



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no JR 1756/2015

The matter between:

ARCELOR MITTAL SA LTD

APPLICANT

And

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

FIRST RESPONDENT

DIDA MASENYA N.O

SECOND RESPONDENT

JOSEPH DIKGANG MOTSAMAI

THIRD RESPONDENT

Heard: 18 July 2017

Delivered: 11 August 2017

JUDGMENT

NTSOANE, AJ

Introduction:

- [1] This matter came before me as a review launched by the Applicant (the Company) in terms of Section 145 of the Labour Relations Act¹, (the LRA) to review and set aside the arbitration award handed down by the Second Respondent (the Commissioner) in case MEGA45390 dated 19 July 2015. The Company is seeking an order that the arbitration award be reviewed and set aside matter or further and/or alternative relief. The application is opposed by the third respondent (the employee).

Background:

- [2] The third respondent was employed by the applicant on the 1 March 2008 and the time of his dismissal on the 8 December 2014, he was occupying a position of an electrician.
- [3] What is common cause between the parties is the fact that on the day of the incident, 25 September 2014, the third respondent reported to Mr Wiid (Wiid) an inappropriate conduct by one Mr Lebakeng (Lebakeng). According to the third respondent, he was in the change room trying to change his clothes when Lebakeng entered and on his exit left the door wide open for ladies in the tea room to see the inside of the change room. In his response, Wiid said to the third respondent that he should simply ignore Lebakeng.
- [4] There was no witness to testify as to what happened following the report to Wiid of Lebakeng's unwelcome conduct. In fact it appears that the third respondent and Lebakeng were the only people in the change room when the fight started thus only can they testify as to who started. The next that happened was Wiid and Mr Du Plessis ("Du Plessis") found themselves in the midst of a physical fight between the Lebakeng and the third respondent, in an attempt to separate the two. The fight went on until the security was called and only then could the fight come to an end.

¹ Act 66 of 1995

- [5] The third respondent was for that reason, charged with misconduct of “*fighting on AMSA property*” following his involvement in a fight with Lebakeng which took place on the applicant’s premises on 25 September 2014. The third respondent pleaded not guilty to the charge and submitted that he did not fight. Nonetheless, he was found guilty and dismissed on 8 December 2014.
- [6] Disgruntled by the dismissal, the third respondent approached the first respondent and referred an unfair dismissal dispute, alleging that he was unfairly dismissed. Consequently, the matter was set down for arbitration proceedings which were held over a period of two days on 18 May 2015 and 2 July 2015. The procedural aspect of the dismissal was not in dispute therefore the second respondent was called upon to determine only the substantive fairness of the dismissal.
- [7] Dismissal was common cause therefore the applicant had the onus of proving the fairness of the dismissal.

The Commissioner’s award

- [8] The second respondent held in his award that it was clear from the evidence that the third respondent and Lebakeng were not in good terms at all and that the applicant knew about this but did nothing to avoid what ultimately turned into a fight or assault. He further held that, by going to Wiid who was the only senior available at the time, to report Lebakeng, the third respondent (applicant in the CCMA) clearly indicated that he needed help and that he had no intention of fighting or finding himself in an assault or a fight incident.
- [9] The second respondent further held that Wiid did not deny the version of the third respondent that when he was busy trying to undress and change his clothes, Lebakeng opened the change room door. It was also not denied that there were female interns in the applicant’s premises and the kitchen which is next to the change room, is used or shared by staff.

- [10] The second respondent held further that the information as determined, gives reasons to believe that the third respondent had a legitimate reason to be upset or to feel provoked and these issues could lead to an altercation which ultimately sought the first respondent's intervention.
- [11] Neither Wiid nor Du Plessis saw how the altercation started as they both found the two already fighting and exchanging blows. The second respondent found that it is highly possible that even though it was alleged that the two were throwing punches at each other when Wiid and Du Plessis arrived at the scene, the altercation could have started with an assault as alleged by the third respondent. The version of Wiid and Du Plessis becomes hearsay only in as far as to who started the altercation.
- [12] The second respondent found that he was satisfied that the third respondent had clearly demonstrated that he did not want to fight by reporting Lebakeng's conduct to Wiid and that it was highly likely that what Wiid and Du Plessis saw was a desperate attempt to repel the assault. The second respondent went further to find that he was of the view that the third respondent at the time, found himself in a state of trying to fend off Lebakeng, which in that instance was seen as a fight.
- [13] The second respondent was ultimately not convinced that the applicant had discharged the onus that the third respondent was guilty of assault as he merely fended off blows. The second respondent found that the dismissal of the applicant was substantively unfair. The latter awarded the third respondent retrospective reinstatement on the same terms and conditions which existed prior to the dismissal and an amount of R152,000.00 which is equivalent to eight (8) months' salary.

Grounds for Review:

- [14] The applicant submitted the grounds of review as follows:

- 14.1 The second respondent had committed reviewable irregularity in that his award does not comprise a decision which a reasonable decision maker could have reached as it is not rationally connected to and/or justifiable in relation to the evidence that was placed before him. The second respondent did not apply his mind to the evidence.
- 14.2 The second respondent failed to apply his mind to the material that was placed before him thus his award is grossly irregular.
- 14.3 The second respondent completely ignored or disregarded evidence led by Wiid and Du Plessis that they both witnessed the third respondent and Lebakeng actively fighting. In that regard, the second respondent failed to appreciate the fact that, quite apart from the issue of how the fight started, the third respondent was engaged in a fight which continued despite pleas to refrain from such by the witnesses.
- 14.4 The second respondent ignored or disregarded evidence led by Wiid and Du Plessis that they both tried to stop the third respondent and Lebakeng from fighting and that the said parties only stopped when the applicant's security guards were called to the scene.
- 14.5 The second respondent erred in considering irrelevant issue of how and who started the fight while at the hearing and the charge was not about who and how the fight started but whether the third respondent was engaged in a fight.
- 14.6 The second respondent erred by placing much weight on issues irrelevant to the charge. In paragraph 41 of the award, the second respondent says *"the unfortunate thing about this matter was that, neither Wiid nor Du Plessis saw the altercation from when it started. They both testified that they found Lebakeng and the third respondent already fighting and exchanging blows"*.

- 14.7 The second respondent erred in placing much weight on issues that the third respondent was busy trying to undress and change his clothes when Lebakeng opened the change room door and further that female interns had access to the applicant's premises. He further pointed out that the third respondent had a legitimate reason to be upset or to feel provoked.
- 14.8 The second respondent erred in disregarding the fact that the third respondent admitted under cross-examination that he knew that he and Lebakeng were not supposed to fight.
- 14.9 The second respondent erred in disregarding the fact that the third respondent admitted that he saw and heard Wiid and Du Plessis shouting at them to stop fighting.
- 14.10 The second respondent failed to apply his mind on the matter and that his award falls short of what a reasonable commissioner would have awarded, considering the evidence placed before him in that he says *"this makes me wonder, given the fighting or boxing skills he had, why he did not run towards Du Plessis and Wiid for help because they were there to assist or stop the fight. But having said this, I find that it is highly possible as well that even though it was alleged that the two were throwing punches at each other when Wiid and Du Plessis arrived at the scene, that the altercation could have started as was alleged by the applicant"*.
- 14.11 The second respondent erred in considering the wrong position which was not before him when he says in his award *"I am not convinced that the respondent discharged the onus that Mr Motsamai was guilty of assault. He merely fended off blows to defend himself. Therefore I find that the dismissal of Mr Motsamai was substantively unfair"*. It was never the case of the applicant that Mr Motsamai was guilty of assault. That was not the charge he faced at the disciplinary hearing.

Test for review:

- [15] The grounds for review for arbitration awards are stipulated in Section 145 of the LRA. In the case of *Sidumo and Another v Rustenburg Platinum Mines and Others*² the Constitutional Court held that section 145 is suffused by the constitutional standard of “reasonableness”. The Court in *Sidumo* subsequently confirmed that the standard of review is whether the decision reached by the CCMA commissioner is one that a reasonable decision maker could not reach. The Court in the case of *Shoprite Checkers vs Ramdau NO*³ held that public power must be exercised rationally and therefore a decision made by a public agency must be rationally related to the purpose the decision making power was given. In addition thereof, and in *CUSA v Tao Ying Metal Industries and Others*,⁴ O'Regan J held:

‘It is clear.... that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.’

- [16] What the Constitutional Court meant in *Sidumo* and *Tao Ying Metal Industries* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable. This review test was considered and applied in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*,⁵ where the Court said the following:

‘The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution

² [2007] 12 BLLR 1097 CC

³ [2001] BLLR 1011 (LAC)

⁴ (2008) 29 ILJ 2461 (CC) at para 134.

⁵ (2008) 29 ILJ 964 (LAC) at para 96.

to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

- [17] As to what would be considered to be unreasonable, the Court in *Fidelity Cash Management Service* held as follows:⁶

'The Constitutional Court further held that to determine whether a CCMA commissioner's arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the commissioner 'is one that a reasonable decision maker could not reach' (para 110 of the *Sidumo* case). If it is an award or decision that a reasonable decision maker could not reach, then the decision or award of the CCMA is unreasonable, and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration award or decision of the commissioner is one that a reasonable decision maker *would* not reach but one that a reasonable decision maker *could* not reach....'

- [18] The Court in *Fidelity Cash Management Service* then went further and formulated this outcome based review test which the Court considered the *Sidumo* review test envisaged, where the Court said:⁷

'It seems to me that there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives

⁶ Id at para 97.

⁷ Id at para 102.

reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[19] The Court in *Fidelity Cash Management Service* then concluded:⁸

'.... Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'

[20] What the judgment of *Herholdt v Nedbank Ltd and Another*⁹ means is simply that if the commissioner ignored material evidence, and the review court in considering this material evidence so ignored together with the case as a whole, believes that the arbitration award outcome cannot still be reasonably sustained on any basis, then the award would be reviewable. The Court again in this case specifically considered the *Sidumo* test, and concluded as follows:¹⁰

'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. 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 the particular facts, are not in and of themselves

⁸ Id at para 103.

⁹ 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA) per Cachalia and Wallis JJA.

¹⁰ Id at para 25.

sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[21] I am now, in view of all these cases laying the test for review, inclined to intensively conduct a review enquiry in order for me to be in a better position to determine if irregularity, which warrants the award to be set aside, occurred. I will then interrogate the evidence holistically presented before the second respondent in order to establish if there is an irregularity. If, in conducting this enquiry, I find that there is no irregularity in the first place, the matter is at an end, no further determinations need to be made, and the review must fail. However, should I find that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably lead to a different outcome in the arbitration proceedings. If I were to put it differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court needs not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity existed in the first part of the test.

Analysis of the evidence:

[22] As far as the award is concerned, I find no reason to interfere with the award and its reasoning. It is my finding, the second respondent has considered the evidence presented before him concerning the actual issues, drew the reasonable inference and probabilities that any reasonable decision maker could have made and properly applied the law. As stated above, the issue that the second respondent was called upon to determine was that of substance as the procedural aspect was never placed in dispute. The second respondent correctly found that the dismissal of the third respondent was

unfair and awarded reinstatement and back pay. Once again, I do not see why I should be interfering with this determination.

[23] The third respondent was charged with *“fighting at the premises of AMSA”*. The third respondent denied having engaged in any fight, nonetheless was subjected to a disciplinary hearing where after he was found guilty for fighting at the AMSA premises and subsequently dismissed.

[24] I am not going to deal with each and every ground of review raised by the applicant but only those that will lead to a reasonable conclusion to set aside the award or dismiss the review application. In fact the issues to be determined in this case to take me to a reasonable and correct conclusion are pretty simple and straight forward. These are few facts herein that when I look at them very closely, it is rather difficult to separate them in order to reach a different conclusion to that of the second respondent. These are the facts relevant in this regard:

24.1 It is indeed common cause from the papers and transcript itself that the third respondent had reported to Wiid Lebakeng’s conduct which he viewed unreceptive when Lebakeng opened the change room door and left it wide open for outsiders to see the naked third respondent who was changing clothes. The change room is next to the kitchen used by the staff. Wiid’s response was that the third respondent should ignore Lebakeng.

24.2 Wiid and Du Plessis attempted to separate the third respondent and Lebakeng when the two were engulfed in a physical fight. They failed to do so until they resorted to calling security for assistance and only then could the fight end.

24.3 There was no witness to testify as to who actually started the fight. As it stands, the third respondent’s testimony that Lebakeng had started the fight, remained unchallenged as the only person who can effectively

challenge the third respondent is Lebakeng and Lebakeng was not called to testify.

24.4 The applicant's two witnesses; Wiid and Du Plessis testified that the third respondent and Lebakeng were fighting, exchanging blows to an extent that they failed to separate them whilst the third respondent on the other hand denies having fought with Lebakeng and stated that he was only blocking the bunches.

[25] The second respondent found that the applicant knew that the third respondent and Lebakeng were not in good terms and did nothing to avoid what resulted in a physical fight. I am persuaded to deal with issue with the next determination of the second respondent when he finds that the third respondent, by going to Wiid, clearly indicated that he needed help and that he had no intention of fighting. The second respondent considered and determined this probability in a correct way and I can only concur with his determination. If the third respondent ultimately avers that Lebakeng started the confrontation and then the fight, then I am persuaded to accept this as the third respondent attempted to report this to Wiid who was the only senior at the premises, but in vain. In his own terms, Wiid said to the third respondent that he should ignore Lebakeng. Wiid in any event confirmed having said this to the third respondent.

[26] The second respondent further finds that neither Wiid nor Du Plessis saw the altercation from when it started. This is correct. In terms of Wiid and Du Plessis' testimony, they found the two already overwhelmed in exchanging fists that it was even difficult to separate them. This piece of evidence is married to the next one which is the issue as to who started the fight. The second respondent found that the third respondent's testimony that it was Lebakeng who started the fight, remains unchallenged. This is also correct. The third respondent, during the arbitration, said *"the guy is always starting fighting I don't do fighting but I can defend myself yes, that one I can do"*. Any reasonable decision maker will be inclined to conclude that Lebakeng started the fight as he is the only person who can challenge the third

respondent's version to that effect and he did not do so. This is also supported by overwhelming evidence that the third respondent reported Lebakeng's unpleasant conduct to Wiid but nothing much came of it instead he was advised to ignore Lebakeng.

- [27] Having determined that the second respondent's analysis of evidence is probable and reasonable, that Lebakeng had started the fight, that the third respondent had attempted to avoid the fight at all cost, the next issue to determine is the pertinent ground for review raised by the applicant that the applicant was charged for fighting at the AMSA premises and not who might have started the fight. Did the third respondent in fact engage in a fight with Lebakeng or was he simply defending the punches that came his way? The second respondent's determination in this regard was that the third respondent found himself in a state of trying to fend off Lebakeng which was construed as a fight. If I were to find that the second respondent misconstrued the probability herein then I will be inclined to determine whether the third respondent's fighting at AMSA's premises is wrong and a dismissible offence despite every other piece of evidence.
- [28] I am, in any case, persuaded to deal with the charge as it stands. In terms of the evidence led at the arbitration, there is nowhere where the applicant admits to having engaged in a fight (exchanging blows) with Lebakeng. This then leaves the evidence of the applicant's two witnesses that they both found the third respondent and Lebakeng fighting each other and exchanging blows. It is my determination that whether the third respondent was indeed fighting as testified by Wiid and Du Plessis or whether he was fending off the punches from Lebakeng as he testified, this is immaterial. After having considered the evidence and after having taken complete view, determination of the evidence and sequence of events, I find that the sanction of a dismissal was nevertheless not warranted under the circumstances.
- [29] This then leads me to justification for fighting at work. An attack on another employee in the absence of provocation would serve as an aggravating

factor which ordinarily would significantly decrease the chances of leniency in the imposition of a sanction. This however is different with the third respondent as the unchallenged evidence as presented and admitted shows that Lebakeng started the fight. Even if it were to be accepted that the third respondent was also fighting then his actions are justifiable especially in view of the fact that he attempted to get assistance from Wiid who was at the time a senior available in the applicant's premises, but in vain. The situation is exacerbated by the fact that evidence shows that Lebakeng started the fight therefore the third respondent had to justifiably hit back. In the case of *Anglo Operations Limited (Bank Colliery) v Tokiso Dispute Resolution (Pty) Ltd and Others*¹¹ the Court found that:

The commissioner failed to apply his mind to the totality of the issues and evidence before him in reaching his conclusions. Although it is not unreasonable *per se* in these circumstances to conclude that dismissal was too harsh a sanction, and the reaction of the employee is understandable and one has sympathy for her, the award must fall on the grounds of review set out. This leaves the issue of the appropriate remedy and in circumstances where it appears that the record is substantially complete and all the issues have been ventilated it would be appropriate to substitute the award with an appropriate order.

- [30] In applying the reasonable decision maker test there seem to be no doubt that there is no need to interfere with the second respondent's arbitration award, in this matter. The second respondent has executed the judicial duties he conformed to and reached a decision which could have been reached by a reasonable decision maker, which decision is reasonable. The analysis of the reasoning and the conclusion reached in this matter indicates that the second respondent did not misconceive the task that was before him and did not commit fundamental mistakes of law. Ultimately, the evidence clearly shows that the third respondent did everything in his powers to evade a fight. The

¹¹ [2006] ZALC 77 (4 July 2006)

second respondent seems to have correctly understood the fundamental rules of evidence including the principles governing mitigation and probabilities. Based on the considerations I have set out above, I can see no reason to interfere with the second respondent's decision to award the third respondent retrospective reinstatement and back pay as he did. Such award is certainly consistent with the evidence and exercise of his judicial discretion.

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

1. The review application is dismissed with costs.

MM Ntsoane
Acting Judge of the Labour
Court of South Africa

Appearances

For the Applicant: Mr Zondo

Instructed by: Nozuko Nxusani Inc

For the Respondent: Victor Tshabalala

Instructed by: Workers Against Regression (WAR)