



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JR 271/15

In the matter between:

**SOUTH AFRICAN AIRWAYS (SOC)
LTD**

Applicant

and

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

STEPHEN BHANA (N.O.)

Second Respondent

**NATIONAL TRANSPORT
MOVEMENT OBO MATEBOGO
THIPE**

Third Respondent

Heard: 23 November 2017

Delivered: 19 January 2018

Summary: (review-unfair dismissal-reasonableness - despite errors of reasoning outcome only partially flawed – a reasonable arbitrator could have decided that the misconduct did not warrant dismissal)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application of an unfair dismissal award. There is also an application for condonation for the late filing of the initial application.

[2] The employee in this matter, Ms M Thipe ('Thipe') had been dismissed for 5 out of 8 charges she had originally been charged with. The charges she was found guilty of were as follows -

2.1 Charge 1: Poor timekeeping for the period 23 December 2013 to 28 January 2014 and not working her official hours.

2.2 Charge 2. Being absent without leave on 2, 3 and 9 January 2014.

2.3 Charge 3. Fraudulent timekeeping for indicating that she was at work when she was not.

2.4 Charge 7: Failing to obey an instruction to populate an induction register.

2.5 Charge 8: Failing to follow instruction to issue invitations for an induction program.

The parties had agreed at the arbitration that it was common cause that the rules on timekeeping and instructions were reasonable and that the turnstile records were what they purported to be and were not in dispute.

Condonation

[3] The arbitration award was received by the applicant on 10 December 2014, but the review application was only filed on 19 February 2015. Accordingly, it was just under a month late. The explanation for the delay related to the absence of staff handling the matter over the December and January period resulting in poor internal communications between them. It is apparent that on receipt of an application to make the award an order of court on 27 January 2015, the communication gaps came to light and the applicant moved with reasonable speed to file the application thereafter. The condonation application was included in the founding review papers.

- [4] I accept that a certain allowance has been made for parties 'dropping or fumbling the ball' during the annual shutdown period, in that the court has rightfully acknowledged the fact that the absence of a Labour Court rule stipulating *dies non* during the ordinary annual shutdown period over December and January should be taken into account when delays over this period are being considered.¹ Accordingly, some leeway must be allowed in this regard, even though it does not mean that employers, unions and employer organisations in particular should not have some arrangement in place to deal with handling awards received during that period, given the limited time period for challenging awards. Similarly, an employee ought to try and ensure an award reaches their attention if they are away.
- [5] In this instance there was someone appointed, who was supposed to deal with matters, but they were somewhat remiss in making sure that the award was timeously referred to the person responsible for acting in such matters as soon as the latter returned from leave. All in all, the explanation for the delay was not an unreasonable one and the prejudice caused by the delay is insignificant. Accordingly, notwithstanding the limited merits of the review application dealt with below, it is appropriate to condone the late filing thereof.

The Award

- [6] When Thipe referred her dismissal to CCMA, the arbitrator found that the applicant ('SAA') had failed to prove any of the five charges except the first one, which it only "partially" proved. That misconduct did not warrant dismissal in terms of the applicant's code or in general. The arbitrator also found that there was no evidence that the trust relationship had been broken down especially because Thipe had not been found guilty of fraud. The arbitrator found the dismissal of Thipe had been substantively unfair and reinstated her. The employee had been employed as a training coordinator by the applicant, SAA, for 12 years.

¹ See ***Lentsane & others v Human Sciences Research Council* (2002) 23 ILJ 1433 (LC)** at 1440, para [24].

- [7] The arbitrator concluded that because Thipe's supervisor, Ms Nyobolo ('Nyobolo') had signed off on her December 2013 timesheet, no account could be taken of her alleged absenteeism in December. However, the arbitrator accepted that the January turnstile records showed that Thipe had at times come to work late and left early which supported the employer's allegation of poor timekeeping during that period. On any reasonable assessment of her timekeeping during the period 23 December to 30 January, Thipe worked short hours or was absent without leave on 19 out of 27 days, which is a shockingly poor attendance record. Nonetheless, no attempt was made to correct it before relying on it as a reason for dismissal.
- [8] The Commissioner decided that it was not necessary to consider Thipe's short working hours in December because her supervisor had signed off the attendance register as correct even though the turnstile record showed that it was manifestly incorrect.
- [9] In relation to the failure to obey the two instructions, the arbitrator concluded that Thipe had not refused to send the invitations as such, nor was she guilty of not populating the register. The arbitrator seem to adopt the view that as there was only one witness for each party on these issues that the employer had failed to prove the charge.
- [10] The employee's explanation why there was no record of her presence at work on 2, 3 and 9 January is that she had entered the workplace via the crew bus and as a result would not pass through the turnstiles. The employer tendered evidence that there was a form that had to be filled in by staff who boarded the crew bus and that Thipe had not provided any evidence that she had completed the same. However, one of Thipe's witnesses had testified that even though there was such a document it was not always completed. The same witness testified that Thipe had been assisting her with her own workload on 9 January and had been with her the whole day. The arbitrator concluded on a balance of probabilities that Thipe had used the crew bus and had worked with a colleague on 9 January and hence on a balance of probabilities not guilty of the charge relating to her absence on three days in question.

Evaluation of the Review

[11] SAA's challenge to the award is essentially one based on the alleged unreasonableness of the arbitrator. The test of reasonableness has undergone a number of iterations. For the purposes of this review the following extracts of the authorities are pertinent:

[14] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd* (Congress of SA Trade Unions as Amicus Curiae)⁵ made it clear that a review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the Labour Relations Act E 66 of 1995 (LRA):

'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as 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 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.'

[15] This court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (Gold Fields) stated that:

'Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s 145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, 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 in a band of decisions to which a reasonable decision maker could come on the available material.¹²

To this may be added the following statements of principle:

“[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork.”

3

and

“[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and

² *Schwartz v Sasol Polymers & others* (2017) 38 ILJ 915 (LAC) at 920-921 (all footnotes omitted)

³ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC) at 950

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 inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 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 whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to “defects” as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] 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 upon the arbitrator's conception of the enquiry, the delimitation 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. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.’⁴

(Emphasis added; footnotes omitted.)

[12] SAA's main grounds of review are:

12.1 In relation to the arbitrator's finding on the poor timekeeping, the arbitrator had ample evidence of the fact that she failed to attend work on 25 days out of a 36 day working cycle and not work her normal official hours.

12.2 Secondly, the arbitrator having made the finding that Thipe had not kept official hours during January 2014, ought to have found that dismissal was the appropriate sanction instead of the verbal warning which he recommended. This was glaringly inappropriate in view of the fact that she was paid for her full normal attendance, whereas she had not worked normal hours. Moreover, he ignored her dishonesty in submitting a timesheet in which she indicated she had

⁴ *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at 2811-13 (ILJ); 59-61 (BLLR)

been at work and worked all the required hours during the period 23 December 2013 to 28 January 2014 when she had not done so.

12.3 The arbitrator ought not to have ignored the evidence of the turnstile records and Nyobole's evidence at the arbitration that Thipe was absent from work on several occasions during December 2013 simply because Thipe had signed off her timecard as correct, when Nyobolo testified that she had only signed Thipe's timesheet because she had trusted her.

12.4 The arbitrator could not justify why he accepted Thipe's explanation of her apparent absence from work on 2, 3 and 9 January 2014 rather than SAA's version and should have made an adverse credibility finding against her.

12.5 The arbitrator unreasonably concluded that in the absence of proving that Thipe was guilty of fraud, there was no basis for concluding that there had been an irretrievable breakdown of trust.

[13] SAA places much reliance on the importance to be attached to the turnstile records. At the start of the arbitration, SAA's representative pertinently raised the issue of the turnstile records and sought clarity on the defence which would be advanced by Thipe in relation to those records as a record of attendance. Thipe's representative confirmed that the turnstile records were valid but that it was possible to enter the premises without passing through the turnstile if the staff shuttle bus from the airport was used to enter the premises. No other explanation for why the turnstile records would not be a valid reflection of work attendance was advanced by Thipe, except for one instance when she was questioned about her attendance record on 30 December 2014 when she advanced a further explanation relating to collection of a parcel to why it appeared from the turnstile record that she left work shortly after midday. Further, there was a concession by Thipe's representative during the hearing that they did not dispute that the turnstile record showed that there was no instance where she came in at 08H00 or before 08H00 and left either at 16H30 or later than that, but that every day she came in late and left early except for one instance where she came in late and left after 17H00. In

effect, the arbitrator had before him the uncontroverted evidence of a very bad work attendance record, even if he accepted Thipe's explanation for her apparent absence from work on 2, 3 and 9 January 2015 could be explained by her use of the shuttle bus to access the premises. The arbitrator was not entitled to simply discount Thipe's actual attendance record of December 2014 because Thipe's immediate supervisor had signed it off because she trusted her. Nyobole's neglect in this regard does not excuse Thipe's poor attendance. Accordingly, the arbitrator's conclusion that the charge of poor work attendance by Thipe was only partially sustained, cannot stand.

- [14] In relation to the fraud charge, SAA claims that the arbitrator failed to explain why on a balance of probabilities he accepted Thipe's version about travelling on the crew bus on all three days when Thipe herself had conceded that there was a document that had to be completed when she was aware of and could not be evidence of having completed on any of the three days in question. However, SAA did not adduce any evidence in rebuttal of Thipe's central defence that if she took the shuttle bus from the airport to the office where she worked, she would not pass a turnstile where she would clock in, which is what she claimed she did on the three days she was accused of being absent from work. The evidence of her witness in regard to the lax procedures on recording attendance on the bus was also not effectively disputed by the applicant. Consequently, in my view it is not beyond the bounds of what a reasonable arbitrator might do, namely to accept that Thipe's explanation for not passing through the turnstile on those days might have been true and that SAA had not established that she was not present on those days on a balance of probabilities. It follows from this conclusion that the fraud charge in relation to those days cannot be sustained.

- [15] Her poor attendance record also had a bearing on her dishonesty according to SAA. Despite the above, attendance record is reflected by the turnstile records, Thipe did not indicate a single anomaly in her attendance on all the working days in January. In this regard, it must be noted that the actual entries on the timecard only record the days when the employee is at work and not the actual hours worked, even though the

timecards make provision for recording times an employee is on duty and off duty, and were clearly intended to reflect actual working hours. However, it appears that SAA did not consider it necessary to reflect the actual hours worked on each day on the timesheet. At the bottom of the timesheets is an endorsement that “The time shown is a true statement of my actual time worked” which Thipe signed. Her supervisor signed a similar endorsement stating that “I have examined this register and I am satisfied that the time claimed is correct.” Clearly, these statements were both intended to refer to the detailed record of actual hours worked, which the timesheet provides for. At the top of the timesheet is also an entry showing that the total official working hours of the employee, in this case 42 hours per week. It might therefore be argued even in the absence of the details of the actual working hours that the signed endorsements amounted to a representation that normal working hours had been worked.

- [16] However, the closest SAA came to putting such a proposition to Thipe was that the timesheet was a representation of the days when an employee was at work. This interpretation of the timesheet is reinforced by Nyobole's own statement that she did not sign the January timesheet “because there were days that I realised that Matebogo was not at work” (emphasis added). The timesheets as a record of daily attendance at work, rather than a detailed record of hours actually worked, also appears to reflect what SAA's own representative understood the timesheets to be portraying when he asked Ms Dlamini (one of Thipe's witnesses) “Now if an employee indicates on their timecard that they were at work when in effect they were not at work would you agree with me that that is an act of misrepresentation, dishonesty, even fraud?”. It must also be remembered that in the arbitration the issue of dishonesty arose primarily from the fraud charges and it was never pertinently suggested to Thipe that she had been generally dishonest in representing her working hours. Had she been charged with misrepresenting that she had worked normal hours, the result might well have been different and her dismissal easier to justify, but I cannot say that it was wholly unreasonable of the arbitrator to conclude that on the basis of the timecards and put timekeeping that she could not

be trusted in circumstances where no prior disciplinary action had been taken.

- [17] In the circumstances, even though Thipe's attendance record in December 2013 and January 2014 was undeniably bad, it would not be unreasonable for an arbitrator to conclude that the code nevertheless enjoined the employer to warn an employee before resorting to more serious disciplinary action, and even if the arbitrator had regarded her actual record of attendance in the more serious light it deserved, a reasonable arbitrator might still have concluded that it did not warrant dismissal in the absence of any prior warnings.
- [18] In respect of the charge that Thipe failed to complete various administrative duties, the arbitrator's reasoning in exonerating her of any failings in that regard appears to have ignored the fact that her version of what Thipe claims she did was never put directly to SAA's main witness in this regard and accordingly the arbitrator could not reasonably have attached equal weight to their evidence as he appears to have done. However, even if this omission is corrected as I have done by substituting the arbitrator's finding on these charges, it is quite possible that a reasonable arbitrator could have concluded that such misconduct did not warrant dismissal in the absence of any prior disciplinary sanctions. It is also obvious that the main reason for Thipe's dismissal related to her timekeeping.
- [19] Consequently, it seems that notwithstanding flaws in the arbitrator's reasoning, and even if some of his conclusions require variation, his ultimate conclusion that dismissal was not an appropriate sanction is not one that no reasonable arbitrator could have arrived at on the evidence. That said, his conclusion that the first charge was only partially justified cannot stand in the light of his unreasonable disregard of the December attendance record based solely on Nyobole's endorsement based on trust. Further, his conclusion that a mere verbal warning would have been sufficient as an alternative sanction, is difficult to reconcile with the frequency and seriousness of her work record during that December 2013

and January 2014 period even if she had not been previously warned for poor timekeeping.

[20] I have little doubt that if this case had been run slightly differently the outcome might have been different, but that is not a consideration affecting the outcome of the review.

Order

- [1] The late filing of the review application is condoned.
 - [2] The review application of the arbitration award and down by the second respondent ('the arbitrator') under case number GAEK6704-14 on 9 December 2014 succeeds only to the extent set out below:
 - 2.1 The arbitrator's finding in paragraph 36 that the employee was not guilty of charges 7 and 8 is substituted with a finding that, on a balance of probabilities, the employee was guilty of failing to follow a lawful instruction and on her return to work she must be issued with a written warning valid for six months for failing to obey instructions.
 - 2.2 the arbitrator's finding in paragraph 36 of his or that the employer had only partially discharged the onus of proving the employee's guilt in respect of charge one is substituted with a finding that the employer discharged this onus fully;
 - 2.3 the verbal warning valid for one month from 15 December 2014 imposed by the arbitrator in paragraph 39 of his award is substituted with a final written warning for poor timekeeping valid for twelve months from the date of the employee's return to work.
 - 2.4 No order is made as to costs.
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Lagrange J

Judge of the Labour Court of South Africa

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