



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH.
JUDGMENT

Not Reportable

Case no: P196/12

In the matter between:

VOLKSWAGEN OF SOUTH AFRICA (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

BULELANI BUSAKWE, N.O

Second Respondent

MARIOS HAYWARD

Third Respondent

Heard: 9 May 2013

Delivered: 3 June 2014

Summary: When the commissioner's omission to afford the parties an opportunity to be heard on an issue he or she intends considering in reaching his/her award leads the award to be unreasonable, the award may be reviewed and set aside.

Review in terms of section 145 of the LRA –Dismissal for misconduct

JUDGMENT

LALLIE J

Introduction

- [1] This is an application to review and set aside the arbitration award of the second respondent ('the commissioner') in which he found the third respondent's dismissal substantively unfair and ordered his reinstatement.

Factual background

- [2] In 2010, the applicant was informed of corruption in its manufacturing planning department. Investigations established that the corruption had been going on for years. The third respondent who was employed by the applicant as an automation maintenance specialist in its body shop was fingered as one of the culprits. He was charged with accepting payment from a supplier, PK Welding and Robotics ("PK"), in return for the potential or actual non-reporting of maintenance breakdowns of PK's equipment to applicant. He was accused of having accepted the payment in contravention of the applicant's stipulation guideline GHR 026 and for abusing his position for self-enrichment and/or a third party to further his own or the third party's interests. He was subjected to a disciplinary enquiry and dismissed for bribery.

The award

- [3] Giving reasons for his decision, the commissioner found that no direct evidence was led by the applicant as to the exact transactions/deals / tenders or projects which the applicant influenced in favour of PK. He found that no specific recommendations on equipment to be used were made by the applicant or his senior. Only Mr Terblanche (Terblanche) who was an employee of PK performing his duties at the applicant led evidence about the applicant's influence. The commissioner found his evidence of no assistance as all he could tell the arbitration was that he was informed by Mr Klein (Klein) that the reason PK's opposition equipment failed when tested at the applicant was with the assistance of the third respondent. He had no knowledge of how he assisted. Klein had testified at the disciplinary enquiry but died before the arbitration sat. The commissioner considered evidence he tendered at the disciplinary enquiry and concluded that he made no mention of the third respondent assisting the equipment of PK's opposition fail. He therefore

concluded that no evidence was tendered by the applicant to prove that the third respondent used his influence in favour of PK.

- [4] The commissioner rejected for lack of evidence the applicant's evidence that the third respondent received a R15 000.00 bribe from PK which Klein instructed that it be deposited in the bank account of the third respondent's daughter. He treated Tereblanche's evidence on the charge that Klein gave the third respondent a R20 000.00 bribe with caution as he was under criminal investigation. He also found him an incredible witness whose evidence had changed and rejected the applicant's version. He further criticised the applicant's version for being inconsistent and concluded that the third respondent's dismissal was substantively and procedurally unfair and ordered his reinstatement.

Grounds for review

- [5] The applicant sought to rely on a number of grounds. They are mainly that the commissioner's failure to determine the central issue, the finding that Terblanche's evidence changed, the finding that a *quid pro quo* for the bribe had not been established and the finding that it was improbable that a bribe of R20 000.00 had been paid.

The test for review

- [6] Applying the test for review as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹, the Court in *Herholdt v Nedbank Ltd*² held as follows with regard to errors made by commissioners when conducting arbitrations:

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145 (2) (a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be

¹ 2008 (2) SA (CC)

² [2013] 11 BLLR 1074 (SCA) at para 25

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’.

- [7] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*³ reasonableness as envisaged in *Sidumo (supra)* was interpreted as follows:

‘...This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of 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] The gist of the third respondent’s argument was that the award is reasonable. He also relied on authority consistent with the current legal position that there is only one law of review. He further relied on section 138 (1) of the LRA which requires commissioners to conduct arbitrations in a manner which ensures that disputes are determined fairly and quickly and deal with their substantial merits with the minimum of legal formalities.

- [9] It is common cause that in determining the dispute the commissioner had to deal with a number of difficulties. They included the death of Klein who was said to have played a pivotal role in the misconduct which led to the third respondent’s dismissal. The parties were not legally represented and were therefore not in a position to assist the commissioner effectively in ensuring that all the necessary evidence was presented at the arbitration either as evidence in chief or during cross examination.

³ [2014] 1 BLLR 20 (LAC) at para 14.

- [10] The applicant's approach that the award stands to be reviewed owing to its patent and latent gross irregularities is incorrect. See *Herholdt and Gold Fields (supra)*. The process related irregularity the applicant sought to rely on was criticized by the Court in *Gold Fields (supra)* on the basis that it raises the standard of review. It should not be considered in isolation but should form part of the assessment of the evidence which served before the commissioner in its totality, in the process of determining whether the commissioner reached a reasonable decision. When a decision has been made that the commissioner has committed an irregularity a further enquiry needs to be conducted to determine whether the irregularity led the commissioner to reach an unreasonable decision. The applicant's approach on its own does not render the application defective or its arguments irrelevant. The correct approach in determining whether reviewing an award is permissible, is to consider the totality of the evidence, whether the arbitrator has considered the main issue, evaluated the facts before him and reached a reasonable conclusion. See *Gold Fields (supra)*. A consideration of the totality of the evidence which served before the commissioner reflects that he considered the main dispute before him. The main dispute was the fairness of the third respondent's dismissal for accepting bribes from PK. The commissioner made a considerable effort in considering the fairness of the dismissal. In evaluating the facts before him, the commissioner was required to have been mindful of the relevant legislation and legal principles, consistently with his duty in section 138 (1) of LRA to determine a dispute fairly and dealing with the substantial merits of the dispute.
- [11] In evaluating the facts, the commissioner made an omission which had an impact on his decision. In reaching his decision that the third respondent's dismissal was substantively unfair, the commissioner considered evidence led by Terblanche and Klein at the disciplinary enquiry with regard to the payment of the R20 000.00 to the third respondent. He found that they did not corroborate each other as there was a difference of about four to five years in their version of the year in which the bribe was paid. He further found that the evidence tendered by Terblanche at the disciplinary enquiry was materially different from the evidence he tendered at the arbitration and rejected the applicant's version in that regard based on the inconsistencies.

- [12] The issue of inconsistency in the applicant's evidence was not raised at the arbitration. The applicant was denied the opportunity of dealing with it. There was a duty on the commissioner to bring the issue to the applicant and the third respondent's attention for them to deal with it. An omission to bring to the parties' attention an issue which a commissioner intended basing his or her decision on is a manifestation of the commissioner's failure to evaluate the facts presented by the parties. By not bringing the inconsistency to the attention of the applicant and the third respondent, the commissioner denied the parties the opportunity of dealing with an issue the commissioner intended to rely on in making his decision and himself, a proper and complete basis of his decision. He commented that the applicant's version left one with more questions than answers. The commissioner's omission to ask some of those questions but base his award on incomplete facts constituted a gross irregularity.

The following dictum in *Yao Ying Metal Industry (Pty) Ltd v Pooe NO and Others*⁴ is relevant as part of the test to determine the reasonableness of an award:

'.....An award may also not be founded on matters that occur to the arbitrator but that the parties have had no opportunity to address. That is simply an application of the principles of natural justice, and in particular the right to be heard, that are now formalised in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").'

- [13] The irregularity led the commissioner to reach an unreasonable decision. Had the commissioner afforded the applicant and the third respondent an opportunity to deal with the inconsistencies he would have had the relevant facts on which to base a reasonable decision. The commissioner denied the applicant and the third respondent a full opportunity to have their say in respect of the dispute. The review application must succeed.
- [14] The appropriate relief is to afford the applicant and the third respondent an opportunity to have their dispute ventilated properly at the first respondent. Granting a costs order will not be appropriate in the circumstances.
- [15] In the premises, the following order is made:

⁴ [2007] 7 BLLR 583 (SCA) at para 6

- 15.1 The arbitration award issued by the second respondent under case number ECPE 2917-11 is reviewed and set aside.
- 15.2 The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant: Advocate Myburgh SC

Instructed by: Chris Baker and Associates

For the Third Respondent: Advocate Fourie

Instructed by: Unwin Attorneys

LABOUR COURT