



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2682-11

In the matter between:

AMT SERVICES

Applicant

and

METAL AND ENGINEERING BARGAINING

COUNCIL (MEIBC)

First Respondent

TSHEPO MASHIGO N.O. (THE COMMISSIONER)

Second Respondent

KHULEKANI SITHOLE

Third Respondent

Heard: 16 January 2014

Delivered: 11 February 2014

Summary: Review application

JUDGMENT

VENTER A J

- [1] This is an application to review and set aside an arbitration award issued on 14 September 2011 by the second respondent (to whom I shall refer as the “commissioner”). The arbitration award was issued under auspices of the first Respondent under case number MEGA 32466.
- [2] Ms. Charoux appeared for the Applicant whilst Ms. Hanif appeared for the third Respondent.

FACTUAL BACKGROUND

- [3] The third Respondent was employed by the Applicant in their maintenance department. The third Respondent was found in (unauthorised) possession of company property. He was subsequently charged for theft of brass bushes to the approximate value of R 26 000-00.
- [4] The third Respondent pleaded guilty during a disciplinary inquiry that was conducted on 13 January 2011. Aggravating- and mitigating factors were considered and the third Respondent was dismissed on 20 January 2011.
- [5] The third Respondent lodged an appeal against his dismissal but the dismissal was confirmed on 28 February 2011.
- [6] The dismissal dispute was subsequently referred to the first Respondent and the dispute was arbitrated on 1 September 2011.
- [7] No *viva voce* evidence was presented during the arbitration proceedings and the commissioner was only called upon to determine one issue namely consistency. The commissioner was of opinion that the Applicant failed to act consistently and that the dismissal was therefore substantively unfair. The Applicant was ordered to pay compensation to the third Respondent in the amount of R 12 600-00 (which was equal to three month’s salary).
- [8] It was common cause between the parties that another employee, Mr. Zungu (“Zungu”) was also charged for theft of company property during the same period. He was found guilty of removing two door handles to the value of approximately R 10-00 and was issued a final written warning.

- [9] The Applicant filed this application in reaction to the finding that their conduct was substantively unfair.

GROUND FOR REVIEW

- [13] The Applicant's grounds for review are broadly stated. The Applicant contends that the commissioner's finding is not reasonable and that the conclusion reached was unreasonable as the arguments presented to him do not support such conclusion. The Applicant's case is, in essence, that any reasonable commissioner would have arrived at a different finding when faced with the same set of facts. The Applicant's contention is that they had reason to differentiate in applying discipline and that they acted consistently.

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 and Others*, case number JA2/2012 [2013] ZALAC 28 (4 November 2013) ("*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 and Another v Rustenburg Platinum Mines Ltd and Others*¹ ("*Sidumo*").

¹ 2007] 12 BLLR 1907 (CC).

- [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 the *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 case of *Herholdt v Nedbank Ltd*². 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

² [2012] 9 BLLR 857 (LAC).

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 Herholdt went on appeal, however, the Supreme Court of Appeal did not uphold such a generous approach. It revisited and analysed the provisions of section 145 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 section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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.'³

[21] The SCA thus made its position clear on the issue through its judgment in the Herholdt 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] 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

³ 2013 (6) SA 224 (SCA) at para 25.

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?'⁴

- [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

⁴ Ibid at para 20

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

- [25] The commissioner's findings were, in essence, that the Applicant acted unfairly in dismissing one employee and not dismissing another employee after both employees were convicted of theft of company property. The commissioner found that "theft was theft" and damaged the trust relationship.
- [26] The commissioner furthermore concluded that length of service and the value of the stolen items should not have played a role and both employees should have been dismissed.
- [27] The facts in this matter are common cause. The Applicant pleaded guilty to theft of brass bushes and the value is also not in dispute. It is also common cause that he had approximately two years service at the time of his dismissal whereas Zungu had a clean record for a protracted period. The legal representatives were unable to provide clarity on the exact duration of Zungu's employment but they were *ad idem* that it was for many years.
- [28] It was therefore incumbent on me to consider the parity principle in determining whether the commissioner acted reasonable.
- [29] Contemporaneous consistency or the so-called parity principle is a well known principle and an important yardstick in determining fairness of discipline at the workplace. The classic example is where two employees are guilty of the same form of misconduct and issued with different sanctions.

- [30] The parity principle should however be applied with caution and is merely a general principle of fairness and should not be applied rigidly. The courts have made some important rulings such as the matter of *Rustenburg Platinum Mines (Rustenburg Section) v CCMA and Others*,⁵ where the court noted that the applicant had not challenged the commissioner's finding that the onus rested on the employer to prove that its conduct was consistent. The law requires employees who have committed similar misconduct to be treated consistently. Consistency is an element of fairness in disciplinary matters. However, there must be sound reasons for treating employees guilty of the same offence differently. The evidence indicated that of the two employees with whom the Respondent (employer) compared his situation, one had received a bottle of perfume without declaring it, as required by the company policy. She had received a final written warning. The other employee had also received a gift which he did not declare, and had also been given a final written warning. No evidence had been led concerning the circumstances of the second employee. It appeared from the record of the arbitration proceedings that the Applicant had not sought to justify the different sanctions handed down to the three employees. Unlike the respondent employee, one of the other employees had been found guilty of a second charge, yet had received only a final warning. There was no evidence before the commissioner to support the Applicant's arguments that various factors were taken into account when it applied its conflict of interest policy. In review applications, the court cannot go beyond the evidence placed before the commissioner. The Applicant had accordingly failed to prove that the commissioner's finding of inconsistency was unjustifiable.
- [31] In *SRV Mills Services v CCMA and Others*,⁶ the court held that an employee need not prove *male fides* on the side of the employer in order to prove inconsistency. In *SACCAWU and Others v Irvin and Johnson*,⁷ it was however held, by the Labour Appeal Court, that consistency is not a true "principle" in its own right but merely a factor in determining fairness. An employer only needs to be "reasonably" consistent.

⁵ [2006] 11 BLLR 1104 (LC).

⁶ [2004] 2 BLLR 184 (LC).

⁷ [1999] 8 BLLR 741 (LAC).

- [32] The Labour Appeal Court has also found that an employer may be justified in differentiating between employees who have committed similar offences on the basis of personal circumstances, merits or the misconduct in itself.⁸
- [33] The Applicant did not treat the two employees alike and their argument is that the length of service and value of the theft should be considered.
- [34] It is trite that long service is a relevant factor to be considered when discipline is applied.
- [35] Long service and the value of a stolen item were at the heart of the matter of *Shoprite Checkers (Pty) Ltd v CCMA and Others*,⁹ where an employee consumed food belonging to the employer. The Supreme Court of Appeal held, *inter alia*, that the length of service and relatively low value of the item should be of paramount importance.
- [36] There are two distinct reasons why the Applicant did not dismiss both employees and the reasons are common cause. In my view these reasons are valid and the commissioner ought to have considered them properly. To merely state that theft is theft and that the trust relationship has become intolerable would not suffice. The third Respondent was guilty of stealing brass bushes that form part of the Applicant's daily operations and income. The value is R 26 000-00. Zungu stole two door handles to the value of R 10-00 and the evidence clearly suggests that the door handles were of very little financial value or of operational significance to the applicant.
- [37] The Applicant provided a reasonable explanation to the commissioner as to why they differentiated in the issuing of different sanctions. I am satisfied that their reasons are sound in law and the commissioner should have considered these factors.
- [38] The arguments that were placed in front of the commissioner does not support his conclusion and I am not satisfied that the commissioner correctly interpreted the available arguments and/or legal position. The award therefore stands to be set aside.

⁸ See *Early Bird Farms v Mlambo* [1997] 5 BLLR 541 (LAC) in this regard.

⁹ [2009] 7 BLLR 619 (SCA).

[39] 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 I should order that costs be paid by the third Respondent. He opposed the application but was not frivolous or vexatious.

[40] For these reasons, I make the following order:

(a) The arbitration award dated 14 September 2011, issued under MEIBC case number MEGA 32466, is hereby set aside and replaced by an order that the dismissal of the third respondent was substantively fair.

(b) Each party to pay its own costs.

APPEARANCES:

FOR APPLICANT: Ms. Charoux from Stanley Moldt Attorneys.

FOR THIRD RESPONDENT: Ms. Hanif from Mitti Attorneys.

Pieter Venter AJ

Acting Judge of the Labour Court