



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2862/2011

In the matter between:

L H MARTHINUSSEN

Applicant

and

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL (MEIBC)**

First Respondent

AHMED CACHALIA N.O.

Second Respondent

VUSI DANIEL KUBEKA

Third Respondent

JEFFREY NKOSENHLE NDLOVU

Fourth Respondent

MASTER BHEKI DLUDLU

Fifth Respondent

MSELEKI WILBERFORCE MAZULA

Sixth Respondent

Heard: 18 December 2014

Delivered: 27 January 2015

JUDGMENT

LE ROUX, AJ

- [1] Two applications are before me in this matter. In the first, under case number JR 2862/ 2011, the applicant (“LH Marthinussen”) seeks to have an arbitration

award issued by the second respondent under case numbers MEGA 29996, MEGA 29658, and MEGA 29494 reviewed and set aside. In this award the second respondent found that four employees, namely, VD Kubeka, JN Ndlovu, MB Dlodlu and MW Mazula, had been unfairly dismissed by the applicant.

- [2] The second application, under case number J 391/2012, seeks to have the same arbitration award made an order of court in terms of section 158(1) (c) of the Labour Relations Act, 66 of 1995 (“the LRA”) I should add that although all the pleadings cite the applicant as “LH Marthinussen” thus creating the impression that the employer is an individual, the applicant is, according to the founding affidavit, Savcio Holdings (Pty) Ltd. This is also reflected in a resolution of the board of directors of this company attached as annexure “VS1”. Nevertheless, in the interests of consistency, the heading in this judgment will also simply refer to LH Marthinussen.
- [3] The section 158 (1)(c) application came before Bhoola J on 5 February 2013 and was postponed *sine die* pending the outcome of the review application. The court order also records that the parties agreed that the handwritten notes of the second respondent would constitute the record of the arbitration proceedings.
- [4] Argument proceeded on the agreed basis that if the review application succeeds the section 158(1)(c) application will fall away. If the review application fails, the award will be made an order of court.
- [5] I therefore proceed to deal with the review application. As indicated above, the applicant in this matter is LH Marthinussen, a division of Savcio Holdings (Pty) Ltd, the entity that employed the four respondent employees who were dismissed by it. (These persons will be referred to as the “individual respondents”.)
- [6] The facts in this matter are largely common cause. During April 2010, the department where the individual respondents worked experienced low productivity levels. As a result management reviewed video footage of the activities of the night shift on 26 and 28 April 2010. The video footage showed that at various times during one or both of these night shifts all four of the individual respondents had

turned off their machines that they were operating, his was done prior to the end of the shifts. All four of them were then subjected to disciplinary proceedings.

[7] They faced a charge that read as follows –

‘Dishonesty related to false timekeeping resulting in financial and production loss to the Company’.

[8] The allegation of dishonesty arises from the applicant’s view that the individual respondents, who were hourly paid employees, accepted their wages for the full night shift or shifts when in fact they did not work a full shift or shifts.

[9] They were found guilty of this offence and dismissed. They challenged the fairness of their dismissal. It appears that three separate disputes under the case numbers referred to above were referred to the first respondent but that these were consolidated for the purposes of arbitration.

[10] The second respondent presided over the arbitration and issued an award on 12 October 2011. In this award the second respondent rejected the various defences raised by the individual respondents and found that they were guilty of turning off their machines as alleged. He then turned to the issue of whether dismissal was justified for these acts of misconduct. The relevant part of the award reads as follows -

‘The Respondent dismissed them for dishonesty as a result of false timekeeping **in that they did not work their full hours as expected and switched their machines off.(sic) (my emphasis)**. In my view by wording the charge as dishonesty the Respondent would easier be able to dismiss. Dishonesty is an offence for which employers can fairly dismiss employees in most instances. However, I believe the true essence of the charge is not dishonesty in the normal understanding of the word but rather the failure of employees to diligently fulfil their work functions as expected of them in respect of them working their full hours. I do not think the Applicants would have been charged let alone dismissed had they met their production targets. I also don’t believe the Applicants would have been dismissed had they had their machines on but did not meet the expected production.

The length of service of the Applicants must work as a strong mitigating factor and not an aggravating factor as suggested by Mr Abbott. In my view, dismissal was too harsh in the circumstances. Dismissal is the death knell of an employment relationship and an employer should only resort to it when the trust relationship has been irretrievably broken down. In my view a sanction short of dismissal would have had the desired effect on employees who have such lengthy years of service. This would also serve as a means of correcting their behaviour. The trust relationship in my view had not irretrievably broken down as a result of the Applicants misconduct.'

- [11] In essence, the second respondent found that the individual respondents were not guilty of dishonesty in the true sense of the word and that this, together with their length of service, meant that dismissal was too harsh a sanction. The trust relationship had not broken down. The second respondent reinstated the individual employees but not with retrospective effect. He also ordered that the individual respondents be given a final written warning. This was seen as a corrective measure.
- [12] The applicant seeks to review and set aside this award.
- [13] The grounds for review as set out in the founding affidavit all attack the finding that dismissal was not an appropriate sanction. These grounds are wide-ranging and the applicant has taken a "shot gun approach".
- [14] The most consistent theme running through the affidavit is that the second respondent misconstrued the evidence, and failed to consider or to consider properly, relevant evidence. The founding affidavit does not clearly state what this evidence was. However, the affidavit does specifically refer to other "additional" factors that should have been considered. These were –
 - 1.1. the individual respondents were the only employees in the relevant department on duty that evening and that their conduct therefore affected the productivity of the department;
 - 1.2. the negative effect that their conduct had on the applicant's business;
 - 1.3. the applicant's business would be harmed if such dishonest conduct was not "rooted out";

- 1.4. the importance of abiding by the principles of a disciplinary code in order to ensure consistency;
- 1.5. the fact that the individual respondents did not deny their conduct;
- 1.6. the threat which the reinstatement of the employees would have on the maintenance of discipline; and
- 1.7. the obligation of loyalty that the individual respondents owed their employer.

[15] In addition, it is argued that the second respondent failed to place sufficient importance on the breakdown of the trust relationship between the individual respondents and the applicant and that the second respondent should have accorded due deference to the employer's finding as to sanction.

[16] The founding affidavit argues for a process related review and argues that the Court should not enquire whether the award was capable of being sustained on other grounds that may emerge from the award.

[17] In his heads of argument, and during oral argument, the applicant's legal representative raises certain additional points. He argued that there are certain inconsistencies in the award and seemed to imply that the second respondent was biased and "entered into the arena". These grounds are not contained in the founding affidavit and can therefore not be raised in argument. In any event, they are not supported by anything in the record.

[18] The approach adopted by the individual respondents in their answering affidavit and in argument was that the award was reasonable and based on the facts placed before the second respondent.

Analysis

[19] This is not a case where the applicant accepts that an arbitrator understood and considered all relevant evidence but nevertheless came to a decision relating to sanction that was unreasonable.

[20] The applicant argues that the second respondent's finding with regard to sanction is reviewable because he misconstrued or failed to properly consider evidence relevant to determining whether dismissal was an appropriate sanction or not.

[21] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*¹, the SCA referred to the decision of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² and formulated the test to be applied in this regard as follows -

'[12] ... That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.'

[22] The importance of the unreasonableness of the outcome was also emphasised in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*³ where the following is stated –

'[14] ... 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

¹ (2013) 34 ILJ 2795 (SCA)

² [2007] 12 BLLR 1097 (CC)

³ (2014) 35 ILJ 943 (LAC)

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.’

- [23] I have considered the award. Whilst a court on review may differ in its view as to whether or not dismissal was an appropriate sanction in this regard, this is not the test to be applied. I must decide whether the award is one that could reasonably be reached on the evidence and other material properly before the second respondent. In my view this question must be answered in the affirmative.
- [24] The second respondent’s finding that the individual respondent’s conduct did not amount to dishonesty in the strict sense of the word and that this amounted to something akin failure to work diligently is, in my view, a reasonable finding. The second respondent considered the length of service of the individual respondent’s and their disciplinary record and came to the conclusion that the trust relationship had not been broken down. He came to the conclusion that dismissal was too harsh a sanction and that a lesser sanction would serve a corrective purpose. I should also observe that the lesser sanction is in fact a fairly severe one in that, apart from the imposition of a final written warning, the fact that the individual respondents were not retrospectively reinstated meant, in effect, that they were suspended without pay for a lengthy period of time.
- [25] The notion advanced by the applicant’s legal representative that a commissioner must accord deference to the employer’s decision as to sanction was rejected by the Constitutional Court in the *Sidumo* decision.
- [26] With the exception of that mentioned in paragraphs 12.1 and 12.2, the considerations mentioned in paragraph 12 of the founding affidavit are either irrelevant or not supported by any evidence in the scant record that was agreed upon by the parties. In any event these factors do not, in my view, impact significantly on the reasonableness of the award.
- [27] In the light of the above it is my view that the application to review should be dismissed. In my view this is a case, given the continuing relationship, where costs should not be awarded.

[28] My order relating to the application to have the award made an order of court is dealt with separately under case number J391/2012.

ORDER

I make the following order:

- 1 The application is dismissed.
- 2 No order as to costs is made.

Le Roux, AJ
Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr M Mkhize

For the Respondent: Mr A Goldberg