REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

CASE NO: JR 2616/12

In the matter between:

FAMOUS BRANDS MANAGEMENT COMPANY (PTY) LTD	**Applicant**
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
MARINA TERBLANCHE *N.O.*	**Second Respondent**
CUSA obo BONGANI STANLEY MADONDO	**Third Respondent**

Heard: 14 March 2014

Delivered: 25 March 2014

Summary: (Review-findings not ones that a reasonable arbitrator could have reached on the evidence).

REASONS FOR JUDGMENT

LAGRANGE, J

Background

[1] Judgment in this matter was handed down on 25 March 2014. The reasons for the judgment and the order made are set out below.

[2] This is an application to review an arbitration award dated 18 September 2012 in terms of which the arbitrator (the second respondent) found that the dismissal of Mr B S Madondo (the third respondent) was substantively and procedurally unfair and ordered his retrospective reinstatement with backpay.

[3] The third respondent was charged and dismissed for gross insubordination for going on leave on 26 June 2012 without authorisation. It was common cause on the evidence that on that date, the applicant was refused permission to go on annual leave from the following day. Two witnesses of the employer testified that when the third respondent was informed on that day that his application for annual leave had been refused by the Depot Manager, Ms Coetzer, his response was that he was going on leave regardless. Both witnesses also testified that Madondon had said he would not be at work for the rest of the week. On the applicant's version he denied saying this but admitted only that he questioned why there was always a problem when he applied for leave. However, this version was not put to either of these witnesses under cross-examination.

[4] When the applicant gave his evidence in chief he explained that on 26 June 2012, he had gone to the distribution and warehouse manager, one Marius, to say that he had put in an application for leave on the basis that if school closed at Friday he wanted to go on leave the following week. He alleges Marius agreed to this even though he told him that he did not know when the schools were closing. He further testified that towards the end of the day he was approached by Marius who asked him if his need to go on the leave was so serious. He continued:

"I told Marius, Marius you know we black people have traditions that we have to follow. When the time was set to go on that time you cannot change it. But he said okay I will come back to you. And then about past 16:00 we were busy loading the track and I told Marius I do not feel so well. He said are you all right? Can you proceed? I said no will proceed and then about before knockoff time she told me Stanley go to Elsa and tell else I say you can go on leave."

[5] Mr Madondo further claimed that he relayed Marius's endorsement to the HR Administrator Ms Boshoff, but was advised that his leave was not approved. He claimed that he queried why his leave was not approved because he had told the distribution manager when he came with the leave plan that he wanted to go on leave if the school closed that week. He said that the next day he woke up not feeling well as he had advised his supervisor Marius. He faxed the doctor's certificate to work but had forgotten his cell phone at home. As with other elements of his defence, this evidence, apparently intended to explain why he had not responded to Coetzer's two calls that morning, was never put to Coetzer in cross-examination.

[6] Under cross-examination he agreed that he had been warned by Boshoff administrator that he would be in trouble if he went on leave when it had been declined, but said he had felt ill the following day when he woke up and he had already indicated he was not feeling well to his supervisor Marius on 26 June 2012. According to his evidence he did not anticipate staying away but fell ill and was booked off.

[7] The Depot manager, Ms A Coetzer, confirmed her written statement that she declined his leave application because three crew members were already on leave. After instructing Boshoff to notify him that the leave had been declined she was phoned a few minutes later to say that the third respondent said he was going on leave regardless of whether he had authorisation to or not. When she enquired the following day whether he had come into work she was told that he had not and also that he had not been scheduled to accompany a truck on that day because he had told his supervisor that he would not be coming in for the rest of the week. She further testified that she phoned him twice that morning that he did not answer the call or make contact with her. Madondo did

not dispute that he had told Marius he would not be coming in, nor did he dispute that he had made an arrangement for a replacement to take over his duties on 27 June 2012.

[8] When Madondo did not arrive again on Monday, Coetzer notified him via SMS that he was currently not on authorised leave as his leave was declined and that leave for the first week of July had not been authorised. Her evidence was that when he reported for work the following day he was served with the notice to attend the enquiry, he said that he had wanted to leave for the previous week but did not know what the date was and then it was put incorrectly on the leave plan. It seems what Madondo was trying to convey was that he still believed he was entitled to take leave but that it had not been correctly entered on the leave planner. Again, Madondo did not challenge Coetzer's evidence in this regard.

[9] Coetzer also confirmed that at no point when the application for leave was made did Madondo mention that he was ill. She further confirmed that the charge concerned the fact that he refused to accept the decision she had made to decline his leave.

[10] She further emphasised that the third respondent was not charged for being on sick leave but for not accepting the instruction refusing him leave. She reasoned that if he did not know that he would be sick, the only conclusion to draw from his actions on 26 June in telling his supervisor he would not be in for the rest of the week and even arranging another van assistant to do his job the following day, was that he intended to take his leave despite it being declined. Coetzer further emphasised that the fact that the sick note only covered the period ending 29 June 2012 was a further indication that he refused to accept the decision declining his leave because he only returned to work on 3 July 2012.

[11] It is further common cause that on 27 June 2012 the third respondent faxed a medical certificate issued by one Dr WJ Jacobs on the same day to the effect that he was suffering from what appears from the handwriting on the certificate to be "backache and dermatitis". It is unclear from the cryptic marks on the certificate supposedly made by the doctor if he was recording his own professional assessment or simply recording what the third respondent told him

when he stated that the applicant "was unfit" for work for the period 27 June up to and including 29 June 2012.

[12] The third respondent only reported for work again on Tuesday 3 July 2012 even though the period of anticipated incapacity in the medical certificate should ended the previous Friday. Eleven months earlier, the third respondent had been issued with a final written warning for insubordination for refusing to follow instructions and turning his back while discussing a matter. The warning was still valid at the time the third respondent was dismissed.

[13] At the arbitration hearing the only issue of alleged procedural unfairness raised by the third respondent’s representative was that the chairperson of the disciplinary enquiry regarded the information about the third respondent's illness as irrelevant when he should have applied his mind to it. The arbitrator confirmed her understanding that the challenge to the fairness of the procedure of the disciplinary enquiry concerned what information the chairperson did or did not consider but then concluded that the alleged unfairness was essentially a claim of bias.

<u>The arbitrator’s award</u>

[14] The arbitrator analysed the fairness of the third respondent's dismissal using the guidelines in item 7 of schedule 8 to the Labour Relations Act 66 and 1995 ('the LRA’). On the issue of substantive fairness, the crux of the arbitrator’s reasoning concerned whether or not the third respondent had contravened a rule of the workplace.

[15] Firstly, the arbitrator declared herself unsure as to whether the charge of insubordination against the third respondent was because he actually took leave despite his application been declined or because he said he was going to take leave regardless of his leave application being declined. She reasoned that if it was the former then he did not actually take leave in defiance of the instruction not to because he had a valid medical certificate, which the employer did not challenge. On the other hand, if it was the latter, his defiant utterance to the HR administrator that he would take his leave regardless of being refused permission did not constitute insubordination because it was not made to the person issuing the instruction, namely Ms Coetzer. In passing it

should be mentioned that the third respondent himself did not raise a challenge that the charge was ambiguous. In essence, his defence was that he was not insubordinate because he was absent on account of ill health. Similarly, neither was it part of his defence that he could not have been insubordinate because his defiance of Coetzer was not conveyed to her directly.

[16] Secondly, the arbitrator found that the respondent had not proved that he had actually followed through on this intention because of the valid medical certificate. She dismissed the evidence that he had intended to defy the instruction as being merely being ‘circumstantial’.

[17] The arbitrator concluded that the employer’s case was based on a suspicion that the third respondent was not really ill and that the medical certificate was simply a ruse to obtain the time off which he had failed to get approved as annual leave. The arbitrator reasoned that if the employer wished to question the applicant's intention it ought to have gone a step further and challenged the validity of the medical certificate.

[18] Consequently, the employer had failed to prove that the applicant was intentionally subordinate by taking leave when it had been declined. In fact he never took the leave but was booked off ill and the medical certificate stood as unchallenged proof of his illness.

[19] Turning to the question of procedural fairness, the arbitrator decided that this issue concerned bias and a lack of objectivity on the part of the chairperson. The arbitrator concluded that the respondent had failed to discharge the onus of proving that the chairperson was fair in applying his mind. In order to prove this, the applicant should have called the chairperson of the enquiry to “rebut” the allegation of bias.

<u>Evaluation</u>

[20] The applicant raised a number of grounds of review relating to the arbitrator’s alleged failure to apply her mind to the evidence and alleged lack of rationality in her award.

[21] 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. 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 reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence."*[1]
>
> (emphasis added)

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[1] 1080 at para [12]. This approach had previously been endorsed 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."*

Further on in the judgment the SCA stated:

> *"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."*[2]

[22] These dicta determine the framework within which the applicant's review grounds must be evaluated.

Finding on procedural fairness

[23] Turning to the arbitrator's finding of procedural unfairness, the applicant complains that she accepted a mere allegation that the commissioner was biased without any evidence being led to this effect. The only evidence the applicant sought to adduce was evidence to the effect that the chairperson of the enquiry did not apply his mind to the matter. It seems the arbitrator was of the view that the chairperson ought to have testified on this issue. However, no specific allegation was put in cross-examination to any of the applicant's witnesses in the enquiry about the way in which the chairperson's alleged bias was demonstrated. If the third respondent's complaint was about whether the chairperson accepted the evidence of the medical certificate as a valid defence to the charge, which is what appears to be the third respondent's main complaint of about the chairperson's handling of the enquiry, this was actually not an issue going to the procedural fairness, but rather concerns the substantive fairness of the dismissal, because it is really an attack on the correctness of the chairperson's findings Moreover, the applicant did lead evidence that the third respondent had confirmed he had been advised of all his rights before the hearing. This was not disputed by him, nor did he suggest any procedural flaws in the way the proceedings were conducted that were indicative of bias. On any reasonable interpretation of the evidence, there was nothing to support a finding that the chairperson acted procedurally unfairly in

[2] 1084 at para [25]

the conduct of the enquiry. The arbitrator seems to have been of the view that the applicant was obliged to canvass every aspect of procedure to show that it had been fair. What the applicant did was to establish a *prima facie* case of procedural fairness. It was then for the third respondent to attack that version in cross-examination and by leading his own evidence on the alleged shortcomings of the enquiry. Failing that, the *prima facie* evidence hardens into proof of procedural regularity on a balance of probabilities. The third respondent did not launch any significant attack against the fairness of the disciplinary procedure. The mere allegation of procedural impropriety based on a criticism more akin to a ground of appeal on the merits of the chairperson's finding, was a wholly insufficient basis for the arbitrator's finding on procedural fairness, which appears to have been an argument developed more by the arbitrator herself than the third respondent.

Finding on substantive fairness

[24] Was the arbitrator unreasonable in her reasoning on substantive unfairness? The thrust of the applicant's attack on the arbitrator's findings on this issue, is that the arbitrator accepted the third respondent's version, namely that he was not wilfully disobeying an instruction he could not take leave, without giving any weight to the evidence that he had no intention of obeying it and that, on the contrary, his actions plainly demonstrated that intention.

[25] The applicant argued that there was ample evidence of the third respondent's insubordination, which was not materially disputed, but the arbitrator focussed narrowly on the medical justification of three days of his absence, which in her view was enough to disprove an insubordinate intent, or that his absence from work was evidence of him carrying through his threat of defying the refusal to grant him leave. On any analysis, it seems the arbitrator regarded the medical certificate as dispositive of the question whether insubordination was in fact committed. The question that must be asked is whether the arbitrator's emphasis on the significance of the medical certificate was such that it rendered her conclusion unreasonable, on any plausible interpretation of the evidence before her.

[26] As the applicant points out the essential characteristic of insubordination is conduct by an employee which demonstrates an intention to defy the employer's authority.[3] The arbitrator appears to have accepted that the third respondent did clearly state his intention to disregard the refusal of his leave application to Ms Boshoff, who was conveying the instruction of the Depot Manager, Ms Coetzer and that this statement of defiance occurred in the presence of another employee, Ms Schropfer, who shared Boshoff's office. The arbitrator seeks to avoid the implications of this indisputable conduct by introducing her own requirement for proving an insubordinate act: that because he expressed his intention to defy Coetzer's decision to a third person in the form of Boshoff and not to Coetzer directly his action did not amount to an act of insubordination. The fact that he did not express his intention to defy a superior's decision to her in person, but to her subordinate intermediary, cannot by any stretch of imagination rob his act of its insubordinate character. If anything, it aggravated the gravity of the insubordination because he expressed his defiance in the presence of other subordinates rather than in private to Coetzer.

[27] The second device the arbitrator relies on is to find that another pre-requisite for proving insubordination is whether the employee follows through on the act of defiance by fulfilling his threat. The first difficulty with this, is that the third respondent's conduct on 26 June 2012, was itself an unequivocal act signifying an intention to defy the Depot manager's authority not only to her, through Boshoff, but also to her subordinates.

[28] The arbitrator was unreasonable in effectively insisting that the employer also had to prove that Madondo did not waiver in his resolve to defy the leave decision as time passed by. It simply does not follow that if an employee later changes their mind and complies with an instruction, that their initial refusal to accept the instruction then evaporates as if it was conduct that never occurred. The duration of an employee's defiance is a matter which concerns

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[3] See Grogan J, Workplace Law, 10 ed (2009) at 218, viz: . *"The test, it seems, is whether the employee intended to challenge the employer's authority.*

Insubordination is a more serious offence than mere rudeness because it presupposes a calculated breach by the employee of the duty to obey the employer's instructions."

the continuation of the insubordination not whether the employee was guilty of insubordination at all. It is possible the arbitrator might have conflated what are normally considered elements of gross insubordination that might justify dismissal for a first offence, with ordinary insubordination. In this regard, it has been held that gross insubordination occurs when the defiance is serious, persistent and deliberate. .

[29] The third respondent's defence was that he had not been insubordinate because he was absent because he was ill. On his argument, the fact that he plainly stated he would not respect the Depot manager's decision did not amount to insubordination at all. This defence does not rely on the extended conception of persistent defiance as a pre-requisite for proving insubordination that features in the arbitrator's reasoning..

[30] Even if a continuing intent was a pre-requisite for proving insubordinate conduct, by focussing exclusively on the medical certificate as the sole explanation for the third respondent's subsequent absence from work from 27 June 2012, the arbitrator failed to consider the fact that he provided no other coherent reason for his continued absence on 2 July 2012, which was after the period of incapacity indicated in the medical certificate. All the third respondent provided by way of explanation was a somewhat garbled explanation suggesting he was confused about whether he was on leave or not. It is noteworthy that he offered this explanation, which is more in line with someone who believed he was wrongly deprived of his leave, than an explanation that he had not recovered.

[31] Further, the arbitrator completely ignored the uncontested, albeit hearsay evidence of Coetzer that the third respondent had made an arrangement for someone else to take on his duties as a van assistant on 27 June 2012 and he had not been assigned to any vehicle for that day. The third respondent never disputed that he had made such arrangements nor that he was not assigned duties for that day. It is difficult to escape the inference that he had made such arrangements in advance because he had no intention of coming to work on 27 June 2012, and when he woke up that morning to find himself stricken with backache and dermatitis, this simply provided him with a reason for not going to work which he previously lacked. But his steps the day before clearly indicated

that in all probability he would not have come in even if he had not fallen ill. . It is noteworthy that nowhere in his own evidence did the third respondent suggest that between the time he was told his leave had been refused on 26 June and before he woke feeling ill the next morning, he had decided to report for work despite his utterances to the contrary made to Boshoff. There was no evidence before the arbitrator to support an inference that it was reasonably possible he would have recanted on his stated intention to ignore the refusal of his leave application, but for the fact that he fell ill. His conduct before the onset of his illness was consistent with someone who intended to make good his assertion that he would stay away despite his leave being refused. However, the arbitrator simply relegated evidence of this to the category 'circumstantial evidence', which she seemingly believed did not warrant consideration.

[32] It should also be mentioned that no attempt was made to contradict Boshoff and Schropfer'sevidence about what the third respondent said on 26 June. It was not put to them that the third respondent had reported any feeling of illness, nor that Marius had endorsed him being absent. The third respondent also never disputed that he had told Marius he would not be at work the rest of the week.

[33] In the circumstances, the arbitrator's conclusion that the applicant failed to prove the third respondent was insubordinate was an unreasonable one that cannot be plausibly supported on the evidence and must be set aside together with the finding that the dismissal was procedurally unfair.

Substitution

[34] For the reasons which are apparent in the analysis above, it is more probable than not that the third respondent did demonstrate open defiance towards the Depot Manager by stating he would go on leave regardless of her decision to refuse it, and it is also probable that the fact he might have fallen ill would not have altered that resolve. In any event, his act of defiance on 26 June 2012 was a serious challenge to the Depot Manager's authority and was expressed to other subordinates. The third respondent already had a final written warning for insubordination toward the same manager which was still current. I think, in

the circumstances that it was not unfair of the applicant to have dismissed the third respondent.

Order

[35] The second respondent's findings in her arbitration award dated 18 September 2012 under case number FS 4655-12 that the third respondent's dismissal was procedurally and substantively unfair are reviewed and set aside and substituted with findings that his dismissal was substantively and procedurally fair.

[36] The further consequential relief awarded in paragraphs [2] and [3] on page 7 of the award is also reviewed and set aside.

[37] No order is made as to costs.

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R G LAGRANGE, J

Judge of the Labour Court

For the Applicant: W Hutchinson instructed by Fluxman's Inc.

For the Third Respondent: R K Mashego of Mashego Attorneys Inc.