REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D774/11

In the matter between:-

SASOL NITRO **Applicant**

and

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY **First Respondent**

COMMISSIONER MOKGERE MASIPA N.O. **Second Respondent**

CLEMENT REDDY **Third Respondent**

Heard: **8 January 2014**

Delivered: **19 February 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 its dismissal of the third respondent was

procedurally and substantively unfair. It was directed to reinstate the third respondent with effect from 25 August 2011. The third respondent was not awarded back-pay.

[2] The third respondent was employed by the applicant as a plant manager in Durban. There was only one other permanent Sasol employee at the plant, an administrator. All other personnel were employed by contractors. The third respondent had been employed by Sasol for 18 years, although he had only spent the previous four with the applicant division.

[3] The following allegations of misconduct were levelled against him at a disciplinary hearing:

> '1. Dishonest Conduct
>
> 5 (e) Incorrect application of company assets or property for reasons of personal gain or any improper purpose, in that you used the store room for storing personal stuff viz. shin guards in boxes for sale in the Sasol premises without authorisation.
>
> You also acted outside your responsibility, by appointing a temporary employee (Xavin Dayal) without following an appropriate procedure and securing the employee contract [*sic*] with WLS without the knowledge of your superiors.
>
> 2. Gross Negligence
>
> You deliberately disregarded the Procurement Supply Management policy (PSM), where you procured services and items outside the system.
>
> Allowed contractors to provide services without purchase orders viz. Ponen Construction cc, invoice dated 12 October 2010; Q14 WLS-repairs and install work done on Ranco etc.
>
> 3**.** Disorderly conduct
>
> 6.5 (c) Improper / disgraceful conduct which are in conflict with the accepted norms of behaviour vesting in the Sasol Values, the Sasol Code of Ethics and the Guidelines to the Code of Ethics, and/or the

> commission of criminal offences, either within or external to the work situation, which can blemish the company's image or bring the Company into disrepute, where you used the company laptop for pornographic material.'

[4] The three headings under which the behaviour in question is detailed coincide with headings in the applicant's disciplinary code under which more specific instances of possible misconduct are set out.

[5] The charge-sheet was obviously drafted by a lay person and one should therefore not be unnecessarily pedantic about its exact wording. However, there are several issues in that regard that will require comment, beginning with the fact that the third respondent pleaded guilty at his disciplinary hearing to the first part of the first allegation, relating to the storage of private property on the company's premises, as well as to the third allegation, relating to the discovery of pornographic material on his laptop. It is important to determine precisely what portions of those charges the third respondent admitted. I will return to this.

[6] At the conclusion of his disciplinary hearing he was found guilty of all of the allegations against him and dismissed. I will also return to the question of precisely what instances of misconduct he was found to have committed.

[7] The third respondent then lodged an internal appeal in terms of the company's disciplinary code and the appeal chairman upheld the decision to dismiss him. However, the appeal chairman found that the third respondent was not guilty of certain of the misconduct attributed to him at the original disciplinary hearing.

[8] Because the letter of outcome of the appeal hearing effectively determines the reasons for the third respondent's dismissal, it is worth quoting the body of that letter in full. It reads as follows:

> 'After due consideration of evidence and arguments pertaining to the appeal hearing of Mr Clement Reddy, which I presided over on Monday, 31 January and Tuesday, 2 February [*sic*] 2010, I have

> arrived at a decision to uphold the sanction of a dismissal. Please note that two of the three charges addressed in the initial disciplinary hearing were not in dispute at the appeal hearing.
>
> As far as the third charge is concerned, Mr Reddy was found guilty on some of the allegations pertaining to the charge but also cleared on others. The nature of his transgressions, particularly when considered as a collective, has informed my decision to uphold the sanction of a dismissal. This decision was further informed by Mr Reddy's level of responsibility in the organisation when the transgressions took place.'

[9] What seems clear from this letter is that the third respondent was considered to have been guilty of "dishonest conduct" in storing his personal collection of shin guards in a company store room for sale on company premises without authorisation; "disorderly conduct" in "using the company laptop for pornographic material"; and some other allegations which are not specified except that they "pertain" to a charge falling, according to the charge-sheet, under the overall heading of "gross negligence" in respect of which he had been cleared of certain of the allegations.

[10] The appeal chairman did not testify at the arbitration, but the third respondent's evidence was to the effect that, on appeal, he had been cleared of the Ponen Construction case and the Ranco case, which are the only two matters specified in the charge of gross negligence, as well as of allegations that were made against him concerning expenditure on a team-building exercise at an external venue.

[11] However, the abbreviation "etc" is added to those Ponen Construction and Ranco allegations in the charge-sheet and the applicant did lead evidence of certain other alleged breaches of the Procurement Supply Management policy. It seems that, at the disciplinary hearing, the charge "evolved" as evidence was led to include allegations that had not been specified in the charge-sheet. Indeed, the third respondent based part of his argument concerning procedural unfairness on this and the company's failure, he said, to furnish him with sufficient detail and/or documentation. The additional

complaints, not specified in the charge-sheet, related to the purchase of a DVD writer, the purchase of a printer and to the money that was spent on the team-building exercise referred to above.

[12] However, when the third respondent was requesting copies of relevant documentation during his disciplinary hearing, the chairman, Evenwell, is reflected in the record as having told him, referring to Moropodi, the person who was presenting the company's case:

> 'Copies of printer purchase and invoice … like I said … he's not even looking at that …or the DVD writer, he's not looking at that … nor the team building thing.'

[13] In addition, when Evenwell testified during the arbitration, he said that, "I did not look at the DVD or the printer as part of the thing because Mr Moropodi didn't lead evidence." He later conceded that Moropodi had indeed led evidence on these matters, though his attempts to explain this apparent contradiction were unconvincing. His difficulty appeared to involve trying to explain the fact that the third respondent had not timeously been provided with details and/or documentation relevant to those issues.

[14] Nevertheless, we are left with the clear statement by the disciplinary chairperson that he did not consider the DVD or printer issues, nor, apparently, the team building issue – all of which the company appeared to attempt to include under the general heading in the charge-sheet of "etc".

[15] Now, if the disciplinary chairperson did not consider those matters, and the appeal chairperson cleared the third respondent of the Ponen Construction and Ranco allegations, and, it seems, the team-building expenditure, then there is nothing left of the second charge, even allowing for the initially unspecified complaints that appear to have been incorporated by the applicant into the term "etc".

[16] This leaves the first charge, which consists of two elements, and the third charge.

[17] The second part of the first charge, relating to the securing of an employment

contract for Dayal with WLS, appears to have been deliberately distinguished from allegations concerning a breach of the PSM. The charge merely claims that the third respondent did this without following “an appropriate procedure”. However, it is not clear from the evidence on what basis the applicant considered that this behaviour constituted dishonest conduct.

[18] WLS is a service provider engaged by the applicant. There appears to be an inherent contradiction in the allegations that the third respondent appointed Dayal as a temporary employee and that he secured an employment contract for Dayal with WLS, which seems to be what the charge actually means. The evidence suggested that the third respondent had secured employment for Dayal with WLS, but that his work had been performed for the applicant. On the face of it, Dayal was probably a temporary employment service employee, although that might not necessarily have been the case having regard to the fact that it appears as if it was the applicant, through the third respondent, rather than WLS, who actually procured Dayal’s services.

[19] Nothing turns on this, though, except by way of an explanation for the confusing nature of the charge.

[20] The third respondent admitted that he had procured Dayal’s services, but said that he had received authority from his seniors to do so. The authority to engage assistance on a temporary basis when it was needed was given, he said, after his request for a 2IC was turned down. In any event, he said – and this was not disputed by Moropodi – that it was the norm to take on additional employees (presumably through WLS) at busy times.

[21] The applicant’s primary complaint in this regard was that the third respondent had not followed an appropriate procedure in doing so, which would constitute misconduct if the third respondent was aware that he was required to follow a different procedure, and knew the details of that different procedure. He said that he was not and did not. The applicant’s response was that he could have found the “appropriate procedure” on the company’s Intranet. The third respondent’s evidence in that regard suggested that there were a large number of documents on the Intranet and that it was difficult to find one’s way

around these.

[22] But, even if the third respondent was aware of the procedure, or perhaps ought to have been able to navigate his way around the Intranet sufficiently competently to find it, there was no evidence that his failure to do so constituted dishonesty, under which heading this allegation resided in the charge-sheet, or even gross negligence, which is where the other allegations concerning a failure to follow procedures were placed.

[23] Although the third respondent had pleaded guilty to the first part of the first charge it was obvious that he did not admit all of the elements of the allegation. He admitted storing, for several months, a large number of shin guards that he had purchased in his personal capacity in a store room belonging to the third respondent, but he did not admit that these were “for sale in the Sasol premises” whether with or without authorisation. In fact, he denied that he had offered the shin guards for sale on the applicant’s premises.

[24] The applicant led no direct evidence, in the face of that denial, to the effect that the shin guards were for sale on its premises. The essence of this charge, as it was ultimately proved, therefore, is that the third respondent stored his personal property on his employer’s premises without authorisation. One assumes that the “personal gain” referred to in the charge-sheet was that he did not have to pay for the storage costs, or find space for the shin guards at his own residence or elsewhere and, perhaps, that they were eventually moved by people who were meant to be performing duties for Sasol and not for the third respondent.

[25] There was no evidence that the third respondent had attempted to conceal this storage from his employer and it seems that he did not personally specify the method by which they should be moved. The identification of this storage as “dishonest conduct”, despite the fact that it did involve the “incorrect application of company property” seems, in my view, to be something of a stretch. It does, nevertheless, constitute misconduct.

[26] As far as the third charge is concerned, it is once again necessary to establish

exactly what misconduct was encompassed by the third respondent’s guilty plea at his disciplinary hearing. In that regard, Evenwell testified at the arbitration that the third respondent had pleaded guilty to the fact that there was pornographic material on his laptop computer and that no further evidence had been led regarding the nature or extent of the material, how it came to be on his computer, whether it was accessed while he was at work and so forth.

[27] A document in the bundle presented at the arbitration reflected the fact that there was a significant amount of pornographic material, reckoned by file size, on the computer, but Evenwell conceded that he had not been in possession of that document. Nevertheless, since this arbitration is a fresh hearing, that document constituted part of the evidence before the arbitrator.

[28] The third respondent said that the material had come onto his computer by way of emails received from other people and that he had not personally downloaded it. It was, however, stored on his computer, and this also constitutes misconduct.

[29] It is clear that there are might be various degrees of seriousness involved in a charge concerning the possession of pornographic material. The applicant’s disciplinary code envisages, at item 6.5 (c) – which is the portion of the code specified in the charge-sheet – that such misconduct, which is categorised as “improper/disgraceful conduct”, might warrant a serious warning for a first offence and dismissal only at the third time of asking. Disciplinary codes are generally only guidelines, but the sanction specified in the code is clearly the recommended one for what might be termed standard deviations from the disciplinary norm.

[30] There was no evidence to suggest that the third respondent’s possession of the pornographic material was especially egregious beyond the fact that it was a breach of a company rule of which the employee was, on a balance of probabilities, aware.

[31] Indeed, it was clear from the evidence of Evenwell, as well as the appeal chairperson’s letter referred to above, that it was the cumulative effect of the

third respondent's misconduct that led to his dismissal, rather than the extreme seriousness of any one of the charges on its own. In that connection, the code provides for a final warning as the recommended sanction for a contravention of item 5 (e), the unauthorised use of company property to which the third respondent had pleaded guilty.

[32] Now there is no problem with applying the cumulative effect of a number of disciplinary charges to increase a recommended sanction, even to the point of dismissal, but one must, of necessity, consider what is being accumulated.

[33] In this case, it turns out to have been the unauthorised storage of shin guards, without evidence that they were being sold on the employer's property; the possession on his laptop of pornographic material of a nature that would usually attract a serious warning; and, even if one allows the applicant the benefit of the doubt in this regard, the securing of a temporary employment contract with a temporary employment service in respect of services that the company required, for which there was a clear precedent and which the third respondent believed had been authorised by his seniors, albeit that all of this happened without compliance with a specific company procedure.

[34] It would appear that, in deciding not to award the third respondent back-pay, the arbitrator took into account the fact that he had committed misconduct, although not, in her view, dismissible misconduct.

[35] In my view, the cumulative effect of these charges did not warrant dismissal.

[36] But that is only my view, and this is a review, not an appeal, so it is the arbitrator's conclusion that matters, and the method by which she arrived at that conclusion.

[37] Before I deal with the arbitrator's award, and despite the fact that counsel focused principally on substantive matters during argument before me – unsurprisingly since it is substantive unfairness that opens the door to reinstatement – I must consider the third respondent's procedural complaints in the light of the applicant's contention that the arbitrator's finding was not one at which a reasonable decision-maker could have arrived.

[38] In her award the arbitrator found that the dismissal was procedurally unfair. The conclusion she arrived at was that “the chairperson’s conduct during the hearing did not appear neutral”. She enumerates a number of procedural issues in the award, some of which, raised by the third respondent, she finds did not constitute unfairness. The applicant argues that her findings in this connection are contradictory.

[39] The arbitrator found that the fact that the chairman mentioned the need to ensure procedural fairness in case the matter ended up at the CCMA, and the fact that he wanted to speak to his superior before finally deciding on the sanction, were satisfactorily explained. I agree. But this not the full extent of the third respondent’s procedural complaint.

[40] The applicant complained that the chairman said at a very early stage of the proceedings that he was ready to deliver a verdict. It seems that this was in the light of the fact that the third respondent had pleaded guilty to two of the allegations. However, as matters turned out, the applicant had apparently not admitted the allegations in their entirety and it appears that the chairman may have prejudged the matter without identifying precisely what it was that the third respondent admitted.

[41] There was also a complaint that he frequently discussed the matter with the company representative and the arbitrator found, in addition, that the minutes reflected that he “used a tone that could be seen as intimidatory”.

[42] The record reflects, by way of example, that, during one particular caucus, the company HR representative tells the chairman that the third respondent “used this other way instead of the given procedure. He used, he actually purchased those things out of our system”, to which the chairman responds, “And you can’t do that.”

[43] Since her findings regarding the chairman were not restricted to the comments about the CCMA and the need to discuss the sanction with his superior, I cannot agree that those findings were contradictory.

[44] There was a further procedural complaint by the third respondent. He

complained several times that he was not given full details of the charges and/or documentation relating to them in order to enable him to prepare properly. This was especially the case in relation to charge 2. Much of this problem concerns that abbreviation, “etc”, at the end of the charge. Whether or not the chairman considered them to be part of the charges, evidence was led relating to the printer, the DVD writer – where the somewhat specious suggestion was made, in the face of the third respondent’s evidence that it was required for company purposes, that he may have needed it in connection with the pornography on his laptop – and the expenditure on the team-building exercise. No matter how much leniency one allows for the fact that the charges were probably drafted by a lay person, none of these complaints is foreshadowed in the charge-sheet.

[45] The recording device was left on during a caucus between the chairman and the company HR representative. It reveals that the chairman’s response to a request for the relevant purchasing procedure appears to be entirely unsympathetic. He commented that, since the procedure was available on the company Intranet, “he could have drawn it himself”.

[46] Later, when the hearing reconvened, and the third respondent complained about the lack of clarity in the charges, the HR representative said the following, and I quote his exact words from the transcript:

> ‘Ja sorry Mr Chair, if I may come in from ER point of view. We, it is our practice. We do not put all the information here on the charges. The reason why we’re sitting here, that is when you’re going to get everything. Here is a, we only indicate to people in terms of what has happened, why are the people charged. That’s it. That is our practice.’

[47] The chairman accepted that and the matter proceeded.

[48] That kind of approach is rife with potential procedural pitfalls. It may be just about acceptable if the charge is a simple one and the alleged misconduct itself is clearly described, but when the examples of a failure to comply with a policy are encompassed entirely, without any hint of detail, by the word “etc”, it is certainly not.

[49] I cannot hold, in the circumstances, that the arbitrator's finding that the dismissal was procedurally unfair was one that a reasonable decision-maker could not have reached.

[50] The applicant listed a number of grounds of review in its application. These may be summarised as follows:

1 The arbitrator failed to take into account the totality of the circumstances and the importance of the rules that had been breached. It is worth pointing out in this regard that the applicant's own witnesses, including the chairman of the disciplinary hearing, seemed unsure of precisely what rules had been breached or, indeed, what complaints formed part of the charges.

2 The arbitrator failed to take into account the calculated manner in which the third respondent went about contravening the procurement rules. Of course, one must take into account in that regard the fact that the appeal chairman exonerated him on three of these instances and the enquiry chairman did not consider that the other two formed part of the charges.

3 The arbitrator failed to consider the fact that the most senior employee in the Durban terminal had acted without integrity and honesty. Without wishing in any way to diminish the seriousness of managerial behaviour that does not set an example to fellow employees, one must remember that, grammatically correctly, the third respondent was the more, as opposed to the most, senior employee, since there was only one other employee of the applicant at the terminal. The charges relating to honesty have already been dealt with above.

4 The arbitrator failed to consider the importance of the breach of the procurement rules and the viewing of pornographic material during the third respondent's working hours. I have dealt with the procurement rules above, and no evidence was led that the third respondent viewed pornographic material during his working hours, an allegation that he specifically denied.

5 The arbitrator imposed her own outcome on the process rather than considering whether the employer's sanction was fair. Although it is not clear to me how the two complaints are related, the applicant also complained under this heading that the arbitrator had made contradictory findings. I will deal with this below when dealing with the test on review and how it is to be applied.

6 The arbitrator failed to appreciate that the breach of procurement rules and the viewing of pornographic material constitute dismissible misconduct in the applicant's business. I have dealt with this above.

7 The seventh ground consists of a repetition of the complaint about the arbitrator's contradictory findings.

8 The arbitrator failed to take into account the fact that the third respondent admitted to viewing pornographic material on the company's laptop. The charge in this regard was that he "used the laptop for pornographic material" and his admission was that it was on the laptop, having arrived by way of email. I have dealt with this charge above.

9 The ninth ground repeats previous grounds in different words.

10 The tenth ground refers to the alleged contradictory findings relating to procedural fairness and the conduct of the chairman. I have dealt with this above.

11 The eleventh ground once again repeats previous complaints.

12 The twelfth ground is that the arbitrator's award is unreasonable and the thirteenth simply repeats that allegation.

[51] The question to be answered by this Court is not whether the arbitrator was right or wrong in coming to the conclusion to which she did, because, as I have pointed out above, this is a review, not an appeal. The question that I must answer, as formulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC), is whether the conclusion

she reached was one that a reasonable decision-maker could not have reached. It is a relatively stringent test.

[52] In *Herholdt v Nedbank Ltd* and Others[1], the Supreme Court of Appeal had the following to say about this test and its application at paragraph 12 of that judgment:

> 'That test 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 other material properly before the arbitrator. 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.'

[53] 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*[2], 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.'

[1] [2013] 11 BLLR 1074 (SCA) at para 12.
[2] *Ibid*

[54] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[3] , 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:

> [15] '… 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 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.
>
> [16] 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...
>
> [17] 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.
>
> [18] 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

[3] [2014] 1 BLLR 20 (LAC)

> decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

[55] Applying the principles enunciated in these judgments I am of the view that it cannot be said that the arbitrator in this case misconceived the nature of the inquiry or that she arrived at an unreasonable result. Consequently it cannot be said that her award is one that a reasonable decision-maker could not have made.

[56] I am empowered, by section 162 of the LRA, to make an order for the payment of costs, according to the requirements of the law and fairness. In my opinion it is in accordance with the requirements of the law and fairness that the costs in this matter should follow the result.

[57] 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

<u>APPEARANCES:</u>

For the Applicant:	X Matyolo
Instructed by:	Maserumule Inc Attorneys, Braamfontein
For the Third Respondent:	L Naidoo
Instructed by:	T Gyapersad & Associates, Umhlanga