REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

CASE NO JR 1197/09; JR 1125/09

In the matter between:

MINISTER OF CORRECTIONAL SERVICES	**APPLICANT**
and	
GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL	**1ST RESPONDENT**
AC MANNDE NO	**2ND RESPONDENT**
POPCRU obo J MATLOU & ANOTHER	**3RD RESPONDENT**

Application argued: 6 February 2014

Judgment delivered: 18 February 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent (the arbitrator) on 23 March 2009 under case number PSGA 274-08/09. In his award, the arbitrator held that the individual employees on whose behalf the third respondent acts were unfairly dismissed by the applicant. He ordered that they be reinstated, with retrospective effect.

The material facts

[2] The third respondent acts on behalf of two of its members, Matlou and Maake. Matlou was employed as a supervisor in the registry office at the Polokwane Correctional Centre. He was also appointed as a club official at the Correctional Centre's general club. Maake was similarly employed at the Correctional Centre. He was also appointed as the club's treasurer.

[3] In February 2007, Maake left an amount of R 2340, 00, funds belonging to the club, in a drawer in his office. On 12 February 2007, Maake reported that R500 had gone missing, and could not provide an explanation for the missing money. He undertook to replace the money, but failed to do so.

[4] Later the same month, Maake deposited an amount of R11039, 75 into the club's account, having received R 11339.76. Maake did not report the R300 shortfall.

[5] In early April 2007, Maake states that he had placed an amount of R 20 285 in a small safe situated in Matlou's office. Maake stated that he had entrusted the money to Matlou, who was to bank it on 3 April. Maake does not dispute that when the money was entrusted to Matlou, no handover was conducted. Matlou

denies ever having been made aware of the money in the safe, or having undertaken to bank it. The money went missing when the whole safe, which was not amounted to a wall in the office despite screws having been provided for this purpose, was stolen.

[6] On 18 April 2007, Matlou states that he received an amount of R22 780, being club funds, from the head of the correctional centre, a Mr. Mdhluli. Mdhluli states that he instructed Matlou to bank the money. It is common cause that Matlou did not bank the money but instead put the money into a safe and went on leave until 23 April 2007. Matlou does not dispute that the leave was unauthorised. On Matlou's return on 23 April, Matlou reported that the money had been stolen during his absence.

[7] After an internal investigation into irregularities at the club, the employees were called to attend a disciplinary hearing. Two charges of theft alternatively, a charge of dereliction of duty, were brought against Maake. The latter charge related to Maake's failure to conduct a proper handover to Matlou on 3 April 2007. A charge of dereliction of duty, alternatively theft, was brought against Matlou.

[8] After the disciplinary hearing, both Matlou and Maake were dismissed.

<u>The grounds for review</u>

[9] The applicant submits that the arbitrator's decisions in respect of the following issues are decisions to which no reasonable decision-maker could come on the available material:

a. That the activities of the club fell outside of the scope of the employment contract
b. That any transgressions committed by the employees did not impact on the department's business
c. That it was not proven beyond doubt that the money went missing

d. That the employees' dismissal was procedurally unfair because the chair of the disciplinary enquiry was of the view that the employees were guilty of the alternative charges brought against them on account of their having been found guilty on the main charge against them.

<u>The applicable legal principles</u>

[10] The test to be applied is that enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*, recently affirmed by the Supreme Court of appeal in *Herholdt v Nedbank* (701/2012, 5 September 2013). In the latter judgment the court summarised the position as follows:

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (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 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, as well as the weight and relevance to be attached to particular facts, 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.'

[11] The *Heroldt* decision clarifies the *Sidumo* test, at least to the following extent:

a. The test to be applied is cast in the negative- the court must ask whether the arbitrator's decision is one that could not reasonably be reached on the available material.

b. The test is concerned primarily with the result of the arbitration proceedings and not the arbitrator's reasoning. The arbitrator's reasons are relevant only in so far as they assist the court to determine how the result was reached, and whether the result can reasonably be reached by that route.

c. A 'latent irregularity' or 'dialectical unreasonableness' on the part of the arbitrator (i.e. a failure by the arbitrator to take into account one or more material facts, or the taking into account of irrelevant facts, or any unreasonableness flowing from the arbitrator's process of reasoning) is not in itself a sufficient basis for review. The arbitrator's conduct in this regard is relevant only in so far as it renders the outcome of the arbitration proceedings unreasonable.

[12] In *Goldfields Mining South Africa (Pty) Ltd v CCMA* (JA 2/2012, 4 November 2013) the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a "process-related review", at least in the sense that it is no longer open to a reviewing court to set aside an arbitration award only on account of a process- related irregularity on the part of the arbitrator. This has the consequence that the failure by an arbitrator to mention a material fact in the award, or to deal with any issue that has a bearing on the issue in dispute, or any error in regard to the evaluation of the facts presented at the arbitration hearing, is of no consequence. Provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material.

[13] At paragraph [20] of the judgment, the court stated:

> 'The questions to ask are these: (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 (this may in certain cases only become clear after both parties have led their evidence)? (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?
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> [21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails

to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must aactually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.

[14] The test to be applied clearly maintains the distinction between a review and an appeal. The correctness of the commissioner's decision is not in issue, and the court is not entitled to interfere only because it would have come to a different conclusion on the same material. It also requires the court to overlook any lapses in reasoning on the part of the commissioner and to determine whether the outcome of the proceedings is nevertheless reasonable.

Analysis

[15] I deal first with the finding that the employees' dismissal was unfair because the activities of the club fell 'outside the employment contract'. The arbitrator's reasoning is reflected in the following paragraphs:

> '[46] It is not in dispute that the Department of Correctional Services is a creature of the Correctional Services Act number 11 of 1998. In the same fashion the social club was created in compliance with its constitution. The club is joined voluntarily. The applicants joined voluntarily. The club also calls upon retired employees to join. The retired employees are non-employees of the respondent.
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> [47] The club has the chairperson who according to the constitution represents a club in lawsuits. This is an indication that the club is a legal entity. The chairperson is the overseer of all club activities. The club members had to be updated from time to time as to the affairs of the club. It is worth noting that the

> money which initiated the hearing is the club's money. The money does not belong to the respondent. The members join voluntarily serve the club activities could not be part of the employee's contract of employment.
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> [48] I regard the club's activities as activities outside of the employment contract. The employer may discipline the applicants if their conduct impacted on the running of the respondent. The question we have to ask ourselves is whether the applicants conduct adversely affects the working relationship.'

[16] The arbitrator decided that the club was independently constituted, and that the employees owed discrete obligations to the club. It is largely on this basis that he found that the applicant had an insufficient interest in the conduct of the employees in relation to the club, and that their dismissals were therefore substantively unfair.

[17] The general rule to be applied is that an employer has a right to institute disciplinary action against an employee when it has some interest in the conduct of the employee, ordinarily to be found in some nexus between the employee's conduct and the employer's business. On this basis, the long arm of the employer's disciplinary code has been held validly to extend to assaults against co-employees committed after hours (*Van Zyl v Duhva Open Cast Services (Edms) Bpk* (1988) 9 *ILJ* 905) and on a bus transporting workers home after the end of shift (*NUM & others v East Rand Gold and Uranium Co Ltd* 1986) 7 *ILJ* 739 (IC)). Similarly, In *NEHAWU obo Barnes v Dept of Foreign Affairs* [2001] 6 BALR 539 (P), the arbitrator held that the department was entitled to discipline a diplomat for harassing two flight attendants while on a flight to take up a posting. The relevant threshold is a sufficient and legitimate interest by the employer in the employee's conduct; not, as the arbitrator appeared to consider, whether the employment contract covered the conduct in question. The undisputed evidence before the arbitrator was that the club was established and operated in terms of s 132 of the Correctional Services Act, 1998, read with regulation 39 of the regulations promulgated under s 134 of the Act. The club was established

primarily for the use of employees at the correctional centre. The employees had been appointed in terms of that legislation and contracted the duties in regard to the club's activities, subject to the authority and discipline of the Department. They were also remunerated for their services in the club by the Department. The fact that the club had its own constitution is both unremarkable and irrelevant to the issue that fell to be determined. Similarly irrelevant is the fact that the club, as opposed to the applicant, suffered financial loss on account of the employees' conduct. In these circumstances, I fail to appreciate how any reasonable decision-maker could come to the conclusion that the employees conduct in relation to the club and its activities were so remote from their employment so as to fall outside of the course and scope of employment, and that the Department as a consequence was not entitled to take disciplinary action against the employees. There is an obvious nexus between the employees conduct and the business of their employer, if only in respect of the orderly running of the club primarily established for the benefit of all employees, and the application of basic principles of good governance. For this reason alone, the arbitrator's finding in regard to substantive fairness stands to be reviewed and set aside.

[18] In so far as the outcome of the arbitration proceedings is dependent on the reasonableness of the arbitrator's finding on procedural fairness, the arbitrator's finding is that the chairperson of the disciplinary hearing erred by regarding a finding of guilt on the main charge to necessarily result in a finding of guilt on the alternative charges. The arbitrator concluded "it must be borne in mind that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The finding of guilt on alternatives which were not assessed aggravated the chairperson to dismiss the applicants. This is a procedural defect."

[19] First, such a defect would only count as procedural in nature. The arbitrator's complaint appears to be that the employees were found guilty on charges in respect of which there was no proper assessment of the evidence in relation to

the charge, and a finding of dismissal in those circumstances. This, on the face of it, is a concern that goes to substance rather than process. Secondly, the arbitrator appears to have adopted the view that it was his function in effect to sit as a review tribunal to review the decision of the chair of the disciplinary hearing. He appears not to have appreciated that the arbitration hearing was a proceeding de novo and that it was incumbent on him to have assessed all of the evidence to establish whether the employees were guilty of the charges brought against them. Thirdly, common sense dictates that if the arbitrator had found the employees guilty of the charges that formed the basis of the alternative charges against him, this would have had a profound impact on his thinking and on his award as the alternative charges, misguidedly formulated as they were, were serious.

[20] In short, I am persuaded that the decisions to which the arbitrator came in respect of substantive and procedural fairness of decisions that fall outside of the band of decisions to which reasonable decision-makers could come on the available material. The award stands to be reviewed and set aside. In terms of the applicable principles, it is incumbent on this court then to enquire whether notwithstanding the arbitrator's reasoning, the outcome of the proceedings is nonetheless sustainable having regard to the evidence on record. I am unable to come to that conclusion. In my view, the evidence clearly establishes that Maake failed to comply with an instruction from the head of the correctional facility to update the club's financial statements, that he failed to comply with an instruction to ensure that all money from the tuckshop was banked immediately, that R 500 went missing from Maake's office drawer, that he was responsible for the safekeeping of the missing money he undertook to refund the club, but that he failed to comply with his undertaking and that he failed to report a shortfall of R 300 when banking the club's funds. In respect of Matlou, in my view, the evidence establishes that there was a standing instruction that banking was required to be done regularly. Indeed, Matlou admitted as much in his statement. Matlou was specifically instructed by the head of the correctional facility to bank the money that went missing, he willfully ignored that instruction and in the

absence of any explanation for his conduct, went on unauthorised leave immediately after ignoring the instruction. The fact of the matter is that after Matlou left on leave, neither the money nor the safe were seen again.

[21] Given the weight of the evidence against both employees, at least in respect of charges of a gross dereliction of duty, I fail to appreciate on what basis the result of the award can be rescued from the arbitrator's reasoning.

[22] Ordinarily, an order to the effect that the arbitration award should be set aside and the matter remitted for rehearing would have sufficed. I'm concerned that the events that formed the basis of the present dispute occurred in mid-2007, nearly seven years ago. There is nothing in the papers that indicates any delay in the conduct of this matter that can be attributable to the officials of this court; on the contrary, it appears that the parties have been content to litigate at in their leisure. The middle purpose would be served in a rehearing at this stage. The court has a discretion to substitute the arbitrator's award, and given the frustration of the statutory purpose of expeditious dispute resolution in this instance, I intend to exercise that discretion. The evidence against the employees have been summarised above, and as I have already indicated, I have no station in concluding that they are both guilty of gross direction of duty in circumstances where the consequences for the club were particularly serious. In my view, the arbitrator ought to have upheld the dismissals.

[23] There is also before the court an application to have the arbitration award made an order of court. The parties are agreed that the fate of that application would be dependent on the outcome of the review application. Finally, in relation to costs, although the applicant has succeeded in having the award set aside, in my view, an order for costs should not be made in circumstances where a successful applicant in a matter such as the present has failed to pursue the application with due diligence, and where inordinate and unexplained delays have resulted.

For these reasons, I make the following order:

1. The arbitration award issued by the second respondent on 23 March 2009 under case number PGSA 274- 08/09 is reviewed and set aside.
2. The second respondent's award is substituted by the following:

   "The dismissal of the applicants was substantively and procedurally fair."

3. The application in terms of s 158 (1) (c) is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. Pio, instructed by the state attorney

For the third respondent: Adv. Basson, instructed by Grosskopf Attorneys