



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2604/10

In the matter between:

SITHOLE & 3 OTHERS

Applicant

and

NATIONAL BARGAINING COUNCIL FOR

THE ROAD FREIGHT & LOGISTICS INDUSTRY

1st Respondent

SEELE MOKWENA N.O. (THE COMMISSIONER)

2nd Respondent

SIZEKA OUTSOURCING SOLUTIONS

(SUPER GROUP)

3rd Respondent

Date of application: 16 January 2014

Date of judgment: 12 January 2014

JUDGMENT

VENTER A J

- [1] This is an application to review and set aside an arbitration award issued on 30 August 2010 by the second Respondent (to whom I shall refer as the “commissioner”).
- [2] Mr. Frahm-Arp acted on behalf of the Applicants whilst Mr. Mer acted on behalf of the third Respondent.

FACTUAL BACKGROUND

- [3] The third Respondent’s operations fall within the scope of the first Respondent and they therefore render a service in the road freight and logistics sector. The four Applicants were employed as a driver (the first Applicant) and crew members (the second to fourth Applicants).
- [4] According to the award the Applicants were employed since March 2009 and their services were terminated on 20 October 2009. It was alleged that the Applicants were involved in theft of company property.
- [5] The dismissal dispute was referred to the first Respondent and the matter was ultimately arbitrated by the commissioner. The commissioner’s findings were, in essence: that the dismissal of the first Applicant (“Sithole”) was substantively and procedurally fair but the dismissal of the second to fourth Applicants were substantively unfair. The Applicants sought compensation only from the commissioner and 4 month’s salary was awarded to the second to fourth Applicants.
- [6] All four Applicants apply to have the commissioner’s award set aside. The first Applicant’s case is, in essence, that he was not guilty of misconduct and that the commissioner erred in concluding that he was guilty. The second to fourth Applicants’ case is that the amount of compensation that was awarded by the commissioner is not just and equitable. Procedural issues are not raised by any party.

- [7] The arbitration proceedings were not mechanically recorded due to some technical difficulty experienced by the commissioner. The record of proceedings was however filed and the commissioner's (comprehensive) hand written notes were typed and filed. I was therefore able to determine the matter and the core issues were clearly dealt with in the handwritten notes (that were typed).
- [8] The handwritten notes are adequate and enables me to consider the evidence that was led during the arbitration proceedings. See *Transnet t/a Metrorail v Hefer (2002) 10 BLLR 1011 (LC)*, *Liwambano v Department of Land Affairs (2012) 6 BLLR 571 (LC)* as well as *Bakasan v MIBCO (2011) 2 BLLR 161 (LC)* in this regard.

POINTS IN LIMINE

- [9] The 3rd respondent raises a preliminary issue that the 2nd to 4th applicants are not before court due to the fact that no confirmatory affidavits are deposed to. Mr. Frahm-Arp submitted the confirmatory affidavits from the bar and the 3rd respondent abandoned the preliminary issue.
- [10] The 3rd respondent raises a further preliminary issue in their heads of argument relating to the peremptory rule or waiver. In broad terms the argument is that the 3rd respondent was ordered to pay compensation and duly complied with the award. The monies were paid and accepted by the 2nd to 4th applicants and they therefore abandoned their intention to challenge the award. The 2nd to 4th applicants furthermore filed no confirmatory affidavits and one should infer that they are satisfied with the payments received. The applicants arguments are that payment was only made after the date ordered by the commissioner, the issue is only raised in the 3rd respondent's heads of argument and the 2nd to 4th applicants never unequivocally abandoned or waived their right to institute any proceedings.
- [11] There is a variety of case law on the legal principle (see *National Union of Metal Workers & Others v Fast Freeze (1992) 13 ILJ 963(LAC)*, *Jusayo v*

Mudau & Others (2008) 29 ILJ 2953 (LC), PSA obo Strydom v SA Revenue Services (2007) 28 ILJ 2037 (LC) and Venture Otto SA v MEIBC (2005) 26 ILJ 349 (LC).

- [12] For reasons referred to later, I do not deem it necessary to deal with the issue raised by the 3rd respondent at this stage.

GROUND FOR REVIEW

- [13] The applicants' grounds for review are broadly stated. The applicants contend that the commissioner committed gross irregularities in the performance of his duties, that there is no rational connection between the evidence and his award, and that the commissioner erred in inferring that the 1st applicant was guilty of misconduct whereas the evidence presented to him do not support such conclusion. When the application was argued, the grounds for review were brought within the ambit of the *Sidumo* test, the primary arguments being that the commissioner erred in law in finding that a possible involvement in theft is a competent charge to theft, the commissioner failed to appreciate the nature and extent of the evidence that was led before him in inferring that the 1st applicant was guilty of misconduct and that he made an award that was contrary to that evidence. It is also argued that the amount of compensation ordered to the 2nd to 4th applicants is not just and equitable.

THE APPLICABLE LEGAL PRINCIPLES

- [14] The approach our courts are required to adopt in reviewing awards and rulings of arbitrators was revisited in the recent Labour Appeal Court decision of *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA*, case number JA2/2012 ("Goldfields").
- [15] This issue has been the subject of debate over a number of years. At the heart of the debate was the question of to what extent the Labour Court should be able to overturn awards and rulings. It was the intention of the

legislature that the powers of the court in this regard should be limited. This is the reason why the Labour Relations Act, 66 of 1995 ("LRA") does not make provision for an appeal against arbitration awards or rulings. It simply makes provision for the review of such awards on limited grounds (e.g. where the arbitrator commits misconduct in relation to his/her duties or there is a gross irregularity in the arbitration). But, experience over the last few years has shown that the concept of a review has been widely or narrowly interpreted by different courts – hence the debate. The approach our courts should adopt was finally decided, or so we thought, in the widely-popularised case of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1907 (CC) ("*Sidumo*").

- [16] In essence, *Sidumo* required a review court to ask the following question: Is the decision one that a reasonable decision maker could not reach on the evidential material available. Thus the focus was largely on the outcome of the decision, as opposed to the manner in which the arbitrator arrived at the outcome. This approach presupposes that arbitration awards based on defective reasoning by an arbitrator will still pass the muster required in reviews, provided that the result is one that a reasonable arbitrator could have reached. This is generally known as an 'outcome-based approach'.
- [17] However, in various decisions, the Labour Court did not limit itself to this relatively narrow test for review. It developed the concept of the "process related review", which it treated as existing in addition to *Sidumo*'s 'outcome-based approach'. This approach accepted that, even if the outcome of the award was one that a reasonable arbitrator could have reached, an award could still be overturned if the process through which the award was arrived at was found materially wanting – for example if the arbitrator ignored material relevant facts or misconstrued material evidence in coming to his/her decision.
- [18] This approach had been accepted by the Labour Appeal Court in the recent case of *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC). In this case the LAC adopted a generous approach to the scope of the test for reviews. The LAC indicated that the ground of review of gross irregularity in terms of s145 (2)(a)(ii) of the LRA included "latent irregularities" and "dialectical unreasonableness" as the basis for the review of an award. This required the

reviewing court to consider the reasoning of the arbitrator. The LAC stated that a 'latent irregularity' occurs where an arbitrator fails to take into account material facts or takes into account immaterial facts, whereas 'dialectical unreasonableness' is unreasonableness stemming from the process of reasoning of the arbitrator. In this regard, the LAC held that the reviewing court must consider whether the arbitrator's decision is supported by arguments and considerations that are valid, albeit, not necessarily conclusive. In order for an arbitrator's decision to be reasonable in a dialectical sense, he/she is required to properly consider all the relevant and material facts indispensable to a reasonable decision.

[19] This was a far wider interpretation than the traditional approach to the concept of gross irregularity which was largely limited to the situation where the arbitrator misconceives the whole nature of the enquiry, and as a result the arbitrator misconceives his/her mandate or duties in conducting the enquiry. The LAC's judgment in Heroldt went on appeal, however, and the Supreme Court of Appeal did not uphold such a generous approach. It revisited and analysed the provisions of s145 of the LRA, and stated that the legislature was deliberate in rejecting the option of an appeal of awards. It deliberately chose review, on narrow grounds, so as to serve as a deterrent to parties seeking to challenge awards. This supported the purpose of the CCMA as a dispute resolution forum that is to provide for an inexpensive and expeditious dispute resolution process.

[20] The SCA summarised the position as follows:

"A review ...is permissible if the defect in the proceedings falls within one of the grounds in s145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii) ...the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

- [21] The SCA thus made its position clear on the issue through its judgment in the Heroldt matter. However, since the coming into force of the Constitutional Seventeenth Amendment Act, 2012 the SCA no longer has the jurisdiction to hear appeals from the LAC and the LAC is now the final body of appeal (except for Constitutional issues) when interpreting the LRA.
- [22] There was therefore some anticipation to see if the LAC would follow the SCA decision in Heroldt when it next confronted the review test issue. The Goldfields decision, handed down on 4 November 2013, was the first LAC decision to consider the test for review after the SCA's Heroldt decision. In its judgment, the LAC recognises that the process-related grounds of review provided for in section 145(2)(a) still pertain but finds that, once the procedural defect is established, the reviewing court must go a step further and satisfy itself that the defect resulted in the award being one that a reasonable arbitrator could not have reached. In the words of the LAC, "What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated or independent of the Sidumo test. That being the case it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review."
- [23] The LAC in Goldfields reaffirmed the purpose of an arbitrator, as set out in section 138 of the LRA, to deal with the substantial merits of the dispute between parties with the minimum of legal formalities and to do so expeditiously and fairly. The relevant enquiries to make in review applications, said the LAC are the following:

"(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate...? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv)

Did he or she deal with the substantial merits of the dispute? And (v) Is the arbitrator's decision one that another decision – maker could reasonably have arrived at based on the evidence?"

[24] Thus, where an arbitrator commits misconduct in relation to his/her duties or there is a gross process-related irregularity in the arbitration, this is not - in and of itself - a sufficient ground to warrant interference by our courts on review. The irregularity must be of such a nature that it renders the decision reached unreasonable in the circumstances. So practically what does all of this mean? It is no longer good enough for employers or employees wishing to review an award based on one of the procedural defects provided for in section 145(2)(a), to only establish the existence of the defect, i.e. misconduct by an arbitrator in relation to his/her duties, a gross irregularity committed by the arbitrator in the conduct of the arbitration proceedings or the arbitrator exceeding his powers. It is now also necessary to show that the defect caused the ultimate result of the award to be unreasonable. Thus, the two stage test adopted by the LAC in such instances is:

a. Was there a section 145(2)(a) defect ?; and

b. If so, can the defect be said to be such that resulted in the decision reached being unreasonable (in the sense that it was one that a reasonable arbitrator could not have reached)?

THE COMMISSIONER'S AWARD REGARDING THE MATTER OF THE 1ST APPLICANT

[25] The crux of the 1st applicant's argument is that he committed no wrongdoing and that the commissioner erred in arriving at another decision. In his award, the commissioner summarises the evidence of each witness in some detail. I have studied the averments made by the 1st applicant and the answers thereto. It is also clear from the handwritten notes of the commissioner and his subsequent award that the only incriminated evidence against the 1st applicant is that of Mrs. Roux. She gave clear and precise evidence on the duties of the 1st applicant as well as the procedures followed when trucks are

loaded and the like. She explained that 4 extra pellets were loaded on the 1st applicant's truck and that a manual gate pass was issued to him instead of the usual electronic gate pass. I do not intend dealing with her entire evidence but I am satisfied that the commissioner correctly considered the totality of her evidence and that he correctly arrived at a conclusion that the 1st applicant was guilty of serious misconduct albeit on a balance of probability.

- [26] Mr. Frahm-Arp argued that the only incriminating evidence against the 1st applicant only surfaced during re-examination. I have considered this argument but in my view her evidence should be considered in totality. The commissioner clearly did so and analysed the evidence and presented sound reasons for accepting her evidence.
- [27] The commissioner's conclusion is supported by evidence and he came to the correct finding. In my view, the commissioner applied his mind to the facts before him and came to a conclusion that falls within a band of decisions to which reasonable decision makers could come on the available evidence
- [28] In short: the commissioner's conclusion that the 3rd respondent's version that the theft would not have occurred without the 1st applicant's involvement is a decision that is not unreasonable, given the material before him.

THE COMMISSIONER'S AWARD REGARDING THE MATTER OF THE 2nd TO 4th APPLICANTS

- [29] The 2nd to 4th applicants were awarded 4 months compensation and it is common cause that reinstatement was not sought during the arbitration proceedings.
- [30] Their case is simply that the amount awarded is not just and equitable as they were deprived of their livelihoods despite the fact that they committed no wrongdoing. It is also the 2nd to 4th applicant's case that the commissioner considered that they had short service at the time of the dismissal where in fact this is factually not correct (they had 5 years' service). The commissioner furthermore failed to consider that the 2nd to 4th applicants were unemployed at the time of the arbitration proceedings and find themselves in a dreadful position by no fault of their own.
- [31] Section 193 of the LRA grants a commissioner a discretion in awarding

compensation and there is simply no fixed yardstick in determining the exact amount that should be allocated. The CCMA guidelines on misconduct arbitrations (Government Gazette number 34573 dated 2 September 2011) provides that commissioners ought to consider certain factors in determining an amount that is just and equitable. These factors are listed in paragraphs 133.1 to 133.15 and it is abundantly clear that the commissioner considered only some of these factors (but not each and every factor).

- [32] It would be easy to criticize the commissioner for awarding 4 months compensation and not a higher amount. The test for review is however dealt with above and in my view the decision to award 4 months compensation is not unreasonable or of such nature that it necessitates interference from this court. The commissioner was faced with the relevant facts and explained why he granted 4 months compensation.
- [33] The decision to grant 4 months compensation is not unreasonable albeit that the commissioner did not apply each and every listed factor to be considered.

THE PEREMPTORY RULE OR WAIVER

- [34] The 3rd respondent raises this as a preliminary issue in their heads of argument and arguments from the bar (see paragraphs 10 to 12 *supra*).
- [35] I do not deem it necessary to consider this aspect as the award should not be set aside. It is therefore simply not necessary to consider the 3rd respondent's arguments as the application is dismissed.
- [36] Finally, in relation to costs, and in the exercise of the discretion conferred on me by section 162 of the LRA, there is no reason why costs should not follow the result.

For these reasons, I make the following order:

1. The application is dismissed, with costs.

Pieter Venter

Acting Judge of the Labour Court

Appearances

For the Applicant: Ludwig Frahm-Arp (Bell Dewar Inc.)

For the Respondent: Darryn Mer (Fluxmans Incorporated)

Labour Court