light of the facts her conclusion that the dismissal was substantively and procedurally unfair cannot be faulted. The award balances the different considerations and in fact penalises the fourth respondent for her lack of diligent performance. In the circumstances the review must fail and there is no reason why costs should not follow the result.

Order

25] Therefore, I make the following order :

The application is dismissed with costs.

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BHOOLA J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

J. Botes

Instructed by Cliffe Dekker Hofmeyer Inc

FOURTH RESPONDENT:

A. Goldberg, Goldberg Jansens Attorneys

³ Above at para 119.

