



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1071/12

UASA obo B MONAGENG

Applicants

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

N MBHELE NO

Second Respondent

SOUTH AFRICAN AIRWAYS (PTY) LTD

Third Respondent

Heard: 27 February 2014

Delivered: 8 May 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an opposed application brought in terms of the provisions of section 145 and/or section 158 (1) (g) of the Labour Relations Act (The LRA) to review and set aside an award issued by the second respondent (Commissioner) under case number GAEK 7066-11 dated 20 March 2012. In the award, the Commissioner found that the dismissal of the applicant (Monageng) by the third respondent (SAA) was substantively fair.

- [2] The relief sought by the applicant in the Notice of Motion is curiously framed in the following terms:

“Substituting the award issued by the second respondent with an order that the case must be referred back to the CCMA for an arbitration afresh before another Commissioner”

“Alternatively, directing that the matter be referred back to the First Respondent for consideration de novo before a Commissioner other than the second respondent”

Background to the application:

- [3] Monageng was employed by SAA with effect from September 1992 as a Customer Service Agent for 9 years. In 2001 she was promoted to the position of Team Leader: Domestic Arrivals, and was *inter alia*, responsible for the supervision of about 16 other employees who were employed as Customer Service Agents. Monageng held that position until her dismissal on 13 October 2011 following upon a disciplinary enquiry into allegations of misconduct pertaining to dishonesty.
- [4] The allegations against Monageng followed upon a grievance lodged against her on 6 August 2010 by SATAWU on behalf of its members (the Agents) who worked under her team. The grievance against Monageng pertained to allegations of dishonest time keeping on 13 different occasions between the period April 2010 and July 2010.
- [5] Pending the investigations into the grievances, Monageng was then removed from the Domestic Arrivals to Domestic check-in by her manager Susan Venter. The investigations took longer than necessary to complete due to the reason that SATAWU initially objected to persons appointed to lead the investigation. In this regard, Susan Venter, Monageng's manager was initially tasked with the investigations but had to recuse herself. Archibald Marawa then took over and also recused himself. Pumi Kumalo also conducted the investigations but could not finalise them. Marawa was brought back for a short period and still did not complete them. Ultimately, another person, Boshoff took over and concluded the investigations around end of July 2011.

- [6] On 1 September 2011, Monageng was issued with a suspension letter. She was then on 17 August 2011, provided with a notice to attend a disciplinary enquiry scheduled to take place on 25 August 2011, and to answer to 13 allegations of dishonest time keeping. All the allegations related to Monageng having wilfully recorded incorrect times that she had either arrived at or left the working station during varying times in April, May, June and July 2010.
- [7] Following the disciplinary hearing, Monageng was found guilty on all the charges and was dismissed on 13 October 2011. A dispute was referred to the CCMA on 26 October 2011. Following arbitration proceedings held on 29 February 2012 and 8 March 2012, Monageng's dismissal was found to be substantively fair.

The arbitration proceedings and the award:

- [8] Three witnesses, Nyamutsha, Marawa and Khoza had testified on behalf of SAA whilst Monageng had testified in her case and called upon Venter to testify on her behalf. In support of the allegations against Monageng, SAA relied upon its event log documents, which had recorded the times Monageng had accessed or exited the parking area using her access card and the time sheets. Marawa was Monageng's manager and had testified about three instances where Monageng had incorrectly recorded her arrival times. Khoza had testified about being asked by Monageng to perform her duties whenever she arrived late and the reason the grievance was lodged.
- [9] Monageng's evidence was that she was not aware of the event log until she attended the disciplinary enquiry. She could not during the arbitration proceedings, recall the reasons for the different times recorded on the event log as compared to what was recorded in the time sheets. She could not recall whether she had always advised her then manager Venter whenever she was running late or had to leave early. Her time keeping was not questioned until the investigations and her dismissal. She had denied having asked Khoza to perform her duties. Her contention was further that the access card was merely for access and exiting the parking area, and not meant to monitor time keeping.

[10] Having summarised and analysed the evidence, the Commissioner concluded that:

- 10.1 SAA's version was more probable, and that Monageng's version should be rejected as it was false.
- 10.2 There were discrepancies in regards to the times recorded in the time sheets and the event log.
- 10.3 The period between the lodging of the grievance and the time of charging Monageng was long, but this did not prevent Monageng from getting evidence from the airport parking officials to support her version that she normally parked her vehicle at the airport after accessing the parking area.
- 10.4 Venter as Monageng's manager trusted her and did not monitor her, and could thus not know whether she arrived late or left the workstation early on the days in question.
- 10.5 Monageng failed to submit any evidence contrary to that of SAA.
- 10.6 The argument of inconsistent application of discipline should be rejected.
- 10.7 Monageng was employed in a position of trust and her conduct constituted dishonesty, which had a destructive effect on an employment relationship, rendering continued employment intolerable.

The legal framework pertaining to review applications:

[11] In considering whether an award is reviewable, the test is that as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. The reviewing Court is required to enquire whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach on the material placed before him or her.

¹ 2008 (2) SA 24 (CC) at para 110

[12] Where the review application is based on an alleged irregularity committed by a Commissioner, the enquiry in line with the *Sidumo* test is whether the Commissioner misconceived the nature of the enquiry or arrived at an unreasonable result.²

[13] Flowing from the explication of the review test in *Herholdt v Nedbank Ltd* and in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others*³, the Labour Appeal Court recently held in *Head of the Department of Education v Mofokeng and Others*⁴ (per Murphy AJA) summarised the relevant principles as follows;

“The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (“the SCA”) in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act (“PAJA”); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should

² *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) at para 25.

³ [2014] 1 BLLR 20 (LAC).

⁴ [2015] 1 BLLR 50 (LAC) at paragraphs [30] to [34]

keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error

material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.”

The grounds for a review:

[14] The crux of the applicant’s case is that the Commissioner misconstrued the evidence before her, incorrectly applied the legal principles and disregarded relevant material evidence placed before her. It was further submitted on behalf of the applicants that the conclusion arrived at was not a conclusion which a reasonable decision maker would have arrived at. In summary, it was submitted that;

14.1 The Commissioner misconstrued the evidence before her. In this regard, it was submitted that there was no evidence before the commissioner to justify the delay between the lodging of the grievance and the institution of the disciplinary enquiry. The Commissioner despite having accepted that there was a delay nevertheless found against Monageng in circumstances where she could not recall events that took place two years earlier.

14.2 The Commissioner applied incorrect legal principles in that Marawa’s evidence was based on hearsay, as he was not present when the alleged offences took place. The Commissioner failed to understand or take into account the fact that SAA failed to discharge the onus of proving fairness of the dismissal, and sought to shift the onus of proof on Monageng.

14.3 The Commissioner disregarded material or relevant evidence placed before her, and failed to appreciate that Monageng’s attendance was not measured by arrival and exiting of the parking area, and that the event log could not prove allegations of dishonest time keeping. The Commissioner further failed to take into account that no evidence was

presented to refute Monageng's evidence that Venter was told whenever she was running late or leaving early.

- [15] The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others*⁵ held that in assessing whether the result of an award is unreasonable, the reviewing court should not adopt a piecemeal approach, and must further enquire whether;

“..... (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 or she was required to arbitrate? (This may in certain cases only become clear after both 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? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?⁶

- [16] SAA's response to the review application was that the Commissioner reached the correct result and that the award was unassailable. It further submitted that the grounds relied upon by the applicants were akin to grounds of appeal, and accordingly, they had not made out a proper case for review.

- [17] In terms of the approach adopted in *Goldfields* by the LAC, despite the applicants contending that Monageng was prevented from having the dispute determined fully and fairly, I did not understand in what material respects this was the case, and there is no reason to doubt that indeed the Commissioner had afforded the parties a full opportunity to have their say in respect of the dispute before her.

- [18] Where a Commissioner misconstrues the nature of the enquiry at arbitration proceedings, it follows that she cannot arrive at a reasonable result. In regards to the question whether the Commissioner had identified the dispute she was required to arbitrate, in the award, the Commissioner had clearly identified the issue to be decided as being whether the dismissal of

⁵ At para 14

⁶ At para 20

Monageng was substantively fair, and I did not understand the applicants' case to contend otherwise. Furthermore, from the grounds of review as pleaded, I did not understand the applicants' case to be that the Commissioner misunderstood the nature of the dispute she was required to arbitrate.

- [19] The question whether Commissioner dealt with the substantial merits of the dispute entails an evaluation of whether the Commissioner had properly captured the essence of the dispute before her; whether she had properly considered, evaluated or analysed all the relevant material placed before her and applied her mind to that material in coming to her conclusion.
- [20] The applicant's main contention was that the Commissioner had misconstrued the evidence before her and in particular, in respect of acknowledging that there was a length of time between the lodging of the grievance against Monageng and the institution of disciplinary proceedings. As already indicated, it was contended that the Commissioner failed into account that the time lapse might have affected Monageng's ability to recollect events in respect of the dates it was alleged the transgressions took place.
- [21] When the courts make reference to 'material placed before a Commissioner', it can only be in reference to the oral evidence presented and documentary material before a Commissioner and nothing more. Thus where a Commissioner relies on material that was never placed before her, there would be grounds to find that there was gross irregularity on her part. As it was stated in *Head of the Department of Education v Mofokeng and Others*⁷, mere flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.
- [22] In this case, what was placed before the Commissioner was the evidence of the individuals identified elsewhere in this judgment, her own evidence, that of Venter on her behalf and documentation. The issue before the Commissioner

⁷ *Supra*

was whether Monageng's dismissal on account of misconduct pertaining to dishonesty in regards to irregular time keeping was fair or not. The Commissioner had properly dealt with the evidence pertaining to the delay referred to above and had concluded that despite that delay, nothing prevented Monageng from acquiring evidence to support her contentions that she used to park her vehicle somewhere and thereafter access the airways parking area. In this regard, the Commissioner's reasoning cannot be faulted in view of the fact that if it was Monageng's testimony that there was evidence that could have assisted her in recollecting events, it was up to her to secure such evidence. Even if such evidence was within the knowledge of SAA or in its possession, Monageng could have requested that such evidence to be discovered. This could not be construed as shifting the question of onus on Monageng, in that she had to corroborate her defence to the allegations against her.

- [23] To the extent that what was placed before the Commissioner was the event log, which was compared with the time sheet, the Commissioner cannot be faulted from relying on nothing other than what was before her. The Commissioner clearly took cognisance of the fact that the event log was not used to monitor attendance, but was only one of the factors taken into account in establishing whether there was irregular time keeping.
- [24] What the Commissioner had to consider in regards to the evidence presented was whether the dismissal was fair. It was common cause that the grievances were lodged against Monageng in the light of complaints by her subordinates that she was not adhering to time keeping. SAA had relied upon the event log and the time sheets in pointing out discrepancies in Monageng's time keeping. What was required of Monageng was to give an account or at least attempt one, notwithstanding the time lapses between the transgressions, the disciplinary enquiry and the arbitration proceedings. Her responses in this regard during an exchange during her cross-examination in the arbitration proceedings is instructive as evident from the transcribed record⁸, which went as follows:

⁸ Page 177 of the record – from line 12 to page 178 line 15

“RESPONDENT REPRESENTATIVE: Ms Monage (Monageng) there is a highly probability that you might have parked outside the airport and went in and then to airways but in terms of the events log how do you justify a situation where, on several occasions you left earlier than you are supposed to have left, what would the reason be for you leaving earlier you know in terms of arrival you might – there is a probability that you might have parked outside the airport and sign on and drove to Airways park to park your car. Now all – and it happened on numerous occasions whereby you claimed that you left at the particular time but you left early, how do you justify that? (Sic)

MS BRENDA MONAGE: Let me give you a scenario of what happens. The parking area I am not given – when can you go out and when you can come in, so if I get out of the parking early it does not mean I have gone home. There could be reasons, if I borrowed a car for example if the owner of the car wants the car I would go to the parking, take out the car, give it to the owner and go back to work so there could be any reason – it could be something, can't tell you. Like I said if I was asked in 2010 why did you leave then I would say I was giving my brother the car, I was borrowing – I am not using my car I borrowed somebody's car so he is here to come and fetch it. But then for now can't justify that, because it two years down the line and can't be expected you cannot expect me to tell you what happened on the 6th of August 2010 or in the period the World Cup. This was the period of the World Cup I cannot answer that. (Sic)

RESPONDENT REPRESENTATIVE: So do you want to tell me over the period all the time you were using somebody else's car or you were going to give your brother a car that is why you were leaving early?

MS BRENDA MONAGE: I have no idea what could have transpired you are too late to ask me that question unfortunately Sir.”

[25] In the light of these exchanges and Monageng's response, it was apparent that she could not give a plausible or probable account of the discrepancies identified between the times in the event log and the time sheets. Her contention was that the event log was not determinative of her attendance or movements. This was conceded by SAA. However, Monageng had no other probable or plausible explanation. In these circumstances, the conclusion arrived at by the Commissioner that SAA's version was more probable is

unassailable, and there is therefore no basis for a conclusion to be reached that the Commissioner had misconstrued the evidence.

- [26] The applicants had further contended that the Commissioner had failed to apply the correct legal principles in regards to hearsay evidence. This was in regards to the evidence of Marawa, whom the applicants had contended was not present when the grievance against Monageng was lodged, or even present when the alleged offences took place.
- [27] Despite summarising Marawa's evidence, nowhere in the analysis is such evidence referred to with any particularity and it is doubted from the award that any weight was attached to it. To this end, I do not understand in what context it was alleged that Marawa's evidence, was relied upon without due regard to the applicable legal principles relating to the admission of hearsay evidence. In the award, the Commissioner had merely stated that SAA's version was more probable and should be accepted, and I did not understand that part of the award to be merely in reference to the evidence of Marawa, which it was alleged to have been hearsay, to the exclusion of that of Nyamutsha and Khoza on behalf of SAA.
- [28] It was further submitted that the Commissioner had disregarded relevant material and evidence, and in particular, the evidence of Venter, who had testified that Monageng was not measured by the event log. The Commissioner had dealt with Venter's evidence by stating that as she did not monitor her, she had trusted that she would be at work on time, it was more than probable that she (Venter) did not know whether Monageng was coming late or leaving early.
- [29] The Commissioner had accepted that the event log was not a clocking system, but that Monageng had not presented any evidence to rebut that of SAA. In the light of the Commissioner's analysis and conclusions, it cannot be said that she had disregarded Venter's evidence, and the fact that it was not dealt with in the manner that the applicants had expected does not imply that it was ignored.

- [30] Submissions made to the effect that the Commissioner failed to deal with the issue of inconsistency in the application of discipline in the light of evidence presented that other employees were similarly not adhering to time keeping are also without merit. Monageng was a Team Leader and it was expected of her in her capacity to be exemplary. Team Leaders worked on a shift basis in accordance with a roster system, and had to take over their duties from other Team Leaders who were on earlier shifts. In this regard, it was expected of Team leaders to arrive 30 minutes prior to the commencement of their shifts for the purposes of preparations for a take over. Team Leaders are in a position of trust and responsibility, and it is expected of them to adhere to clocking times without having to be supervised, as they are responsible for the supervision of their subordinates.
- [31] A claim of inconsistency can never succeed where an employer is able to differentiate between employees who committed similar transgressions on the basis of, *inter alia*, differences in personal circumstances, the severity of the misconduct or on the basis of other material factors. Furthermore, in appropriate cases an employer may be justified in differentiating between two employees guilty of the same transgression on the basis of their personal circumstances or on the merits of their respective cases⁹.
- [32] In this case, the Commissioner had correctly rejected arguments surrounding inconsistency on the basis that SAA was not aware on the evidence that there were other employees who had committed similar transgressions, and neither had Monageng led evidence to the effect that SAA was indeed aware of such similar cases. Nevertheless, even if such cases had come to the attention of SAA, in the light of Monageng's position of authority, responsibility and trust, and further in the light of the continuous nature of the transgressions, a claim of inconsistency was correctly rejected by the Commissioner.

Conclusion:

- [33] The grounds of review as relied upon in this case have not laid a basis for any conclusion to be reached that the Commissioner committed any gross

⁹ *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC). See also *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC)

irregularity in the conduct of the proceedings, nor has it been established that there is a basis for the Court to interfere with the award on any ground contemplated in section 145 of the LRA. The piece-meal approach of the applicants in this review application unfortunately typifies the one that the Labour Appeal Court in *Goldfields* warned the review courts to guard against.

- [34] It is accepted that the Commissioner did not deal at length with the evidence presented nor did she give much detail in her analysis. This however does not imply that her reasoning was flawed or that there was no fair trial of the issues before her. Furthermore, the provisions of section 137 (7) (a) of the LRA requires of a Commissioner to issue an award with brief reasons. What is of importance ultimately is whether the Commissioner had captured the essence of the dispute, applied her mind to those salient facts, and arrived at a decision, which falls within the band of reasonableness. In this case, no basis has been laid that there was a misconception of the true enquiry resulting in an unreasonable outcome. To this end, it is concluded that the Commissioner's decision is one that another decision-maker could reasonably have arrived at based on the evidence and material placed before her. SAA had sought a cost order in the event that the application was dismissed. I however do not hold the view that a cost order is appropriate in this case.

Order:

- i. The application to review and set aside the award issued by the Second Respondent under case Number GAEK 7066-11 dated 20 March 2011 is dismissed.
- ii. There is no order as to costs.



Tlhotlhalenmaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr G Manganyi – UASA Official

For the Third Respondent: T Ngakane of Bowman Gilfillan

LABOUR COURT