



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

CASE NO D 928/10

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

And

MANDLAKHE KHAWULA

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION

Second Respondent

DUDUZILE NATACIA DANCA

Third Respondent

Date heard: 20 November 2014

Date delivered: 13 January 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the first respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner found that the dismissal of the third respondent (the employee he employee) was substantively unfair, and ordered her reinstatement.

Factual background and award

- [2] The employee was engaged in January 2008 as a cashier. On 5 March 2009, she was dismissed after having been found guilty on charges of under-ringing mixed chicken portions to the value of R 35.99, shortchanging a customer by R 47.10 a till shortage of R 34.70 and breaking a workplace rule against possessing cash (a sum of R60) while working on the till.
- [3] The parties' respective versions are recorded in the commissioner's award. In broad terms, the applicant denied that the chicken braai pack was among the items that the customer bought from her; she stated that she gave the customer the correct change and that the cash in her possession had been retrieved from the canteen after she had been released from her till. In his award, the commissioner correctly recorded that he was called upon to decide on a balance of probabilities whether the dismissal of the employee was procedurally and substantively fair. Given the dispute of fact in relation to the charge of under ringing the mixed chicken portions, the commissioner concluded that the employee was the only person in a position to shed light on what had transpired. It is common cause that Sithole was not present at the time of the incident. The commissioner concluded as follows:

I find it strange that a big supermarket like the respondent could in the absence of the customer not lead the evidence of a surveillance camera to prove that applicant had allowed the chicken portions to go through without payment. It is common cause that the chicken portions do not appear on the till slip but it cannot be the only reasonable inference that they went through the applicant's till. In view thereof

the evidence of the applicant that the said chicken portions were not amongst the goods that the customer had bought from her is more probable.

- [4] In regard to the charge of shortchanging, the commissioner noted a discrepancy between Sithole's evidence and that of a witness in the disciplinary hearing (Mkhungo) in regard to the amount short-changed. Here, the commissioner concluded as follows

I am of the view that if the customer was honest she should have informed Mkhungo that she had R150.00 in her possession without searching herself. It is strange that the customer had shown R34.24 to Sithole and R30.00 to Mkhungo as change that she received from the applicant. The reasoning of Sithole that the said customer could not lie because she was an elderly lady and that she had money in their position was a personal opinion and I cannot accept it as a fact. In the light thereof it is my finding on a balance of probabilities that the respondent has failed to prove that the customer was short changed. It is also my finding that, if the Respondent had investigated this matter properly, is would not have taken the R50.00 from the applicant's float. In the circumstances the applicant would not have had a shortage of R84.70. Therefore Sithole should blame herself for jumping to the conclusion that there was no reason for the customer to lie.

- [5] In regard to the charge of possession of the R60.00, the employee's case was that at the relevant time, she had retrieved the money in the canteen, was on a lunch break and on her way out of the building when called by her supervisor and found in possession of the cash. At that point, she was not operating the till. This much was conceded by Sithole. The commissioner concluded that the employee was not working at the till when she was found with the R 60.00 in her possession.
- [6] During the course of her evidence, the employee stated that she had been short paid for the month of January and February.

The grounds for review

- [7] Two grounds for review are articulated in the applicant's founding affidavit. The first is that the CCMA condoned the late referral of the dispute in circumstances where the explanation for delay was inadequate, and where the employee had failed to deal with her prospects of success. The second is that the award is reviewable because the commissioner found that the employee had not committed the misconduct for which she had been dismissed, and on account of the award of reinstatement to the date of dismissal in circumstances where the employee had delayed referring the dispute to the CCMA by some 250 days. Also attacked under this head is the award of arrear salary, being the underpayments claimed by the employee for the months of January and February 2009. Specifically, the applicant submits that the commissioner '*failed to apply his mind, misconducted himself, committed a gross irregularity and/or exceed his powers*' in the circumstances described above.
- [8] The supplementary affidavit adds very little, except that the deponent states that the condonation ruling dated 8 December 2009 was received on 11 August 2011 and that "*Commissioner P Mkhize [the commissioner who granted the application for condonation] is added to the proceedings as the fourth respondent*". In relation to the commissioner's finding that the employee had not committed an act of misconduct, the applicant simply adds, after including an extract from the record, that '*The applicant submits that it has established beyond any doubt that the third respondent committed the misconduct for which she was charged and that the first respondent's finding otherwise constituted a reviewable irregularity.*'
- [9] The applicant's heads of argument advances a case entirely different to that articulated in the founding and supplementary affidavits. Here, the applicant contends that the commissioner failed to apply his mind to the evidence before him and erred in finding that on a balance of probabilities, the evidence was insufficient to prove the charges brought against the employee. The grounds for review contained in the heads of argument are also entirely different – here the applicant (for the first time) contends that the outcome of the proceedings under review fell outside of a band of decisions to which reasonable people could come on the same

material, that the commissioner misconceived the nature of the enquiry resulting in an unreasonable outcome, and that the commissioner committed a gross irregularity by making material errors of fact and failing to weigh the evidence and the relevance to be attached to that evidence, to the extent that it rendered the outcome unreasonable.

The applicable principles.

- [10] The legal principles to be applied are well established. This court is entitled to interfere with an arbitration award if and only if the decision to which the arbitrator came is one which falls outside of the band of decisions to which reasonable decision makers could come on the available material. The court is not concerned with the correctness of the decision. Insofar as a party might rely on the conduct of an arbitrator (for example, having regard to the relevant evidence and disregarding relevant evidence) this is not in itself a basis for review – this court is entitled to interfere only if the arbitrator's conduct resulted in an award which is unreasonable in the sense referred to above.
- [11] The relevant principles were summarised recently by the Labour Appeal Court. In *Head, Department of Education v Mofokeng and others* (JA 14 /2014, 1 October 2014) the court, per Murphy AJA, said the following:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant 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 inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically 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 whether, 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. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

Analysis

[12] I deal first with what purports to be an application to review and set aside the decision to condone the employee's late referral of her dismissal dispute. The notice of motion makes no mention of any specific relief in this regard, but as I have indicated, the deponent to the founding affidavit states no more than that the referral was late, that the applicant had not received a condonation ruling and that the condonation of the late referral was reviewable. After receipt of the record in the proceedings under review and the condonation ruling, the applicant made no effort to amend the notice of motion. The supplementary affidavit, as I have indicated, simply purports to add commissioner Mkhize as a fourth respondent to the review application. Rule 22 sets out the procedure for the joinder of parties in clear and concise terms. None of the provisions of this rule were observed. It is not competent for a party unilaterally to 'add' other parties to proceedings as respondents simply by making an averment to this effect by way of affidavit. In the absence of an application for joinder having been made or heard, and an order granted by this court joining commissioner Mkhize to the proceedings, the commissioner has not been joined.

[13] The non-joinder of the commissioner is fatal to the application to review the condonation ruling. In *Hair Health and Beauty (Pty) Ltd v De Beer & another* (JR 922/2012) this court stated, at paragraphs 32 and 33 of the judgment:

... I do not hesitate to come to a considered finding that the non-joinder of the commissioner is fatal to the applicant's application for review. The decisions the applicant's sales were made by the commissioner and he ought to have been joined as a respondent in the review. It is incontrovertible that the commissioner had a direct interest in the matter.

[33] In *MEC for the Department of Education, Eastern Cape Province v Gcebe*, the Labour appeal Court held as follows:

'It is settled law that where a person or entity has a direct and substantial interest in the outcome of the preceding such a person and/or entity should be joined in the proceedings... In review applications, it is necessary to cite the arbitrator and/or CCMA or the relevant bargaining council.

- [14] The court went on to note that in the absence of any indication that the commissioner had consented or undertook to be bound by the judgment of the court, the failure by an applicant in a review application to join the commissioner whose award is the subject of the review proceedings, renders the application materially defective. I see no reason to depart from this approach. The non-joinder of commissioner P Mkize is accordingly fatal to the applicant's attempt to review the condonation ruling. In any event, the founding and supplementary affidavits simply fail to make out a case for review in relation to the condonation ruling. What they record is nothing more than an assertion of the applicant's unhappiness with the ruling; at most, the averments made suggest that the ruling is incorrect. None of these meet the required threshold for review. The absence of any record in relation to the condonation ruling is also, in itself, a basis to dismiss any application to review and set aside that ruling.
- [15] Turning next to the review of the first respondent's award, again, the founding and supplementary affidavits do no more than dispute the correctness of the commissioner's finding. The affidavit does no more than suggest that the award is reviewable because the employee had not committed the misconduct for which she was dismissed. The supplementary affidavit does no more than incorporate portions of the record in order to sustain this allegation, with a conclusion that the applicant had on the papers established 'beyond any doubt' that the employee committed the misconduct for which she was charged. In other words, the primary complaint by the applicant is that the commissioner, in effect, erroneously concluded that the employee was not guilty of the misconduct complained of.
- [16] To the extent that the applicant's heads of argument make reference to what is contended to be a failure by the commissioner to meet the threshold of reasonableness, as I have indicated, this is not the case made out on the papers. It is not open to a party in a review application to make out a case in the heads of argument. It is trite that a proper case must be made out in the founding and supplementary affidavits and that the court must disregard a recasting of the case by way of its of argument.

[17] On its own papers, the applicant has simply failed to make out a case for review. There is no reference to the applicable threshold and the basis of the application is nothing less than an appeal against the commissioner's decision. While the founding affidavit makes cursory reference to the grounds for review set out in section 145 (2), there is no attempt to relate any of those grounds to the content of the award. This court is not entitled to interfere with an arbitration award even if it is persuaded that the commissioner's decision is incorrect. Commissioners are allowed to be wrong. What the applicant was required to establish for the purposes of these proceedings was that the commissioner's decision fell outside of a band of decisions to which reasonable people could come, having regard to the available evidence. That is not a case that has been made on the papers. The papers further make no reference to let alone do they make out a case that the commissioner failed to appreciate the nature of the enquiry before him, or that he failed to appreciate or apply his mind to evidence properly before him. And on this basis alone, the application stands to be dismissed.

[18] Given my findings in relation to the failure by the applicant to make out a proper case for review, I do not intend to assess the specific factual bases on which the applicant contends that the award is reviewable. The applicable principles require only the following:

'The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

See Goldfields Mining South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others (2014) 35 ILJ 943 (LAC).

- [19] It is not in dispute that the commissioner gave the parties a full opportunity to state their case, that he identified the dispute that he was required to arbitrate and that he understood its nature, and that he dealt with the substantial merits of the dispute. The only possible basis for review in the present instance is a failure by the commissioner to meet the reasonableness threshold insofar as the result or outcome of the proceedings is concerned. As I have indicated, that is not the case that is made by the applicant and the application for review accordingly stands to be dismissed.
- [20] Finally, in relation to costs, the third respondent has been successful in her opposition to the application, but this court is traditionally reluctant to make orders for costs in matters where collective bargaining partners litigate and where an order for costs may have the potential to prejudice the collective bargaining relationship. This is not one of those cases. The employee, while assisted by a trade union in the disciplinary proceedings, was cited in her personal capacity and the union is not a party to these proceedings. There is no basis to assume that whatever relationship might exist between the applicant and the third respondent's trade union will prejudice that relationship. What particularly concerns me in the present instance is the applicant's conduct in seeking to review the commissioners' award in circumstances where there has been a manifest failure by the applicant to make out a case for review in accordance with the applicable principles. Even if I were to accept, as I do, that there have been a number of significant developments in the law relating to the threshold for review since the filing of the founding affidavit, the papers make no reference to the principles that applied to even at that date. The principle that this court has no right to entertain an application that is tantamount to an appeal is long standing. The papers have been drafted as if the applicant had a right of appeal. Further, the notice of motion in this matter was filed in September 2010, more than four years before the hearing of the application. I appreciate that during the course of 2012 the matter was struck off in circumstances where there appear to have been some confusion in relation to the notice of set down and that there were other delays along the way but the applicant, as *dominus litis*, ought to have taken steps to ensure that this matter

was dealt with on a more expeditious basis. The Practice Manual characterises a review application as one which by its very nature is urgent. For these reasons, there is no reason to deprive the third respondent of her costs.

I make the following order:

1. The application is dismissed, with costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv I Pillay, instructed by Norton Rose Fulbright

For the third respondent: Adv K Allen, instructed by Clifford Atham Attorneys