

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)**

CASE NO: D543/08

In the matter between:

LOVEMORE BROS TRANSPORT (PTY) LTD Applicant

and

**NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT INDUSTRY First Respondent**

MOKSHA NAIDOO Second Respondent

LOUIS KOEN Third Respondent

JUDGEMENT

LALLIE AJ:

Introduction

- [1] The applicant applied in terms of Section 145 of the Labour Relations Act 66 Of 1995 (the LRA) to review and set aside an arbitration award issued by the second respondent (arbitrator) under the auspices of the first respondent on 13 June 2008.
- [2] The applicant applied for the condonation of the late filing of its supplementary affidavit. The application was not opposed by the third respondent. It was granted because the applicant furnished good reasons for the delay.

The background facts

- [3] The third respondent was employed by the applicant. After he was involved in a motor vehicle collision he was charged with damage to property, reeking of alcohol at work and damage to a third party's private property in Bamboo Lane. A disciplinary enquiry was scheduled for 3 March 2008. He failed to attend it and it was held in his absence and he was dismissed.
- [4] He referred an unfair dismissal dispute to the first respondent. A conciliation was scheduled for 23 April 2008 before commissioner Zwane (Zwane). Both parties failed to attend the conciliation and Zwane issue an outcome certificate and a dismissal ruling. In the dismissal ruling which is a standard form it is stated that the

conciliation/arbitration was dismissed in terms of section 138(5)(a) of the LRA or Rule 13 and 30 of the NBCRFI interim dispute resolution procedures for the parties' failure to attend.

- [5] The dispute was referred to arbitration and it was arbitrated by the second respondent on 13 June 2008. It is the arbitration award which was issued at the end of the arbitration that forms the basis of this application.

Arbitration award and grounds for review

- [6] The main attack on the arbitration award is that the second respondent ought to have adjourned the arbitration in order to give the applicant an opportunity to call witnesses because its representative lacked knowledge of the arbitration process.
- [7] Another ground the applicant sought to rely on was that the arbitrator failed in his duty to ensure that the dispute before him was properly ventilated in accordance with rules of natural justice and committed misconduct by allowing an unrepresented (the applicant was referring to legal representation) party to present its case where it was patently obvious that such party was not aware of

the arbitration process and needed to lead oral evidence.

[8] It was argued on behalf of the applicant that the arbitrator had no jurisdiction to arbitrate the dispute as the matter had been dismissed by Zwane on 23 April 2008 and his failure to apply his mind to what transpired at the conciliation rendered his award reviewable.

[9] With regard to the first and second grounds for review the arbitrator made the following comment in the arbitration award.

“Waller was the only person to testify on behalf of the respondent and her testimony is set out hereunder:

Waller testified that she would be reading from the minutes of the applicant’s disciplinary enquiry but that she did not attend the said enquiry nor was she a witness to any event that allegedly establishes the applicant’s guilt in the above mentioned charges.

I did inform Waller that it would be difficult for me to accept such evidence if there is no valid reason as to why the authors of the statements were not here to testify themselves. Waller informed me that she understood my concern but carried on with her case”

[10] After rejecting the evidence of the applicant's only witness on the grounds that it was hearsay evidence which could not be tested and subjected to the rules of natural justice the arbitrator concluded that the third respondent's dismissal was both substantively and procedurally unfair and reinstated him.

Test for review

[11] The grounds upon which an award is reviewable in terms of Section 145(2)(a) of the LRA are as follows:

'that the commissioner –

- (i) committed misconduct in relation to the duties of the commissioner as arbitrator;*
- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or exceeded the commissioner's powers;*

[12] The test for review as enunciated by the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines & others* [2007] 12 BLLR 1097 (CC) as follows:

"Is the decision reached by the commissioner one that a reasonable decision maker could not reach?"

[13] In *Relyant Retail Limited t/a Bears Furnitures v Commission for Conciliation, Mediation and Arbitration & others* reported in [2009] JOL 24327 (LC) the Labour Court found its function in considering whether or not to interfere with the arbitration award on review limited to those grounds provided for in term of section 145 of the LRA, as suffused by the constitutional standard of reasonableness. The reasonableness standard entails the applicant having to show that the decision reached by the arbitrator under the statutory arbitration system is one which a reasonable decision-maker could not reach.

[14] In *Edcon Ltd v Pillemer NO & others* [2011] BLLR 1 (SCA) after referring to *Sidomo* (*supra*) the SCA held as follows:

“It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner’s conclusion is rationally connected to his/her reasons taking account of the material before him/her. That this is the correct approach has been stated on a number of occasions by the LAC, this Court in the Sidumo matter as well as the Constitutional Court in the same matter.”

[15] In determining this review application, I have therefore to consider whether the second respondent’s conclusion is

rationally connected to his reasons taking into account the material before him.

Evaluation

[16] In the main grounds for review the applicant alleges that a reasonable decision-maker would have adjourned the proceedings in order to allow the applicant who was unrepresented to call witnesses in support of the evidence which it presented through documentation only. It was also submitted that the arbitrator failed in his duties by not guiding the applicant's representative.

[17] The arbitration award paints a totally different picture. It is clear from the arbitration award that after Waller who was both a representative and the only witness for the applicant testified that she would be reading from the minutes of the third respondent's disciplinary enquiry minutes and that she was not present at this disciplinary enquiry. She also did not witness any event which would establish the third respondent's guilt in any of the charges. The second respondent told her that it would be difficult for him to accept her evidence in the absence of the authors of the statements without valid reason. Waller informed the second respondent that she understood his

concern and took a decision to continue giving evidence. The applicant is bound by the decision of its own representative particularly because she was warned of the consequences of not calling the authors of the statements she sought to rely on at the arbitration. The arbitrator performed his duty of guiding Waller in that she took an informed decision having been advised of the consequences of not calling the authors of the statements as witnesses. The second respondent cannot be expected to take responsibility for Waller's decision. If Waller needed a postponement in order to call witnesses she should have asked for it. Her failure to ask for a postponement cannot be laid at the second respondent's door.

In *Sidumo (supra)* the Constitutional Court confirmed that the grounds for review are stated in Section 145 of the Act as suffused by the constitution.

The applicant's first 2 ground for review have no basis as the applicant failed to substantiate them and prove that the arbitrator conducted himself in a manner that rendered his arbitration award reviewable as envisage in section 145 of the LRA.

[18] Turning to the question of jurisdiction, it was argued on behalf of the applicant that the arbitration award stand to

be reviewed and set aside on the grounds that the outcome certificate is unsigned and invalid and the arbitration should not have been held as the third respondent's case was dismissed at the conciliation stage.

[19] An outcome certificate is valid until it has been set aside by a court of competent jurisdiction, it stands and must be treated as valid and all concerned can act upon it. See *Fidelity Guards Holdings (Pty) Ltd v Epstein No and others* (2000) 21 ILJ 2382 applied in *NUM v Hernie Exploration (Pty) Ltd* [2003] 4 BLLR 319 (LAC).

[20] The Court further found in *Fidelity Guards (supra)* that a review application challenging the jurisdiction of the CCMA to arbitrate must be filed within a reasonable time from the date it was issued.

[21] In both *Fidelity Guards and JDG Trading (supra)* the Labour Appeal Court expressed the view that an unreasonable delay is inconsistent with the purpose of the LRA.

[22] In *Premier of Guateng and another v Ramabulena NO and others* [2008] 4 BLLR 299 (LAC) the Court interpreted the meaning of dismissing a case owing to an employee's absence at a conciliation as follows:

“In light of the above, it seems to me that to construe “dismiss the matter” in rule 30(1) of the CCMA Rules as meaning that the employee loses his right to take the dispute to arbitration or adjudication, would be to give the phrase a construction that is in conflict with section 191(4) of the Act.

The conciliator has no power to “dismiss” the referral in the sense of dismissing it on the merits or in the sense of precluding the employee party from pursuing the dispute to arbitration. What he or she could do, I would imagine, is to make a decision if the relevant rules of the bargaining council permitted him or her to do so, the effect of which would be that the dispute could not longer be set down for another conciliation meeting either at all or at the request of the employee party, In such a case, if the matter is not again placed on the “conciliation roll” within the prescribed period, including an extended prescribed period, the employee is entitled, once the 30-day period has lapsed, to request that the CCMA or the bargaining council to arbitrate the dispute and, if he makes that request, the CCMA or the bargaining council is obliged to arbitrate the dispute”.

[23] If the applicant intended to challenge the validity of the outcome certificate, it should have done so shortly after it

had been issued. As the certificate had not been set aside by this court it remained valid. The third respondent correctly acted on it and the second respondent cannot be faulted for accepting it. At the commencement of the arbitration proceedings the applicant had another opportunity to raise the point that the first respondent lacked jurisdiction to arbitrate the dispute. It did not. It waited until it was too late for the point to be raised. The delay is unreasonable and inconsistent with the purpose of the LRA. I find no basis for concluding that the second respondent's conduct of proceeding with the arbitration in the face of the certificate and the dismissal ruling.

[24] For these reasons the application stands to be dismissed and there is no reason for the costs not to follow the result.

[24] In the circumstances I make the following order:

24.1 The application is dismissed with costs.

LALLIE AJ

Date of hearing:

16 March 2011

Date of judgement: 20 June 2011

Appearances:

For Applicant: J. Forster

For Third Respondent: K. Allen
Obo Purdon Attorneys