



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P229/11

In the matter between:

BERNARD ANTONY MARROW

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER NALEDI BISIWE

Second Respondent

PICK 'N PAY

Third Respondent

Heard: 23 October 2013

Delivered: 22 August 2014

Summary: There is no basis to review and set aside an award which falls within bounds of reasonableness. Errors which have no effect on the reasonableness of the award do not render it reviewable.

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 an arbitration award issued by the second respondent ('the commissioner') under the auspices of the first respondent ('the CCMA'). It is opposed by the third respondent.

Factual background

- [2] The applicant was employed by the third respondent and a shelf parker from 1 December 2007 until his dismissal for misconduct on 18 April 2008. The facts which led to the applicant's dismissal are mostly common cause. Policies of the third respondent require its employees to be searched each time they exit its store. On 28 March 2008, the applicant needed to discard empty boxes. There was no male security guard at the receiving area exit. He waited briefly at the door to be searched by Mr Mfulatelwa (Mfulatelwa), the receiving manager. He went out before he would be searched. A verbal exchange ensued between the applicant and Mfulatelwa which was joined by Mr Ritchie (Ritchie), the departmental manager. The incident was reported to Mongameli, the floor manager who called the applicant to his office. His attempts to resolve the problem were unsuccessful and he instructed the applicant to leave work for the day as he was in no position to carry on with his duties. After swiping out the applicant was seen by Mr Taylor (Taylor), the assistant store manager at the cigarette counter. He had his shirt unbuttoned and tied at the bottom. Taylor told him to dress properly but the applicant became rude and aggressive and refused to carry out the instruction.
- [3] As a result of the events of 28 March 2008, the following charges were preferred against the applicant:

'1. Transgressing laid down and regulations in that you left the store and refused to be searched; 2. Bringing the company name into disrepute; 3. Disobeying lawful instructions from management with regards to being searched and with regard to your dress code.'

The applicant was found guilty of all the charges and dismissed. He challenged the fairness of his dismissal at the CCMA where the commissioner issued the award which is the subject of this application.

- [4] The applicant filed this application outside the six weeks period prescribed in section 145 of the Labour Relations Act 66 of 1995 ('the LRA') and applied for condonation. The condonation application is unopposed. I have considered the submissions made by the applicant in his condonation application and I am satisfied that he has shown good cause for condonation of the lateness. The application for the late filing of the review application is therefore granted.

Condonation for the late filing of the record

- [5] Rule 7A (6) requires an applicant for review to furnish the registrar and the other parties with a copy of the record. The applicant was informed by the registrar of the availability of the record on 27 July 2011, filed the record on 3 May 2013 and served it on the third respondent on 2 July 2013 delaying by about two years. Since his dismissal, the applicant has not secured alternative employment. He managed to raise funds to pay for volume one of the transcript of the arbitration proceedings which he delivered at the third respondent on 11 January 2012. He applied for legal aid on 22 March 2012 from which date he was represented by Legal Aid South Africa which made the filing of the outstanding portion of the record possible. The applicant's explanation is that he could not afford to pay for the whole transcript, a problem he commuted to and the registrar and the third respondent on a number of occasions.
- [6] The third respondent opposed this application on the grounds that the delay is excessive. It sought to rely on clause 11.2.2 and 11.2.3 of the Practice Manual of this court which provide that an applicant's review application is deemed to be withdrawn in the event of the applicant's failure to file the record within 60 days from the date of being advised by the registrar of its availability. The period may be extended. The third respondent argued that this application should be dismissed based on the *vigilantibus non dormientibus lex subveniunt* maxim particularly because it raised the issue of the delay in its answering affidavit to the review application (the answering affidavit).

- [7] The third respondent cannot rely on the Practice Manual because it came into effect on 2 April 2013. It does not apply retrospectively. Save for bringing the lateness of the filing of the record to the applicant's attention in the answering affidavit, the third respondent took no steps to have the dispute disposed of expeditiously. Rule 11 was open to the third respondent but it decided not to invoke its provisions. The applicant will suffer more prejudice than the third respondent in the event of this application being refused. Further, the applicant did not sit on his laurels. He made his interest in this matter known.
- [8] It is common cause that the real reason for the delay is the applicant's inability to pay for the transcript of the record of the arbitration proceedings. It has been held in a number of decisions of this court that it serves all who appear before it including the impecunious. Having taken into account the circumstances of this matter, I accept that the applicant never lost interest in pursuing it, a fact which was known to the third respondent which decided to afford him an opportunity to file the record. I am not convinced that the doors of this court should be closed to the applicant because he had no source of income and therefore unable to pay for the transcript of the record. While the delay is inordinate, the explanation proffered by the applicant is reasonable. The applicant took active steps to pursue this matter and granting this application will not prejudice the third respondent. For these reasons, the application for the late filing of the arbitration record is granted.

The award

- [9] The commissioner found that the applicant did not dispute the existence of the rule which required him to be searched before exiting the third respondent store. His knowledge was confirmed by his conduct of going to the receiving area to be searched before exiting. He merely challenged the third respondent's failure to display the rule on the walls. The commissioner considered the evidence that before taking up employment with the third respondent, the applicant worked for a security firm and performed his duties at one of the Pick n Pay stores. He was therefore aware of the need to be searched. The commissioner expressed the view that the applicant could have cancelled his box discarding trip in the absence of an emergency which forced

him to exit without being searched. She accepted the third respondent's version that Mfulatelwa followed the applicant after he exited the store and asked him to submit to a search but he refused. The version was not disputed by the applicant who seemed to take exception to Mfulatelwa's delay in leaving whatever he was doing in order to search him. The commissioner found that the third respondent had discharged the onus of proving that the applicant's refusal to be searched because of Mfulatelwa's delay by a few seconds was unjustifiable.

- [10] The commissioner found that the applicant made himself guilty of the third charge when he refused to submit to a search after being urged by Mfulatelwa and Ritchie.
- [11] Dealing with charge two which is based on the manner in which the applicant wore his uniform after he was told to leave the workplace, the commissioner considered that the uniform policy specifies that the uniform is an important element in the creation of a positive image of Pick 'n Pay, it forms part of many different aspects of the company's corporate identity. She took into account the third respondent's submission that the unkempt manner in which the applicant wore his uniform discredited its image. After considering the applicant's defence that there was no prescribed manner for wearing the uniform and that the incident occurred outside working hours, she found that the way in which the applicant was wearing his uniform was inconsistent with the third respondent's stated objectives. She found that the third respondent could discipline the applicant although he had knocked off because he was at the store, during working hours and wearing uniform similar to that of the employees who were still on duty. His uniform was associated with the third respondent by members of the public. Taylor was therefore within his right to take him to task for his conduct. The commissioner found the applicant's appearance deserving of censure and disregarding Taylor's instruction to dress properly disobeying a lawful instruction with regard to the dress code.
- [12] The commissioner found the applicant's dismissal procedurally fair because the third respondent's disciplinary code indicates that its list of disciplinary offences is not comprehensive and serve as guidelines. The code gives

management the discretion to determine, the level of disciplinary action to be initiated according to the degree of transgression. She found that a transgression of laid down rules or procedures falls under mandatory offences for which the conducting of a disciplinary enquiry is compulsory.

Test for review

- [13] The test for review is whether the commissioner's decision is a decision a reasonable decision maker could not reach based on the evidence before the commissioner.¹ In determining review applications the reviewing court needs to consider the evidence before the commissioner in its totality. It is further required to consider if the commissioner considered facts presented at the arbitration and reached a reasonable conclusion. In this regard see *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*.²
- [14] The applicant drafted his founding papers in which he stated everything that he is dissatisfied with in the award some of which does not necessarily constitute grounds for review. The complaints include the commissioner's failure to establish whether the charge is dismissible as the third respondent's disciplinary code is silent in that regard. Her failure to consider that the applicant was not inducted and not in possession of the third respondent's disciplinary code. He had referred a dispute regarding the third respondent's failure to induct him to the CCMA. She disregarded his evidence in connection with the video footage and his refusal to be searched. The commissioner was prejudiced, partial and biased and accepted the third respondent's evidence before considering the probabilities of his version. The applicant complained about the commissioner's failure to comply with the code of good practice. She ignored his shop steward's evidence that there was no need for a disciplinary hearing as he was not guilty of refusal to carry out instructions, theft or dishonesty. She stopped him from leading his shop steward on the fairness of his dismissal and used his failure to lead evidence against him in her award. She also ignored evidence in his favour. The applicant criticised the commissioner for not ruling that his misconduct deserved a verbal warning and

¹ See *Sidumo and other v Rustenburg Platinum mines Ltd and Others* 2008 (2) SA (CC) at para 110.

² [2014] 1 BLLR 20 (LAC) at paras 15-16.

for not taking into account that sending him home after the incident involving his refusal to be searched was not the third respondent's procedure. Had he not been sent home the conduct in charges two and three would not have happened. On the list of the commissioner's errors the applicant seeks to rely on, is her failure to consider that the applicant was given no instruction and the third respondent's breach of its own security procedures by not having a security guard at the door of the receiving area. The commissioner is alleged to have made false allegation and given management protection by not recognising the third respondent's inconsistency but protecting Mfulatelwa by finding that he chased after him when he did not even run. She is further attacked for twisting the applicant's version, disregarding his submissions that Mr young (Young) who charged him was an important witness and not taking into account that other dishonest employees had been given their jobs back. In the applicant's heads and supplementary heads of argument an effort is made to categorise some complaints into legitimate grounds for review.

- [15] An analysis of the grounds for review reflects that the applicant seeks to rely on a number of errors made and gross irregularities committed by the commissioner. In *Herholdt v Nedbank Ltd (Congress of South African Trade union as Amicus Curiae)*³ it was held that the following approach should be adopted in determining reviews based on gross irregularities of commissioners.

'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 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'.

³ [2013] 11 BLLR 1074 (SCA) at para 25.

[16] The same principle was enunciated as follows in *Gold Fields (supra)*:

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The Court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations act ("LRA") continue to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. 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'⁴.

[17] A number of grounds the applicant sought to rely on are not based on the evidence. The reasonableness of the award is based on the evidence before the commissioner, the relationship between grounds for review and the evidence before the commissioner is therefore material. It was argued on behalf of the applicant that the conclusion that the sanction of dismissal was appropriate was unreasonable because in reaching it, the commissioner completely failed to attach any weight to a number of important factors. The factors include the absence of evidence in respect of the charge of bringing the third respondent's name into disrepute. This argument overlooks the fact that the commissioner's ruling is based on Taylor's evidence that the incident involving the applicant's refusal to dress properly created a bad image for the third respondent in the public eye. It occurred on a Saturday which coincided with the end of the month when there were many customers in the store. A further factor is the concession made by the third respondent that failure to

⁴ Above n 2at para 14.

follow the dress code was punishable by a verbal warning. The applicant's argument does not render unreasonable the commissioners finding that the list of disciplinary offences in the third respondent's disciplinary code provides that it constitutes guide-lines. It gives management discretion to determine the level of disciplinary action to be initiated according to the degree of the transgression.

- [18] The applicant argued that the commissioner failed to consider as a mitigating factor the fact that some misconduct took place while the applicant was off-duty. The commissioner is required to act reasonably. She applied her mind to the issue of misconduct which is committed by employees outside working hours and made a reasonable ruling based on the evidence before her. The applicant's argument that the importance of the rule that employees need to be searched before exiting the store is not based on the evidence tendered at the arbitration. The commissioner's ruling in this regard is based on the evidence before her. She accepted Mfulatelwa's need to run after the applicant leading him to exit the store without being searched. The applicant's argument that he was not made aware of the rule, its importance and consequences of its breach is not based either on the evidence before the arbitrator or the pleadings. It flies in the face of the unchallenged evidence that the applicant was given the human resources document which included the disciplinary code. It is further common cause that when the applicant joined the third respondent, he already knew the consequences of leaving the store without being searched. It is knowledge that he could not wish away which he correctly did not deny. The argument therefore has no factual basis.
- [19] The applicant argued that the commissioner failed to consider progressive discipline. In the award, the commissioner gave clear and reasonable reasons based on the evidence before her why dismissal was appropriate.
- [20] The applicant had to provide the commissioner with relevant facts on which to take her decision on the fairness or otherwise of the applicant's dismissal. A reading of the record reflects that the commissioner afforded the applicant a fair opportunity to present his case. The applicant was not dismissed for theft and the commissioner made that fact clear in her award. The applicant's

complaint that the commissioner ignored evidence which proved that he did not commit theft or any act of dishonesty does not assist him. So is his criticism that the commissioner failed to consider that the decision to send him home was against the third respondent's procedure. Evidence was led at the arbitration to the effect that Mongameli had the authority to handle the incident involving the applicant as he deemed fit. The commissioner's finding that a manager who removes from the workplace, an employee who is not in a position to perform his duties in an effort to resolve conflict is not unreasonable. The applicant's decision to commit further misconduct after he was told to leave the workplace for the day cannot be imputed on either Mongameli or the commissioner. It is factually incorrect that one of the commissioner's errors was that she did not consider that no instructions were given to the applicant. Overwhelming admissible evidence supporting the finding was led at the arbitration. The applicant did not deny that Mfulatelwa gave him instructions to submit to a search. His gripe was that he took his time. He further did not deny that Taylor instructed him to dress properly and correct the way he had worn his uniform. His complaint was that he was off duty and under no obligation to carry out the instructions. The attack based on the absence of a security guard at the receiving area has no basis either as Mfulatelwa's evidence was that security formed part of his responsibilities. He is the one who would have searched the applicant had he not refused. Amongst his grounds for review, the applicant, in stark contrast to his accusation based on the commissioner's omissions, acknowledged that it was management's responsibility to carry out searches.

- [21] The evidence that the applicant was a security guard placed at Pick and Pay before taking up employment at the third respondent constitutes relevant unchallenged evidence which the commissioner correctly took into account in reaching her decision. It is not true that the commissioner accused the applicant of conspiracy and pilferage. The commissioner did not falsely charge the applicant with dishonesty and insubordination as he alleged. Insubordination forms part of the charges the third respondent preferred against the applicant.

- [22] Contrary to the applicant's accusations, the commissioner considered his concerns about the third respondent's decision not to call Young as a witness at the arbitration, the commissioner made it clear that the third respondent could not be dictated to with regard to witness it wanted to call. She further apprised the applicant of his right to call Young as his own witness if he so wished. The applicant did not disclose the manner in which the commissioner twisted the version of his evidence.
- [23] The applicant was not dismissed for dishonesty, his attempt to rely on an unsubstantiated claim that the third respondent gave two of its employees their jobs back after committing acts of dishonesty does not assist his case. The applicant attempted to rely on the fact that he had approached the CCMA because of the third respondent's failure to induct him. He expressed the view that the third respondent could not discipline him before he was inducted. However, Mr Harris (Harris), who chaired his disciplinary enquiry led unchallenged evidence that on 23 May 2008 a portion of the third respondent's human resources documents including its disciplinary code was printed and handed to the applicant who acknowledged receipt by appending his signature. Nothing precluded the third respondent from charging the applicant before his induction. He was in possession of the disciplinary code and did not claim not to have known the existence of the misconduct of exiting the premises without being searched and its consequences. Refusal to carry out an instruction is the kind of misconduct which an employer can reasonably expect an employee to be aware of.
- [24] It is not the duty of the review court to determine the fairness of a dismissal. Commissioners are charged with the responsibility of making such pronouncements. An award may not be reviewed and set aside because a commissioner has reached a decision the reviewing court would not have reached. In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*,⁵ it was held that two commissioners acting reasonably may reach different decisions on the same matter. The test is whether the award falls within bounds of reasonableness.

⁵ [2008] 3 BLLR 197 (LAC) at para 97.

- [25] The applicant did not succeed in proving that the commissioner committed errors or acts of misconduct which led her to reach an unreasonable decision. The piece-meal approach adopted by the applicant in presenting his case did not assist him because in determining his application, the evidence before the commissioner had to be approached in its totality.
- [26] In the award, the commissioner identified the issue before her correctly. She dealt comprehensively with all the evidence in respect of the charges which the applicant was found guilty of. She further dealt with the enforcement of discipline in terms of the third respondent's disciplinary code. She gave reasons for her decision and relied on authority to highlight the gravity of insubordination. She applied the guide-lines in *Sidumo* (supra) in reaching her decision. When the totality of the evidence is considered it reflects that any error on the part of the commissioner did not have the effect of rendering her decision unreasonable.
- [27] In the premises, the following order is made:
- 27.1 The application for condonation of the late filing of the review application is granted.
 - 27.2 The application for condonation of the late filing of the record is granted.
 - 27.3 The application for review is dismissed.

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: Coenie Du Toit of the Third Respondent

LABOUR COURT