



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D459/13

In the matter between:

**CAPITAL TOBACCO AND DISTRIBUTION (PTY)
LTD**

Applicant

and

FARHAAD MAHOMED

First Respondent

COMMISSIONER MICHAEL BOYCE

Second Respondent

**COMMISSION FOR CONCILIATION
AND ARBITRATION**

Third Respondent

Heard: 07 January 2015

Delivered: 28 January 2015

Summary: Application to review arbitration award following a dismissal – alleged that arbitrator committed a gross irregularity and acted unreasonably – test on review restated – narrow test – no basis for interfering with arbitrators finding that employee had not been insubordinate – review application dismissed with costs.

JUDGEMENT

LAWRENCE AJ

- [1] This is a review application brought by the Applicant in terms of Section 145 of the Labour Relations Act No. 66 of 1995 ("LRA") to have the arbitration award issued by the Second Respondent, Commissioner Michael Boyce, on the 15 May 2013 reviewed and set aside.
- [2] The arbitration award arises from the dismissal of the First Respondent, Farhaad Mahomed, on the 17 January 2013 by the Applicant, Capital Tobacco and Distribution (Pty) Ltd.
- [3] The dismissal occurred after the First Respondent was disciplined by the Applicant for being insubordinate in that he had allegedly failed to obey a reasonable and lawful instruction given to him by the Chairman of the Applicant, a Mr Abdoola on the 10 January 2013.
- [4] It is common cause that the First Respondent had been employed by the Applicant as a Manager and was remunerated a salary of R20 000 (twenty thousand rand) per month as at the date of his dismissal.
- [5] On the afternoon of 10 January 2013, Mr Abdoola had a conference telephone call with the Applicant's various Managers based at its Johannesburg office, and this included the First Respondent.
- [6] During that telephone conference, Mr Abdoola expressed concern about the fact the Applicant's female Warehouse Manager who is female, had been undertaking the task of opening and closing the premises alone on a daily basis. He went on further to indicate that in his view this constituted a safety risk.
- [7] Mr Abdoola proceeded to indicate that in future male Managers of the Applicant would be required to be present when the Warehouse Manager open and close the premises.

- [8] After the telephone conference, the First Respondent and another Manager referred in the arbitration award as “Nelson” spoke to Ms. Bibi the General Manager of the Applicant indicating that they had difficulties in being present at the opening and closing of the premises.
- [9] In the Applicant’s case he had responsibilities of fetching his daughter from crèche whilst in Nelson’s case he also had some difficulties with being present in opening the premises in the morning.
- [10] It is unclear from the record or the arbitration award of the Second Respondent as to whether both Nelson and the First Respondent were required to both be present at the opening and closing of the premises or whether only one of them were required to be present at the times in question.
- [11] It is also unclear as to whether the responsibility for performing this task was allocated solely to the First Respondent and Nelson or whether other male Managers of the Applicant at its Johannesburg office would also be expected to perform this function.
- [12] The First Respondent’s contract of employment respectively provided at paragraph 7 and paragraph 9 for the regulation of working hours and overtime.
- [13] As far as the regulation of working hours is concerned, the contract provided that the First Respondent hours of work could change in future depending on the demands of the business. It went out further to provide that adequate notice would be given to the First Respondent.
- [14] As far as overtime is concerned, the contract provided that the First Respondent, due to operational needs of the business could be required to work overtime when the need arose.
- [15] As it turned out the following morning, the 11 January 2013, Nelson did not attend work as he was ill and the First Respondent was also not present when the female Warehouse Manager opened the premises.

- [16] The First Respondent left work at his normal time on the 11 January 2013 and did not remain behind with the Warehouse Manager for the purposes of closing the premises.
- [17] He was telephoned by Bibi and instructed to return to work but indicated that he was unable to do so as he was already on the Freeway and on the First Respondent's version at the arbitration he was committed to picking up his child from crèche.
- [18] The First Respondent was charged before a disciplinary enquiry with insubordination for failing to obey a reasonable and lawful instruction.
- [19] His defence was that there was uncertainty as to which Managers were specifically required to be present at opening or closing of the premises. He further contended that he had attempted to articulate his concerns to the Chairman but was unable to "get a word in" during the teleconference. He went on to state that he had raised his concerns with the General Manager, Ms. Bibi and contended that he had set working hours that had been agreed to and if these hours were to be changed he needed to be given adequate notice by the Applicant.
- [20] In essence the substance of his defence appears to have been that the notice given to him was hardly adequate particularly in view of his personal commitments.
- [21] After hearing evidence from Applicant's witnesses and the First Respondent, the Second Respondent found that the dismissal was substantively unfair and ordered the Applicant to pay 4 months compensation to the First Respondent in the amount of R83 200 (eighty three thousand two hundred rand).
- [22] In the Second Respondent's analysis of the evidence at arbitration he found that the notice of change of working hours given by the Applicant to the First Respondent was not adequate (as is envisaged in the First Respondent's contract of employment) and the instruction was accordingly both unreasonable and unlawful and as such the First Respondent was not under

obligation to comply. He further noted that the First Respondent had a credible explanation in that he had obligations to collect his child from crèche.

- [23] The Second Respondent further found that although the Applicant's disciplinary code provided for a sanction of dismissal for insubordination, there was firstly no insubordination in the present matter and aside from that, the sanction meted out to the First Respondent was not in keeping with the principles of progressive discipline as are indicated in Schedule 8 of the Code of Good Practice to the LRA.
- [24] The grounds upon which the Applicant seeks to base its review application are set out in Section 145(1) of the LRA and the Applicant also contends that the Second Respondent has issued an award that is so unreasonable that no reasonable decision maker could have reached such a decision in the light of issues and evidence placed before him.
- [25] In this regard, it was argued on behalf of the Applicant that the Second Respondent had acted grossly irregular by overlooking the fact that the First Respondent was a senior Manager and his insubordination had been perpetuated over three separate occasions. Ms. Oliver argued on behalf of the Applicant that the Second Respondent had failed to take into account the fact that the Applicant had on the morning of 11 January 2013 failed to arrive at work timeously to open the premises ("the first act of insubordination"), the fact that the First Respondent had left work before closing the premises ("the second act of insubordination"), and thirdly that he had refused to return to work when instructed to do so by Ms. Bibi ("the third act of insubordination"). It was further submitted that had the Second Respondent properly taken into account the separate incidents of insubordination by the First Respondent, she would have found that the misconduct complained of was so gross that it broke the employment relationship.
- [26] It was further submitted on behalf of the Applicant that the compensation awarded by the Second Respondent to the First Respondent was also unreasonable.

- [27] Mr Van der Westhuizen who appeared on behalf of the First Respondent submitted that there were no grounds for review established by the Applicant. It was argued that if one had regard to the test on review, as set out in *Herholdt v Nedbank Ltd and Another*,¹ the focus in a review application should be on the reasonableness or otherwise of the outcome and one is less concerned with the correctness or otherwise of the method used by the particular arbitrator.
- [28] The Second Respondent, it was submitted, had considered all the material facts and the criticisms raised by the Applicant that the gravity of the insubordination was serious is without merit and in reality the alleged insubordination related to a single instruction given by Mr Abdoola on the preceding day. As the argument went, the First Respondent had been given less than 24 hours' notice of a change to his working hours and in any event, the instruction was so vague that it was unclear as to exactly what is expected of the First Respondent.
- [29] As far as the compensation is concerned it was argued on behalf of the First Respondent that the amount awarded was reasonable having regard to the fact that the First Respondent had been unemployed for the full period of four months between the date of his dismissal and the date of the award.
- [30] Both representatives agreed that the costs should follow the result.
- [31] I have considered the arguments placed before me and am satisfied that there is no basis for the award of the Second Respondent to be reviewed and set aside.
- [32] In the *Herholdt* decision (*supra*) the Supreme Court of Appeal stressed that the test as was initially espoused in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² is couched in the negative i.e. whether the decision reached at the arbitration is one that could not reasonably be

¹ [2013] 11 BLLR 1074 (SCA); 2013(6) SA 224 (SCA)

² 2008 (2) SA 24 (CC)

reached by an arbitrator. In other words this is a stricter test than simply asking whether the decision is one that the arbitrator could reasonably have reached.

- [33] While it was argued by Ms. Oliver that even though material facts may not have an impact on the outcome, a failure to take these into account by an arbitrator is a reviewable irregularity. In this regard she referred to the decision of *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*, [2009] 11 BLLR 1128(LC). I disagree, and it is clear from the *Herholdt* case (*supra*) and the subsequent case of *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*³ ‘...material errors of fact, as well as the weight and relevance to be attached to particular facts are not in themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable’⁴.
- [34] The award of the Second Respondent contains a fairly detailed recordal of the evidence placed before him and also contains a clear indication of the Second Respondent’s analysis of that evidence. There is no basis to suggest that he failed to take into account relevant factual or evidentiary material that has impacted on his award to the extent that it is so unreasonable that it could not reasonably be reached by any arbitrator.
- [35] If one examines the Second Respondent’s analysis of the evidence rendered at the arbitration he has taken into account, correctly so, the nature of the instruction given to the First Respondent and his explanation for not complying with that instruction. From that explanation furnished by the First Respondent it was reasonable for the Second Respondent to conclude that the instruction given by the Applicant was not reasonable or lawful, particularly if one has regard to the provisions of the First Respondent’s contract of employment.

³ (2014) 35 ILJ 243 (LAC).

⁴ [2013] 11 BLLR 1074 (SCA) at para 25.

[36] Even if there is some basis for suggesting that the First Respondent had committed some misconduct, I would agree with the Second Respondent's further observations that a sanction of dismissal would not be appropriate having regard to the Code Of Good Practice in Schedule 8 of the LRA.

[37] As far as the issue of compensation is concerned, the approach adopted by the Second Respondent in determining compensation is reasonable and there is no basis to interfere with the quantum of the Second Respondent's award as well. In determining quantum of compensation Section 194(1) of the LRA gives the Second Respondent a wide discretion. The First Respondent was dismissed on the 17 January 2013 and the arbitration award was issued by the Second Respondent some four months later during which period the First Respondent remained unemployed.

ORDER

[38] I accordingly, make the following order:-

38.1 The Applicant's application to review and set aside the arbitration award made the Second Respondent in this matter is dismissed;

38.2 The Applicant is ordered to pay the costs of the First Respondent in respect of this review.

Lawrence AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:-

For the Applicant: Ms Z. Oliver

Instructed by: Lockhat & Associates

For the First Respondent: Mr AP van der Westhuizen.

Instructed by: Abdool Gaffoor Parasram & Associates

LABOUR COURT