REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

JUDGMENT

CASE NO: JR 3063/2010

In the matter between:

VAALRIVER MOTORS CC **APPLICANT**

and

DISPUTE RESOLUTION CENTRE **1st RESPONDENT**

ERNST RICHTER *N.O.* **2nd RESPONDENT**

NUMSA obo THOMAS HADEBE **3rd RESPONDENT**

Heard: 21 February 2014

Delivered: 25 February 2014

Summary: (Review-application of Herholdt test)

JUDGMENT

LAGRANGE, J

[1] The applicant in this matter is a filling station business run by a husband and wife, Mr and Mrs Botha. The second respondent, the arbitrator, found that the dismissal of the third respondent, Mr T Hadebe, on 14 July 2009 was procedurally and substantively unfair and ordered payment of compensation of eight months' remuneration to the third respondent.

[2] The third respondent was dismissed for theft after he allegedly admitted at the disciplinary enquiry that he had stolen takings received for petrol. It should be mentioned that he had been charged with gross negligence and poor work performance. The enquiry was convened when the applicant realised that there was a significant discrepancy between the value of receipts from customers and the quantity of petrol actually pumped on a particular shift. On the payment receipts issued, the garage should have sold about 472 litres during the shift but in fact only pumped 311 litres, meaning that customers collectively paid for a third more fuel than they actually received. The 'excess' cash equivalent to the overcharged amount was missing.

[3] The hearing was conducted by Mr Botha with his wife in attendance. Mrs Botha testified that when the third respondent was asked to explain the irregularity he admitted he had taken the money. This was corroborated by other witnesses of the respondent. The third respondent said he never admitted he was guilty. Rather, Mr Botha simply told him he was guilty and was dismissed without being given an opportunity to state his case. He also testified that only one of the cash slips on the day in question had been signed by him and the others had been signed by a petrol attendant, who was identified only as 'Jacob' in the proceedings.

[4] Jacob was also disciplined arising from the incident but received a final written warning. Mrs Botha also testified that during the shift when the overcharging occurred, Joseph and Mr Hadebe both worked on the pumps and the till but, as the cashier, Mr Hadebe was the responsible person on the shift. Significantly, there was no evidence before the arbitrator that Joseph had admitted to theft as Hadebe allegedly had, nor was it very clear what Joseph was found guilty of.

[5] The Commissioner found that Mr Hadebe's dismissal had been procedurally unfair because the chairperson had also initiated the proceedings after being informed of the reconciliation problem by his wife. He found that the chairperson was involved in the investigation and prosecution of the matter and those facts he considered sufficient to establish a reasonable perception of bias. He further accepted the evidence of three of the employer's witnesses that the Mr Hadebe had admitted his guilt, but the arbitrator was not satisfied that the 'additional evidence' tendered was sufficient to prove the charges against the employee. Further, he held that even if the employee was guilty, the fact that Joseph, who was involved in the same incident, was only issued with a final written warning amounted to inconsistent treatment and was unfair.

[6] The first ground of review is that the arbitrator could not justifiably have concluded that the procedure was unfair simply because the chairperson of the enquiry was aware of the misconduct before chairing the hearing. Further, it is claimed there was no suggestion of bias raised in the enquiry on this basis. I am inclined to agree this ground of review is well founded. The supposed bias of the chairperson was not raised in cross-examination, nor was it put to the applicant's witnesses that it would be relied on as a reason for saying the enquiry was unfair. Moreover, the arbitrator clearly failed to consider the context of the business he was dealing with, which was a material omission.

[7] Accordingly, I am satisfied it was improper of the arbitrator to raise an issue of procedural unfairness which had not been raised by the third respondent and then to make a finding on it.[1] Even if he had been correct to make a finding on the issue, there was no evidence before him to show that Mr Botha's prior knowledge affected his judgment, nor that the third respondent expressed any perception that Mr Botha had been biased in the sense meant by the arbitrator.. Accordingly, his finding on procedural fairness is not one a reasonable arbitrator could have reached and must be set aside.

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[1] See e.g.***Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*** **(2010) 31 *ILJ* 452 (LC)** at 468, par [31] and cases cited in fn. 16 of the decision.

[8] Secondly, the applicant attacks the rationality of the arbitrator's finding of substantive unfairness. The employer's reason for the differential treatment of the third respondent and the attendant was that, as the cashier on duty, the third respondent was the responsible person on the shift. The arbitrator appears not to have considered this material factor in his deliberations, and it is clear that he regarded their culpability as on a par with each other, whereas the evidence before him was that their responsibilities and therefore levels of accountability were not the same even if they both performed similar duties during the shift in question. Had he explained why there was some justification for treating them the same, despite their different responsibilities, then, his decision on sanction might have been rationally explicable. But without that there is no basis on the evidence for understanding why Joseph and Mr Hadebe's respective degrees of responsibility might not have justified disparate disciplinary sanctions.

[9] However, even if the arbitrator seems to have ignored the relevance of their different degrees of responsibility does this mean the court can set his finding on sanction aside? In ***Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*** **[2013] 11 BLLR 1074 (SCA)** the SCA said the following of the reasonableness review test laid down in ***Sidumo v Rustenburg Platinum Mines Ltd*** **2008 (2) SA 24 (CC):**

> *[12] ......That test involves the reviewing court examining the merits of the case "in the round" by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. <u>On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those</u>*

reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence."[2]

(emphasis added)

Further on in the judgment the SCA pronounced:

"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, 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."[3]

(emphasis added)

[10] What the *Herholdt* rendering of the *Sidumo* test highlights is that it is simply a matter of convenience and possibly deference to the arbitrator to first analyse the reasonableness of the arbitrator's own explanation for their findings. This is

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[2] 1080 at para [12]. This formulation of the *Sidumo* test approach was already adopted by the LAC in ***Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*(2008) 29 *ILJ* 964 (LAC)** where Zondo JP said, at 997, para [102]:

"In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or c finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision."

[3] 1084 at para [25]

because the second phase of the analysis will always have to be undertaken,even if the arbitrator's own justification for the findings is unreasonable, and it will *always* be the decisive analysis.

[11] In this case the arbitrator plainly did not feel that Mr Hadebe's higher degree of accountability in his capacity as cashier made any difference when considering an appropriate sanction. His reasoning was that there was no justification for distinguishing Mr Hadebe's misconduct from that of Joseph because they were doing the same work. The arbitrator appeared to assume that as they had both been implicated and because both of them had been involved in the operating the till and the pumps during that shift, their misconduct was necessarily on a par. The first difficulty with the arbitrator's reasoning is that there was no evidential basis for concluding that they had both been found guilty of theft. Thus there was no reason for the arbitrator to even suppose he was dealing with persons who were found guilty of the same misconduct. All he really knew was that they were both charged arising from the overcharging incident. Secondly, even if they had been swapping duties that shift, it was never disputed that Hadebe had occupied the more responsible position. In short, there was no evidence on important issues pertinent to the question of consistency for him to assume he was really dealing with comparable cases, aside from the fact that they had both been facing disciplinary action arising from the same events.

[12] As such, the arbitrator's own rationale for making his finding of inconsistent treatment is not one that was reasonable, and there was wholly insufficient evidence to support such a finding on any alternative rationale. Consequently, the requirements of both legs of the reasonableness test in *Sidumo* as rephrased in *Herholdt* are met.

[13] Once the claim of bias falls away, Mr Hadebe's claims of procedural unfairness were insubstantial. There were a number of postponements of the enquiry to accommodate his difficulties in obtaining representation and the employer did not act unfairly in that regard. On the substantive issue, the shortfall between the missing cash amounted to a third of payments received from customers. It did not go missing through negligence but theft. It is true that Mr Hadebe had eleven years service with the employer, but he was placed in a position of trust

which he abused. On the employer's version, which I accept on a balance of probabilities was supported by the evidence, Mr Hadebe confessed to theft. As Mr Hadebe denied having confessed, he understandably did not seek to rely on the confession as a mitigating factor. I cannot say that dismissal was not an appropriate sanction in the circumstances.

[14] In the circumstances,

14.1 The arbitration award of the second respondent issued on 12 September 2010 under case number MINT 19805F is reviewed and set aside;

14.2 The arbitrator's finding on the unfairness of the third respondent's dismissal is substituted with a finding that the dismissal was substantively and procedurally fair.

14.3 No order is made as to costs.

R LAGRANGE, J

Appearances:

For the applicant: Adv K Lapham instructed by Geldenhuys CJ at Law Inc

For the third respondent: Mr N Masutha of NUMSA