IN THE LABOUR COURT OF SOUTH, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2081-15

In the matter between:

NAMPAK PRODUCTS LIMITED t/a	
NAMPAK GLASS	**Applicant**
and	
NATIONAL BARGAINING COUNCIL	
FOR THE CHEMICAL INDUSTRY	**First Respondent**
A KRIEL N.O.	**Second Respondent**
THEMBA MATHEBULA	**Third Respondent**
CHEMICAL ENERGY PAPER WOOD	
AND ALLIED WORKERS UNION	**Fourth Respondent**

Heard: **23 August 2016**

Delivered: 31 March 2017

JUDGMENT

MAHOSI AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] ("LRA") to review and set aside the arbitration award ("the Award") dated 1 August 2014 issued by the second respondent ("the arbitrator") under the auspices of the first respondent ("bargaining council"), under case number GPCHEM 185/13-14. The arbitrator found the dismissal of the third respondent ("employee") to be substantively unfair. Procedural fairness was not in dispute. The applicant further seeks an order to stay the execution of the award pending the finalisation of the review application.

[2] The applicant also seeks condonation of the late filing of its review application. This application is unopposed.

Background

[3] The employee was employed by the applicant from the 29th of March 1996. At the time of his dismissal, he was a Lehr Inspector. A Lehr is typically a long kiln with a temperature gradient from end to end with which newly made glass objects are transported on a conveyor belt. "Annealing" is typically a heating process whereby a compound is heated to a specific temperature and/or colour and thereafter allowed to slowly cool down.

[1] Act 66 of 1995

[4] In terms of the employee's job description, the role of a Lehr Inspector is to detect bottle fault identification and fracture analysis to ensure that only the best quality product reaches the customer. Lehr Inspector must monitor the glass products manufactured on each line in accordance with checklists and packaged according to instructions and in accordance with South African Standards such as SABS 150 9001, SABS 150 14001, SABS 2200 and HACCP.

[5] On 11 November, the employee was notified to attend a disciplinary enquiry. The complaint that the employee was required to address was couched as follows:

> *'Alleged misconduct/charges*
>
> 1. *Negligence in carrying out your duties as a Lehr Inspector (in) that on 29 October 2013, morning shift, on line 1/2, you failed to investigate and do follow ups as per your job description and ran the line from 06h30 to 09h25 with 5 moulds (4, 5, 22, 31 and 36) that had been rejected on the MNR that resulted in a financial loss for the business and loss of 23% of good ware'.*

[6] The disciplinary enquiry proceeded on the 13th of December 2013, and it resulted in the employee's dismissal. The employee did not appeal the outcome of his disciplinary enquiry. Instead, on 18 December 2013, the union referred a dispute on behalf of the employee concerning the alleged unfair dismissal to the bargaining council. The dispute was not resolved at the conciliation stage, and a request was made for this dispute to be arbitrated.

[7] The arbitration hearing was conducted on 10 April 2014, followed by an inspection *in loco* of the applicant's factory on 18 June 2014 at the request of the employee. Thereafter, the arbitration was held from 23 to 25 July 2014. The Second Respondent found the employee's dismissal to be substantively unfair and ordered the applicant to reinstate the employee on a final written warning but with no back pay.

<u>Condonation application</u>

[8] The applicant received a copy of the award on the 6th of August 2014. The last day to launch the review application was the 17th of September 2014. However, it was only launched on the 27 October 2015, some 13 months late. The reason for the delay was essentially attributed to a misunderstanding between the applicant's former human resource manager and the applicant's attorney of record concerning a possible settlement of the matter. The applicant submitted that it has always intended to pursue the review application and that its failure to do so timeously was as a result of a *bona fide* misunderstanding and not wilful default on its part.

[9] Although the extent of delay is substantial, the applicant's explanation thereof was reasonable and acceptable, and the applicant has good prospect of success. Therefore, I see no reason why condonation should not be granted.

<u>Arbitration award</u>

[10] It was common cause that on the morning shift of 29 October 2013, the applicant's Shift Manager, Mr Eugene Rossouw ("Rossouw") noticed that the production line named "'*1/2*" was losing good quality glass product. On investigation, Rossouw discovered that 23% of the production on that line had been lost during that shift. Rossouw approached the employee to seek clarity on the matter, only to discover that he was not aware of the problem or its cause.

[11] On further investigation, Mr Rossouw also discovered that five incorrect moulds had been rejected by the MNR but remained running for three hours into that shift. This meant that the MNR was inadvertently rejecting good glassware. The fact that this problem occurred for three hours during morning shift indicated that the employee was not carrying out important checks on the Lehr and on the IAFIS computer system that monitors production and shows up error reports. These inspections must be continuously done at regular intervals on the shift. This resulted in a loss of about five pellets of glassware, amounting to 9866 bottles that were erroneously rejected the cost of which was R7 808.53. Mr Rossouw raised the complaint against the employee because he had failed to

carry out the necessary regular inspections. Had he done so, the problem could have been detected and rectified, and the loss would have also been averted.

[12] The employee's defence was that he was unable to conduct the required regular checks because he had concentrated on bad stacking of product and fall overs. He claimed he had no time to check for anything else and did not call for any additional assistance, because "*none*" was available. He further argued that he was surprised that no one came to his aid, therefore implying that other personnel were unavailable.

[13] Under cross-examination, the employee admitted that he knew the procedure that he was required to follow and that he had recently been trained again on that procedure. He also admitted that he did not check the IAFIS reports and that he was on a valid final warning for the same misconduct.

[14] In his analysis the arbitrator found that the employee was guilty of negligence in failing to carry out his duties as Lehr which resulted in the financial loss on 29 October 2013, because he had failed to carry out the necessary regular checks. He found that the applicant had good and sufficient reason to discipline the employee. However, he found the sanction of the dismissal to be unfair because of the employee's lengthy service with the applicant and the applicant's failure to follow the concept of corrective discipline before dismissing him. It was for this reason that the applicant seeks to review the arbitrator's award.

<u>Grounds for review</u>

[15] The applicant submits that, in arriving at his conclusion that the sanction was too harsh and therefore unfair, the arbitrator failed to take into account the following relevant evidence:

(i) The employee's negligence in failing to perform his duties as a Lehr Inspector properly had resulted in the applicant suffering a financial loss of R7 808.53;

(ii) Rossouw had given refresher training to the employee on 24 October 2013 [some five days before the incident on the 29 October 2013] concerning his duties and responsibilities as a Lehr Inspector;

(iii) The employee's disciplinary record which included a valid final written record for the same offence;

(iv) Employee's failure to immediately report the production loss to the shift manager, Rossouw;

(v) The employee's failure to display remorse during arbitration proceedings;

(vi) The employee's failure to appreciate or acknowledge his wrongdoing during arbitration.

[16] The applicant argued that in failing to apply his mind to the evidence, the arbitrator arrived at a conclusion which no reasonable decision-maker could have reached on the evidence and thereby committed a reviewable irregularity.

<u>Applicable Law and Analysis</u>

[17] It is trite that arbitration awards are reviewable in terms of section 145 of the LRA which provides that any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award. The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rusternburg Platinum Mines Ltd and Others* [2] was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*[3] as follows:

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as

[2] 2007 (28) ILJ 2405 (CC).
[3] 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013(34) ILJ 2795(SCA).

> contemplated by s 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 fact, 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.'[4]

[18] The applicant's contention is that, in finding that the sanction was too harsh and ordering his reinstatement on a final written warning, the arbitrator committed gross irregularity in that he failed to apply his mind to the evidence thereby misconceiving the nature of the inquiry. Item 3 of the Code of good Practice: Dismissal provides guidance on how the arbitrators should deal with the determination of sanction and it provides as follows:

> '3. Disciplinary measures short of dismissal
>
> Disciplinary procedures prior to dismissal
>
> (1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to employees in a manner that is easily understood. Some rules of standards may be so well established and known that it is not necessary to communicate them.
>
> (2) The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system

[4] At para 25.

of graduated disciplinary measures such as counselling and warnings.

(3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.

(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself.

(6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

[19] Thus, in determining the appropriateness of the sanction the arbitrator must enquire into the gravity of the contravention of the disciplinary rule; the consistency of application of the disciplinary rule and sanction; and the mitigating

and aggravating factors. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[5] the Constitutional Court held that:

> 'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'[6]

[20] In this case, the basis of the arbitrator's finding that the sanction of dismissal was harsh was the incorrect factual finding that the applicant failed to apply progressive discipline. Evidence on record does not support this finding. The employee's disciplinary record was part of the bundle of documents which was submitted to the arbitration by the applicant. The employee further testified under cross-examination that he was issued a final written warning. It was therefore not disputed that the employee was issued with two written warning and a final written warning prior to his dismissal. The arbitrator failed to take into consideration the evidence of the employee disciplinary record and that he was on a valid final warning prior to his dismissal.

[21] In determining whether the sanction imposed by the employer is fair, the arbitrator is required to take into account the totality of circumstances.[7] The reading of the award reveals that the arbitrator also put more emphasis on the employee's length of service. He failed to appreciate the nature and the importance of the rule breached, the consistency of application of the disciplinary rule and sanction; and the mitigating and aggravating factors. The applicant led

[5] [2007] 12 BLLR 1097 (CC).
[6] At para 78.
[7] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

relevant evidence that the employee's negligent conduct resulted in the applicant's financial loss; he was recently trained on his duties and responsibilities as a Lehr; he failed to report the incident immediately; and he failed to display remorse, to appreciate or to acknowledge his wrongdoing at the arbitration proceedings. The commissioner did not take these factors into consideration before arriving at the finding that the sanction of the dismissal was too harsh.

[22] For the abovementioned reasons, I am of the view that the arbitrator's decision is not one that a reasonable decision-maker could, on material on record, arrive at. The arbitrator's award falls to be reviewed and set aside. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[23] In the premises, I make the following order:

a) The arbitration award dated 1 August 2014 issued by the second respondent under the auspices of the first respondent under case number GPCHEM 185/13-14 is reviewed and set aside and replaced with the following order:

The employee's dismissal was substantively fair.

b) There is no order as to costs.

Mahosi AJ

APPEARANCES:

FOR THE APPLICANT: Adv. Van As

Instructed by Cliffe Dekker Hofmeyer Inc.

FOR THE THIRD AND FOURTH RESPONDENTS: