REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 342/12

In the matter between:

PRIDE MILLING COMPANY (PTY) LTD — **Applicant**

and

CAIPHUS NAKEDI KGATLA — **First Respondent**

COMMISSIONER STEPHENS SHEMA MOLAPO (*N.O.*) — **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION — **Third Respondent**

Heard: 13 March 2014

Delivered: 17 March 2014

REASONS FOR JUDGMENT

LAGRANGE, J

[1] The application was dismissed with costs. My brief reasons for the judgment are set out below. The first respondent had been late in filing his opposing affidavit and sought condonation therefor. At the hearing of the matter the applicant did not pursue its opposition to granting condonation. Although the period of delay was significant, it does not appear to have been owing to the first respondent's own dilatoriness. While that does not mean the delay should be excused, in view of the strength of the merits, the late filing of an answering affidavit is condoned.

[2] The first respondent, Mr C N Kgatla, was dismissed after pleading guilty to gross negligence and failing to adhere to safety standards and procedures. He did not dispute the charges which arose out of him reversing a vehicle into a customer's car. As an alternative to dismissal, the applicant was willing to allow him to continue working provided he paid the cost of the lowest quotation to fix the customer's car, which was R 11,400-00. However, it required the applicant to pay off the amount by accepting a deduction of R 950-00 per month from his salary, which was R 3,300-00 per month. Kgatla was willing to pay for the damage but could not agree to this arrangement. Accordingly, having not accepted the alternative offered by the employer he was dismissed.

[3] The arbitrator found that the deduction was too high relative to Kgatla's salary and was of the view that the applicant should have negotiated with him to arrive at a more reasonable deduction. He found the decision to dismiss Kgatla was unreasonable in the circumstances. Moreover, he found that dismissal was not an appropriate sanction because Kgatla had acknowledged responsibility for the damage and was willing to pay for it showing that he was remorseful. In his view, a progressive disciplinary approach would have been more appropriate and the employment relationship was still possible.

[4] The applicant sought to set aside the award on review. The central theme of the grounds of review was that the arbitrator's decision was unreasonable for failing to take account of various material evidence. The test for review on grounds of the reasonableness of an arbitrator's

evaluation of the evidence was formulated in the following way in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***[1] characterised the central question in the following way:

> *"… the award was one that a reasonable decision maker could not reach. <u>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. 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</u>. 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 reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."* [2]

[5] In evaluating the review application therefore, the issue is not whether or not the arbitrator did not mention or appear to consider certain evidence, but whether his findings were nonetheless competent in the sense that a reasonable arbitrator could have arrived at the same findings on the available evidence, even if other reasonable arbitrators might have concluded otherwise on the same evidence.

[6] It was common cause that at the disciplinary enquiry, Kgatla admitted his misconduct and said he was 'not refusing to pay but the quotation was too high'. Initially he had offered to fix the vehicle himself because he could not afford it as he was no longer earning overtime on long distance trips. At the end of the disciplinary enquiry Kgatla was given the option of paying R 950, 00 per month to pay for the repairs over 12 months, as an alternative to dismissal. He said he would take the dismissal.

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[1] (2013) 34 *ILJ* 2795 (SCA) at 2801, para [11]

[2] At 2802, para [12].(emphasis added)

[7] Seven days after his dismissal in the form of an appeal against the decision Kgatla offered to pay an amount of R 250,00 per month to pay for the lowest quoted price of a professional panel beater. The appeal was a few days late in terms of the procedure Although Kgatla was dismissed for his negligence and failing to follow company procedures, it is clear that if he had agreed to the level of deduction stipulated by the applicant he would have been retained. He acknowledged liability and was willing to fix the damage, but his failure to agree to the payment schedule determined by the employer that decided his fate.

[8] What the arbitrator was faced with was an employer that was willing to retain an employee if he agreed to repay a debt caused by his negligence but only if he agreed to specific terms of payment. Although Kgatla initially tried to argue that he could fix the vehicle and that the lowest quote of R11,400 was too high, his closing submissions in mitigation was that he agreed he was wrong and was ‘not refusing to pay’ but the quotation was too high and his salary had dropped. He was asking for the company to give him a chance. Although there was a suggestion that Kgatla could have earned incentives, his evidence that his salary had dropped to R 3,050 was not challenged in cross-examination.

[9] What the arbitrator had to assess was whether dismissal was an appropriate sanction in those circumstances or whether progressive discipline would have been more appropriate. In relation to the level of deductions the applicant wished to impose, the arbitrator found the employer should have negotiated further with Kgatla on this because the amount was high relative to his earnings. The only evidence advanced at the arbitration hearing for the irreparable state of the employment relationship between Kgatla and the applicant was that Mr Van der Merwe said Kgatla’s failure to take responsibility for his action to repay the money made matters difficult between the customer and the applicant.

[10] It may be that the applicant was having difficulty getting Kgatla to agree to a specific rate of deduction but it was not unreasonable of the arbitrator to find that it was unduly onerous and Kgatla’s unwillingness to accept that rate was not a justification for dismissal in circumstances where he

admitted his wrong and was willing to pay for it. In any event, the rate the employer sought to impose appears to have exceeded what is a permissible rate of deduction even if the rate is agreed to.[3]

[11] In the circumstances, I do not think the arbitrator's findings were unreasonable in the circumstances.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant: L Pillay instructed by Yusuf Nagdee Attorneys

For the First Respondent: A Goldberg of Goldberg Attorneys

[3] S 34(1) of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA') prohibits an agreement to deduct more than one quarter of an employee's wage for a debt.