



**REPUBLIC OF SOUTH AFRICA**

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Case no: D549/13

In the matter between:

**DEPARTMENT OF HEALTH**

**APPLICANT**

and

**HOSPERSA OBO SHIREEN INCE**

**FIRST RESPONDENT**

**PHSSBC**

**SECOND RESPONDENT**

**PATRICK STILLWELL N.O.**

**THIRD RESPONDENT**

**Heard: 28 May 2015**

**Delivered: 24 September 2015**

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**JUDGMENT**

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**WHITCHER J**

- [1] The Applicant seeks to review and set aside an arbitration award in which the third respondent ("the arbitrator") found that the dismissal of the employee, Mrs Ince, was substantively unfair and ordered her reinstatement.
- [2] The award was issued on 21 May 2013. On 29 May 2013 the Applicant's attorney informed the employee that he has received instructions to file to review the award, but the review application was only filed on 14 August 2013, more than one month late. The record was also filed and served late, in August 2014, that is, 10 months late. The Applicant made application for the condonation of the late filing of the review but not for the late filing of the record. I am not persuaded that the Applicant has provided a good explanation for the delays and in this regard, it will be required to establish excellent prospects of success in its review application.
- [3] In 1987 the employee became employed by the Applicant's predecessor. In November 1987 the employee was placed in a post in the Central Provincial Stores (her workplace at time of her dismissal). On 17 June 2011, the employee was dismissed.
- [4] The employee was found guilty of and dismissed for five charges of misconduct relating to procedures and approval in respect of write-offs of stock losses and discrepancies. In light of the limited grounds of review, there is no need to set out the extensive details of these charges.
- [5] The arbitrator found that the employee had contravened the rule. However he found that the employee was not aware of the rules or procedures that she had to follow and could not have reasonably been expected to know same. As a consequence of this, he found that the dismissal was substantively unfair.
- [6] The grounds of review relate to the reasoning of the arbitrator and how he assessed the evidence and conflicting versions.
- [7] The threshold for review is fairly well-established. Section 145 permits the review of an arbitration award, amongst other grounds, where the arbitrator commits a

gross irregularity. This extends to latent gross irregularities or, put another way, instances where an arbitrator fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC), the Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; in the event that a gross irregularity in the conduct of the proceedings is established, it is incumbent on an applicant to establish that the result was unreasonable or 'put another way, whether the decision that the arbitrator arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material'. In other words, the review court must consider whether despite the arbitrator's reasoning, the result is nevertheless capable of justification on the available material.

- [8] Precisely how this determination to be made was the subject of recent guidance provided by the Labour Appeal Court. In head of the *Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), Murphy AJA said the following:

'The determination of whether a decision is unreasonable in its result is an exercise inherently dependent 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 interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed 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 with 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 (at paragraph 31).

Further:

Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had on the arbitrator's conception of the enquiry, the determination of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. The material error of this order would point to at least a *prima facie* unreasonable result.'

- [9] What this analysis requires is a determination first of the nature of the error alleged to have been committed by the arbitrator and any distorting effect that the error may have had on the outcome of the arbitrator's award. If it is reasonably clear that but for the identified error relied upon the award would have been different or cannot stand on its own reasoning, then it is *prima facie* an unreasonable award. The court must then have regard to the issues and the evidence as a whole to determine whether or not the outcome is nevertheless capable of being sustained on the *Sidumo* test.
- [10] The Applicant contends that the commissioner "placed undue weight" on the employee's assertion that she had not been informed of the procedures that she was alleged to have ignored and that the arbitrator ignored the evidence of the Applicant's witness, Bouwer, who testified to the contrary.
- [11] The Applicant contends that "it is highly improbable that she would have performed her duties without knowing the rules which applied to her duties" and in any event she ought to have known the rules.

- [12] With regard to the latter contention, the respondent correctly contended that an employee can only know what rules apply to his or her task if he or she is informed of them by the employer. Of necessity an employee performs the task in the manner that the employer has indicated it to be performed.
- [13] The respondent demonstrated, with reference to the record, that the evidence of both the employee and the witness Hamilton Shezi was to the effect that they both performed the task in the same way that they had done year after year without demur from those in charge of them, and in the way they had been told to do it many years ago.
- [14] The arbitrator thus correctly found that the employee's version was corroborated by the evidence of Hamilton Shezi. The Applicant did not aver or establish, with reference to the record, that Shezi's testimony fell to be rejected on any grounds.
- [15] While corroboration is not a rule, in situations where there are conflicting versions, it is in order for an arbitrator to choose a version which is corroborated, as long as there is nothing *inherently* improbable in such version. There is nothing in the version itself (the version of Shezi) which does not make sense.
- [16] There is no substance to the Applicant's submission that the arbitrator ignored the evidence of Bouwer. The first respondent pointed out that the arbitrator devoted two full pages to the evidence of Bouwer. The arbitrator was thus alive to that evidence. The respondent further demonstrated with reference to the record that Bouwer did not establish unequivocally that stores staff was trained in the procedures and policies in issue.
- [17] In all these circumstances it cannot be said properly that the arbitrator "placed undue weight" on the employee's assertion that she had not been informed of the procedures that she was alleged to have ignored.
- [18] It is important to note that the weight to be attached to any particular evidence is pre-eminently a determination to be made by the arbitrator because it is the function of the trier of fact to weigh evidence and to make assessments of its

sufficiency, cogency, credibility, probative value and so on. It is only where it can be established that the assessment is so wrong that it was an assessment that no reasonable arbitrator could have made on the material before him or her. The applicant has not demonstrated such an irregularity in the reasoning process of the arbitrator. Even if the arbitrator made errors of fact and his reasoning is not perfect, it has not been demonstrated that his reasoning and decision is so material that his conduct amounts to a reviewable irregularity.

- [19] The next ground of review, as articulated by the Applicant, is that the arbitrator “failed to consider the evidence of the Applicant’s witnesses”. The first respondent correctly submitted that this is not a ground of review and the assertion can be dismissed solely on the basis that the allegation is baldly stated as a legal conclusion. The Applicant makes no reference in its application to particular references or passages or findings in the arbitration award to the record to justify its allegation. In this regard see the judgment of Gush J in *Naidoo v National Bargaining Council for the Chemical Industry and Others*.<sup>1</sup>
- [20] In my view the arbitrator gave a detailed award in which he dealt at length with the testimony of each witnesses and analysed their evidence in relation to the evidence of other relevant opposing or corroborating witnesses. In every aspect he provided a cogent reason for accepting or rejecting certain evidence.
- [21] In light of all the findings above, I make the following order:

1. The review application is dismissed, with costs.

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BENITA WHITCHER

JUDGE OF THE LABOUR COURT

#### APPEARANCES

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<sup>1</sup> [2012] 9 BLLR 915 (LC).

For the Applicant: Z Luthuli from A P Shangase & Associates, Durban

For the First Respondent: Adv P J Blomkamp instructed by Llewellyn Cain  
Attorneys

Labour Court