



**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**

**JUDGMENT**

Not Reportable

Case no: P 31/13

In the matter between:

**BAGSHAW FOOTWEAR (PTY) LTD**

**Applicant**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**First Respondent**

**JONATHAN GRUSS N.O**

**Second Respondent**

**NULAW obo JONAS AND OTHERS**

**Third Respondent**

Heard: 30 April 2015

Delivered: 12 February 2016

**Summary: The commissioner's decision that the applicant's sick leave policy was unfair, unreasonably restrictive and inconsistent with a collective agreement binding on the parties is not, based on the material before him, unreasonable and therefore not susceptible to review.**

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## JUDGMENT

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LALLIE, J

### Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent (“the commissioner”) in which he found the dismissal of the individual third respondents, who I will refer to in this judgment as the respondents, for incapacity substantively unfair and ordered their reinstatement. It is opposed by the third respondent.

### Factual background

- [2] The respondents were employed by the applicant who conducts business in the shoe manufacturing industry. Pursuant to their dismissal for incapacity owing to absenteeism as envisaged in the applicant’s absenteeism policy, they referred an unfair dismissal dispute to the first respondent (“this CCMA”) challenging the substantive fairness of the dismissal. The commissioner issued the award which the applicant seeks this court to review and set aside.

### The award

- [3] The commissioner recorded the issue before him as the determination whether the respondents’ dismissal was substantively fair. In doing so, he had to determine whether the applicant’s absenteeism policy amounted to a fair standard and whether the applicant had fairly applied the policy when dismissing the respondents. He noted that the respondents were dismissed for incapacity in that their absence from work in terms of the absenteeism policy (“the policy”) was excessive and rendered them unable to execute their obligations in terms of their contracts of employment. Giving reasons for his decision, the commissioner considered the provisions of the policy. He took into account the applicant’s membership of the National Bargaining Council

for the Leather Industry of South Africa (“the bargaining Council”) whose collective agreement for the footwear sector is binding on the applicant. The collective agreement provides that during every 36 months sick leave cycle an employee’s entitlement to paid sick leave will be limited to 10 days in each 12 months. The limitation shall not apply to employees whose incapacity owing to illness or hospitalisation exceeds a period of 10 days in which event the Basic Conditions of Employment Act will prevail.

- [4] The policy sets its sick leave target at less than 2.5 days sick leave per quarter. The first quarter runs from January to March, the second, from April to June, the third, from July to September and the fourth from October to December. If an employee exceeds the annual limit stipulated in the policy, management reserves the right to apply the policy against the employee or grant the employee unpaid leave. A return to work interview is held each time an employee returns from sick leave. Absenteeism is monitored quarterly. If an employee is absent for three or more days in a quarter, the employee is subjected to counselling. If necessary, mitigating circumstances are taken into account. Each counselling is valid for six months and has the same value as a disciplinary warning. After the third counselling an enquiry which may result in dismissal is held.
- [5] The commissioner took into account the applicant’s right to manage persistent but intermittent absence by setting fair standards which are not in conflict with the collective agreement. He noted that in terms of the collective agreement employees were entitled to 10 days paid sick leave in each sick leave cycle. On dismissal, Miss Jonas had 26 years service. Between 26 April 2010 and 18 June 2010, she was on sick leave for 6 days on two occasions. The first counselling was held on 14 July 2010. She was on sick leave from 10 to 12 November 2010 and was subjected to a counselling session on 20 January 2011. Between 20 May 2011 and 24 June 2011, she was on sick leave for five days on three occasions and was subjected to a counselling on 18 July 2011. Owing to a miscarriage, she was on sick leave from 18 to 24 September 2011 and an enquiry into her absenteeism was held on 4 November 2011. In 2012,

she was on sick leave for five days on two occasions and on 21 May 2012 an enquiry which led to her dismissal was held.

- [6] Ms Samuels had worked for the applicant for 14 years before she was dismissed. Her sick leave record reflects that between 28 January and 2 March 2011, she was on sick leave for three days on two occasions. The first counselling session was held on 12 April 2011 and the second on 18 July 2011. Between 7 June and 28 October 2011, she was on sick leave on two occasions for seven days. The third counselling session was held on 1 February 2012. She was on sick leave for four days from 2 to 5 April 2012 and an enquiry which led to her dismissal was held on 3 August 2012. Mr Monakali had served the applicant for six years before he was dismissed. In 2010, he was booked off sick for six days on two occasions and his first counselling session was held on 4 November 2010. He was on sick leave for four days from 22 to 25 March 2011 and his second counselling session was held on 15 April 2011. From 17 July to 6 September 2011, he was on sick leave for four days on two occasions and his counselling session was held on 19 October 2011. He was on sick leave for three days on one occasion from 26 to 28 March 2012 and the enquiry which led to his dismissal was held on 21 May 2012.
- [7] The commissioner expressed the view that standards set by employers to manage persistent but intermittent absence must be fair and not in conflict with provisions of any leave determination agreed to in a collective agreement. He found that as employees employed in the footwear section of the bargaining council were entitled to 10 days paid sick leave in each 12 month cycle, to be regarded as incapacitated or to have persistent intermittent absence an employee's sick absence must be in excess of 10 days per year. He found the sick leave targets of less than 2.5 days per quarter set by the applicant unfair, unreasonably restrictive and failed to consider the cause of an employee's illness. He concluded that the respondents' dismissal was substantively unfair as he was not convinced that they were incapacitated owing to persistent and intermittent absence. He did not find their absence from work excessive.

### Grounds for review

- [8] The applicant submitted that the arbitration award stands to be reviewed and set aside as it is not one which a reasonable decision-maker could have made in relation to the facts. The award is not reasonable and justifiable in relation to the law. The commissioner committed a gross irregularity in that his reasoning is flawed and his finding consists of a number of random and mutually contradictory observations. Further irregularities committed by the commissioner which the applicant sought to rely on are based on his analysis of evidence, arguments and conclusions which rendered his award unreasonable. He abrogated his responsibility to consider the merits with reference to all the evidence, issues of credibility and inherent probabilities of the dispute. He misinterpreted facts and misapplied legal principles.
- [9] The respondents opposed the application mainly on the grounds that the arbitration award falls within bounds of reasonableness. They denied that the applicant set out any basis for review. They further denied that the commissioner committed any irregularity including unreasonably determining the matter beyond the issues in dispute as agreed upon between the parties. He correctly concluded that the absenteeism policy was unreasonable and that there was no basis to dismiss the respondents.

### Analysis

- [10] The applicant elected not to file a supplementary affidavit. A number of the grounds that it sought to rely on were not substantiated based on the record of the arbitration proceedings. However, a number of submissions made by the respondents in the answering affidavit are denied in the replying affidavit. The test for review is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.<sup>1</sup> The applicant alleged that the arbitration award is unreasonable mainly because the commissioner made errors and committed gross irregularities. In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*,<sup>2</sup> the court

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<sup>1</sup> In this regard, see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.

<sup>2</sup> [2013] 11 BLLR 1074 (SCA) at para 25

elucidated the issue of gross irregularities resulting from errors made by commissioners in the conduct of arbitrations as follows:

‘A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145 (2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry 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, 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.’

- [11] The applicant argued that the commissioner’s approach that the respondents should have exceeded their sick leave entitlement before being dismissed for incapacity was unreasonable and inconsistent with the decision in *AECI Explosives Ltd (Zomerveld) v Mambalu*.<sup>3</sup> In that matter, so went the argument, the employee was absent for 30 days over a period of almost four years and he was entitled to 14 days sick leave pay year. Had the LAC decided that the employee was entitled to 14 days sick leave per year before he could be dismissed, he would have been entitled to 56 days sick leave in the 4 years in question, yet he was absent for only 30 days. The respondents correctly pointed out that the applicant had incorrectly calculated the number of days that the respondent was on sick leave in the *AECI Explosives* matter. A proper reading of the *AECI Explosives* judgment (*supra*) reflects the applicant’s sick leave record as follows:

- 11.1 From 2 March 1989 to 21 December 1989, he was on sick leave on 10 occasions for 26 days. In July 1998, he was counselled for unsatisfactory attendance. From 25 January 1990 to 4 November 1990, he was off sick on six occasions for 16 days. He was on sick leave on 11 occasions for 37 days during the 14 months preceding June 1991. From 3 October to 29 November 1991, he was on sick

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<sup>3</sup> [1995] 9 BLLR 1 (LAC).

leave on three occasions for eight days. The applicant's record therefore proves that in the *AECI Explosives* matter, the applicant was dismissed after exceeding his sick leave entitlement for the 4 years. The *AECI Explosives* matter is, therefore, distinguishable in that the sick leave record of the applicant in that matter is materially different from those of the respondents.

[12] The applicant further argued that the guiding questions that the commissioner should have focused on was the nature of the illness of the employee and prognosis; whether the employee is still capable of doing the work he/she was employed to do; if the employee was not, the commissioner should have considered the duties the employee was still able to do; and lastly, he should have considered whether alternative work was available. It was the applicant's submission that the respondents did not address the above factors as they relied only on the submission that they did not exceed their annual sick leave entitlement. In the arbitration award, the commissioner considered the sick leave records of the respondents, the provisions of the collective agreement relating to sick leave and found the absenteeism sick leave targets set by the applicant of less than 2.5 days per quarter unfair and unreasonably restrictive. He expressed the view that as soon as an employee was booked off sick for three days, he would automatically receive counselling irrespective of the cause of his or her illness. He was not convinced that the applicants were incapacitated due to persistent and intermittent absence or that their absence from work was excessive. The commissioner was, therefore, of the view that the respondents were still able to do their work.

[13] The test for review laid down in *Sidumo (supra)* is interpreted as follows in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*:<sup>4</sup>

'... where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls

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<sup>4</sup> [2014] 1 BLLR 20 (LAC) at para 14.

in a band of decisions to which a reasonable decision-maker could come on the available material".

In paragraph 18 the court expressed the view that the reviewing court has to consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make. The applicant sought to rely on *Anglo Platinum (Pty) Ltd v De Beer* (citation omitted) where the above interpretation of the *Sidumo* judgment was relied upon.

- [14] The totality of the material before the commissioner reflects that the commissioner considered the issue before him which was the fairness of the respondent's dismissal for incapacity based on the applicant's absenteeism policy. The applicant's submission that the commissioner exceeded what he was required to determine is not supported by evidence. The commissioner evaluated the evidence presented. He noted that the counselling sessions that the respondents were subjected to had the same value as disciplinary warnings. His finding that the absenteeism sick leave targets set by the applicant were unfair and unreasonably restrictive is based on the evidence before him.
- [15] The reasonableness of the arbitration award is aptly illustrated by the case of one of the respondents, Ms Jonas (Jonas). On 31 October 2011, she received a notification to attend a formal medical absenteeism enquiry relating to her repeated absenteeism during the third quarter of 2011. The enquiry was scheduled for 2 November 2011. Its record reflects that amongst the facts which were considered and explained during the enquiry were the need for her regular attendance and the detrimental effect of the absence on the applicant's operational requirements. The nature of her illness/incapacity is recorded as miscarriage for which she was on sick leave for five days, from 18 to 24 September 2011. At the enquiry, Jonas submitted that after being treated for the miscarriage, she felt that she had not recovered fully although she was well enough to work. She planned to have her tubes tied. She had to obtain a date for the procedure which she promised to convey to the applicant. When asked whether it was likely that absenteeism would continue



in future, she responded that at that moment she had no further medical appointments. When asked what she was doing to prevent further absenteeism and better her health, she responded that she was in good health and promised to do her best to be at work at all times. She conceded that she understood that she was in contravention of the applicant's absenteeism policy. Her response, to what the applicant could do to assist her, was that there was none at that moment but she would approach the applicant should the need arise. She gave no mitigating circumstances. Factors taken into account by the presiding officer relating to the effect of Jonas' absenteeism are its operational requirements and/or productivity including the fact that absenteeism immediately leads to overtime which in turn results in additional labour costs and delay in production.

- [16] In his finding, the chairperson did not take into account the five days Jonas was booked off sick owing to her miscarriage. He noted that her previous attendance record was poor and she had been counselled three times. He extended the outcome of the enquiry and monitored her attendance for the fourth quarter of 2011 (October, November and December 2011) and the first quarter of 2012 (January, February and March 2012). He added the condition that if the days that Jonas was booked off sick exceeded the days allocated in terms of the applicant's absenteeism policy, a further enquiry which could lead to her dismissal would be held. But for the applicant's absence policy, Jonas would not have been subjected to an enquiry for being on sick leave owing to miscarriage. She would not have been threatened with possible dismissal in the event of being on further sick leave. Jonas was on sick leave in the first quarter of 2012 for mostly pelvic pain resulting in infection after her miscarriage. In his findings, the chairperson noted that Jonas was afforded an opportunity in November 2011, she again exceeded her sick leave terms of the absence policy in the first quarter of 2012 and dismissed her for incapacity. It is the restrictive nature of the absenteeism policy which persuaded the chairperson to take into account that Jonas was afforded a final opportunity in November 2011; overlooking the reality that the November enquiry was held because Jonas was on sick leave owing to miscarriage. Jonas is no medical practitioner. When she made the promise, she was not

aware that after her miscarriage she would have pelvic pain and infection which would require her to be on sick leave.

[17] The commissioner dealt with the issue before him. He neither misconceive the nature of the enquiry before him nor reach an unreasonable decision. The decision that the respondents' dismissal is substantively unfair is reasonable and based on the evidence before him. Although the applicant sought to rely on gross irregularities committed by the commissioner, it did not establish those gross irregularities or that they led the commissioner to reach an unreasonable decision. The commissioner reached a decision which a reasonable decision-maker could reach on the facts before him. His arbitration award is, therefore, not susceptible to review.

[18] I could find no reason both in law and fairness for costs not to follow the result.

[19] In the premises, the following order is made:

19.1 The application for review is dismissed with costs.

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Lallie, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Grobler

Instructed by Kirchmanns Inc

For the Third Respondent: Mr Conradie of Bradley Conradie & Halton Cheadle

LABOUR COURT