



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case no: P 102/12

In the matter between:

SUTHERLAND TRANSPORT

Applicant

and

**THE NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT AND LOGISTICS INDUSTRY**

First Respondent

SIYABONGA COKILE N.O

Second Respondent

DENZIL VAN DER BYL

Third Respondent

Heard : 22 October 2013

Delivered : 05 August 2014

Summary: Application to review and set aside arbitration award. Award is reasonable and not to be interfered with on review. Compensation to be calculated on the employee's rate of remuneration on the date of dismissal. Compensation cannot be calculated on the basis of a salary the employee would have earned had he accepted an offer he never accepted.

JUDGMENT

PRINSLOO, AJ

Introduction

- [1] The Applicant is seeking to review and set aside an arbitration award issued on 27 January 2012 and to substitute it with an order that the Third Respondent's ('the Respondent or van der Byl') dismissal was fair, alternatively to remit the matter back to the First Respondent for a hearing *de novo*. The application is brought in terms of the provisions of section 145 of the Labour Relations Act¹ ('the Act').
- [2] The issue in dispute is whether the Respondent's dismissal was substantively and procedurally fair.
- [3] The Second Respondent ('the arbitrator') found the Respondent's dismissal procedurally fair and substantively unfair and ordered that the Applicant pays van der Byl compensation in the sum of R 42, 000.00.

Condonation

- [4] At the outset, the Applicant sought condonation for the late filing of the application for review that was filed 5 days late.
- [5] In the application for condonation the Applicant explained the reasons why this application was filed late. I considered the reasons for the delay and I am of the view that the delay is not excessive, the explanation tendered is plausible and I have also considered the fact that van der Byl is not opposing the application for condonation. For these reasons condonation is granted.

Brief exposition of the facts

- [6] Mr van der Byl was employed by the Applicant as a code 14 long distance driver in April 2008. His duties included driving heavy duty trucks on long distances. He earned a salary of about R14 000 per month.
- [7] It was common cause that van der Byl was involved in a collision whilst on duty in 2008. According to him, following this collision he started experiencing ill health and he suffered from gastro and appendicitis, which resulted in his appendix being removed.

¹ Act 66 of 1995.

- [8] During the period 25 January 2009 and 9 December 2010, van der Byl was absent from work for a total of 43 days on sick leave and 35 days on unpaid leave. He was also booked off as unfit for work from 9 December 2010 until 12 January 2011.
- [9] On 20 January 2011 van der Byl was called to a meeting with the Applicant's erstwhile human resources manager, Ms Yolandi Cundy. Ms Cundy referred to this meeting as an 'informal discussion'.
- [10] Ms Cundy's evidence before the arbitrator was that during this 'informal discussion', she and van der Byl went through his sick leave and doctors' sick notes, one in particular from Dr Titus and from Dr Brown. The sick notes stated that van der Byl was unfit for work. The medical doctor recommended that van der Byl be taken off driving heavy duty trucks.
- [11] It is common cause that van der Byl was due to undergo a further medical assessment on 6 April 2011.
- [12] Ms Cundy testified that van der Byl wanted to be medically boarded but that was not an option as his incapacity was not of a permanent nature and it was not a situation where he would never be able to drive again. It was temporary.
- [13] A second meeting was held on 27 January 2011 and during this meeting van der Byl was offered two alternative positions, one as a local driver collecting post and performing general administrative functions, not driving a heavy truck but a normal vehicle and the other was assisting in the maintenance division. It is common cause that van der Byl rejected these alternative positions because the remuneration he would have received was around R 2 200.00 per month and it was too little for him to accept as he was at the time earning R 14 000 per month and was the sole breadwinner.
- [14] On the other hand van der Byl proposed that he be offered the position of 'instructor'. The Applicant rejected this proposal as the Applicant was of the view that it was impossible to offer this position to van der Byl as the duties of an instructor were more onerous than those of a driver. According to the Applicant, the instructor has to be physically present with the trainee driver on long distances and would have to take over the duties of driving in the event the trainee driver encounters difficulties on the road. Mr van der Byl also

suggested that he be boarded or retrenched. The Applicant also rejected these suggestions for alternatives.

- [15] According to Ms Cundy the alternative positions offered to van der Byl would be on a temporary basis pending the results of the follow up assessment with Dr Brown on 6 April 2011. Mr van der Byl disputed the fact that he had knowledge of the temporary nature of these alternative positions. It is not evident that he was aware that the Applicant was willing to wait for the results of his re-assessment, nor did Ms Cundy testify to that effect.
- [16] Ms Cundy testified that the Applicant followed the prescribed steps, provided alternative positions to van der Byl and that there was nothing else left that the Applicant could do but to dismiss him.
- [17] Mr van der Byl was dismissed on 31 January 2011 for reasons of incapacity and ill-health.
- [18] Mr van der Byl testified that he consulted Dr Brown on 6 April 2011 and he was found to be fit for work.

The arbitration award

- [19] It was common cause during the arbitration that the Applicant terminated van der Byl's services on 31 January 2011, after an incapacity enquiry was held, and the reason for termination was incapacity and ill-health. It was also common cause that van der Byl was absent for extended periods during the period January 2009 and January 2011, so was the fact that he was injured on duty in 2008 when he was involved in an accident whilst driving the Applicant's truck.
- [20] The central issue to be determined by the arbitrator was whether the Respondent followed the four-stage enquiry provided for in Schedule 8 of the Act.
- [21] In deciding the case before him, the arbitrator considered the provisions of Schedule 8 of the Act, the Code of Good Practice: Dismissal ('the Code'). Items 10 and 11 thereof provide for incapacity due to ill health or injury. Item 10 reads as follows:

‘10: Incapacity: Ill-health or injury

- (1) Incapacity on the grounds of ill-health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
- (3) The degree of incapacity is relevant to the fairness of the dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps to consider.
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate incapacity of the employee is more onerous in these circumstances.’

[22] Item 11 provides guidelines in cases of dismissal arising from ill-health or injury and embodies the so-called four-stage enquiry. Item 11 provides that:

‘Any person determining whether a dismissal arising from ill-health is unfair should consider-

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable-

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.'

[23] The arbitrator also sought guidance in the well-known case of *Standard Bank of SA v CCMA and Others*² where the court formulated the four-stage enquiry which employers ought to embark on when dealing with dismissal based on incapacity due to illness³.

[24] The Labour Court in the matter of *IMATU obo Anton Strydom v Witzenburg Municipality and others*⁴ held as follows;

'The onus of proving the fairness of a dismissal remains always with the employer. An element of that onus is the employer's duty to avoid the dismissal. Accommodating an employee with a disability is the primary way of avoiding a dismissal for incapacity. To determine how to accommodate the employee, the employer needs to know what the employee is capable of doing. For that, the employer depends on the employee and medical advisers. It could have obtained medical reports from doctors of its own choice if it wanted to challenge the employee's doctors.'

[25] The Labour Appeal Court in the matter of *IMATU obo Anton Strydom v Witzenburg Municipality and others*⁵ held as follows;

² (2008) 29 ILJ 1239 (LC) at para 71

³ 'Stage one: the employer must enquire into whether or not the employee with a disability is able to perform her work. If the employee is able to work, that is the end of the enquiry; the employer must restore to her position or one substantially similar to it. If the employee is unable to perform her work and her injuries are long term or permanent, then the next three stages follow. Stage two: the employer must enquire into the extent to which the employee is able to perform her work. This is a factual enquiry to establish the effect that her disability has on her performing her work. The employer may require medical or other expert advice to answer this question. In respect of stage three: the employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the possibility. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee. During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the employee. Stage four: if no adaptation is possible, the employer must enquire if any suitable work is available.'

⁴ (2008) 29 ILJ 2947 (LC).at 2950 E-H

'I am of the view that the provisions of item 10 and 11 are inextricably tied and thus non-compliance therewith would render a dismissal both procedurally and substantively unfair..'

In the case of *Samancor Tubatse Ferrochrome v Metal and Engineering Industries Bargaining Council and Others* (footnote omitted), the court, dealing with a dismissal based on incapacity albeit not one related to illness, stated as follows:

'Manifestly, the question as to whether a dismissal in the circumstances of the present dispute is substantively fair depends upon the facts of the case. An employer needs to consider the reasons for the incapacity, the extent of the incapacity, whether it is permanent or temporary, and whether any alternatives to dismissal do exist'.

- [26] In my view the arbitrator's application of the principles, as set out, as a yardstick in cases such as these, was correct.
- [27] The arbitrator considered whether the Applicant followed the four-stage enquiry. He found that since van der Byl was due to be re-assessed by his doctor on 6 April 2011, his incapacity was temporary and that called for the Applicant to consider the last three stages of the enquiry. Stage two was a factual enquiry and the onus was on the Applicant to enquire into what extent van der Byl was unable to perform his duties. The Applicant dismissed van der Byl before he was re-assessed and in doing so, the Applicant failed to enquire into the extent van der Byl would have been able to perform his duties. The Applicant's witnesses testified that they regarded the incapacity as temporary.
- [28] The arbitrator found that the Applicant did not investigate what caused van der Byl's incapacity and had they waited for the re-assessment on 6 April 2011, they would have known the extent of his capacity to perform his duties. The Applicant should have investigated the cause of van der Byl's ill health and the extent to which he was able to perform his duties after the follow-up assessment on 6 April 2011.
- [29] The arbitrator found that the Applicant followed stages three and four when it considered van der Byl's work circumstances and created alternative positions to accommodate him.

[30] The Applicant's failure to investigate the extent to which van der Byl was capable of performing his duties caused the arbitrator to find his dismissal substantively fair. The arbitrator awarded three month's compensation, as van der Byl's dismissal was unfair only in respect of the Applicant's failure to investigate the extent to which he was able to perform his duties.

[31] The arbitrator found van der Byl's dismissal procedurally fair.

Grounds for review

[32] The Applicant seeks to review the arbitration award on a number of grounds as set out in the founding and supplementary affidavits filed in support of the application for review.

[33] In the heads of argument filed on behalf of the Applicant, Mr Euijen identified three grounds for review. Those are the arbitrator's findings in respect of the extent of van der Byl's incapacity, the arbitrator's failure to assess the probabilities and quality of van der Byl's evidence and the amount of compensation awarded. The application for review is opposed.

[34] This application for review will be considered on the basis of the three main grounds identified by the Applicant.

The test on review

[35] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*;⁶ 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[36] In the decision of *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁷ the Supreme Court of Appeal held that:

'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

⁶ (2007) 28 ILJ 2405 (CC) at para 110.

⁷ (2013) 34 ILJ 2795 (SCA).

within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. 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.’

[37] In the subsequent judgment of *Goldfields Mining South Africa v Moreki*⁸ the Labour Appeal Court held that:

“In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.”

[38] It is against this background that the Applicant's grounds of review must be assessed.

Analysis and conclusion

[39] The first ground for review relates to the arbitrator's findings in respect of the extent of van der Byl's incapacity. The Applicant's argument is that the arbitrator failed to consider the distinction between the *Standard Bank* matter and the *IMATU obo Strydom* matter and the attitude of van der Byl escaped the arbitrator. The findings of the arbitrator that van der Byl's employment was prematurely terminated left out of account that van der Byl exhausted his leave, refused offers of alternative employment and pressed for a permanent termination package. The Applicant submitted that it was evident from the testimony of the Applicant's witnesses that the Applicant was prepared to accommodate van der Byl in the period until his next assessment.

[40] The Applicant's case was supplemented in a supplementary affidavit wherein it was averred that the arbitrator ought to have found that van der Byl was not prepared to agree to any interim arrangement pending his re-assessment on 6 April 2011 but instead insisted on a severance package or high paid light

⁸ (2014) 35 ILJ 943 (LAC).

duties job when none was available and the Applicant cannot be criticized for terminating van der Byl's services prior to 6 April 2011. The arbitrator had no regard for the extent to which van der Byl contributed to the situation where the Applicant found itself in that as at 30 January 2011 it had exhausted all viable and reasonable options and had no alternative to dismiss van der Byl on the ground of incapacity.

- [41] Mr Unwin on behalf of van der Byl submitted that the onus was on the Applicant to ensure that the dismissal was for a fair reason and it ought to have investigated the cause of van der Byl's ill health and to what extent he was able to perform his duties after the follow-up assessment on 6 April 2011. The Applicant failed to comply with stage two of the four-stage approach to dismissals for ill-health.
- [42] In my view the starting point to assess and evaluate this ground for review would be the arbitrator's findings.
- [43] The question as to whether a dismissal in the circumstances of the present dispute is substantively fair depends upon the facts of the case. An employer needs to consider the reasons for the incapacity, the extent of the incapacity, whether it is permanent or temporary, and whether any alternatives to dismissal do exist.
- [44] The arbitrator considered whether the Applicant followed the four-stage enquiry and since van der Byl's incapacity was temporary, the Applicant had to consider the last three stages of the enquiry. The arbitrator found that the Applicant followed stages three and four when it considered van der Byl's work circumstances and created alternative positions to accommodate him.
- [45] There is no merit in the submission that the findings of the arbitrator left out of account that van der Byl exhausted his leave, refused offers of alternative employment and pressed for a permanent termination package. These issues were indeed considered by the arbitrator.
- [46] The arbitrator's finding on substantial unfairness is limited to the Applicant's non-compliance with stage two of the enquiry.

- [47] Stage two is a factual enquiry and the onus was on the Applicant to enquire into what extent van der Byl was unable to perform his duties. The arbitrator found that the Applicant did not investigate the cause of van der Byl's incapacity and had they waited for the assessment on 6 April 2011, they would have known the extent of his capacity to perform his duties. The Applicant should have investigated the cause of van der Byl's ill health and the extent to which he was able to perform his duties after the follow-up assessment on 6 April 2011.
- [48] The Applicant's failure to investigate the extent to which van der Byl was capable to perform caused the arbitrator to find his dismissal substantively fair.
- [49] There was no evidence before the arbitrator to show that the Applicant ever embarked on any enquiry into the extent or otherwise of van der Byl's illness or incapacity or the cause of his incapacity. In fact, the evidence of Mr Knox and Ms Cundy show that the only medical enquiry made by the Applicant was the contents of the doctor's note which stated that van der Byl 'was unfit to drive'. No further enquiry was made in respect of the extent of his inability to drive. What makes matters worse for the Applicant is the fact that no further medical assessment was made prior to dismissal neither by van der Byl's own doctor nor of any other doctor appointed by the Applicant. Mr van der Byl's incapacity was decided only on the doctors' notes he submitted. The Applicant never investigated the reason for van der Byl's ill health and incapacity. This is unfortunate, as the Code and this Court clearly require that the degree of incapacity should be investigated, at least in a better way than the investigation conducted by the Applicant.
- [50] Based on the evidence before the arbitrator and the arguments before this Court, it is clear that the Applicant did not investigate or consider the reasons for the incapacity and the extent of the incapacity and in failing to do so, the Applicant failed its obligations as envisaged in item 10 and 11 of the Code⁹.
- [51] The Applicant placed much emphasis on the alternative positions it had created for van der Byl. The arbitrator accepted this when he found that the Applicant had complied with stages three and four of the enquiry.

⁹ supra

- [52] There is no merit in this ground for review. It is evident that the Applicant did not properly consider the reasons for van der Byl's incapacity and the extent of his incapacity and the enquiry conducted by Ms Cundy fell short of what the Code and this Court requires of an employer. The arbitrator's finding that the Applicant did not follow stage two of the enquiry is not so unreasonable that it calls for interference.
- [53] The second ground for review is that there were material disputes of fact between the parties. The disputed facts are identified as whether it was made clear to van der Byl that the positions offered were temporary, whether he made any counter offer to the alternative positions and whether he was pressed to resign. It is further the Applicant's case that material portions of van der Byl's evidence was never put to the Applicant's witnesses and van der Byl presented different versions on when Ms Cundy allegedly asked him to resign. The Applicant submitted that the arbitrator had to assess the probabilities and the quality of van der Byl's evidence and he did neither. A reasonable arbitrator should have found that van der Byl's evidence was of a poor quality and self-serving.
- [54] The Respondent submitted that the arbitrator's findings on the factual disputes amount to factual findings and that the Court should not interfere with factual findings unless those findings are completely disconnected from the evidence before the arbitrator, completely unsupported by evidence or amount to speculation. The material disputes of fact played no role in the determination of the matter.
- [55] The Applicant identified the disputed facts as whether it was made clear that the positions offered were temporary, whether van der Byl made any counter offer to the alternative positions and whether he was pressed to resign. The arbitrator accepted that the Applicant followed stages three and four of the enquiry and he found that the Applicant created alternative positions to accommodate van der Byl, he accepted that the alternatives were short of dismissal and that those alternatives were rejected by van der Byl. The arbitrator found that it was common cause that the Applicant dismissed van der Byl after an incapacity hearing was held.

- [56] In my view the arbitrator determined these issues in favour of the Applicant and he accepted the Applicant's version. Once the arbitrator accepted that the Applicant dismissed van der Byl after an incapacity hearing was held and that it complied with stages three and four, he effectively preferred the Applicant's version. I can see no review of these findings because the arbitrator failed to specifically resolve whether it was made clear that the positions offered were temporary, whether van der Byl made any counter offer to the alternative positions and whether he was pressed to resign.
- [57] The Applicant's case is further that material portions of van der Byl's evidence was never put to the Applicant's witnesses and van der Byl presented different versions on when Ms Cundy allegedly asked him to resign. The arbitrator accepted that van der Byl was dismissed and he made no findings on whether he was asked to resign or not. In my view dismissal was never in dispute and van der Byl's resignation or not was irrelevant to the dispute the arbitrator had to determine.
- [58] Portions of van der Byl's evidence that were not put to the Applicant's witnesses played no role in the arbitrator's determination of the dispute.
- [59] Ms Cundy's testimony showed that she did not conduct a proper enquiry to determine the reasons for the incapacity, the extent of the incapacity and whether it was permanent or temporary. Her evidence supports the finding that the Applicant failed to follow stage two of the enquiry and none of the versions not put to the Applicant's witnesses, or the dispute whether van der Byl proposed alternatives or was forced to resign, informed or influenced the arbitrator's finding that stage two was not followed.
- [60] The finding made by the arbitrator that stage two was not followed is not disconnected from the evidence before him and is indeed supported by evidence. The material disputes of fact played no role in the determination of the matter.
- [61] The last ground for review relates to the compensation awarded to van der Byl. The Applicant's case is that the arbitrator should have concluded that van der Byl is not entitled to any compensation in view of the fact that he refused offers of alternative employment. The award of three months' compensation is

without rational foundation, arbitrary and unreasonable. The Applicant's last attack on the compensation is that the amount awarded should have been calculated at the rate of R 2 200 per month, which is the amount van der Byl would have earned had he accepted the offer of alternative employment.

[62] This ground for review is without merit for a number of reasons.

[63] The arbitrator found that van der Byl's dismissal was substantively unfair and awarded three months' compensation, as van der Byl's dismissal was unfair only in respect of the Applicant's failure to investigate the extent to which he was able to perform his duties. The arbitrator has set out in detail the factors he considered when he decided on the appropriate compensation. He substantiated the awarding of three months' compensation and there is no merit in the allegation that the award of three months' compensation is without rational foundation, arbitrary and unreasonable.

[64] The Applicant submitted that the amount awarded should have been calculated at the rate of R 2 200 per month, which is the amount van der Byl would have earned had he accepted the offer of alternative employment. This submission is outrageous. During the arbitration proceedings the parties agreed that van der Byl's remuneration was R 14 000 per month. This was not disputed, nor was the arbitrator at any point requested to consider a different amount to calculate van der Byl's remuneration.

[65] It is trite that when compensation is awarded, it is calculated at the employee's rate of remuneration on the date of dismissal.

[66] The Applicant seeks for compensation to have been calculated at the rate of R 2 200 per month, which is the amount van der Byl would have earned had he accepted the offer of alternative employment. It is common cause that van der Byl did not accept the alternative offer and it is astonishing that the Applicant is of the view that compensation should be calculated on the basis of a salary he would have earned had he accepted an offer he never accepted.

[67] In my view an award of three months' compensation for substantive unfairness is not so unreasonable that no other reasonable decision maker could have awarded it.

[68] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed and this Court can only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[69] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I find that the arbitrator's decision did not fall outside of the band of decisions to which a reasonable decision maker could come to. The conclusion that the arbitrator reached in respect of the fairness and unfairness of the Applicant's dismissal is not one that no other reasonable decision maker could not have reached and it is therefore not subject to review.

[70] I can see no reason why costs should not follow the result.

Order

[71] In the premises the following order is made:

71.1 Condonation of the late filing of the review application is granted.

71.2 The application for review is dismissed with costs.

Connie Prinsloo

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate M Euijen

Instructed by : Deon van der Merwe Attorneys

For the Third Respondent : Mr C Unwin of Chris Unwin Attorneys

LABOUR COURT