REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 3277/12

In the matter between:

WHOLESALE HOUSING SUPPLIES (PTY) LTD **APPLICANT**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **FIRST RESPONDENT**

PHEHELO MOTAKE **SECOND RESPONDENT**

SOLIDARITY OBO RIAAN AGENGAG **THIRD RESPONDENT**

Heard: **13 May 2015**

Delivered: **6 August 2015**

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JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner held that the dismissal of Mr. R Agenbag (the employee) by the applicant was substantively and procedurally unfair. The commissioner ordered that the employee be reinstated, with partially retrospective effect, and with a final written warning valid for six months.

[2] The material facts are not in dispute. The employee accepted an offer of employment on 19 December 2011, and was engaged as the applicant's financial and administration manager. The effective date of the commencement of his employment was 9 January 2012. The applicant's contract of employment provided, amongst other things, as follows:

> 17.1 Remuneration structure
>
> 17.1.1 Your remuneration package will be structured on a cost to company basis, with your cost to company being R 27 000.00 per month. This cost will consist of a mix of cash and benefits which may be varied by agreement once per annum;
>
> 17.1.2 All reasonable cellular expenses up to a maximum of R 1000.00 per month will be borne by the company;
>
> 17.1.3 Pensionable earnings are equivalent to 75% of the cost to company package referred to in 18.1.1 above;
>
> 17.1.4 The cash portion of your package will be paid monthly in arrears, but not later than the last working day of each month………

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<u>Petrol and vehicle maintenance</u>

17.2.1 All reasonable fuel up to a maximum of R800.00 per month will be borne by the company;

17.2.2 All reasonable repairs and maintenance up to a maximum of R500.00 per month will be borne by the company.

17.2.3 You will receive an amount of R800.00 to be used for vehicle insurance purposes.

[3] It is not in dispute that on receipt of his salary advice on 26 January 2012 the employee complained that he did not receive the value of the amounts referred to in clause 17.1.2 and 17.2, a total amount of R3100.00, in addition to his salary. It is also not disputed that during a subsequent conference call in which the applicant's financial director participated, the employee was advised that the so-called benefit component of his remuneration package would be paid only on the production of expenses actually incurred. The employee subsequently submitted a claim, with supporting vouchers. The vouchers related to expenditure incurred in the purchase of fuel and airtime on 7 January 2012, the Saturday before the applicant commenced work.

[4] The employee was called to a disciplinary hearing to answer to the following charges:

1. Intention to defraud/deceive the company – you submitted claims for a period prior to your starting date at the company even though you were told by Andrew Buddricks that you could only submit slips dated after your starting date;
2. Unbecoming conduct in a management position in that you submitted an invalid claim after how to submit a claim was discussed with you.
3. Lack of integrity. You indicated on two occasions, on 27 January 2012 in a conversation with Sandra da Costa and the conversation with Andrew Buddricks/ Sandra da Costa/ William Maroleng, that if you did not use your full fuel allowance, you would need to make sure that you did so that you did not lose out. Also your submission of this claim raises serious doubts as to

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> your integrity. Especially in the position that you occupy this is very concerning (sic).

[5] The employee was found guilty of the above charges and dismissed on 14 February 2012. He disputed the fairness of his dismissal; a dispute that was referred ultimately to the first respondent for an arbitration hearing before the commissioner.

<u>The arbitration award</u>

[6] The award under review is not a model of clarity, but the essence of it is that the employee was not guilty on the first charge of fraud/deception, but guilty of the second and third charges of unbecoming conduct and lack of integrity respectively. The commissioner's reasoning can be discerned from paragraph 28 of the award onwards in which the commissioner finds that the work rules regulating the conduct in question existed, and that the employee must have been aware of these rules. He also considered the rules to be reasonable, since they were intended to protect the legitimate rights and interests of the applicant.

[7] In regard to any breach of the rules, in respect of the first charge, the commissioner finds that the applicant had failed to establish that the employee was guilty of fraud, in essence, because there was no deceit on the part of the employee. The relevant paragraphs of the award read as follows:

> [30.6] The applicant throughout, even of the disciplinary hearing, maybe even before that, acted like someone who genuinely and openly believe that he was entitled to claim as it did. He never hid or tried to hide his intentions about the claims. He obstinately argued that he was entitled to claim the alleged benefits.
>
> [30.7] I have already indicated above that are not going to decide whether the alleged benefits were indeed benefits or not. What I must decide is whether the applicant acted fraudulently or the intention to deceive the respondent when he claimed the alleged benefits. I believe he did not act fraudulently or deceitfully or dishonesty.

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[30.8] Without deciding whether his interpretation of the employment contract was correct or not, I find that the applicant most probably misinterpreted the contract. He genuinely but probably incorrectly believe that he was entitled to be by the Lancers in question in order to make up the elite shortfall in his salary. However, that does not make his conduct fraudulent or deceitful dishonest in any way! ...

[30.9.9] In respect of charge one in charge two, as indicated, all hinted above, the applicant breached the rule by claiming the way he did despite being warned against their that and because, especially in respect of charge three, he stubbornly insisted on claiming what he believes or insisted was part of his remuneration.

[8] In relation to the question of sanction, the commissioner's finding that the sanction imposed on the employee was too harsh was clearly influenced by the fact that the employee had been found not guilty of fraud or deceitful conduct. The commissioner says the following:

[32.2] Indeed if he was guilty of fraud and misconduct involving dishonesty especially gross dishonesty, I would have supported the sanction of dismissal because such conduct normally destroys the trust relationship between the employer and the employee. However, as indicated above the applicant's conduct was not fraudulent deceitful or dishonest.

[32.3] In respect of charges two and three of which the applicant was guilty there is no proof of the trust relationship having been destroyed. If the relationship was damaged or broken down, it was not damaged or broken down to the extent that the continuation of employment relationship was quite no longer tenable" as stated in the De Beer decision.

[32.4] there was a communication breakdown between the parties in respect of the claims of the allowances or what the actual remuneration packages was (sic). The respondent tried to remedy the situation through, for instance, the teleconference. However, seemingly much more direct will personal (one-on-one) communicational discussion was required, as the applicant had suggested in his emails. The parties had only known each other when the problem arose. The

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applicant had worked about two months with the teleconference was held (in February 2012 in which the claims issue was discussed.

[32.5] In the light of the fact that the applicant honestly believe that he was merely enforcing is right, the sanction of dismissal is too harsh.

<u>Grounds for review</u>

[9] The grounds for review are broadly stated but in essence, they concern the factual findings made by the commissioner in relation to the absence of fraud or deceit, and his conclusion that the sanction of dismissal was too harsh. In particular, the applicant avers that the commissioner failed to take into account particular evidence (relating in the main to the employees experience in financial matters, his financial background and acumen), that the commissioner who didn't finding that the relationship of trust between the parties had not broken down, the dismissal was not an appropriate sanction in the circumstances and that the evidence, properly considered, disclosed deceitful and fraudulent conduct on the part of the employee.

[10] On the basis of these averments, the applicant contends that the conclusion as reached by the commissioner are ones that no reasonable commissioner could have arrived at, given the evidence on record. In particular, it is contended that no reasonable commissioner could have found that the employee was not guilty of dishonesty or any intention to deceive, or that the sanction of dismissal was inappropriate in the circumstances.

<u>The applicable legal principles</u>

[11] The threshold for review is fairly well-established. Section 145 permits the review of an arbitration award, amongst other grounds, where the arbitrator commits a gross irregularity. This extends to latent gross irregularities or, put another way, instances where an arbitrator fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. *In Gold Fields Mining*

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SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others [2014] 1 BLLR 20 (LAC), the Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; in the event that a gross irregularity in the conduct of the proceedings is established, it is incumbent on an applicant to establish that the result was unreasonable or '*put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material*'. In other words, the review court must consider whether despite the arbitrator's reasoning, the result is nevertheless capable of justification on the available material.

[12] Precisely how this determination to be made was the subject of recent guidance provided by the Labour Appeal Court. In head of the *Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), Murphy AJA said the following:

> 'The determination of whether a decision is unreasonable in its result is an exercise inherently dependent 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 interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed 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 with 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 (at paragraph 31).

Further:

> 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 enquiry. 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 on the arbitrator's conception of the enquiry, the determination 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. The material error of this order would point to at least a prima facie unreasonable result.'

[13] What this analysis requires where what is at issue is any assessment of whether a reviewable defect and/or irregularity has occurred or what its impact is to be upon an award, is a determination first of the nature of the error alleged to have been committed by the arbitrator and any distorting effect that the error may have had on the outcome of the arbitrator's award. If it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then it is *prima facie* an unreasonable award. The court must then have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test.

<u>Analysis</u>

[14] The basis for the attack on the commissioner's award boils down to an attack on his factual finding regarding the existence or otherwise of an intention to defraud, and his related decision that dismissal was too harsh a sanction for the charges of misconduct that had been established. As I have indicated above, the commissioner's award is not a model of clarity, and indeed, in some instances, it appears to be contradictory. At paragraph 29.3 of the award for example, the commissioner states:

> It was indeed strange for a finance manager not to realise will know that he was breaking a rule especially after being warned against the claims that he was making.

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And further, at paragraph 29.5:

> The applicant's defence that he did not know the claim procedure cannot, in all probability, be true or correct.

Despite these findings, the commissioner inexplicably states the following, at paragraph 29.4:

> The position outlined above does not of course apply to the claim or claims made for the period before the applicant started working. He had not been warned at the time. He probably honestly believe that he was entitled to claim as he claimed at the time. This involves charge one, fraud. I have already found that he was not fraudulent, deceitful or dishonest.

This conclusion makes little sense given the fact that it was common cause that the claim which included expenses relating to the period prior to the employees commencement of employment was submitted on 27 January 2012, after the teleconference at which the relevant procedure was explained to the employee. The commissioner also contradicts his earlier findings that the employee was aware of the claims procedure and the fact that he was acting in breach of a rule when he comes to the conclusion, as he does in paragraph 30.8 that:

> [The employee] genuinely but probably incorrectly believe that he was entitled to be paid the allowances in question in order to make up for the alleged shortfall of his salary. However it does not make's conduct fraudulent or deceitful or dishonest in any way.

[15] However, I am not persuaded that the commissioner ignored material facts or failed properly to deal with the facts before him to the extent that it had a distorting effect on the outcome. The evidence before the commissioner was that the employee had expected a salary of R 360,000 per annum, or R 30,000 per month. After payment of the employee's January salary, he made enquiries as to the payment of the amount of R 3100.00, which he clearly considered would be payable regardless of any expenses actually incurred by him in regardless of any documentation in relation to any claimed expenses. During the course of the

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teleconference, the applicant's management made clear that the payment of the R3100.00 in respect of the expenses listed in the contract of employment was not automatic and that the applicant should submit receipts to substantiate his claims. The employee's response to this is recorded in his email of 27 January is the following:

1. I need your written summary or the lengthy explanations you gave telephonically regarding claiming procedures, et cetera. Please specify what you authorise in future when I'm claiming for cell phone, fuel and maintenance and repairs.
2. I will also complete another claim form today, (Friday the 27th) with slips for pay-as-you-go cell phone it down purchased, and invoice for servicing my vehicle and one slip for putting in fuel. It will be up to you how and if you will entertain paying me what I am claiming.
3. Acknowledge please that you are clear where my understanding came from regarding the payout of my benefits as per my employment contract. Note the attached documents that clearly state what I was offered on 19 December 2011, but ask for clarification, that I had no other means to accept that what and how my employment contract was worded, it indicated my expectation: to be paid out in cash monthly the R 3100 for cell phone, fuel, maintenance and repairs and insurance.

[16] This is not the language of an employee intent on defrauding his employer. It is common cause that there was no response to this email and that on 27 January the employee submitted a second claim this time with invoices and receipts to substantiate amounts that he had paid toward the servicing of his vehicle, cell phone and fuel. The employee's undisputed evidence was that by 31 January, he had not been paid his first claim or the second, and that he had not received any information or feedback regarding the teleconference and his subsequent emails. The next communication with the employee was a notice of suspension.

[17] The employee's evidence was that the documentation submitted in support of the second claim submitted after the telephone conference related to expenditure in respect of fuel, maintenance and air time, incurred on 6, 7 and 8 January, the

weekend before the employee commenced work (on Monday 9 January) and in anticipation of the commencement of work. The applicant is version before the commissioner was that after the teleconference the employee was left in no doubt that the amounts payable to the employee over and above is salary were not automatic payments of the maximum permissible allowances, and that the employee was advised in no uncertain terms that he should submit documentation to verify that the costs of the amount claimed had in fact been paid. The employee's case ultimately was that a finding ought to have been made that the employee was only entitled to claim expenses actually incurred after his commencement of employment on the basis of the terms of his contract of employment, his commencement date of 9 January 2012, the explanation to him that he was required to submit proof of expenses actually incurred and the fact that he was in a senior managerial position and all to be expected to be familiar with the management of finances. What was not established though was that it was made clear to the employee that he was not entitled to submit any claims in respect of the period prior to 9 January. This is precisely the question asked by the employee in his email on 27 January, and never answered. The employee's undisputed evidence was that the expenses that he had incurred, in respect of fuel and maintenance and airtime, had been incurred on the weekend prior to his commencing employment and into anticipation of that commencement. It is difficult appreciate our this might amount to fraud or deceitful conduct, particularly given the terms of the email are clear as to what is being claimed and extend a clear invitation to challenge the basis on which the claim was presented. Taking into account all of the evidence, the commissioner (correctly) found that the employee's had been obstinate; he may even have been pig-headed about what for him was his employer's different and incorrect understanding on how his remuneration package would be made up and paid, but the evidence fell short of establishing any intention to deceive. Being difficult is not tantamount to being deceitful. I am unable to agree therefore that the commissioner's finding in relation to the absence of deceit or any intention to

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defraud the applicant had any distorting effect on the outcome of the proceedings under review.

[18] Insofar as the applicant contests the commissioner's findings on the appropriateness of dismissal as a sanction, again, the court's capacity to interfere is limited. The commissioner was acutely aware that he was not entitled to impose the remedy that he considered to be appropriate in the circumstances – he specifically recognised that his function was to determine whether the sanction of dismissal was fair or not. The commissioner had regard to the relevant factors that are ordinarily to taken into account in dispute such as the present and after addressing each one, concluded that a lesser sanction would have been fair, given his findings on the second and third charges against the employee. His assessment that the award of reinstatement should not be fully retrospective and that a final written warning valid for six months should be imposed in respect of charges 2 and 3 reflects the outcome of the decision-making process which properly have regard to the irrelevant factors and to the interests of both parties and which sought to achieve an appropriate balance. In my view, the applicant has failed to establish that the commissioner's award of limited reinstatement coupled with a final written warning falls into the latter category. For these reasons, the application stands to fail. It is not necessary for me in these circumstances to consider the submissions made in respect of the commissioner's findings of procedural fairness.

[19] Finally, there is no reason why costs should not follow the result. Although the employee is represented by a trade union, there is no evidence that the union and the applicant are engaged in a collective-bargaining relationship, or that any order for costs might prejudice that relationship. In my view, and in the exercise of the broad discretion conferred on this court by the provisions of s 162 of the Act, the interests of the law and fairness are best served by an order to the effect of that costs follow the result.

I make the following order:

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1. The application is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicants: Adv. A Mosam instructed by Van Veijeren Incorporated.

For the Respondent: Ms. N Greef, Solidarity

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