



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR3075/09

In the matter between:

SOUTH AFRICAN CUSTODIAL MANAGEMENT (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

DONALD KGALAKE NKADIMENG, N.O.

Second Respondent

KLAAS KGATLE

Third Respondent

Date of hearing: 18 September 2012

Date of judgment: 21 September 2012

JUDGMENT

Review of CCMA award – commissioner applying unjustifiable cautionary rules in relation to evidence of prisoners – latent gross irregularity committed – award set aside – court to finally determine matter in terms of section 145(4) in a separate process.

MYBURGH AJ:

Introduction

- 1] This is an application in terms of section 145 of the LRA¹ to review the arbitration award issued by the second respondent ('the commissioner'). In his award the commissioner found that the dismissal of the third respondent ('Kgatlé') by the applicant ('SACM') was substantively unfair on account of Katlè being not guilty of misconduct, and accordingly reinstated him.
- 2] Given the order that I intend to make in this matter, I will not deal with the merits of Katlè's dismissal and evidence relating thereto in any more detail than I have to for the purposes of this judgment.

Relevant background

- 3] As its name denotes, SACM manages correctional centres. One of these centres is the Kutama-Senthumule Correctional Centre ('KSCC') in Louis Trichardt which accommodates some 3000 prisoners. Katlè was employed there as a unit manager in charge of a unit of prisoners.
- 4] On 6 March 2007, Katlè was charged with three counts of misconduct, with the only one of any relevance for present purposes being count two, which reads: 'unprofessional conduct by organising, or making available, or arranging to make available intoxicating substances to offender Pitso Bomi.' In

¹ Labour Relations Act 66 of 1995.

simple terms, Kgatle was accused of supplying a prisoner (Bomi) with dagga in or about May 2006.

- 5] On 2 July 2008, following a marathon disciplinary enquiry (enduring for 62 days) at which he was found guilty of the aforesaid charge, Kgatle was dismissed.
- 6] An arbitration hearing before the commissioner followed intermittently for 12 days during the better part of 2009.
- 7] At the arbitration, the SACM called a number of witnesses, including Bomi and Leso, who is a prisoner in the Zonderwater prison in Pretoria and had been a prisoner at the KSCC in 2004-2005.
- 8] Bomi's evidence was that, in about May 2006, Kgatle had provided him with dagga as a *quid pro quo* for having made a false statement implicating Motsoeneng (a female unit manager) in having engaged in a sexual activity with a prisoner, and that he had sold the dagga to fellow prisoners. According to Bomi, Kgatle's scheme was motivated by the fact that he was jilted by Motsoeneng only being romantically interested in prisoners, and not security staff (like himself).
- 9] Leso testified, in turn, that, in about September 2005, he had caught Kgatle and Motsoeneng kissing, and that in return for not disclosing their affair, Kgatle and Motsoeneng had provided him with dagga. This developed to the extent that the three of them dealt in dagga for a time, until the relationship between Kgatle and Motsoeneng soured. (The link between the incidents that Bomi and Leso testified about is readily apparent.)

- 10] On 1 October 2009, the commissioner issued his award. He found that Kgatle's dismissal was procedurally fair, but substantively unfair (on account of Kgatle not having been guilty of misconduct) and ordered his reinstatement with full back-pay. In the process, the commissioner rejected the evidence of both Bomi and Leso.
- 11] The present application is aimed at setting aside and correcting this award.

Relevant aspects of the commissioner's award

- 12] For present purposes, there are only two parts of the commissioner's award which need to be set out.
- 13] The first part are these findings made by the commissioner in the process of rejecting the evidence of Leso:

'18.37 Some features of [Leso's] evidence are –

- 18.37.1 He would not testify until some agreement was reached on his payment and safety.
- 18.37.2 One of the reasons for his refusal to testify was that the [SACM] wanted him to speak things about [Kgatle] which were not true.
- 18.37.3 Having ultimately agreed to testify after some two hours of persuasion, I had to wonder if his demands for payment and guarantees for his safety were met, and if so, what the terms thereof were.
- 18.37.4 Needless to say, the evidence of a witness who demanded payment before he would testify *must be approached with great caution, and I did so in this arbitration.*
- 18.37.5 In addition to this, I have evaluated Mr Leso's testimony that he admitted that he was a member of the Big 5 Gang, he smoked dagga in prison, he sold

dagga to other prisoners for profit, he threatened a female prison official, Ms [Motsoeneng] and was prepared to extort money and dagga from [Kgatlé] and Ms [Motsoeneng] in exchange for not reporting them to Mr Kopman' (emphasis added).

- 14] The second part of the commissioner's award that needs to be set out are these findings made by the commissioner in relation to Leso and Bomi having been members of the Big 5 Gang:

'18.40 *It would be extremely dangerous to rely on the evidence of prison gang members to destroy the future of decent prison officials. Normally, such prisoners have nothing to lose by lying.*

18.41 Expert evidence before me was that the Big 5 Gang, to which both Bomi and Leso belonged, collaborated with prison officials in order to safeguard their smuggling and sodomy. The gang's stated objectives included, *inter alia*, engaging in manipulation and deception.

18.42 Both Bomi and Leso were, *by definition, manipulators and deceivers, smugglers and sodomisers.*

18.43 Both Bomi and Leso admitted to breaking various prison regulations, and *accepting their uncorroborated versions would offend against the principles of fairness*, upon which this arbitration is premised' (emphasis added).

Latent² gross irregularities: the law

- 15] In his minority judgment in *Sidumo*,³ Ngcobo J held as follows about the meaning of a gross irregularity in terms of section 145 of the LRA:

'It follows, therefore, that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... *the commissioner's action prevents the aggrieved party from having its case fully and fairly determined.*

2 There are two types of gross irregularities – those that occur during the course of the proceedings (patent irregularities) and those that occur in the mind of the decision-maker in the process of writing his judgment (latent irregularities). I am dealing here with the latter.

3 *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a)(ii) of the LRA. *And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings'* (emphasis added).⁴

- 16] Despite this *dictum* being in the minority judgment in *Sidumo*,⁵ it is firmly entrenched in our labour law – it having been cited with approval by the full Constitutional Court in another judgment⁶ and by the LAC in at least five judgments.⁷
- 17] It is important to appreciate that a commissioner can fall foul of this *dictum* not only by directly failing to consider material facts (or by considering materially irrelevant ones⁸) but also indirectly by placing erroneous constraints on the process of evaluation of evidence, such as to cause him not to consider material facts or issues.
- 18] Examples of gross irregularities falling into the latter category are where a commissioner applies the wrong evidentiary test,⁹ or unduly narrows the inquiry by misconstruing the scope of an applicable rule.¹⁰ In both of these instances, the error results (or potentially results) in material facts or issues being ignored, and the losing party consequently being deprived of its right to

4 At para 268.

5 Fn 3 above.

6 *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC); [2009] 1 BLLR 1 (CC) at paras 76, 134.

7 *Ellerine Holdings Ltd v CCMA & others* (2008) 29 ILJ 2899 (LAC) at 2905G-I; *SAMWU v SALGBC* [2012] 4 BLLR 334 (LAC) at para 10; *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC); [2012] 3 BLLR 285 (LAC) at para 44; *Afrox Healthcare Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 ILJ 1381 (LAC); [2012] 7 BLLR 649 (LAC) at para 21; *Herholdt v Nedbank Ltd* (2012) 23 ILJ 1789 (LAC) at para 38.

8 Failing to consider material facts and placing reliance on materially irrelevant ones has the same effect. Both have long since been recognised as a ground of review. See *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another* 1988 (3) SA 132 (A) at 152A-E.

9 *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC) at 837E-F; (2006) 27 ILJ 1644 (LC) at 1650C-E (and the case collected there).

10 *Gaga* (fn 7 above) at para 44.

have its case fully and fairly determined.

- 19] Recently, in *Herholdt*,¹¹ the LAC set the test for interference in the case of a latent irregularity as follows:

‘There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconstruing the whole nature of the enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, *with such having potential for prejudice and the possibility that the result may have been different*’ (emphasis added).¹²

- 20] In the case of a latent irregularity, an applicant on review thus does not need to establish that the result of the award would necessarily have been different if the commissioner had acquitted himself properly, but only that it might have been.
- 21] In summary, the legal position in relation to latent irregularities is this: where a commissioner fails to have regard to material facts or issues, this deprives the losing party of a fair trial and constitutes a gross irregularity warranting the setting aside of the award, provided it can be said that the commissioner may have come to a different conclusion if he had not misdirected himself.

Reviewable defects in this matter

- 22] Returning now to the commissioner’s findings quoted above, at least two related misdirections are clearly apparent.
- 23] Firstly, there was no evidence before the commissioner that Leso demanded payment for his testimony (or was paid therefor) with the result that there was no basis for the commissioner’s decision to treat Leso’s evidence with ‘*great caution*’. (The representatives of the parties were *ad idem* about this in

¹¹ Fn 7 above.

¹² At para 39. This test was first set by Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2010) 31 ILJ 452 (LC); [2009] 11 BLLR 1128 (LC) at para 17.

argument before me.)

- 24] Secondly, the commissioner's decision that it was '*extremely dangerous*' to rely on the evidence of Bomi and Leso simply on account of their membership of a prison gang, and his stereotyping of them as probable liars, and as manipulators, deceivers, smugglers and sodomisers on the same basis, is utterly unreasonable.¹³
- 25] In respect of both sets of findings, the commissioner misdirected himself in placing an erroneous constraint on the process of evaluation of evidence in the form of a self-created and unsustainable cautionary rule. (The error is analogous to a commissioner applying the wrong evidentiary test or misconstruing a rule resulting in the undue narrowing of the inquiry.¹⁴) Not only did this result in the commissioner not undertaking a full analysis of the evidence in accordance with the rules of evidence, but the commissioner's cautionary rules were, in effect, biased against the acceptance of the evidence of Bomi and Leso. In the result, the commissioner deprived the SACM of its right to a fair trial and thereby committed a gross irregularity (as per Ngcobo J's *dictum* in *Sidumo*¹⁵ quoted above).
- 26] Turning then to the threshold for interference set in *Herholdt*,¹⁶ given the material role that his cautionary rules played in the commissioner's determination of the matter, it is clear that he *may* have come to a different conclusion if he had not misdirected himself. (I put it no higher than this because this is all that *Herholdt*¹⁷ requires, and because a finding on any higher basis would potentially compromise this court's impartiality when it

13 As held in *S v Bull & another; S v Chavula & others* 2002 (1) SA 535 (SCA) at para 34: 'The trial court attached much weight to the fact that both appellants were gang members. In my view, however, gang membership, *per se*, is not necessarily indicative of dangerousness since it is well-known that some people join gangs for no other reason than self-protection or peer pressure. For these reasons the trial court misdirected itself in declaring the appellants to be dangerous criminals.' Read *mutatis mutandis*, this appeal equally in the present matter.

14 See paras 17-18 above.

15 Fn 3 above.

16 Fn 7 above.

17 Fn 7 above.

comes to the next stage of these proceedings – see further below.)

- 27] In these circumstances, there is no need to consider the balance of the grounds of review advanced by SACM, save to state that a number of them would appear to have merit.

What is to be done?

- 28] In terms of section 145(4) of the LRA, I have decided to exercise my discretion¹⁸ in favour of finally deciding the matter myself instead of referring it back to the CCMA for a hearing *de novo* for these reasons:

- a) Kgatle's dismissal occurred as far back as 2 July 2008 (more than four years ago);
- b) the CCMA arbitration ran for 12 days (having been preceded by a 62-day disciplinary enquiry) over almost an entire year – and a repeat thereof would cause undue delay in the finalisation of the matter;
- c) two of the main witnesses in this matter (Bomi and Leso) are long-term prisoners, which would obviously give rise to logistical challenges if this matter was referred back to the CCMA;
- d) Kgatle does not have the funds to become embroiled in another lengthy arbitration – this being apparent from the fact that he is being represented *pro bono*;
- e) this court has all the necessary evidence before it, with the record having been read in preparation for the review; and
- f) given that a full transcription of the evidence is before court, it is in a position to evaluate the evidence.¹⁹

18 For a statement of the applicable considerations, see *Rustenberg Platinum Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2007) 28 ILJ 417 (LC) at paras 9-25 (and the cases collected there).

19 See generally *Union Spinning Mills (Pty) Ltd v Paltex Dye House (Pty) Ltd & another* 2002 (4) SA

29] In circumstances where the review record in this matter runs to in excess of 3500 pages and where the parties' heads of argument filed to date address only the merits of the review, the parties are in agreement that fresh heads of argument should be drafted on the merits of Kgatle's dismissal and the matter set-down for a separate hearing thereon.

Order

30] In the circumstances, the following order is made:

- 1) the arbitration award issued by the second respondent is set aside on review;
- 2) the applicant shall deliver heads of argument on the merits of the third respondent's dismissal by 22 October 2012;
- 3) the third respondent shall deliver heads of argument on the merits of his dismissal by 22 November 2012;
- 4) argument on the merits of the third respondent's dismissal will be heard at 10h00 on 30 November 2012;
- 5) costs are reserved.

A.T. MYBURGH

ACTING JUDGE: LABOUR COURT

For the applicant:

JFA Nel (instructed by Coxwell,

Steyn, Vise & Naude Inc Attorneys)

For the third respondent:

J Duba (Johannesburg Justice
Centre)