



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case No: P543/13

In the matter between:

**MHLANGANISI WELCOME MAGIJIMA**

**Applicant**

And

**THE COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER T POTGIETER**

**Second Respondent**

**CADBURY SA (PTY) LTD**

**Third Respondent**

**Heard: 7 May 2013**

**Delivered: 27 June 2014**

**Summary:** An applicant seeking to rely on an error by a commissioner to have an award reviewed and set aside must first prove that the error was made and thereafter show that the error led the commissioner to reach an unreasonable decision.

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

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## JUDGMENT

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Lallie, J

### Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent (“the commissioner”) in which he found his dismissal by the third respondent both substantively and procedurally fair.

### Condonation

- [2] Section 145 of the Labour Relations Act 66 of 1995 (“the LRA”) required the applicant to have filed this application within six weeks of the date the award was served on him. He filed it two days later and applied for condonation. The third respondent did not oppose the application. The delay is not significant and the applicant proffered reasonable explanation for it. Granting the application will not prejudice the third respondent and the applicant has reasonable prospect of success. The application for condonation is therefore granted.

### Factual background

- [3] The applicant was employed by the third respondent on 26 September 1994 until he was dismissed on 12 November 2011, at a time he was a forklift driver. The third respondent’s business is a twenty four hour operation. Four shifts are scheduled per day. Management prepares shift rosters and communicate them to employees. Employees are required to work the shifts they are allocated to, in order to prevent production loss. On 25 November 2010, the applicant worked the shift which started at 14h00 and ended at 22h00. He was scheduled to work on it even the following day. He, however, did not report for his allocated shift on 26 November 2010 but reported for duty at about 17h40 for the 18h00 to 06h00 shift which is an overtime shift and entitled him to a higher remuneration rate than the one he was scheduled for. When the shift

the applicant was allocated to ended at 22h00, the applicant continued working. When asked for reasons for not leaving as his shift was over, he stated that he was working the 18h00 to 06h00 shift and refused to leave. He was instructed by Mr Nakana (Nakana), his team manager, and Mr Lamani (Lamani), his team leader, to leave but he persisted with his refusal and remained at his workstation. The efforts of a security guard to persuade him to leave were also not successful. He continued working until the end of the overtime shift.

- [4] The applicant was subjected for a disciplinary enquiry and dismissed for gross insubordination for refusing to carry out a reasonable instruction to leave the workplace and for refusing to stop work at the end of a shift. On dismissal, he was on a final written warning for gross insubordination.

#### The award

- [5] The applicant's version was that he worked the overtime shift on 26 September 2010 with the permission of his team leader, Lamani. The applicant expressed the view that the opportunity of working overtime was not made available equally to employees. He complained that the third respondent applied discipline inconsistently as it did not take disciplinary action against Mr Hoza (Hoza), after committing similar misconduct. The commissioner accepted that Lamani had the authority to give the applicant instructions to leave the workplace. He found the applicant's version that he had an agreement with Lamani to work overtime to have been fabricated after the fact as it was not put by the applicant's legal representative to the third respondent's witnesses. He also found the instruction to be reasonable. The insubordination took place in the presence of other employees justifying the third respondent's decision that the applicant could not be trusted. Progressive discipline had proved unsuccessful to correct the applicant's conduct. Inconsistency was not proved as Hoza had not refused to leave and unlike the applicant, he had no final warnings for insubordination. Challenges on procedural fairness were found invalid and the sanction of dismissal appropriate.

### Grounds for review

- [6] The applicant's first ground for review is that the commissioner committed a gross irregularity and exceeded his powers by allowing an advocate to represent the applicant without an instructing attorney either present or on record. Rule 25 of the Rules for the conduct of Proceedings before the CCMA (CCMA Rules) provides that a party may be represented by a legal practitioner at an arbitration. Section 213 of the LRA defines a legal practitioner as any person admitted to practice as an advocate or an attorney in the Republic. Nothing precluded the advocate, as he falls within the definition of 'legal practitioner', from representing the applicant. The LRA is silent on the requirement that the advocate had to represent on the instructions of an attorney. Although the applicant alleges that the absence of the instructing attorney is in breach of the CCMA Rules, he does not disclose the particular Rule breached. Absent the rule that the commissioner was precluded from allowing the applicant's legal representative from representing him, the commissioner's decision cannot be faulted. The absence of an instructing attorney either at the arbitration or on record did not render the award reviewable.
- [7] The applicant attacked the reasonableness of the award on the basis that the commissioner failed to play an inquisitorial role and assist him when his legal representative failed to put his version to the third respondent's witnesses. The helping hand principle has its boundaries. The applicant was legally represented by an advocate, there was therefore no duty on the commissioner to play an inquisitorial role and assist him. The applicant did not raise any exceptional circumstances on which a decision that his legal representation denied him of a fair hearing can be based. He cannot in the circumstances rely on his legal representative's mistake.
- [8] The applicant submitted that the second respondent committed a gross irregularity by attaching unreasonable weight to the fact that his version had not been put to the third respondent's witnesses. He was required to apply his mind to the totality of the evidence with the object of determining the inherent probabilities of the matter before him and failed to assess and determine the

relevant aspects of the evidence. Such aspects of the evidence include Lamani's failure to establish his whereabouts when he did not arrive at the commencement of his scheduled shift. He refused to leave because he had an agreement with Lamani to work overtime. Lamani had caused his unfair dismissal which he successfully challenged and got reinstated. In that arbitration the commissioner commented that Lamani had an agenda. The commissioner, in the matter at hand, should have drawn an inference that Lamani was pursuing the same agenda, leading once more to his dismissal. The applicant further submitted that the commissioner committed a gross irregularity in accepting the third respondent's version on how overtime was managed and overlooked flaws which included favouritism in its allocation. A further criticism on the award is based on the commissioner's finding that the sanction of dismissal was appropriate. The commissioner reached the finding without taking into account the appropriateness of a sanction less than dismissal. He attacked the quality of his representation based on the evidence which, had it been tendered, could have led the commissioner to reach a decision less severe than dismissal. The applicant alleged that all the grounds the applicant sought to rely on led the commissioner to reach an award which is not reasonable and deprived him of his right to a fair hearing and to have his evidence fairly and properly assessed.

[9] Not every aspect of an award an applicant is dissatisfied with constitutes grounds for review. An award is reviewed and set aside when the commissioner has reached a decision which falls outside the bounds of reasonableness. In order to determine whether the applicant has established grounds to have an award reviewed and set aside, the review court needs to consider the totality of the evidence before the commissioner, determine whether the commissioner dealt with the principal issue, assessed evidence and reached a reasonable decision. In this regard see *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*.<sup>1</sup>

[10] Not every error a commissioner makes renders an award reviewable. An applicant seeking to rely on an error by a commissioner needs to identify the

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<sup>1</sup> [2014] 1 BLLR 20 (LAC).

error and prove that the error led the commissioner to reach an unreasonable decision. A reading of the record does not support the applicant's submissions of the errors the commissioner committed. The evidence before the commissioner was that the applicant demanded to work overtime. When his demand was not acceded to, in defiance of his team leader, he reported for duty on 26 September 2010 for the overtime shift and not the one he was allocated to. By his own admission, he refused to carry out the instructions to leave the workplace at the end of the shift that he was allocated to and left at the end of the overtime shift. The commissioner's decision that the dismissal was appropriate cannot be criticised as he correctly found that progressive discipline had not been successful in correcting the applicant's conduct.

- [11] The applicant seeks the award to be reviewed because he would have presented his case differently. Part of his gripe is not necessarily based on the quality of his representation. An award cannot be reviewed because, with hind sight, the applicant decides that he should have presented his case differently at the arbitration. The criticism that the applicant's legal representative failed to bring to the commissioner's attention the outcome of an earlier arbitration in which Lamani was found to have had an agenda against the applicant did not prove the link between his latest dismissal and how Lamani was still pursuing the agenda. Although the applicant criticised his legal representative for not raising the setting aside of some warnings, the criticism did not extend to the final written warnings the commissioner took into account in reaching his decision.
- [12] The amount of weight a commissioner attaches to evidence does not, on its own render an award reviewable. The applicant needs to show that the amount of weight attached led the commissioner to reach an unreasonable decision.<sup>2</sup> The applicant's submission that the commissioner committed a gross irregularity by attaching too much weight to the applicant's failure to put his version that he had an agreement with Lamani to the third respondent's

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<sup>2</sup> See *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as Amicus Curiae)* [2013] 11 1074 (SCA) at para 25.

witness does not assist the applicant. The commissioner dealt with the omission and gave reasons for his ruling.

[13] Contrary to the applicant's submissions, that the commissioner failed to consider sanction less than dismissal before reaching the decision on the appropriateness of the sanction of dismissal, the commissioner considered that the applicant was on final written warning for insubordination and that progressive discipline had been ineffective to correct his conduct.

[14] The applicant did not clear the first hurdle of showing the error made by the commissioner. He therefore could not rely on his submission that the commissioner's errors deprived him of his right to a fair hearing. The commissioner considered the principal issue before him. He assessed the evidence before him. His rulings are based on the evidence before him and the decision that he reached is one a reasonable decision maker could reach.

[15] In the premises, the following order is made:

15.1 The application is dismissed.

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Lallie J

Judge of the Labour Court of South Africa

## Appearances

For the Applicant: Mrs Van Staden of the Justice Centre

For the Third Respondent: Advocate Grogran

Instructed by: Joubert Galpine Searle

LABOUR COURT