

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CASE NO: JR1654/13

DATE: 2015-08-05

In the matter between

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

MOAHLOLI NYAMA

Second Respondent

DONALD MAKOLA AND OTHERS

Third Respondent

JUDGMENT

BODA AJ: There are two applications before me. The first is an application to review and set aside the decision of Commissioner M Nyama dated 23 July 2013 under CCMA case number GAJB12248/12 in terms of which the commissioner found that the dismissal of the employee (Donald Makola) was substantively unfair but procedurally fair, and proceeded to reinstate the employee to his position prior to being dismissed without any loss of benefits, but did not order back pay. The commissioner also ordered the employee to report for duty on 1 August 2013. PRASA (the employer).

Not satisfied with the award the employer has applied for it to be reviewed and and set aside the award.

The employee in turn has applied to make the award an order of court.

Before I deal with the merits of the matter, I just briefly set out the well-known and established principles governing review applications.

The first principle is that an arbitrator commits an irregularity if there is either a failure to appreciate the true nature of the enquiry or if the result is unreasonable. In *Andre Heroldt v Nedbank (Congress of*
10 *South African Trade Unions as Amicus Curiae)* (2013) 11 BLLR 1074 (SCA), the Supreme Court of Appeal considered the test set out in Sidumo and said in summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry, or arrive at an unreasonable result.

In a follow-up case, *Gold Fields Mining South Africa (Pty) Ltd*
20 *(Kloof) v CCMA and Others* (2014) 1 BLLR 20 (LAC), a case that dealt with misconceiving the nature of the enquiry, the court emphasised that regardless of what the peg of the review hangs on, either unreasonableness or misconceiving the nature of the enquiry, it is still necessary for the applicant in the review to show materiality in the sense that the complained irregularity, if it had not been committed,

would have led to a different outcome.

The third principle, which is relevant to a review application, arises from Herholdt itself where the court looked at the Constitutional Court case in Sidumo and compared it with the Sidumo decision of the SCA and then had the following to say on the approach to reviews that the Constitutional Court endorsed. It said: ‘On this approach, (referring to the CC’s approach) the reasoning of the arbitrator assumes less importance than it does on the SCA test where a flaw in the reasons results in the award being set aside. The reasons are still
10 considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.’

From this one, one gains the principle that you look at the reasons to see if they are reasonable. But even if they are not, you look at the outcome. And if there is other material that justifies the outcome on the record, the award stands.

20 Based on this, these applicable principles, I turn to the award in question and the matter in question.

The employee was charged with five charges, which appear in paragraph 57 of the arbitrator’s award. It reads as follows:

“Charge 1: Gross misconduct or alternatively gross dishonesty in that on or about March 2011 you

distributed an anonymous and defamatory letter with malicious allegations against some PRASA executive which you implicated in authoring and distributing to a third party.

Charge 2: Gross misconduct in that on or about March 2011 you abused company property by disseminating an e-mail letter to other employees and third parties which contained defamatory and malicious allegations against some executives in the form of a letter to a third party.

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Charge 3: Gross misconduct, alternatively gross negligence in that on or about March 2011 you deliberately failed to comply with the company's communication policies and procedures by authoring and distributing defamatory and malicious allegations against some executives in the form of a letter to a third party.

Charge 4: Gross misconduct in that on or about March 2011 you breached the company's intranet and communication policies and procedures by distributing defamatory and malicious allegations against some executives in the form of a letter to a third party.

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Charge 5: Gross negligence in that on or about March 2011 you deliberately failed to use

company's formal structures in communicating your complaints or dissatisfaction, i.e. PRASA fraud hotline.

Charge 6: Gross misconduct, alternatively gross negligence in that on or about March 2011 you deliberately opened the company up for litigation by those individuals who were slandered in the letter.

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Charge 7: Gross misconduct in that all these actions by yourself and your counterparts have put the company into disrepute and have breached the mutual degree of trust and confidence which are inherent of your contract of employment.”

The arbitrator in paragraph 57 accepts that this is what the employee was found guilty of and that this charge is what led to the employee's dismissal.

The arbitrator then considered the procedural challenge that the employee launched. And without dealing in any detail with it, he found in paragraph 67 that the dismissal was procedurally fair.

20 When he went to substance, he made the following findings; and I quote at paragraph 68:

“68. The applicant denied any knowledge of the document attached to the e-mail. Magolelwa testified that he conducted an investigation which shows that the e-mail was sent from a

Yahoo address and that the attached document was authorised by Insembanyoni and modified by the applicant. Magolelwa further testified that the JESE, an independent ICT company, confirmed his findings.

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69. During cross-examination on Magolelwa, much time was spent on the terminology of modification. He testified that the modifier does not have to make any changes to the document, but would have had access to the document. The applicant may not have modified the document, but he was the last person who saved the document on the 27th March 2011 as reflected in the document properties snapshot document. The document was also reflected on the recent document screen of the applicant's laptop. The applicant [indistinct] privy to the details of the document.

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70. The contents of the document are indeed malicious, defamatory and cast aspersions on senior employees of the respondent. The allegations also relate to corruption and misuse of the respondent's funds by the

GCEO. It is undisputed that the respondent has a fraud hotline.

71. Magolelwa further testified that clean-up software, which was not installed by the respondent, was also found in the applicant's laptop to be used in an attempt to remove traces of the document. The policy does not allow external software to be installed on the company laptops. This was not disputed by the applicant. I thus draw an inference that the applicant worked with Insembanyoni in preparation of the document."

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After the arbitrator made these adverse findings against the employee relating to guilt, his function was to then assess whether in light of those findings of guilt the sanction of dismissal was appropriate. And if not, what relief, if any, was to be granted by the applicant. Those two issues required the arbitrator to have regard to the evidence before him and not to have regard to what happened at the disciplinary enquiry, because the assessment of the fairness of a sanction of dismissal is an assessment that takes place at the CCMA and not... with due regard to the evidence before it and not with due regard to the evidence that surfaced before the disciplinary chairperson.

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What the arbitrator then went on to do was to draw an adverse inference against the employer for not calling the chairperson to justify the findings relating to dismissal. And then he went through

each charge and found that there was no evidence placed before him to establish that charge, because the chairman did not testify. Now, the chairman's findings was nothing more than an opinion and there was no reason for the chairman to testify to back up the findings, because once the arbitrator found that the dismissal was procedurally fair, the arbitrator had to determine the guilt and the sanction, based on the evidence that was led at the arbitration before him.

The arbitrator manifestly, in my view, misconceived the nature of the function of assessing a fair sanction. This is one of the primary
10 duties of an arbitrator that is placed on the shoulders of an arbitrator by the Labour Relations Act, and this is confirmed by Sidumo.

By looking at the charge sheets in a very technical fashion, the arbitrator also ignored a host of authorities that has come from the Labour Appeal Court that indicate to arbitrators that employers would not draft charge sheets with a modicum of specificity that one would be used to in say civil proceedings when people draw pleadings or in criminal proceedings when prosecutors draw charge sheets. Employers are often laypersons and they draft charge sheets; as long as the charge sheet captures the essence of the complaint. The
20 arbitrator must then deal with that complaint. And the Act enjoins the arbitrator to do so with a minimum amount of legal formalities. The arbitrator must have regard to the substance of the dispute.

Now, there was duplication in the charge sheet, because it was not necessary for the employer to split the charges in the ways that he did. But at the end of the day, the entire case against the

employer resolved around his role in circulating or making common purpose with Insembanyoni in preparing the document. And then Insembanyoni circulating the document, which the arbitrator found as a matter of fact, was circulated, was defamatory. And the employee in this matter (Mr Donald Makola) had a hand in preparing the document.

Now, once the arbitrator made the adverse findings of guilt, all the arbitrator had to do was assess the fairness of the sanction.

In my mind, the failure on the part of the arbitrator to do so is a material failure in that he did not perform one of the fundamental
10 statutory duties assigned to him as arbitrator. And this is material to the outcome, because had the arbitrator considered it, the arbitrator's result would have, in all probability, been different.

I do not intend second-guessing the issue of sanction, because what is sought before me is not that I substitute, but simply that I review the arbitration award and remit it back. I am satisfied that, based on the general principles enunciated in the decisions I have referred to, that the decision of the arbitrator is reviewable in so far as it is being challenged.

I want to emphasise that I am not reviewing the decision of
20 the arbitrator with reference to procedural fairness. That decision stands, because there is no counter application. I am also not interfering with the decision of the arbitrator with reference to Mr Donald Makola's guilt and his involvement in preparing the document, which the arbitrator finds in paragraph 68 to 72 of the award. Those findings stand, because there is no counter application to review and

set aside those findings.

The review application before me is limited to a review against the ultimate finding that the employer did not prove the charges and the finding relating to the relief. Those decisions are reviewed and set aside and the matter is then remitted to the arbitrator, back to the CCMA, simply to deal with what remains in issue. What remains in issue is simply for the CCMA to reconsider the question of the sanction of dismissal, based on the findings of guilt already made by it, which have not been challenged. And if the CCMA
10 finds that the sanction is fair, then the claim should be dismissed. If the CCMA finds that, notwithstanding the findings of guilt made in paragraph 68 to 72, the sanction of dismissal is unfair because it is too harsh, then the CCMA must determine an appropriate remedy. The CCMA does not have to redetermine the findings of guilt made by the arbitrator and does not have to redetermine the issue of procedural fairness. I, accordingly, make the following order:

ORDER

1. There is no counter application to review the findings of the second respondent that:
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 - 1.1 The dismissal is procedurally fair.
 - 1.2 The adverse findings made on guilt in paragraphs 68 to 72 of the award.

Accordingly, these findings are confirmed and stand.

2. The award of the second respondent dated 23 July 2013 in so far as it relates to the finding that the dismissal is substantively unfair and

the relief is reviewed and set aside, the dispute is remitted back to the CCMA to appoint another arbitrator to reconsider the fairness of the sanction and relief, if any, to be granted, based on the acceptance of the findings referred to in paragraph 1 above.

3 There is no order as to cost.

4 The application in terms of section 158(1)(c) is dismissed with no order as to cost.

10 ON BEHALF OF APPLICANT: Adv. Pareen Vahed
INSTRUCTED BY: Makhubela Attorneys
ON BEHALF OF RESPONDENT: Adv. MD Teffo
INSTRUCTED BY: Phaladi Attorneys



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