



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1483 / 2012

In the matter between:

MEDSCHEME LTD

Applicant

and

VENESSA PILLAY

First Respondent

ROB MCCANN N.O.

Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Third Respondent

Heard: Considered in Chambers

Delivered: 26 February 2014

Summary: Application for leave to appeal – Test to be applied – reasonable prospect of different conclusion

Leave to appeal – no proper grounds made out – application for leave to appeal dismissed

JUDGMENT

SNYMAN, AJ

Introduction

- [1] This matter concerned an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as arbitrator of the CCMA (the third respondent).
- [2] The review application was argued on 16 July 2013, and in a judgment handed down on 19 November 2013, the applicant's review application was upheld by me. I reviewed and set aside the determination of the second respondent that the dismissal of the first respondent was substantively and procedurally unfair, and replaced such determination with an award that the dismissal of the first respondent by the applicant was substantively and procedurally fair.
- [3] The first respondent has now sought leave to appeal against my judgment as referred to above. Applications for leave to appeal are now dealt with in Clause 15 of the Labour Court Practice Manual. In terms of Clause 15.2, the applicant in an application for leave to appeal must file written submissions in support of its application for leave to appeal within 10 days of filing such application. Should a respondent party in such application seek to oppose the application, the respondent party must file its written submissions within 5 days after having received the applicant's submissions.
- [4] The first respondent filed written submissions on 6 February 2014. At the time of consideration of this application for leave to appeal, I have received no written submissions from the applicant. I will therefore consider the leave to appeal

application on the basis of the written submissions by the first respondent.

- [5] Clause 15.2 of the Practice Manual further determines that an application for leave to appeal will be determined by a Judge in chambers, unless the Judge directs otherwise. I see no reason to direct otherwise and will therefore determine the first respondent's leave to appeal application in chambers.

Test for leave to appeal

- [6] In deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether or not there is a reasonable prospect that another Court might come to a different conclusion to that of the Court a quo.¹
- [7] As was specifically said in *Karbochem Sasolburg (A Division of Sentrachem Ltd) v Kriel and Others*:²

'I have understood that the test in deciding whether to grant leave to appeal is the traditional test. It requires a judge to ask whether there is a reasonable prospect that another court may come to a different conclusion. See *North East Cape Forests v SAAPAWU and Others* (1997) 18 ILJ 729 (LC); [1997] 6 BLLR 705 (LC) at 710A-B; *NEWU v LMK Manufacturing (Pty) Ltd and Others* [1997] 7 BLLR 901 (LC) and Landman and Van Niekerk *Practice in the Labour Courts* (Service 1) at A-41.'

- [8] The first respondent thus has to show in this instance that there is a reasonable prospect of another Court coming to a different conclusion. The third respondent has raised 11 individual grounds of appeal, some of which in my view overlap. I will not individually address each and every ground of seeking leave to appeal, but will deal with these grounds under the broad categories set out hereunder.

¹ See *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 ILJ 95 (CC) at paras 25-26; *Ngcobo v Tente Casters (Pty) Ltd* (2002) 23 ILJ 1442 (LC); *Volkswagen SA (Pty) Ltd v Brand No and Others* (2001) 22 ILJ 993 (LC); *Singh and Others v Mondi Paper* (2000) 21 ILJ 966 (LC); *Glaxo Wellcome SA (Pty) Ltd v Mashaba and Others* (2000) 21 ILJ 1114 (LC).

² (1999) 20 ILJ 2889 (LC) at 2890B.

The merits of the application for leave to appeal

- [9] The first respondent firstly contends that I have considered the review application as one of appeal in some parts, and as a process related review in other parts. I am compelled to say that there is no merit in these contentions. The first respondent, with respect, completely misconstrued what I believe to be clear reasoning in my judgment where it concerns the issue of the review test. I in fact specifically recorded that the concept of a process related review test was not valid or contemplated by the review test as articulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.³ I specifically referred to and dealt with the recent judgments in *Herholdt v Nedbank Ltd and Another*⁴ and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁵ concerning the proper review test as envisaged by *Sidumo*.
- [10] What I have set out in paragraph 44 of my judgment are examples of what may be considered to be material irregularities for the purposes of the first enquiry to be made by a review Court in the application of the *Sidumo* review test. The point is that if no irregularity exists, there is nothing further to consider and any review application must fail on this basis alone. Without an existing irregularity, which must also be material, there can be no merit in any review. The next point I then make in paragraph 45 of my judgment is that even if such an irregularity indeed exists, that is not the end of the enquiry and that does not mean the review succeeds. The irregularity must lead to an unreasonable outcome, and whether this is the case must then be determined next. I had clearly illustrated that even

³ (2007) 28 ILJ 2405 (CC).

⁴ [2013] 11 BLLR 1074 (SCA) Cachalia and Wallis JJA.

⁵ (JA 2/2012) [2013] ZALAC 28 (4 November 2013) (4 November 2013) not yet reported, per Waglay JP.

where an irregularity exists, but the outcome arrived at by the arbitrator is still considered to be a reasonable outcome based on the record of evidence as a whole (even for different reasons than those relied on by the arbitrator), then the review must equally fail.

- [11] The above approach is fully in line with what is envisaged by *Sidumo*. It is simply a practical manifestation of an outcome based review test, being the proper test. It is this review test process that I applied in determining the review application. With this test now being settled in the *Gold Fields Mining South Africa* judgment, I simply cannot see any reasonable prospect of another Court coming to a different conclusion.
- [12] The first respondent submitted that in paragraphs 62 and 72 of my judgment, I approached this matter in a manner that is tantamount to that of an appeal. I have to disagree. To illustrate the point – the second respondent found it was unclear whether illness was permanent or temporary. This conclusion was then compared by me to the evidence properly on record, as a whole, to determine whether or not the conclusion is a material irregularity (for example pertinent evidence was ignored). I having done so, I then concluded that this finding was indeed an irregularity, considering the evidence properly before the second respondent as a whole. That was however, not the end of my determination in this respect. I then considered whether, even if the second respondent's reasoning was an irregularity, the outcome arrived at by the second respondent with regard to the issue of the nature of the illness was nonetheless reasonable, including for any other cause or reason apparent from the record of evidence as a whole. Unfortunately, and in this case, it was not. Thus, the irregularity was the *sine quo non* for the outcome. Without it, the second respondent's reasoning simply was not a reasonable outcome. I considered all the evidence on record as a whole to come to this conclusion. This is certainly not the process one would follow in an appeal, and there is thus no merit in this ground raised by the first

respondent.

- [13] I remain of the view that a proper reading of my judgment clearly illustrates the proper application of the review test as contemplated by *Sidumo*. The fact that the first respondent may disagree with the outcome I arrived at in applying this test does not change the nature of the test applied. I simply can see no reasonable prospect that another Court may come to a different conclusion in this regard.
- [14] The first respondent contends that I have misconstrued the medical report of Dr Mahabeer. In my view, the report speaks for itself. It does not indicate progress towards a recovery. Far from it. A proper reading of the report shows no definitive date of recovery and in fact contemplates that call centre work by the first respondent would not be possible in the future. Also, the consideration simply cannot be what the first respondent may say about her voice at arbitration. It is about what the applicant was confronted with at the time of determining the incapacity. There is simply reasonable prospect that another Court may come to a different conclusion in this regard.
- [15] The first respondent contends that I should not have interfered with the conclusion that she had a proper explanation for not being present at the enquiry on 30 November 2011. There can in my view be no merit in this contention. The purported explanation must be considered in context and the evidence in this regard speaks for itself. There is no reasonable prospect that another Court may come to a different conclusion.
- [16] The first respondent takes issue with my conclusion that the second respondent failed to consider the evidence before him. This is an unfortunate paraphrasing from my judgment, completely ignoring the reasoning having preceded such conclusion. I pertinently stated why it was apparent that the second respondent failed to consider all the evidence before him. In my view, there is little prospect

of another Court concluding otherwise, considering the evidence as whole.

- [17] The first respondent also raises a ground of leave to appeal based on my finding that the dismissal of the first respondent was procedurally fair. The first respondent refers to Item 9(1) of Schedule 8 of the LRA in this regard. I assume this is an incorrect reference, as the provision the first respondent refers to is actually found in Item 10. I dealt with this in detail in my judgment. Other than a general statement to the effect that I should not have interfered with the award of the second respondent, and that the applicant did not comply with these provisions, no actual case is made out as to why another Court would reasonably find differently in this respect. I considered these issues in some detail in my judgment, with reference to all of the relevant and applicable authorities. I remain unconvinced that another Court could reasonably come to a different conclusion in this regard.
- [18] It is also contended that I erred in concluding that there was no duty on the applicant to conduct a further medical examination after 18 October 2011. I cannot accept this. The simple point is – where does this all end. Does the fact that the situation is not a static one, as the first respondent contends, mean that one must continuously obtain medical report after medical report *ad infinitum*? At some point an employer is entitled to call the game. In my view, this point had been arrived at in this instance, and on the evidence as a whole, I do not believe I erred in so concluding. In this respect also, I have to conclude that there is no reasonable prospect of another Court coming to a different conclusion.
- [19] A final issue to refer to is the fact that the first respondent was found by me to have been the cause of any failure in the incapacity process, which the first respondent contends is an error. With respect, the facts speak for themselves. I dealt with this evidence in detail in my judgment. The first respondent says the applicant was in a rush to finish the process. In my view, the opposite is true, considering the period that had passed. I do not believe that there is any

reasonable prospect that another Court may come to a different conclusion in this regard as well.

- [20] I thus conclude that as a whole, the first respondent has shown no reasonable prospect that another Court may come to a different conclusion. As to the issue of costs, I shall follow the same approach as in my original judgment, and make no order as to costs.

Order

[21] In the premises, I make the following order:

1. The first respondent's application for leave to appeal is dismissed.
2. There is no order as to costs.

Snyman AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Cliffe Dekker Hofmeyr Inc

For the First Respondent: Cheadle Thompson & Haysom Inc

LABOUR COURT