**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

Not Reportable

Case no: JR1665/11

In the matter between:

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| **CHROME FIELD SECURITY SA (PTY) LTD** | **Applicant** |
| And | |
| **J.M RAMADIMALA N.O** | **First Respondent** |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **Second Respondent** |
| **TAWUSA obo G.A MORAKA** | **Third Respondent** |

**Heard:** **12 July 2013**

**Delivered:** **29 May 2014**

**Summary:** **Award set aside due to process related unreasonableness**

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**JUDGMENT**

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PONELIS, AJ

Introduction

[1] In the matter before me the applicant applies for review of an arbitration award, pursuant to the provisions of section 145 of the Labour Relations Act[1] ('LRA').

[2] The award was issued by the first respondent ('commissioner'), pursuant to arbitration proceedings concerning the fairness of the dismissal of the third respondent ('employee') by the applicant ('company').

[3] In terms of the award the commissioner held that the employee's dismissal was both procedurally and substantively unfair and ordered the employee's retrospective reinstatement, from the date of dismissal, together with back pay.

[4] The company contends that the dismissal was fair and challenges the commissioner's findings of procedural and substantive unfairness. For purposes of the present application the company submits that the commissioner's award ('award') constitutes a defect, as contemplated in sections 145(2)(a)(i),145(2)(a)(ii) and 145(2)(a)(ii) of the LRA. In particular, that it is one that a reasonable decision maker could not reach,[2] and that the commissioner committed process related misconduct in reaching his conclusions.[3]

[5] Before I proceed to analyse the commissioner's findings, I set forth the salient background facts as appear from the record.

Factual background

[6] During the arbitration the company was represented by a manager, Mr. Edwin Venter ('Venter'), who also testified as a witness. The company's further witnesses were Mr. Jan Adriaan Roos ('Roos'), the company's Director of Personnel Administration, and Ms. Elizabeth Legae ('Legae'), who is



[1] 66 of 1995

[2] *Sidumo and another v Rustenburg Platinum Mines Limited and others* (2007) 28 ILJ 2405 (CC) at paras 106-110.

[3] *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC) at para 17; *SA Airways (Pty) Ltd v Blackburn & others* [2010] 3 BLLR 305 (LC) at paras 17–21.

employed as Human Resources Assistant by the company. The employee was represented by a member of this trade union, Transport and Allied Worker's Union of South Africa ('union'). The employee testified in person and a fellow employee, Mr. Levy Molahlegi Kole ('Kole'), further testified on his behalf.

[7] The employee was formerly employed as a constable security guard by the company.

[8] On 27 January 2010 a meeting took place between the company and the union; during which the company was represented by, amongst others, Venter and Roos, and the union by, amongst others, the employee and Kole. The primary purpose of the meeting was to discuss the union's request for recognition of shop stewards.

[9] It is common cause that during the course the meeting the company agreed that the union could appoint part-time shop stewards. During the arbitration there was however a factual dispute concerning the union's further request for the recognition of one full-time shop steward. In this regard the employee's version was that the parties did agree on the appointment of a full-time shop steward, whilst the company contended that this was not the case.

[10] The union's members thereafter elected some seven part-time shop stewards and, by letter dated 27 October 2010, the union notified the company of the names of these persons, which included the employee.

[11] In the employee's version he was thereafter elected as a full-time shop steward and introduced as such to the company at a meeting held on 3 December 2010.

[12] Sometime after 20 December 2010 the company received word from Sergeant Major Abbey Mabote ('Mabote'), who oversaw posting of the company's security personnel, that the employee was not wearing his uniform and that he was unwilling to be deployed as a security guard. Mabote was then told to instruct the employee to wear his uniform and to post him as a security guard. A few days later Venter became aware that the employee was

still refusing to be posted. Thereafter, Roos and Venter had a meeting with the employee, on 29 December 2010, during the course of which they instructed the employee to attend to guarding duties at a customer's premises.

[13] On 27 January 2011 a meeting convened between the company and the union, during the course of which the company indicated that they intended to charge the employee for his failure to follow instructions. The union undertook to furnish the company with potential dates for a disciplinary enquiry.

[14] A disciplinary enquiry convened on 27 February 2011, which was postponed because the employee had not been charged in advance of the enquiry.

[15] A charge sheet was eventually issued on 3 March 2011, in terms of which the employee was charged with gross insubordination in that from 29 December 2010 he had failed to follow the company's instructions to be placed at a customer's site.

[16] Another disciplinary enquiry was scheduled for 17 March 2011. The employee and his union representative refused to participate in the hearing, although they remained in attendance, on the basis that the company was precluded from proceeding with the hearing since its disciplinary code provides that the hearing must have been held within five days of the alleged offence having come to the company's attention.

[17] Pursuant to the disciplinary enquiry of 17 March 2011, the employee was dismissed on 22 March 2011.

<u>Commissioner's finding or procedural unfairness</u>

[18] Clause 61 of the company's disciplinary code provides:

> '61 IN PREPARING FOR THE ENQUIRY THE FOLLOWNG SHOULD BE ENSURED:
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> 1) The employee should be given at least 48 hours written notice of the pending enquiry.

2) The hearing should be held as soon as reasonably possible, preferably within five (5) days of the alleged offence having come to the employer's attention. The employer must inform the employee of the alleged transgression within forty eight (48) hours of the alleged transgression being drawn to the employee's attention.

3) The hearing should only be postponed of special circumstances exist;

4) With due to no.3, the hearing should not be postponed more than two (2) times;

5) Reasons for postponing the hearing must be substantiated by the responsible person.' (Emphasis added)

[19] It is implicit in the commissioner's reasons that he did not hold the company accountable to convene a disciplinary enquiry within the specific time limits stipulated in clause 61(2) of the company's disciplinary code. The basis of the commissioner's finding of procedural unfairness is that the company failed to convene the enquiry within a reasonable time. In this regard the following is held in the award:

'27. Under Procedural fairness I considered the applicant's argument that the Code of conduct of the respondent had been violated, the respondent's admission to it and reason advanced by the respondent for not complying. I would be persuaded to agree with the employer that before charging a union representative consultation with the union is required, however I am failing to believe that such process can take in excess of three months. This consultation does not take away the employer's prerogative to charge, inform the employee of the charges levelled against him/her, notify him/her on date, time and venue for the hearing. Therefore the respondent should have charged, set a date and time and notify the applicant. I do not see any reason which could have prevented the respondent to exercise this prerogative within reasonable time limits and in compliance with its codes.

> 28. The respondent has its own disciplinary code and procedures, the content of which referred to above in paragraph 11 above, which I do not intent to repeat. I have considered the reason advanced for non-compliance and do not find it justifiable.
>
> 29. <u>Departure from the procedures contained in the collective and contractually binding procedures constitute procedural unfairness</u>. I therefore find dismissal of the applicant procedurally unfair.' (Emphasis added)

[20] It is so that close to three months have lapsed between 29 December 2010, when the incident occurred, and 17 March 2011, when the disciplinary enquiry convened. The company did not tender any evidence to explain its failure to take its first step in relation to a disciplinary enquiry before 27 January 2011. Also, the only evidence that was tendered in respect of the period between 27 January 2011 and 3 March 2011, when the employee was charged, was to the effect of an initial hearing that was scheduled for 24 February 2011, but which did not proceed because the company had failed to charge the employee prior to the enquiry.

[21] (Though not relevant for present purposes, I pause to note that the company's bundle of documents used at the arbitration contains several further documents pertaining to interactions between the company and the union between 27 January 2011 and March 2011. It is unclear why the company did not tender these documents into evidence).

[22] The commissioner's conclusion that there was an unreasonable delay was reasonable in relation to the evidence that was tendered during the arbitration.

[23] However, there are two material issues that the commissioner failed to take into consideration for purposes of the enquiry into procedural fairness. In the first instant, the commissioner failed to consider that neither the employee nor the union at any stage prior to 17 March 2011 objected to a disciplinary hearing; either on the basis on of clause 61(2) of the company's code, or at all. Furthermore, there was no evidence to suggest that the employee was

prejudiced in having the charge against him fully and fairly determined as a result of the time delay in question.

Commissioner's finding of substantive unfairness

[24] Item 7 of Schedule 8 to the LRA, Code of Good Practice: Dismissal ('Code of Good Practice'), provides:

> '7 Guidelines in cases of dismissal for misconduct
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> Any person who is determining whether a dismissal for misconduct is unfair should consider-
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> (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
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> (b) if a rule or standard was contravened, whether or not-
>
> (i) the rule was a valid or reasonable rule or standard;
> (ii) the employee was aware, or could reasonably be expected to have been aware of the rule or standard;
> (iii) the rule or standard has been consistently applied by the employer; and
> (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.'

[25] On the basis of this provision the commissioner succinctly formulated his approach to the question of substantive fairness as follows:

> '6. There was no dispute regarding whether the instruction was given, and therefore under substantive fairness, I was to determine whether or not the instruction was reasonable, and if reasonable to determine whether or not the reason for refusing to follow those instructions are justifiable and as to whether or not dismissal is an appropriate sanction under the circumstances.'

[26] It is apparent that the commissioner accepted that it was common cause that the company had given an instruction, which the employee failed to follow. Accordingly, the commissioner was not required to make a determination for purposes of item 7(a) of the Code of Good Practice.

[27] The commissioner therefore limited the enquiry into substantive fairness to the matters indicated under item 7(b). On the issues and evidence before the commissioner, it was not required to consider items 7(b)(ii) and 7(b)(iii). Accordingly, the commissioner focused the enquiry to the remaining matters listed in items 7(b)(i) and 7(b)(iv); i.e. whether the rule (instruction) was valid or reasonable and, if so, whether dismissal was an appropriate sanction.

[28] I accept the commissioner's aforementioned approach and formulation of the overall enquiry into substantive fairness as rational and reasonable.

[29] For purposes of the enquiry contemplated under item 7(b)(i) of the Code of Good Practice; i.e. whether the rule (instruction) was valid or reasonable; the commissioner accepted that if the employee had been appointed as a full-time shop steward, it would follow that the instructions that he must perform duties as security guard were not reasonable. In this instance, the following is stated in the award:

> '31 I am required to consider whether or not the reason for failure to obey the instruction is fair and justifiable. In doing so I considered that the applicant refused to be posted, as he allegedly was a full-time shop steward and therefore was supposed to work at the office. I needed to establish whether or not the applicant was a full-time shop steward.'

[30] Consistent with the approach adopted be the commissioner, two enquiries were implicit in his determination of whether the employee had been appointed as a full-time shop steward. In the first instant, it needed to be established whether the parties did agree on the appointment of a full-time shop steward, at the meeting of 27 January 2010. If so, it needed to be established whether the agreement had been implemented; i.e. whether the employee had been appointed as full-time shop steward during the 3 December 2010 meeting.

[31] The commissioner concluded as follows in respect of these issues:

> '32. The applicant's version is that he was a full-time shop steward. At a meeting, wherein Mr. Roos was also present, they were introduced to management as shop stewards and he was subsequently elected as a

full-time shop steward. The respondent disputes this version, however considering the testimony given by Mr. Roos especially taking into account that he does not remember anything about the meeting, which it is alleged that he was present, I find it difficult to accept the respondent's version.

33. Mr. Roos contradicted himself, he could not articulate whether the meetings took place and he could not explain the agreements of those meetings. His credibility as a witness cannot be trusted.

34. I considered that the minutes of the meeting of the 3 December 2010 were not presented, however the minutes of the meeting of the 27 January 2011, wherein the respondent argued that the matter clarified, also does not clarify the issues in dispute. The minutes are poorly drafted and the meaning/intentions are unclear.

35. On balance of probability, I find the applicant's version, that he was an elected full-time shop steward and that he was not supposed to have been posted, as the most probable.

36. I therefore find the applicant's dismissal substantively unfair.'

[32] In respect of the meeting of 27 January 2010, it is apparent from paragraph 34 of the award that the commissioner considered the minutes of the meeting of 27 January 2010, on the basis of which the company contended that the parties had not agreed on the appointment of a full-time shop steward. (In view of this context, it appears that the commissioner's reference to 27 January 2011, as opposed to 27 January 2010, is a typographical error). The commissioner concluded that it is not possible to find on the basis of those minutes whether the parties had reached agreement on the appointment of a full-time shop steward.

[33] The portion of the minutes of the 27 January 2010 meeting on which the company relied during the arbitration, reads as follows:

'<u>Recognition</u>:

- Do the company recognise new shopsteward?
- Company stated do recognise new shopsteward.

Resources:

- please want office
- access to transport
- telephone for

- Company if majority will do this but must look in future
- The shopstewards must continue with normal duties
- Union must have 1 full time shopsteward.
- Company agree to 1 shopsteward.

Union stated office, transport, telephone one shopsteward.' (Original emphasis)

[34] Having regard to the minutes, the commissioner's aforesaid conclusion is reasonable in that it does not on face value support either party's version.

[35] However, it remained incumbent on the commissioner to determine whether the parties did agree on the appointment of a full-time shop steward at the 27 January 2010 meeting. In this regard the commissioner was duty bound to evaluate the evidence of the five witnesses who testified at the arbitration; particularly because all of them tendered evidence about the 27 January 2010 meeting and, with the exception of Legae, they were all present at that meeting. The commissioner however only refers to the evidence of Roos that he could not remember the events of that meeting.

[36] The commissioner's failure to consider this material evidence and to make a finding about the outcome of the 27 January 2010 meeting constitutes a serious flaw in his reasoning process.

[37] A similar flaw appears in the commissioner's reasons and conclusion, in paragraphs 32 to 33 of the award, that during the meeting of 3 December 2010 the union did notify Roos, as representative of the company, of the employee's appointment as full-time shop steward. It is apparent that in this regard the commissioner accepted the evidence of the employee and Kole. He further had regard to the fact that Roos did not have an independent

recollection of these events and that he could therefore not dispute the evidence of the employee and Kole.

[38] The difficulty with this reasoning is that the commissioner failed to take into account that the version of the employee and Kole, about what transpired at the meeting of 3 November 2010, had not been put to any of the company's witnesses during cross-examination. Furthermore, the commissioner misconstrued Roos' testimony about his failure to recollect the events in question. – Roos testified this in the context of the 27 January 2010 meeting; not in respect of the 3 December 2010 meeting.

[39] Since these issues were material in the commissioner's finding of substantive unfairness, it renders the finding reviewable.

<u>Conclusion</u>

[40] In conclusion, the commissioner's decision making process, in reaching his respective conclusions of procedural and substantive unfairness, is materially flawed because he disregarded relevant evidence and considerations. Therefore, the commissioner committed misconduct in the performance of his duties as an arbitrator, as contemplated in section 145(2)(a)(i) of the LRA; as well as a (latent) gross irregularity, as contemplated in section 145(2)(a)(ii) of the LRA.

[41] It is therefore appropriate to set the award aside. I am however not satisfied that the interests of justice will be served if a determination of the fairness of the dismissal were to be made solely on the basis of the record in its present form. Accordingly, I make no order substituting the award and remit the matter to the second respondent for afresh determination before a different commissioner.

[42] Since the employee did not oppose the company's review application, save for filing a notice of opposition, I make no order as to costs.

<u>Order</u>

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

(i) The arbitration award issued by the first respondent under the second respondent's case number NWRB980-11, dated 6 June 2011, is set aside.

(ii) The third respondent's dispute referral under the aforesaid case number is remitted to the second respondent for determination by a commissioner other than the first respondent.

(iii) There is no order as to costs.

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PONELIS, AJ

Acting Judge of the Labour Court

<u>APPEARANCES:</u>

For the Applicant: Mr. R.J.C Orton

Snyman Attorneys

For the Third Respondent: No appearance