



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case No: P 423/12

In the matter between:

**NKOSINDINI MELAPI**

**Applicant**

~~and~~ And

**THE COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**First Respondent**

**COMMISSIONER NTOMBEKHAYA SESANI**

**Second Respondent**

**LINDA SECURITY (PTY) LTD**

**Third Respondent**

**Heard: 18 February 2014**

**Delivered: 18 February 2015**

**Summary:** The fairness of an arbitration award is decided on the totality of the evidence before the commissioner and not only the contents of the arbitration award.

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**JUDGMENT**

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LALLIE J

### Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside the arbitration award of the second respondent (the Commissioner) in which she found the applicant's dismissal for being under the influence of alcohol fair. It is opposed by the third respondent.

### Factual background

- [2] The applicant was employed by the third respondent as a security guard. On 12 March 2012, while on duty at the Motherwell Law Court, he was suspected of sleeping on duty and to be under the influence of alcohol. He was subjected to a disciplinary enquiry and dismissed on 15 May 2012. He challenged the fairness of his dismissal at the first respondent (the CCMA) where the second respondent (the Commissioner) issued the award which the applicant seeks this court to review and set aside.

### The award

- [3] In her brief reasons for her decision, the Commissioner noted that the applicant denied having been under the influence of alcohol. She recorded that the third respondent's evidence was to the effect that the applicant was staggering, smelling of alcohol and had bloodshot eyes. She considered the results of the breathalyser test the applicant was subjected to and concluded that he had made himself guilty of being under the influence of alcohol at work. She also considered the submissions on the procedural fairness of his dismissal and found the applicant's dismissal reasonable and fair.

### Grounds for review

- [4] The applicant sought to rely on a number of grounds. He submitted that the Commissioner committed gross errors and gross irregularities by her failure to determine whether he was guilty of sleeping on duty and the effect of the omission on the sanction. She failed to consider that the breathalyser results were not conclusive in respect of the specific charge. She failed to arrive at

any credibility findings. She unreasonably failed to play an inquisitorial role with a view to determine a number of issues the applicant considered material which include the reliability of the instrument used to conduct the breathalyser test and the appropriateness of the sanction of dismissal. The applicant criticised the Commissioner's failure to ask the third respondent to produce a disciplinary code substantiating reasons for issuing the sanction of dismissal. She submitted that the Commissioner's decision that his dismissal was fair was unreasonable as the third respondent had failed to lead evidence proving the breakdown of the trust relationship. The Commissioner's gross irregularities that the applicant sought to rely on included her failure to consider the applicant's personal circumstances, his clean disciplinary record and that no one suffered any harm.

#### The test for review

- [5] The test for review is settled, it is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach.<sup>1</sup> Interpreting the *Sidumo* judgment (*supra*) the Labour Appeal Court in both in *Fidelity Cash Management Services v Commission for Conciliation Mediation and Arbitration and Others*<sup>2</sup> and *Gold Fields Mining SA (Pty) Ltd (Gold Kloof Mine) v CCMA and Others*<sup>3</sup> expressed the impropriety of the piecemeal approach in dealing with arbitration awards as the review court has to consider the totality of the evidence before the Commissioner when deciding its reasonableness. In *Edcon v Pillemer NO and Others*,<sup>4</sup> the court interpreted the *Sidumo* judgment thus:

'[15] Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision-maker could arrive at considering the material placed before him.

<sup>1</sup> In this regard see *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA (CC).

<sup>2</sup> (2008) 3 BLLR 197 (LAC) at paras 94-95.

<sup>3</sup> 2014 1 BLLR 20 (LAC) at para 18.

<sup>4</sup> (2010) 1 BLLR (SCA) at para 15 and 16.

[16] It is therefore the reasonableness of the award that becomes a focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the Commissioner when making the award.'

[6] Arguing that the arbitration award is susceptible to review the applicant augmented his grounds for review and relied on the relevant authority on reviews. The gist of the third respondent's argument was that the Commissioner's omission to deal with the charge of sleeping on duty was of no moment as, at the arbitration, the parties persisted with the charge of the applicant being drunk on duty. The Commissioner's decision that the applicant was drunk on duty was not based on the breathalyser results only but on the evidence of two witnesses to the effect that the applicant had insulting and aggressive behaviour, was staggering, smelt of alcohol and had bloodshot eyes. It was further argued that there was no duty on the Commissioner to play an inquisitorial role. The applicant's submission that the Commissioner failed to ask the third respondent for a disciplinary code governing the misconduct of being under the influence of alcohol at work was not true as such evidence was led. The third respondent argued that in view of the nature of its business, the Commissioner reasonably decided that the trust relationship between the applicant and itself had been destroyed. The authority which the applicant sought to rely on which required the third respondent to have led direct evidence of the breakdown of the trust relationship is distinguishable from the matter at hand.

[7] The applicant adopted a piecemeal approach as he based his case on everything he considered the Commissioner to have done wrong. He inexplicably sought to rely on the *Gold Fields* decision which expressly precludes the review court from adopting the approach. Nothing turns on some grounds the applicant sought to rely on; by way of example, the Commissioner's failure to deal with the charge of sleeping on duty. It is clear from the record that the parties concentrated on the charge of the applicant being under the influence of alcohol on duty. The Commissioner cannot be fairly criticised for not stating the effect of not dealing with the charge of sleeping on duty on the appropriateness of the sanction of dismissal as she

had to use her sense of fairness in deciding the fairness of the dismissal which includes the appropriateness of the sanction of dismissal. Contrary to the applicant's submissions, the record reflects that the third respondent presented a document which reflects that the misconduct of being under the influence of alcohol on duty was dismissible even to first offenders.

[8] In order to determine whether the award is susceptible to review, this court needs to consider whether the Commissioner dealt with the principal issue before her, considered the evidence presented on behalf of the parties and come to a reasonable decision.<sup>5</sup> As the decision whether the award is reasonable is based on the totality of the evidence before the Commissioner, the applicant's grounds for review to the effect that the Commissioner did not consider the aspects of the arbitration which do not appear in the award have no merit. The Commissioner considered the main dispute before her. She applied her sense of fairness and concluded that dismissal was reasonable and fair. She took a decision which could be taken by a reasonable decision-maker; and I could find no reason to interfere with the award.

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

9.1 The application for review is dismissed.

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Lallie J

Judge of the Labour Court of South Africa

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<sup>5</sup> See *Gold Fields (supra)*.

Appearance

For the Applicant: Mrs Van Staden of the Justice Centre

For the Third Respondent: Advocate Gauss

Instructed by: Larry Dave Attorneys

LABOUR COURT