



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 748/13

In the matter between:

SPAR GROUP LTD

Applicant

and

HAROLD ALEX MALOKA N.O.

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION ("CCMA")**

Second Respondent

TREASURER MOSES MAPHANGA

Third Respondent

Heard: 05 November 2014

Delivered: 07 July 2015

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] In this application the Applicant (“Spar”) seeks an order reviewing and setting aside an arbitration award dated 6 February 2013 made by the First Respondent (“Commissioner”) under case number MP5499/12. The Commissioner found that the dismissal of the Third Respondent (“Maphanga”) was substantively unfair. Spar was ordered to reinstate the Maphanga with a back pay equivalent to five months remuneration in the amount of R30 250.00. The effective date for reinstatement and payment of the compensation amount referred to above was the 15th of February 2013.
- [2] Maphanga, represented by South African Commercial Catering and Allied Union (“Saccawu”), is opposing this application. It is common cause that Maphanga is a member of Saccawu.

Condonation

- [3] The Spar filed this application three weeks outside of the prescribed period in terms of section 145(1)(a) read with section 145(1A) of the Labour Relation Act 66 of 1995 as amended (“LRA”) and accordingly seeks condonation. Saccawu is not opposing Spar’s application in this regard.
- [4] However, I am not satisfied with the explanation furnished for the delay which I find to be opportunistic. Given the fact that CCMA has no power to review its own arbitration awards, it is indiscreet of Spar to delay launching these proceedings whilst awaiting a response to its complaint. In any event, it is highly unlikely that the Convening Senior Commissioner would not have responded to such a serious allegation against the Commissioner if indeed it came to its attention.
- [5] Notwithstanding the above, it is my view that Spar has good prospects of success as would be shown later in this judgement.¹
- [6] I am accordingly inclined to grant the indulgence sought.

Factual background

¹ *Queenstown Fuel Distributors CC v Labuschagne N.O & Others* (2002) 21 ILJ 166 (LAC) at para 24.

- [7] The Maphanga was employed by the Spar with effect from the 1st of March 1999 and held a position of an inventory clerk, earning R6 050.00 per month. He was dismissed on the 4th of June 2012 for refusing to work nightshift. Spar argued that even though there was no agreement to work nightshift between itself and Maphanga, in practice he regularly worked nightshift since 2009.
- [8] Maphanga was strongly warned about consequences of his refusal to work nightshift. On the 4th of June 2012, Maphanga yet again refused to work nightshift. He was summoned to a disciplinary hearing that took place on the 25th of June 2012 on a charge of misconduct. Essentially, on the 3rd of July 2012 Maphanga was found guilty of and dismissed for the following charges:
- 4.1 Charge 1: Interference in the normal running of operations.
 - 4.2 Charge 2: Refusal to obey a reasonable instruction.
 - 4.3 Charge 3: Refusal to work nightshift which is an operational requirement of the company.
- [9] Maphanga denied ever agreeing to work nightshift before December 2011. He only agreed to work nightshift in December 2011 simply because Spar had arranged transport for the employees. When Maphanga was asked to work nightshift in January 2012, he blatantly refused.

Grounds for review

- [10] The Spar premised its application for review on the following grounds:
- 6.1 That the Commissioner misconstrued both law and facts that he was presented with and in so doing he committed a gross irregularity or reached a conclusion that no commissioner could reasonably have reached on evidence before him.
 - 6.2 The First Respondent failed to take into account relevant evidence as he was asleep during the testimony of the Spa's witnesses.

Legal principles and analysis

[11] It is trite that Section 145 of the LRA provides limited grounds for review and is suffused by constitutional standard of reasonableness.² In *Herholdt v Nedbank Ltd*³ the SCA stated that it would be justifiable in terms of the *Sidumo* test to 'set aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner'. Alternatively,

"[21] ... where the decision-maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner. That is well illustrated by the facts of that case. A magistrate seized with a valuation appeal was required under the relevant legislation to conduct a fresh enquiry into the question of the proper value of the property. Instead he refused to consider the evidence of value tendered by the appellant and approached the matter on the basis that he could only amend the valuation if it was clearly erroneous. In the circumstances he did not enter upon the correct enquiry and his decision was set aside." ⁴

[12] In *Goldfield Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & Others*⁵ the application of the *Sidumo* test was explained as follows:

"[18] In a review conducted under s145(2)(a)(c)(ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make."

² *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 28 ILJ 405 (CC) at para 108

³ *Herholdt v Nedbank Ltd* [2013] 34 ILJ 2795 (SCA) at para 13.

⁴ *Ibid* at para 21.

⁵ [2014] 1 BLLR 20 (LAC) at para 18

[13] The Commissioner, confronted with issue of Maphanga's refusal to work nightshift, made the following finding which was ultimately dispositive of the matter:

"Charge [3] Refusal to work night shift which is an operational requirement of the company. The available evidence indicates that the applicant refused to work night shift in January 2012. I find the applicant's refusal to work night shift reasonable. I say this because the (BCEA)...Provides that an employer who requires an employee to work nightshift have to make transportation available between employee's place of residence and the workplace at the commencement and conclusion of the employee's shift. I alight myself with the said law and I find that the applicant did not breach a rule or standard."

[14] Contrary to the finding of the Commissioner, section 17(2) of the Basic Conditions of Employment Act 75 of 1997 ("BCEA") provides:

"(2) An employer may only require or permit an employee to perform night work, if so agreed, and if –

(a) the employee is compensated by the payment of an allowance, which may be a shift allowance, or by a reduction of working hours; and

(b) transportation is available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift."

[15] It was argued on behalf of Maphanga that his refusal to work night shift was consequential to the Spar's refusal to provide him with transport despite his safety concerns. Spar, on the other hand, argued that the Commissioner misdirected himself in his line of reasoning as section 17(2)(b) requires availability of transport as opposed to the employer providing transport.

[16] The essence of the matter is whether or not there was transport available between Maphanga's place of residence and Spar's premises. Mahlombe, Spar's main witness, was adamant that transport had never been an issue in

his department even for Maphanga.⁶ He testified that Maphanga had been complaining about the adequacy of the nightshift allowance up until the final disciplinary hearing where transport was raised for the first time.⁷ For completeness sake, I deem it necessary to excerpt the following Mahlombe's evidence in that regard when quizzed by the Commissioner:⁸

"Commissioner: When he complained about transport, what was your answer?"

Mr Mahlombe: My answer on the issue of transport, I said, all guys, I have got...never complained about transport, so I do not understand when you are saying that I must have a transport to pick you up from your home to work and from work to home because all those people are coming to work and then they never had an issue of transport.

Commissioner: In your view, was he unreasonable to ask for transport?"

Mr Mahlombe: It was unreasonable if it was an issue where there is no transport available for him from home to work, maybe sometimes he was, he spoke to me before to say, okay, I am struggling with transport and my transport is late most of the time, I would consider that to say, okay, maybe there is a problem, I will do further studies on that, but the fact is that we have got guys staying with him that side and they are coming on time, and they are going back home on time. They do not have any issues that they rose with me to say no, Mahlombe we have this challenge with transport."

[17] The Mahlombe's evidence was never challenged. It is therefore my view, as is apparent from the following evidence, that indeed the main reason for

⁶ Transcribed record page 41 (paginated page 43) lines 1 to 5.

⁷ Transcribed record page 41 (paginated page 43) lines 6 to 25; page 51 lines 8 to 15.

⁸ Transcribed record page 52 (paginated page 54) lines 12 to 25; page 53 lines 1 to 9.

Maphanga's refusal to work nightshift was not transport but nightshift allowance:

"Commissioner: What was the problem about the 10% rate, what problem did he have on that rate?"

Mr Mapanga: The money which I was paying in the taxi too, was over than the 10%.

Commissioner: What was the difference if you compare what you would get during dayshift and nightshift?

*Mr Mapanga: During nightshift the problem I had is that I do not use a bus, the bus you have to, the way you use a bus you have to change two times, but when you use a taxi you have to change three times which costs."*⁹

[18] It is clear that the Commissioner's finding is based on anecdotal evidence with little regard to above pivotal facts, if at all. Maphanga was duly warned about the consequences of his refusal to work nightshift. Interestingly, under cross examination Maphanga testified that he would be willing to work nightshift if were to be reinstated and did not persist with his transport issue. Certainly, in the premises, Maphanga was guilty of refusal to work nightshift unreasonably so and despite being warned of the consequences. As such, dismissal was an appropriate sanction.

[19] Spar further argued that the Commissioner failed to traverse the issue of an agreement on nightshift work which was seriously contested during the arbitration proceedings. Nothing turns on this issue, I reckon, as the Commissioner's approach suggests that he had accepted the evidence that there was an agreement or alternatively an established practice to work nightshift. Maphanga himself conceded under cross examination that he did work nightshift in 2009. It is worth noting also that Saccawu took no issue with the Commissioner's finding in that regard.

⁹ Transcribed record page 101 (paginated page 103) lines 12 to 25.

[20] As to whether the Commissioner's conduct constitutes a gross irregularity which entitles this Court to interfere with the arbitration award, I align myself with the Labour Appeal Court's finding as per Ngcobo AJP, as was then, in *County Fair Foods (Pty) Ltd v CCMA & others*¹⁰ that:

"As a result of the arbitrator's misconception of the law relating to the propriety of holding a second disciplinary enquiry, the employer in the present matter was denied the opportunity of having the issue of the fairness of the dismissal considered in a fair public hearing and by means of applying the relevant law."

[21] On the allegation that the Commissioner dozed off during the arbitration proceedings, I deem it unnecessary to deal with this issue in the light of my findings above. However, there is nothing that prevents Spar from further pursuing its complaint that is before the CCMA.

Conclusion

[22] I am persuaded that the Commissioner misconstrued the provisions of section 17(2)(b) of the BCEA and as a result arrived at an unreasonable conclusion that a reasonable arbitrator could not reach on all the material that was before him. As a result, the arbitration award stands to be reviewed and set aside.

Relief

[23] It would serve no purpose to remit this dispute to the CCMA. It is apparent from my reasoning above that the Maphanga was guilty of a serious misconduct meriting dismissal.

[24] On the issue of costs, it is my considered view that it would not be fair to allow costs to follow the results.

Order

[25] In the circumstances, I make the following order:

1. The late lodging of the application is condoned.

¹⁰ [1999] 11 BLLR 1117 (LAC) at para 28.

2. The arbitration award of the First Respondent issued under case number PM5499/12 dated 6 February 2012 is reviewed and set aside.
3. The arbitration award is replaced with the following award:

“The dismissal of the Third Respondent is substantively fair.”
4. There is no order as to costs.

Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Advocate J Eastes

Instructed by Erasmus-Scheepers

For the Third Respondent:

Mr H Mathebula

Saccawu union official

LABOUR COURT