REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 203/13

In the matter between

STATE INFORMATION TECHNOLOGY — **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION — **First Respondent**

R BYRNE N.O — **Second Respondent**

MOSES MTIMUNYE — **Third Respondent**

Heard: 07 March 2014

Delivered: 25 June 2015

Summary: When the commissioner has undertaken the enquiry into the fairness of a dismissal in the wrong manner and reached an unreasonable decision, his or her arbitration award becomes reviewable.

JUDGMENT

LALLIE J

Introduction

[1] This is an application to review and set aside an arbitration award of the second respondent ("the commissioner") in which he found the third respondent's dismissal both substantively and procedurally unfair and ordered the applicant to pay him compensation in the amount of R1 600 005, 62.

[2] The facts of this matter are mainly common cause. They are that the third respondent was appointed by the applicant to the position of Chief: Strategic Services until his dismissal on 30 June 2009. On dismissal he was the applicant's acting Chief Executive Officer ("acting CEO"). He was a member of the Recommendations Committee and the Supply Review Council which deal with tenders on behalf of the government and the applicant. He reported to the applicant's board of directors ("the board"). In terms of the applicant's procurement policies and procedures, the applicant had to obtain the board's approval for procurement of goods and services in excess of R30 million. The approval had to take the form of a board resolution which could be secured through a properly constituted meeting of directors by a simple majority alternatively, through a round robin process. The round robin process required the approval of all the directors to pass a proposed resolution.

[3] On 30 June 2009, the third respondent instructed his subordinate to enter into a contract ("the contract") on behalf of the applicant for the amount of R202 203 877, 23 with Software AG (Pty) Ltd ("SAG"). When the third respondent issued the instruction he was aware that the board approval had not been secured as not all the board members had given their approval to the proposed resolution to have the contract signed although an attempt was made to obtain it by the round robin process. He was charged for contravening the applicant's procurement policy and section 51 of the Public Finance Management Act of 1999. He raised the defence that he acted on the board chairperson's instructions that the contract be signed. The defence was rejected and he was dismissed. Aggrieved by his dismissal, he referred a dispute to the first

respondent ("the CCMA") where the commissioner issued the arbitration award the applicant seeks this court to review and set aside.

[4] The applicant's main grounds for review are that the commissioner committed a gross irregularity and/or committed misconduct and/or exceeded his powers and rendered an irrational and unreasonable award. It submitted that there was no justification for the third respondent's conduct of executing the chairperson's unlawful instruction. The commissioner's finding that compliance with the chairperson's instruction was reasonable is unreasonable. The commissioner had no valid reason for rejecting the applicant's evidence regarding the chairperson's reaction in the meeting of 2 July 2009 to the effect that she was surprised that the contract had been signed. He failed to consider the respondent's omission to call the chairperson as a witness in light of the evidence of her reaction in the meeting of 2 July 2009. The applicant further submitted that the commissioner exceeded his powers by resuscitating the third respondent's claim of procedural unfairness which he had elected not to pursue. He unreasonably considered the irretrievable breakdown of the employment relationship when the third respondent sought compensation and not reinstatement.

[5] The commissioner allowed the third respondent to challenge the procedural fairness of his dismissal on the grounds that he may not have understood his rights at the time he indicated that only the substantive fairness of the dismissal was challenged. He found that the applicant delayed in taking disciplinary action against the third respondent as he was charged a year after the commission of the misconduct and it took two years to finalise the process. The delay impacted on the substantive fairness of the dismissal as it was inconsistent with the conclusion that the employment relationship had broken down. It rendered the dismissal procedurally unfair. Based on his finding that the dismissal was substantively and procedurally unfair, the commissioner ordered the applicant to pay the third respondent compensation equivalent to his annual salary in the amount of R1 600 005 62.

[6] The commissioner found the third respondent's dismissal substantively unfair because he acted on the chairperson's instructions. The applicant's grounds for

review are mainly based on section 145 (2) (a)(ii) of the Labour Relations Act 66 of 1995 (“ the LRA”) as they are based on irregularities committed by the commissioner in the conduct of the arbitration proceedings. There is merit in the applicant’s ground for review that the commissioner’s finding that the third respondent had a good defence because he acted on the instructions of the chairperson is unreasonable. There was overwhelming evidence before the commissioner that the defence raised by the third respondent did not hold water. The third respondent conceded that he was aware that the approval of the board had not been secured when he complied with the chairperson’s instructions that the contract be signed. It was his evidence that there was no time pressure to have the contract signed on 30 June 2009. He conceded that had the chairperson issued the instruction in their telephone conversation preceding the one in which she instructed him to sign the contract, the instruction without the approval of the board would have been unlawful. In the telephone conversation in which the chairperson instructed the third respondent to have the contract signed, she also told him that the approval of the board had not been secured. The commissioner overlooked the reality that the applicant knew that the instruction was unlawful and elected to execute it. He conceded that attempting to achieve cost saving cannot be a license to undermine policies and procedures of an institution.

[7] Evidence tendered at the arbitration was that the amount involved in the contract which was signed without the board’s approval exceeded the R30 million which the third respondent was authorised to bind the applicant in excess of R187 million. In paragraph 22 of the award the commissioner states as follows:

> ‘In my view, even though the Chairman of the Board is the custodian of such processes, one cannot realistically and responsibly conceive of a situation where a CEO can wilfully ignore processes that are designed to establish proper authorisation before executive decisions are carried out. On the other hand, however, the most senior person in the Organisation, the Chairman, gave him the instruction and took on the responsibility of sorting out the procedural/authorisation issue. This is exactly why he had the contract signed – because he received the instruction to do so. The

> facts before him were still the same as earlier that evening, where he accepted that there was "no deal". My view is that this is a good defence, even though it is not a complete defence. Any action of a misconduct nature should therefore be primarily directed at the Chairman, and one would ordinarily conceive of a lesser sanction to him'.

[8] The commissioner's finding that the third respondent had a good defence indicates that he conducted the enquiry into the fairness of the dismissal in the wrong manner. Item 7 of Schedule 8 to the LRA, the Code of Good Practice: Dismissal, provides guidelines for the determination of the fairness of a dismissal for misconduct. It required the commissioner to have considered whether or not the employee contravened a rule or standard regulating conduct at the workplace. If the rule was contravened, to consider the validity or the reasonableness of the rule, whether the employee was aware of the rule and whether dismissal was the appropriate sanction. A reading of the award proves that the commissioner failed to carry out the enquiry in the correct manner. He accepted the existence of a valid rule. He avoided stating unequivocally whether the third respondent had breached the rule. When dealing with whether the third respondent breached the rule he goes as far as to accept that at the time he gave instructions that the contract be signed, the facts before him were still the same as earlier that evening when he accepted that there was no deal. He, however, deliberately omitted to state the obvious result of the third respondent's conduct, thus failing to complete the enquiry he was required to make. His decision on the substantive fairness of the dismissal reflects his failure to make the required enquiry. The gross irregularity of conducting the enquiry in the incorrect manner therefore had a direct effect on his decision.

[9] The third respondent's argument that the commissioner did not disregard the evidence that any instruction to conclude a contract under the circumstances would be unlawful overlooks the commissioner's finding that at the time the third respondent gave the instruction that the contract be signed, the facts before him were still the same as earlier that evening when he accepted that there was no deal. His argument that the commissioner considered that just one member of the board did not support the conclusion of the agreement does not assist him because it is common cause that the approval of all the board

members was necessary. The commissioner only raised questions about what the third respondent should have done and made no findings. The commissioner neither found that the financial saving created exceptional circumstances which called for exceptional measures nor that the third respondent did not want to prejudice the applicant but rather save money. The conclusion he reached was that the third respondent acted on the instructions of the chairperson and should have therefore been issued with a lesser sanction. The commissioner identified the facts which he needed to evaluate in order to reach a reasonable decision but failed to evaluate them.

[10] I agree with the third respondent that there is no merit in the applicant's ground for review that the commissioner acted unreasonably by considering the procedural fairness of his dismissal including the appropriateness of the sanction of dismissal. The argument that the third respondent sought compensation instead of reinstatement is of no moment. The commissioner's conduct is supported by item 7 of schedule 8 to the LRA. However, the commissioner reached an unreasonable decision in finding the third respondent's dismissal procedurally unfair because of the applicant's delay in taking and concluding disciplinary action against him. The third respondent conceded that the delay in the finalisation of his disciplinary enquiry was occasioned by the complexity of the charges which had been preferred against him.

[11] The applicant and the third respondent sought to rely on *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] which allows this Court to interfere with an arbitration award of a commissioner of the first respondent if it is a decision a reasonable decision-maker could not reach on the facts before the commissioner. In *Sidumo* (*supra)* and *Herholdt v Nedbank Ltd*[2] it was held that the conduct of a commissioner is relevant in the enquiry into the reasonableness of the commissioner's arbitration award. Both section 138 of the LRA and the decision in *Sidumo* (*supra*) require commissioners to act fairly when conducting arbitrations. A consideration of the totality of the evidence before the commissioner proves that there is no basis for the commissioner's

[1] [2007] 12 BLLR 1097 (CC)
[2] [2013] 11 BLLR 1074 (SCA)

decision that the third respondent's dismissal was substantively unfair. The facts before the commissioner are that the third respondent contravened a valid rule he was aware of. By virtue of his seniority as the acting CEO of the applicant, he knew that he was being instructed to carry out an unlawful instruction and that he could refuse. He however, elected to carry out the unlawful instruction and instructed that the applicant be bound to a contract which involved in an amount in excess of R180 million without the necessary board approval when there was no time pressure for the contract to be signed. The importance of good governance cannot be overemphasised. With all these facts before the commissioner his conclusion that the third respondent's dismissal was substantively unfair is not based on the evidence before the commissioner and therefore unreasonable.

[12] I am not convinced that the third respondent acted unreasonably in opposing this application. In the circumstances granting a costs order against him would not be appropriate.

[13] In the premises, the following order is made:

13.1 The arbitration award issued by the second respondent under case number GATW 15320 – 11 and dated 21 December 2012 is reviewed and set aside.

13.2 The award is substituted by the following:

13.2.1 The third respondent's dismissal was substantively and procedural fair.

13.3 There is no order as to costs.

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Lallie J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: T. Motau SC

Instructed by: Chuene Gouse Inc

For the Respondents: H Bucksteg

Instructed by: Carel J Schoeman Inc