



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no. JR 25/2013

In the matter between:

S MATHYE

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER I NYATHELA N.O.

Second Respondent

MEROPA LEISURE AND ENTERTAINMENT WORLD

Third Respondent

Heard: 11 July 2014

Delivered: 7 August 2015

Summary: Review Application – grounds of misconduct and gross irregularities – allegations unfounded on the evidence record of arbitration proceedings – test on review considered and applied – review application dismissed.

JUDGMENT

WOODHOUSE AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act, No 66 of 1995 ("the LRA").

Background

- [2] The Third Respondent ("The employer) operates a Casino and Entertainment Centre in Polokwane, Limpopo Province.
- [3] The Applicant ("Mathye") was employed by the employer in December 2004 as a Count Assistant.
- [4] Mathye was dismissed on grounds of medical incapacity on or about 17 November 2009.
- [5] Mathye was absent from work over the period 15 November 2007 to 17 November 2009.
- [6] According to the medical records tendered as evidence at the arbitration proceedings, Mathye was effectively booked off for health reasons from 15 November 2007.
- [7] The employer kept extending Mathye's sick leave to accommodate her.
- [8] At a point, Mathye was placed on unpaid leave in April 2008. She had exceeded all and any leave due to her.
- [9] Mathye was sent to the employer's medical practitioner as well as other Institutions for treatment over this period.
- [10] It was apparent from the medical information that Mathye's ill health had nothing to do with her working conditions.
- [11] On or about 30 March 2009, Mathye appeared to have attempted to resign.
- [12] The employer attempted to obtain disability benefits for Mathye. These attempts proved unsuccessful due to the nature of Mathye's medical condition.
- [13] On 1 September 2009, the employer commenced incapacity consultations with Mathye. The First consultation took place at the employer's premises. It was apparent at this consultation that Mathye was in pain.

- [14] Light duty was suggested, but Mathye was not in a position to even undertake light duty work.
- [15] On 16 September 2009, a further consultation took place with Mathye. This meeting took place at Mathye's home.
- [16] During this meeting, it was discussed with Mathye how the employer would resubmit her claim to get disability to its insurers, Metropolitan Life. An assessment was also done of whether she would be able to work. She was requested to get a second opinion regarding her medical condition.
- [17] A third session was held on 16 October 2009 at Mathye's residence. At this meeting, a variety of issues were discussed including Mathye going for the surgery suggested by the medical practitioners and attempting to get disability benefits from Metropolitan Life. It was also clear that Mathye was not in a position to work due to her condition.
- [18] Mathye's situation did not improve. On 14 November 2009, she was issued with a notification of a hearing.
- [19] The hearing was held on 17 November 2009.
- [20] At the conclusion of the hearing, the employer decided to terminate Mathye's services based on her medical incapacity.
- [21] Mathye, on her own version, had only been able to resume work at some stage in 2012.
- [22] Mathye alleged that the employer's doctor had abused her and that she had become ill due to an alleged employment policy that prohibited her from drinking water and going to the toilet. This was disputed. She never lodged any grievances regarding this conduct.
- [23] The Second Respondent ("the Commissioner") found that Mathye's dismissal was both procedurally and substantively fair.

Mathye's version on review

[24] Mathye has, in her review application, effectively recited her version at the arbitration proceedings. She challenges the Commissioner's award on the basis that the Commissioner:

24.1 attempted to force her to settle;

24.2 refused her the opportunity to call her key witness, namely her mother;

24.3 precluded her from raising the issue of discrimination;

24.4 refused to deal with a payment issue on the basis that she lacked jurisdiction to do so; and

24.5 allowed the Company's witness who testified at the arbitration to sit in the arbitration.

The test on review

[25] Arbitration awards issued by Commissioners of the CCMA are reviewable in terms of, *inter alia*, section 145 of the LRA on any of the specific grounds set out therein.

[26] The test to be applied by this Court in deciding whether an arbitration award is reviewable has been settled by the Constitutional Court.¹ The test now on review is based on the constitutional standard of reasonableness, which, as the Constitutional Court held in *Sidumo*, now suffuses the grounds of review set out in section 145 of the LRA.

[27] Since *Sidumo*, the jurisprudence emanating from not only the Labour Court but also the Labour Appeal Court has developed quite substantially.² These jurisprudential developments have been pushing the boundaries of the test on review and have culminated in two recent judgments, one in the Supreme

¹ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) (*Sidumo*).

² See: *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC) and *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC).

Court of Appeal (“SCA”) and one in the Labour Appeal Court (“LAC”).³ The current case, however, relates, in essence, to Mathye’s challenge against the outcome arrived at by the Commissioner. In essence, it is a challenge on the basis of “*substantive unreasonableness*” as referred to by the LAC in *Herholdt*. Substantive unreasonableness, it was said, relates to the finding in *Sidumo* namely “*Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?*”⁴

[28] The SCA in *Herholdt* also stated that “*an error of fact or law by the arbitrator would not justify the setting aside of the award, unless it had the result that the arbitrator was diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination in the arbitration.*”⁵

[29] The LAC, at paragraph 15 of its Judgment in *Gold Fields*, stated the following:

‘What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonable test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test.’ *In the circumstances, the LAC seems to have found that although a failure to consider certain material facts constitutes a gross irregularity, an applicant on review cannot solely rely on that, but must establish that the arbitrator’s conduct in so doing rendered the result of the arbitration unreasonable.*’

[30] In light of the above, can it be said of the Commissioner’s award in this matter that it is one that a reasonable decision-maker could have made when considering the totality of the evidence before her?

[31] In the *Gold Fields* case, the LAC was considering a review application in which the Commissioner found the employee concerned guilty of poor performance and not misconduct. The Commissioner found that dismissal was not the appropriate sanction. The LAC then went on to find that the

³ See: *Herholdt v Nedbank Limited* (2013) 34 ILJ 2795 (SCA) and *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

⁴ At para 110.

⁵ At para 19.

Commissioner's award was reviewable because the Commissioner had *"misconceived the nature of the enquiry, which was to determine the fairness of a dismissal for misconduct."*⁶ The LAC stated further that the Commissioner had committed a gross irregularity in the conduct of the proceedings by considering the dismissal of the employee concerned as one arising out of poor performance as opposed to misconduct. Importantly, what the LAC also went on to state was that in these circumstances, *"the question needs to be asked: had the categorisation of the case against [the employee] been misconduct as opposed to poor work performance, is the arbitrator's award nonetheless one that could be arrived at by a reasonable decision-maker? In my view it is clearly not."*⁷

Findings

[32] I have examined Mathye's grounds of review in relation to the evidence led at the arbitration. I find that:

32.1 there is no evidence to substantiate Mathye's claims that –

32.1.1 she was precluded from calling her mother as a witness. In fact, in an affidavit filed by the Commissioner, she clarifies this issue. Mathye called her uncle to testify. The Commissioner's explanation for why it was not necessary for Mathye's mother to testify is completely plausible and rational;

32.1.2 the Commissioner refused to entertain the issue of discrimination. It is clear from the transcript of the arbitration proceedings that Mathye agreed not to pursue the issue of discrimination;⁸

⁶ At para 22.

⁷ At para 31.

⁸ Page 280 of the record.

32.1.3 the Commissioner's finding that she lacked jurisdiction regarding certain payment issues was correct and is unassailable;

32.1.4 The Commissioner has explained the issue of settlement. There is no evidence to substantiate Mathye's allegation that she was forced by the Commissioner into settling the matter. The matter was clearly not settled as it proceeded to arbitration;

32.1.5 the allegation of an irregularity arising out of the employer's witness being allowed to sit in on the arbitration proceedings after he had testified is also ill-conceived. This is not irregular. He had completed his testimony and, thus, entitled to sit in on the proceedings.

32.2 It is clear from the Commissioner's reasoning that she properly considered the evidence that was led before her by both Mathye and the employer.

32.3 Mathye has not made out a case whatsoever in terms of the applicable principles as espoused in the Judgments referred to above for the Commissioner's award to be reviewed and set aside.

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

33.1 the Application for the review and setting aside of the arbitration award of the second Respondent issued on 29 November 2015 under case number LP6114-12 is dismissed; and

33.2 there is no order as to costs.

David Woodhouse AJ
Acting Judge of the Labour Court

Appearances:

For the Applicant: In person

For the Respondent: Adv. M.H. Marcus

Instructed by Saljee du Plessis van der Merwe Inc.

LABOUR COURT