



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D142/13

In the matter between:-

GONASEELAN SIGAMONEY

Applicant

~~and~~ And

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

COMMISSIONER F A MOODLEY N.O.

Second Respondent

ETHEKWINI MUNICIPALITY

Third Respondent

Heard: 4 January 2014

Delivered: 13 January 2015

Summary: Application for review of arbitration award.

JUDGMENT

HASLOP AJ

- [1] The applicant has applied to this Court for the review and setting aside of an arbitration award to the effect that his dismissal by the third respondent was

procedurally and substantively fair.

- [2] The respondent applied for condonation in respect of the late delivery of its answering affidavit. This was granted.
- [3] The evidence that was led at the arbitration is set out in many hundreds of pages of transcript and documents and I do not intend to deal with it in detail. It is comprehensively summarised in the arbitration award. The salient facts are the following:
- [4] The applicant was employed by the third respondent in the position of superintendent. He had 34 years of service and a clean disciplinary record.
- [5] On 10 December 2011 the employer issued the applicant with a notice to attend a disciplinary hearing. There were two separate allegations levelled against him. They were the following:

‘In terms of the Rules and Procedures governing the eThekweni Municipality of the South African Local Government Bargaining Council, it is alleged that you contravened:

1: Clause 1.2.3 of the Disciplinary Procedure, in that you failed to perform your task and job responsibilities diligently, carefully and to the best of your ability, when you approved the inferior and incomplete work for refurbishment of vandalized flat in 906 Elwyn Court, Mahatma Gandhi Road (Old Point Road);

2: Clause 1.2.5 of the Disciplinary Procedure, in that you failed to conduct yourself in honest [sic] and integrity, when you process [sic] payments for incomplete work.’

- [6] The applicant was found, following the disciplinary hearing, to have committed misconduct in both of these respects and was dismissed.
- [7] The allegations arose out of a complaint, apparently received by the applicant’s superior several months after it was first made, that the refurbishment work referred to in the first of the two allegations was hopelessly deficient, and yet the contractor responsible for the deficient work

had been paid for the job.

[8] The allegation was that the applicant had certified, by way of his signature on the relevant municipal documentation, that the work had been properly completed. It was further alleged that, although the applicant himself does not process payments, it was his signature on the documentation that set the payment process in motion. The value of the disputed work was in the order of R14 000.

[9] The applicant challenged his dismissal as unfair in an arbitration at the South African Local Government Bargaining Council where the second respondent arbitrated the dispute and held that the dismissal was procedurally and substantively fair.

[10] The applicant's grounds of review are set out in his application and may be summarised as follows:

1. The arbitrator's failure to attach sufficient weight to his long service and clean record;
2. The arbitrator's failure to consider the nature of the dishonesty which was not, he alleged, gross;
3. The arbitrator's failure to consider the issue of consistency;
4. The arbitrator's failure to attach sufficient weight to the lapse of seven months between the completion of the repairs and the complaint; and
5. The arbitrator's failure to implement progressive discipline.

[11] In addition, he alleged that no reasonable decision-maker could have considered dismissal a fair and appropriate sanction in the circumstances of the case.

[12] He then supplemented these grounds by adding the following:

6. The arbitrator's failure to attach sufficient weight to the evidence of the witness Angoninus Moodley, the effect of which was to deal with

deterioration that might have occurred on the property in the seven month period between the alleged completion of the repairs and the date that the complaint came to the notice of the applicant's manager, Thula Phakathi;

- 7 The arbitrator's failure to provide him with an opportunity to "deal with" the evidence of the witnesses Marshall Naicker, Thabani Nyawose and Phiwayinkosi Zulu, who testified at the request of the arbitrator after the applicant had closed his case;
 8. The arbitrator's failure to attach sufficient weight to the failure of the employer to produce the back page of the job card at the arbitration;
 9. The arbitrator's failure to take into account the fact that Phakathi only placed his payment authorisation stamp on the documents some months after payment had already been made;
 10. The arbitrator's failure to take sufficient notice of certain anomalies in the employer's documentation relating to the repair work performed.
- [13] During the arbitration proceedings the applicant denied that the refurbishment work concerned had been inferior and/or incomplete.
- [14] He claimed to have been misled by a subordinate colleague, Sivah Daralingam, a maintenance officer whose signature to the effect that the work was properly completed he said that he had relied upon. He had therefore signed the goods received note to the effect that a post-inspection had been performed. He had not personally inspected the final repairs. He said that this was normal procedure.
- [15] He pointed out that Daralingam had been accused of misconduct in identical terms in respect of the first allegation, and in relation to the same work, that he had been found to have committed that misconduct, and yet Daralingam had not been dismissed. He had received a final written warning.
- [16] The applicant denied that he was responsible for processing payments but the evidence was that his signature set the payment process in motion. I do not

believe that the wording of the second allegation in that regard makes any material difference.

- [17] He denied that his signature on the documentation signified that he had approved the work or authorised the payment for it. He said that he had signed the document on 22 March to indicate that he had performed a spot check that had been requested by Nyawose. However, Nyawose denied that he had requested that a spot check be performed by the applicant. It was also the general tenor of the employer's evidence that, while spot checks are sometimes performed, it is most unusual that a superintendent would sign that he had conducted one. The signature appears on the document without comment that might suggest that it was a spot check, or anything that might identify what aspect of the work he had checked during the spot check.
- [18] Daralingam, the maintenance officer reporting to the applicant in this instance, and responsible for this particular job, testified that he had signed the goods received note while he was ill in hospital and that the applicant's signature was already on the document indicating that the applicant had conducted the final inspection and was satisfied. He had certainly not conducted the inspection himself as he had been off work due to his illness. The applicant knew that he was off work.
- [19] Naicker, a clerk, testified that the applicant advised him, at the time that Daralingam was in hospital, that the work was complete and that the file could be taken to Daralingam in the hospital for his signature. Daralingam's signature was the only one outstanding before he could begin processing payment for the job.
- [20] The applicant denied all of this evidence.
- [21] The arbitrator dealt at some length with this and the other evidence in her award. After assessing the evidence, she accepted the version of the employer's witnesses and rejected that of the applicant. She explains why in some detail in the award.
- [22] In my opinion one cannot say that, in preferring the employer's evidence to

that of the applicant, she arrived at a conclusion that a reasonable decision-maker could not have. In order for all of the employer's witnesses whose evidence the applicant denies to have been giving false evidence there would have to have been some kind of a conspiracy against him, which seems highly improbable.

- [23] In the circumstances, I do not believe that it can fairly be said that she failed to attach sufficient weight to the lapse of seven months between the completion of the repairs and the complaint; or to attach sufficient weight to the evidence of the witness Moodley, or to the failure of the employer to produce the back page of the job card at the arbitration.
- [24] All of these issues are dealt with in the award. The question to be answered is not whether she was right or wrong in coming to the conclusion to which she did, because this is a review, not an appeal. The question, as formulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹, is whether the conclusion she reached was one that a reasonable decision-maker could not have reached.
- [25] It is probable that the applicant 'failed to perform his task and job responsibilities diligently, carefully and to the best of his ability, when he approved the inferior and incomplete work for refurbishment of vandalized flat in 906 Elwyn Court, Mahatma Ghandi Road (Old Point Road).'
- [26] The matter does not end there, however. All that this establishes is that, on a balance of probabilities, the applicant committed the misconduct complained of in the first of the two allegations against him.
- [27] The applicant has pointed out that Daralingam committed the same misconduct yet was not dismissed. Aside from his seniority and his length of service, what distinguishes the applicant's situation from that of Daralingam is, obviously, the second allegation, which is one of dishonesty. The essence of that allegation, in the light of the evidence led at the arbitration, is that the applicant acted dishonestly and with a lack of integrity when he signed the

¹ [2007] 12 BLLR 1097 (CC)

document to the effect that the post-inspection had been performed, and that this signature set the payment process in motion.

- [28] Essentially this is one course of action on the part of the applicant, despite the fact that it has been divided into two separate disciplinary charges.
- [29] If one accepts the employer's evidence, then the applicant instructed Naicker that the documents could be taken to Daralingam in the hospital because the work was complete, and when Daralingam received the documentation all of the signatures were in place save his own, indicating that a post-inspection had been done and all was in order.
- [30] If that is so and if by his signature on the document he misled those charged with processing the payment into believing that he had established, by way of a post-inspection, that the work had been properly completed, then it seems to me that the applicant acted dishonestly and with a lack of integrity.
- [31] Of course there is another feature that distinguishes the two cases, and that is that the applicant was Daralingam's superior. Although he knew that he had not conducted the inspection himself, Daralingam believed that the applicant had.
- [32] Counsel for the applicant criticised the arbitrator for not dealing pertinently with the issue of dishonesty in the award. It is also, as I have pointed out above, one of the applicant's grounds of review.
- [33] She does deal separately with the second allegation and considers the issue of dishonesty, perhaps not particularly elegantly or eloquently, but it cannot be said that she did not deal with the issue. The evidence that she accepted was that the applicant, knowing that he had not personally finally inspected the work, and knowing that Daralingam had not signed off that he had, had signed a document indicating that he, the applicant, had done so. It seems to me that this is a clear instance of dishonesty and, in circumstances where the work had not in fact been satisfactorily completed, his dishonesty cost his employer money. I do not believe that it was necessary for the arbitrator to have spelt this out. The facts that she accepted made it clear.

- [34] In addition, she does note in her award that she is enjoined by the judgment in *Sidumo* to have regard to the applicant's service. She does not deal with this in any detail but she does indicate why she considers dismissal to have been an appropriate sanction, and therefore, by necessary implication, why she did not consider progressive discipline to be appropriate in this instance.
- [35] I do not believe that there is any merit in the complaint that the applicant had no opportunity to deal with the evidence of Naicker, Nyawose and Zulu. Although they testified after he did, the issues in respect of which they testified were dealt with elsewhere in the evidence, and the applicant was given a full opportunity to cross-examine each of them. Although there is a school of thought that it is not the place of an arbitrator to request evidence that might fill gaps in a party's case, in this instance it seems that, having heard evidence involving Naicker and Nyawose, she cannot be criticised for wishing to hear what they had to say about that evidence. In any event it was the applicant who had alleged that Nyawose had instructed him to do the spot check. Of course, Nyawose did not support this version. It seems unlikely, if he had supported it, that the applicant would have complained about the fact that he was called to testify late in the proceedings.
- [36] The alleged anomalies in the documentation do not, in my view, assist the applicant. In summary, the evidence that was reasonably accepted by the arbitrator was that, on a balance of probabilities, incomplete work was signed off by the applicant in circumstances when he had not checked it but advised Naicker that it was complete and that Daralingam could therefore sign in the appropriate place even though he was in hospital.
- [37] In *Herholdt v Nedbank Ltd*,² the Supreme Court of Appeal said the following about the review test at paragraph 12 of the judgment:

'That test (the test in *Sidumo*) involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and

² [2013] 11 BLLR 1074 (SCA)

other material properly before the arbitrator (a more stringent test than asking whether the decision is one that the arbitrator could reasonably reach). On this 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 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.’

- [38] Of course, an award is reviewable under section 145(2) (a) of the LRA if the commissioner committed a gross irregularity in the conduct of the arbitration proceedings. In *Herholdt*³, the SCA considered what this means and summarised the position as follows in paragraph 25:

‘...For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

- [39] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁴, Waglay JP said the following, from paragraph 15 to paragraph 18 of his judgment, about the correct approach to review proceedings where the arbitrator is alleged to have committed a gross irregularity:

‘... What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self-standing ground insulated from or standing independent of the *Sidumo* test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to

³ *Ibid*

⁴ [2014] 1 BLLR 20 (LAC) at paras 15-18.

consider all or some of the issues *albeit* material as rendering the award liable to be set aside on the grounds of process-related review.

In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable...

The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

In a review conducted under section 145(2)(a)(c)(ii) [sic] of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

[40] Applying the principles enunciated in these judgments I am of the view that it cannot be said that the award in this case is one that a reasonable decision-maker could not have made.

[41] Counsel were in agreement that costs should follow the result. It is in any event in accordance with the requirements of the law and fairness that they should do so.

[42] I therefore make the following order:

The application to review and set aside the second respondent's arbitration award in this matter is dismissed with costs.

Haslop, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: P Schumann

Instructed by: Perumauls Attorneys, Durban

For the Third

Respondent: S Naidu

Instructed by: Hughes Madondo Inc, Durban