



Not Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, BRAAMFONTEIN

JUDGMENT

Case no: JR 3006/2012

In the matter between:

ROYAL MNANDI (PTY) LTD

Applicant

and

COMISSION FOIR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

THEMBA HLATSWAYO N O

Second Respondent

HICRAWU obo MOHOLI E & 14 OTHERS

**Third to Eighteenth
Respondents**

Heard: 17 April 2014

Delivered: 28 May 2014

Summary: Review.

JUDGMENT

GUSH J

- [1] In this matter, the applicant applies to review and set aside the award of the second respondent who concluded that the dismissal of the fourth and further

respondents was substantively unfair and ordered that they be reinstated retrospectively to the date of their dismissal.

- [2] The applicant operates a catering business inter alia on contract to the Witwatersrand University. Prior to their dismissal, the fourth to eighteenth respondents (employees) were employed by the applicant, in the kitchens the applicant operated at the University.
- [3] The circumstances that led to the employees' dismissal commenced in October 2011 when the applicant's contract with the University was extended from the four kitchens it was running at the time to six kitchens.
- [4] According to the applicant, this necessitated the rescheduling of rosters and the allocation of staff in different kitchens. The applicant advised its staff of the intended changes to the roster. The proposed rosters reallocating staff caused the employees some concern, particularly regarding their complaint that they did not believe that they had been consulted regarding the move prior to it being implemented. It was agreed that a meeting would take place on 21 February 2012 to discuss these concerns. At this meeting, the applicant scheduled specific meetings to deal with the employees grievances.
- [5] The first of such meetings was scheduled to take place at 14H00 5 March. For reasons described by the applicant as "operational reasons" its manager appointed to attend that meeting on its behalf did not do so. There was some dispute as to whether this manager arrived at the meeting at all or whether as alleged by the applicant, the manager arrived 20 minutes late. Suffice to say that the employees left the venue without the meeting having taken place.
- [6] As a consequence of the meeting not taking place the employees, the next day, reported for duty at the units or kitchens to which had been allocated and where they were working prior to the rescheduling that had given rise to their concerns.
- [7] In response to this action, the applicant addressed the following letter to the employees:

'it has come to our attention of a number of employees opted to abandon their workstation/units today (7 March 2012).

These actions are viewed as a serious contravention of their contracts of employment as well as the policies and procedures of this company. This is impacting negatively on our relationship with the client and the operations of RoyalMnandi.

This kind of behaviour will not be tolerated on the necessary disciplinary action will be initiated to address this misconduct.

All employees are hereby instructed to report back to their respective work stations immediately, failing which the company will have no option but to immediately suspend the perpetrators pending disciplinary procedures.

Any grievances that employees may have should be addressed through the company's grievance procedures and process.¹

- [8] Since the employees did not immediately return to their workstations, the applicant handed them "notice[s] of suspension", suspending them on full remuneration pending the outcome of an investigation and possible disciplinary enquiry.
- [9] Two days later, the employees were issued with a notice to attend a disciplinary enquiry in which notice, they were advised that the charge against them was "gross insubordination".
- [10] At the subsequent disciplinary enquiry, the employees were all found guilty of misconduct. Prior to imposing a sanction on the employees, their representative who appeared on their behalf at the disciplinary enquiry submitted in mitigation of sanction that the employees were remorseful, (and bar one) had no previous disciplinary record of misconduct and that the trust relationship between the applicant and the applicant had not been destroyed.
- [11] At the arbitration the second respondent recorded that the evidence was that only one employee had a disciplinary record viz. a first written warning for an

¹ Bundle of documents Volume 4 page 175.

issue relating to overtime and as far as their length of service was concerned; of the 14 employees: one had 12 years service, 3 -11 years service; 4 - 7 years service; 1 – 5 years service; 1 - 4 years service; 2 – 3 years service; and three between 1 and 2 years service.

- [12] The outcome of the disciplinary enquiry was that the employees were found guilty of the misconduct and were all dismissed.
- [13] What is abundantly clear from the extensive record and bundle of documents is that the employees embarked on what, to all intents and purposes, could be regarded as industrial action, albeit unprotected. They had expressed their concerns regarding their placement and in particular their concerns surrounding what they perceived to be the applicant's failure to consult them. There can be no doubt that the failure of the applicant's manager to attend (timeously or at all) to the first of the scheduled meetings to deal with this issue was the catalyst for the action taken by the employees.
- [14] What however is inexplicable is the applicant's response to the actions taken by the employees. There can no doubt that the action taken by the employees was tantamount to industrial action that did not comply with the provisions of chapter IV of the Labour Relations Act.
- [15] In the Code of Good Practice: Dismissal; Section 6 of the schedule 8 to the Act sets out clear guidelines for employers faced with unprotected industrial action. The only explanation for the applicant's conduct in charging the employees with insubordination is the applicant's reluctance to follow these guidelines.
- [16] In the founding affidavit, the applicant avers that the second respondent's award is "contradictory and unjustifiable"; that the second respondent "misconducted himself", "that the award does not accurately reflect the evidence presented", that the second respondent further considered the inherent probabilities" and that the award is accordingly reviewable. The supplementary affidavit seeks to expand upon these grounds of "review" by averring that the second respondent's questioning of the witnesses "did not demonstrate partiality" (sic)

- [17] The applicant sets out at the commencement of its analysis of the award the following submission:

‘It is submitted that the arbitrator committed gross irregularities in the arbitration proceedings and/or alternatively that the arbitrator committed misconduct and/or alternatively that the findings of the arbitrator are not rationally justifiable in relation to the material before him and/or alternatively that the arbitrator failed to take into consideration material evidence before him thereby committing gross irregularities and/or alternatively ignoring material evidence resulting in latent irregularity in the method of determining issues. The result the award is not one that a reasonable decision maker would make.’

- [18] The test to be applied in determining whether an award of a Commissioner is reviewable was set out in the matter of *Sidumo and Another v Rustenburg Platinum Mines and Others*² and summarised as follows in *Edcon Ltd v Pillemer NO and Others*³

Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.⁴

- [19] The test on review was subsequently dealt with in *Herholdt v Nedbank Ltd*⁵ a decision of the Supreme Court of Appeals and by the Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd v CCMA*.⁶

- [20] in the *Herholdt* matter, the SCA said the following:

‘... the [SCA] enunciated an unreasonableness test ... namely, whether the award was one that a reasonable decision-maker could not reach. 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

² 2008 (2) SA 24 (CC).

³ (2009) 30 ILJ 2642 (SCA).

⁴ At page 2650.

⁵ [2013] 11 BLLR 1074 (SCA).

⁶ [2014] 1 BLLR 20 (LAC).

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. ... the reasoning of the arbitrator assumes less importance ... 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.⁷

- [21] In the *Goldfields Mining* case, the Labour Appeal Court in considering the application of the *Sidumo* test in applying the provisions of section 145 of the Labour Relations Act held the following:

‘... The constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. This implies an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excessive powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.’⁸

- [22] In the circumstances and taking into account the applicant’s grounds of review and the results of the “applicant’s examination of the [2nd respondent’s] findings and award” the simple test to be applied is whether the decision of the second respondent conclusions that the employees’ conduct did not justify dismissal and that the dismissal was substantively unfair is a conclusion to which a reasonable decision-maker could not have come considering the material placed before him.

⁷ At paragraph 12.

⁸ At paragraph [14] pages 24 – 25.

- [23] I am not satisfied that the applicant has established that its averments of so-called "gross irregularities" or "misconduct" are justified. Neither can it be said that there is a latent irregularity in the second respondent's award (in the currently accepted meaning thereof).
- [24] In the SCA judgment in Herholdt the court held that "material errors of fact", or that 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."⁹
- [25] In this matter, the outcome of the arbitration is entirely reasonable. The circumstances surrounding the employees' actions suggest quite clearly that they amounted to all intents and purposes to industrial action. That the applicant relied on a charge of insubordination as a basis for dismissing the employees simply illustrates graphically the appropriateness of the second respondent's conclusion in his award that "in this present situation is clear that the [applicant] acted hastily in dismissing the workers instead of addressing the identified issues".¹⁰
- [26] In the circumstances, I am satisfied that the second respondent's award is not reviewable in that the applicant has not established that it is a decision to which a reasonable arbitrator could not come based on the material placed before him.
- [27] As far as costs are concerned, the respondents were at all times represented by their trade union. It is therefore not necessary to make an order of costs.
- [28] Accordingly, I make the following order:

The applicant's application is dismissed.

⁹ Paragraph 25.

¹⁰ Pleadings page 62 Award para 6.90.

D H Gush

Judge of the labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:

Adv S Bernhardt

Instructed by Yusuf Nagdee Attorney
at Law

FOR THE 3 and further RESPONDENTS:

Martin Modise Hicrawu