



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR1452/2011

In the matter between:

STEPHEN EMMERSON MTIYENSANJI

Applicant

~~and~~ And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER NASIMA RAFFEE; N.O.

Second Respondent

CASHBUILD SOUTH AFRICA (PTY) LTD

Third Respondent

Heard: 01 July 2014

Delivered: 29 January 2015

**Summary:** Application for review in terms of s 145 of the LRA; Review premised on the Commissioner having *inter alia* failed or neglected to apply her mind; failed to enquire into, consider or have regard to certain issues; erred; incorrectly held on certain matters and misdirected herself; These allegations not sufficient to upset the award; No gross irregularity in the conduct of the arbitration proceedings committed; Arbitration award falling

**within the realm of what is reasonable; Application for review dismissed with no order as to costs.**

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## JUDGMENT

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VOYI, AJ

### Introduction

- [1] This is an application to review and set aside an arbitration award that was issued by the Second Respondent (Commissioner Nasima Raffee and hereinafter “the Commissioner”) under case number GAJB29898-10 and dated 19 May 2011. Although this is not particularly stated in the founding affidavit, it is clear that the application is launched under s 145 of the Labour Relations Act.<sup>1</sup>
- [2] In her arbitration award, the Commissioner concluded that the Applicant’s dismissal, by the Third Respondent (hereinafter “Cashbuild”), was substantively fair. The Applicant now seeks to review and set aside the Commissioner’s arbitration award.
- [3] The application for review is opposed by Cashbuild. The answering affidavit, in opposition to the review application, was delivered out of time. The Applicant objected to the late delivery of the answering affidavit. This necessitated an application for condonation, which was duly launched by Cashbuild. The condonation application is, in turn, opposed by the Applicant.
- [4] I am of the view that a proper case has been made out for condonation of the late delivery of the answering affidavit. The explanation proffered for the late delivery of the answering affidavit cannot be said to be unreasonable or unconvincing. The ultimate decision that I arrive at in this matter, further, fortifies my view that the condonation application should succeed. I am herein alluding to the prospects of success in the review application itself.

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<sup>1</sup> Act No. 66 of 1995 (“the LRA”)

The arbitration award under review

- [5] On 20 October 2010, Cashbuild dismissed the Applicant following disciplinary proceedings pertaining to misconduct allegations. Following his dismissal, the Applicant lodged an alleged unfair dismissal dispute with the First Respondent (hereinafter “the CCMA”).
- [6] The dispute was ultimately arbitrated by the Commissioner, who thereafter handed down the arbitration award under review. At arbitration, the only issue in dispute was the substantive fairness of the Applicant’s dismissal. That the dismissal was effected in accordance with a fair procedure was conceded by the Applicant and was, therefore, not in dispute.
- [7] In finding that the Applicant’s dismissal was substantively fair, the Commissioner reasoned as follows:

‘4.1 It is common cause that the Applicant was dismissed after he was found to be negligent, in that he did not comply with company policies and procedures with respect to P.I.C. The Applicant denied that he was negligent. He abdicated responsibility saying he was the trainee manager and that where losses exceeded a certain amount, he as trainee manager had no authority to make the necessary adjustments on the system. The Applicant also argued that the sanction was inappropriately harsh as the sanction for the first offence or negligence is a warning.

4.2 The evidence indicates that the Applicant was employed with the Respondent since 1989 and held a position of assistant manager for a considerable period. The Applicant was trained, although he denied this, and experienced in his position and ought to have known the policies and procedures of the Respondent. The Applicant failed dismally in this regard, contributing to shrinkage in excess of R180 000.00 because of his negligence. The Applicant was also on a final written warning for having failed an audit. The evidence indicates that the Applicant was negligent as charged and that his negligence was of serious consequence to the Respondent. In view of the final

written warning on his record and of his acts of gross negligence the sanction of dismissal is fair.’

- [8] The arbitration award was issued on 19 May 2011 and it was received by the Applicant on 26 May 2011.

The Applicant’s grounds for review

- [9] In contending that the Commissioner’s arbitration award is reviewable, the Applicant advances a few grounds for review.

- [10] These grounds are expressed in the Applicant’s founding affidavit and are also amplified in the supplementary affidavit delivered in terms of Rule 7A(8)(a) of the Rules of the Labour Court. I briefly summarise the grounds for review as follows:

- 10.1 The Commissioner committed gross irregularity in conducting the proceedings in that, she made a finding which cannot be justified on the evidence, alternatively that she gravely misunderstood the evidence presented by the parties.
- 10.2 Evidence led at the arbitration proceedings was cited and considered on a very limited and selective basis.
- 10.3 The Commissioner failed to enquire into, consider or have regard to the fact that the Applicant was not authorised to make adjustments over R1,000.00 (one thousand rand). She equally failed to enquire into, consider or have regard to the fact that the Applicant reported the shortages to Letsoalo and Letsoalo had actually failed to make the adjustments.
- 10.4 The Commissioner erred and acted irregularly, biased and ultra vires when she came to the conclusion that the Applicant “contributed to shrinkage in excess of R180 000.00 because of his negligence.”
- 10.6 The Commissioner failed to apply her mind (either properly or at all) to issues that were apparent from the evidence presented to her, as well as ex facie the documentation placed before her, when she reached

the conclusion that “[i]n view of the final written warning on his record and his acts of gross negligence, the sanction of dismissal is fair.”

- 10.7 The Commissioner also failed and/or neglected to apply her mind to the facts presented to her in that she failed and/or neglected to take into account item 7 of Schedule 8 of the Code of Good Practice: Dismissal.
- 10.8 The Commissioner incorrectly held that the Applicant had a final written warning on his record when this actually pertained to an audit report and the warning had expired.
- 10.9 The Commissioner did not apply her mind objectively [or at all] to all the facts presented to her and as a result, reached a decision which a reasonable decision-maker in her position and faced with the same set of facts would not have reached.
- [11] In his supplementary affidavit, the Applicant amplified the above grounds for review and also added the following further review grounds, namely:
- 11.1 That the Commissioner misdirected himself by accepting hearsay evidence; and.
- 11.2 She incorrectly held that the Applicant had contributed to shrinkage in excess of R18 000.00 as no evidence was led by Cashbuild in that respect.
- [12] It is on the basis of these grounds that the Applicant now seeks to review and set aside the Commissioner’s arbitration award. In the answering affidavit, it is denied that the award is reviewable on the strength of the grounds advanced or at all.
- [13] Each of these grounds is pertinently dealt with by Cashbuild in its answering affidavit. The replying affidavit filed by the Applicant takes the matter no further.

## Evaluation

- [14] The Applicant seeks to review and set aside an arbitration award of the CCMA. This is permissible under s 145 (2) of the LRA. Under s 145 (2) (a), in particular, three grounds for review are provided for.<sup>2</sup>
- [15] The Commissioner's arbitration award is being challenged on the basis of only one of these three allowable grounds for review under s 145(2) (a), namely, that the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings.
- [16] It is not the Applicant's case that the Commissioner committed 'misconduct' or 'exceeded her powers'.
- [17] The common thread running through the Applicant's founding and supplementary affidavits is that the Commissioner failed or neglected to apply her mind; failed to enquire into, consider or have regard to certain issues; erred; incorrectly held on certain matters and also misdirected herself. This, to me, is the vocabulary fitting for an appeal. It warrants reiteration that no appeal lies against a CCMA arbitration award.<sup>3</sup> It is trite law that arbitration awards of the CCMA are final and binding.<sup>4</sup>
- [18] In dealing with applications for review, the standard test to be applied was postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.<sup>5</sup> That test basically asks the question: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'
- [19] In rejecting the 'process related review' approach, the LAC stated in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) CCMA and Others*<sup>6</sup> that what is required in matters of the present nature is '...first to consider the gross

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<sup>2</sup> The first is that the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator. The second is that he committed a gross irregularity in the conduct of the arbitration proceedings. The third is that he exceeded the commissioner's powers.

<sup>3</sup> *Shoprite Checkers (Pty) Ltd v CCMA and Others* (2009) 30 ILJ 829 (SCA) at para 26; *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* (2011) 32 ILJ 1618 (SCA) at para 5.

<sup>4</sup> Under s 143 (1) of the LRA, it is particularly stipulated that an '...award issued by a commissioner is final and binding...'

<sup>5</sup> (2007) 28 ILJ 2405 (CC) at para 110.

<sup>6</sup> (2014) 35 ILJ 943 (LAC) at para 15.

irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*.<sup>7</sup>

[20] In this matter, the starting point should be whether the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings as contemplated by s 145(2) (a) (ii) of the LRA.

[21] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*,<sup>7</sup> the Supreme Court of Appeal pointed out that:

‘Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

[22] I, accordingly, have no hesitation in rejecting the Applicant’s complaint that the Commissioner failed or neglected to apply her mind; failed to enquire into, consider or have regard to the issues identified in the founding affidavit; erred; incorrectly held on certain matters and also misdirected herself. This is more so in the absence of the Applicant demonstrating that such conduct, on the part of the Commissioner, had the effect of rendering the ultimate outcome unreasonable.

[23] In the present application, this court is called upon to ascertain whether the Commissioner considered the principal issue before her; evaluated the facts presented at the hearing and came to a conclusion which is reasonable to justify the decision she arrived at. This approach was stated in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) CCMA and Others (supra)*.<sup>8</sup> In the latter decision, the Labour Appeal Court also stated thus:

‘The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both

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<sup>7</sup> (2013) 34 ILJ 2795 (SCA) at para 25.

<sup>8</sup> *Gold Fields Mining SA* at para 16.

parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'<sup>9</sup>

- [24] In the application for review before me, the answers to all of the above-quoted questions are in the affirmative. In this matter, I am unable to find that the Commissioner committed gross irregularity in the conduct of the arbitration proceedings.
- [25] Except for the reasonableness of the decision reached, there is not a single averment or submission by the Applicant which suggests that the Commissioner (i) did not give the parties a full opportunity to have their say in respect of the dispute, (ii) did not identify the dispute she was required to arbitrate, (iii) did not understand the nature of the dispute she was required to arbitrate, or (iv) did not deal with the substantial merits of the dispute. All of the grounds for review, as captured herein before, advance no case towards that end.
- [26] The reasonableness test espoused in *Sidumo* is not a stand-alone review ground.<sup>10</sup> It seems to me that such is a test by which the reviewability of arbitration awards is to be ultimately measured.
- [27] It has, in fact, been held that the *Sidumo* test has not extinguished the specific grounds for review permitted under s 145 (2) (a) and (b) of the LRA.<sup>11</sup> Instead, those specific grounds are to be 'suffused' with the constitutional standard of reasonableness.<sup>12</sup>
- [28] On this point, the Labour Appeal Court also had occasion to express itself as follows:

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<sup>9</sup> *Ibid* at para 20.

<sup>10</sup> See *Health And Other Services Personnel Trade Union of South Africa ('HOSPERSA') and Another v CCMA and Others* (D498/13) [2014] ZALCD 37 (12 August 2014).

<sup>11</sup> *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* (*supra*) at para 14.

<sup>12</sup> *Ibid*

‘Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness...’<sup>13</sup>

- [29] The present application for review manifests nothing more except a case of an Applicant that is simply aggrieved by an arbitration outcome. Out of the grounds for review advanced, there is no averment which demonstrates that a reviewable irregularity was committed by the Commissioner in the conduct of the arbitration proceedings.
- [30] By way of demonstration, I briefly delve into the grounds for review as advanced by the application.
- [31] In the first place, the Applicant complains that the Commissioner made a finding which cannot be justified on the evidence, alternatively, that she gravely misunderstood the evidence as presented by the parties. Neither the finding made nor the evidence misunderstood is identified. Secondly, it is contended that the Commissioner cited and considered the evidence led by the Applicant at arbitration on a very limited and selective basis. Equally, this evidence is not identified.
- [32] Thirdly, the Applicant complains that the Commissioner failed to enquire into, consider or have regard to (i) the fact that the Applicant was not authorised to make adjustments over R1,000.00, and (ii) the fact that the Applicant reported the shortages to his manager and that the manager had actually failed to make the adjustments.
- [33] At the arbitration proceedings, the Applicant could not point out the policy that limited his authorisation on making adjustments to no more than R1,000. 00. On the contrary, there was evidence led which demonstrated that the Applicant had made adjustments in the past. The reporting of the shortages did not mean that the Applicant needed to do no more. He was a manager after all, be it a trainee or an assistant manager. He had a responsibility to act in respect of the shortages when it became clear that the manager to whom these were allegedly reported had not taken any steps.

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<sup>13</sup> *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964 (LAC) at para 101

- [34] It was common cause, at the arbitration proceedings, that the shortages were picked up after no less than three days. Considering the fact that these shortages had to be adjusted on a daily basis, such was a long time for the Applicant not to take any pro-active steps in addressing the matter. To have simply reported the shortages to the manager was not enough.
- [35] Fourthly, it follows without controversy that the Applicant's conduct had an impact on the overall shrinkage quantification. There is, therefore, nothing erroneous or irregular with the Commissioner's finding to the effect that the Applicant contributed to shrinkage in excess of R180 000.00.
- [36] Fifthly, the Applicant did not have a clean disciplinary record. He was previously issued with a final written warning. The Commissioner simply referred to a final written warning that was part of the Applicant's disciplinary record. She was, to me, alive to the fact that the said final written warning may have lapsed. The fact that the duration of a written warning has lapsed does not result in same being extinguished from the disciplinary history of an employee.
- [37] Lastly, and most importantly, it is my judgment that the Commissioner's alleged failure or neglect to apply her mind is not sufficient to upset her arbitration award. Something more is required in order for the arbitration award to be set aside.
- [38] It is by now trite in reviews that failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable. It, therefore, seems to me that an arbitrator's failure to apply his or her mind must be of such nature as to render the outcome unreasonable.
- [39] All things considered, it is my considered view that the outcome decision reached by the Commissioner is one that falls within the realm of what is reasonable. The application for review can, therefore, not succeed. It stands to be dismissed.

[40] As for costs, I am of the view that each party should bear their respective costs. This is a matter that lies entirely within my discretion. The application for review was launched at a time when the threshold for interference with arbitration awards was set lower by this court. The status *quo* at the time may have motivated the Applicant to launch what is now clearly an application for review that is simply destitute of any merit.

Order

[41] I, accordingly, make the following order:

- (i) The late delivery of the answering affidavit in the application for review is condoned.
- (ii) The application to review and set aside the arbitration award issued by Commissioner Nasima Raffee on 19 May 2011 under case number GAJB29898-10 is hereby dismissed.
- (iii) There is no order as to costs.

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Voyi, AJ

APPEARANCES:

Acting Judge of the Labour Court of South Africa

For the Applicant: Advocate WP Bekker

Instructed by: Gildenhuys Malatji Inc.

For the Respondent: Mr Hardus Lee (Attorney) of Snyman Attorneys