

iAfrica Transcriptions (Pty) Ltd

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR1019/14

DATE: 2015-02-03

In the matter between

EFFICIENT ENGINEERING (PTY) LTD

Applicant

10 and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

COMMISSIONER N.P. MBEKWA

Second Respondent

UCIMESHAWU obo JOHANNES MOICHELA

Third Respondent

J U D G M E N T

20 **STEENKAMP J:**

This is an application to have an arbitration award by the second respondent, Commissioner Pearl Mbekwa, reviewed and set aside. The Commissioner found the dismissal of the employee, Mr Johannes Moichela, to be unfair and ordered the applicant to reinstate him.

Ms *Dreyer*, for the applicant, submitted that another commissioner could have come to a different conclusion from that reached by Commissioner Mbekwa. I agree, but that is not the test.

The test is that set out in *Sidumo*¹ and in *Herholdt v Nedbank Ltd*², that is whether the conclusion reached by this Commissioner is so unreasonable that no other commissioner could have come to the same conclusion.

Even if the Commissioner is wrong, that is not a ground for review.

I debated with Ms *Dreyer* the four grounds of review set out in Section 145 of the Labour Relations Act, that is that the Commissioner committed misconduct; a gross irregularity; exceeded her powers; or
10 that the award was improperly obtained.

Ms *Dreyer* conceded that not one of those criteria had been met in this case.

She raises two grounds of complaint. The first is that the Commissioner was wrong in finding that the employer was inconsistent by disciplining the employee in this case, Mr Moichela, and not his colleague, Mr Ronnie Booysen.

It may be that the circumstances in which the forklift was damaged, relating to those two employees, were not exactly the same. Even if that is so, that does not make the award open to review unless
20 the conclusion was so unreasonable that no other commissioner could have come to the same conclusion.

The applicant also submits in its founding affidavit that the arbitrator "erred" in not taking cognisance of various bits of evidence.

¹ *Sidumo v Rustenburg Platinum Mines Ltd* (2008) 2 BCLR 158 (CC).

² 2013 (6) SA 224 (SCA).

Once again that is not the test on review as opposed to appeal.

The second main ground of review raised by Ms *Dreyer* in her oral argument is a procedural irregularity in that the arbitrator misconstrued the nature of the misconduct when compared to the employer's disciplinary code.

She submitted that the employee had a previous final written warning for what is termed an "attitudinal offence". There are two answers to this. The first is that, as the arbitrator pointed out, the code is a guideline. The arbitrator then finds that there was no fair reason for
10 the employer in this case to overlook its code, and that under the heading for the offence "damage to equipment or materials" various sanctions are listed, ranging from a written warning progressively to dismissal.

Secondly, the arbitrator took into account that the employee in this case had service of 33 years and she found that the misconduct for which he had a final written warning could not be categorised as the same as the one for which he was dismissed.

I may differ with that reasoning; so may another arbitrator. Another arbitrator could have found differently. However, I cannot find
20 that the conclusion reached by the arbitrator on the evidence before her does not fall within a range of reasonable outcomes.

For that reason the award is not open to review, as opposed to appeal.

The application for review is dismissed.

STEENKAMP J

APPEARANCES

APPLICANT: Ms E Dreyer

Instructed by: Corien Potgieter.