IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 40/15

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

obo **First Applicant**

AMANDA MATOME **Second Applicant**

and

MIDDELBURG LOCAL MUNICIPALITY **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNNCIL **Second Respondent**

W. FERREIRA *N.O* **Third Respondent**

Heard: **03 August 2017**

Delivered: **08 February 2018**

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA)[1] for an order reviewing and setting aside an arbitration award issued by the third respondent (arbitrator) acting under the auspices of the second

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[1] Act 66 of 1995 as amended.

respondent (SALGBC), dated 3 December 2014 under case reference number NWD 091402 in terms of which the arbitrator found that the dismissal of the second applicant (the employee) was procedurally and substantively unfair.

[2] The key question is whether the arbitrator failed to apply his mind to the relevant evidence and consequently made an award, which no reasonable arbitrator could make.

Background

[3] The employee started working for the First Respondent on 25 May 1998. At the time of her dismissal, she was a senior licensing clerk and she was responsible for supervising five other cashiers in her section. She was charged as follows:

> 'CHARGGE – GROSS NEGLIGENCE
>
> You are charged with gross negligence in that on the 7th of April 2014 at Brits licensing department, you received R157 475.00 from cashiers but deposited only R149 735.00 thus leaving R7 740.00 unaccounted for.
>
> The said conduct is in Contravention of clause 1.2.3 of Annexure "A" to the SALGB disciplinary code and procedure.'

[4] The disciplinary enquiry was held on 9 July 2014 at the end of which the employee was dismissed. As a result, the employee referred a dispute of unfair dismissal to the SALGBC. The dispute was conciliated unsuccessfully before it could proceed to arbitration. The arbitration was held on 31 October 2014 and 11 November 2014. At the end of the arbitration, the arbitrator found that the dismissal of the employee was both procedurally and substantively fair.

Arbitration award

[5] The arbitrator identified the issue between the parties to be whether the employee's dismissal was substantively and procedurally unfair. The applicant relied on the testimony of the employee, Ms Kotsokwane and Ms.

Moloponyane. The first respondent relied on the testimony of Mr. Masike, Mr Matloki and Ms. Ngama.

[6] In his analysis of evidence and arguments, the arbitrator found the first respondent's version to be more plausible and probable. His finding was based on the fact that all the testimonies of first respondent's witnesses was consistent when they all confirmed that the employee breached the procedure by allowing cashiers to leave without cashing up and further that it was not normal practice to recheck money the following day. Their evidence was supported by documents that were submitted during the arbitration hearing and was further confirmed by the applicant's witness.

[7] The arbitrator found the employee's version highly unlikely and improbable as she was unable to provide any explanation as to how the money went missing. This was despite the fact that she was the custodian of the money and further that she was responsible for its safekeeping. The arbitrator further found that the employee failed to exercise the standard of care and skill that could have been reasonably expected from her.

[8] On the issue of consistency, the arbitrator accepted the first respondent version. According to the arbitrator, the evidence suggested that other incidences relating to cash shortages were still under investigation and the employees concerned were subjected to disciplinary enquiry.

[9] The arbitrator considered the first respondent's evidence that the employee was found guilty of serious misconduct that affected the trust relationship and as a result, he found that dismissal was an appropriate sanction. It was for this reason that he found the employee's dismissal to be substantively and procedurally fair. Dissatisfied the award, the applicants launched this application.

<u>Grounds of Review</u>

[10] The applicants submit that the arbitrator failed to apply his mind to the relevant evidence and consequently made an award, which no reasonable arbitrator could make in that he:

‘1. Found that the dismissal of the second applicant was substantively and procedurally fair as the first respondent has failed to prove that second applicant was guilty of gross negligence.

2. Failed to take into considerations the common cause facts that there had been incidents of missing money in the First Respondent’s workplace since February 2014.

3. Failed to consider that the Second Applicant had previously agreed to pay R 2 600.00 that went missing on 20 February 2014 in order to protect her employment and not as admission of guilt.

4. Took into consideration the hearsay evidence of Masike, who did not conduct any investigation but relied on the information provided by Mohloki and Ngoma.

5. Did not consider that Masike did not take any steps to correct the situation of missing money that has been recurring since February 2014.

6. Failed to consider that, in particular on the finding that the dismissal was appropriate that the second applicant even bought a CCTV camera in order to safeguard and protect the mischief of the missing money.

7. Failed to consider that the Second Applicant has always reported all the incidents of the missing money that occurred to the chief licensing officer.

8. Failed to consider that it has been a practice that the cashiers can leave their workstations before they could balance their daily collections and if they leave before the knock off time without balancing they would put their money in a lockable cash box to be balanced the following day.

9. Ignored the evidence by the Second Applicant that the moneybag was sealed when the Second Applicant gave it Mohloki for him to take it to the safe and therefore the second applicant could not explain how the money got lost.

10. Ignored the evidence of the Second Applicant that she was remorseful as she was not aware that the cashiers are not allowed to leave before they could balance the money they collected for the day.

11. Committed gross misconduct in accepting that issue of consistency was explained by the First Respondent as it was argued before the arbitrator that Machiu's matter where an amount of R7200.00 was missing was concluded and that she was given a final written warning and ordered to pay the missing amount in monthly instalments.'

<u>Applicable law and analysis</u>

[11] The 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. Section 145(2) defines a defect as the commissioner's misconduct in relation to the duties of the commissioner as an arbitrator, gross irregularities in the conduct of the arbitration proceedings, exceeding the commissioner's powers or improperly obtaining an award.

[12] The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*[3] as follows:

> '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 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

[2] 2007 (28) ILJ 2405 (CC) at para 25.
[3] 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA).

sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[4]

[13] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others,*[5] the Labour Appeal Court (LAC) stated as follows:

> '[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.
>
> [18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

[14] *In Head of the Department of Education v Mofokeng and Others*[6] the LAC confirmed *Herholdt* and *Mofokeng* judgments and held as follows:

> '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* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and* 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.

[15] The LAC further held as follows:

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[4] At para 25.
[5] [2014] 1 BLLR 20 (LAC) at paras 17 and 18.
[6] [2015] 1 BLLR 50 (LAC) at para 30.

> '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 inquiry. 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 inquiry, 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.'[7] [Footnotes omitted]

[16] Although SAMWU raised a number of grounds, the question is mainly whether the arbitrator evaluated the facts presented before him and arrived at a conclusion that is reasonable. SAMWU submitted that the employee never admitted that the act on her part was gross negligence but that it was negligence. In his award, the arbitrator stated that the employee was charged with gross negligence but she denied that she was guilty of gross negligence. It is not for the employee to decide whether the misconduct that he/she was charged with may be classified as negligence or gross negligence. Gross negligence occurs if an employee is persistently negligent, or if the act or omission under consideration is particularly serious in itself.[8] What is clear is

[7] At para 33.
[8] John Grogan, *Dismissal, Discrimination and Unfair Labour Practices*, p. 258.

that the employee, in this case, was charged with gross negligence, which is a dismissible offence.[9] The evidence shows that the employee was aware of the rules and that such rules were reasonable and fair. In addition, the employee breached the rules. This was not her first offence, she previously failed to account for R2600.00 which amount she accepted to pay.

[17] SAMWU submitted that the arbitrator failed to apply his mind to the issue of inconsistency. This is not true. The arbitrator considered the evidence presented before him and accepted the first respondent's explanation for the perceived inconsistency. He further relied on case of *SACCAWU and Others v Irvin and Johnson (Pty) Ltd* in which it was stated as follows:

> '[29] It was argued before us by Mr. Grobler for the appellant that by not dismissing four employees who had also participated in the demonstration, the respondent applied discipline inconsistently. In my view too great an emphasis is quite frequently sought to be placed on to the 'principle' of disciplinary consistency, also called the 'parity principle'. (as to which see e.g. Grogan, *Workplace Law*, fourth ed. p.145 and Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal*, p.110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness (The Dismissal of Strikers, MSM Brassey (1990) 11 ILJ 213 at 229). Every employee must be measured by the same standards (Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers' Industrial Union & Others (1991) 12 ILJ 806 (LAC) at 813 H-I). Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where, however, one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper

[9] Index to record page 140.

motives or, worse, by a discriminating management policy. (As was the case in Henred Fruehauf Trailers v National Union of Metalworkers of SA & Others, (1992) 13 ILJ 593 (LAC) at 599 H - 601B; National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd, 1994 15 ILJ 1257 (A) at 1264). Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself.'

[18] On the question whether dismissal was an appropriate sanction, I agree with the first respondent that, also in this regard, the arbitrator applied his mind. The arbitrator took into account the seriousness of the misconduct the employee was charged with, the effect the said misconduct had on the trust relationship between the parties and the position held by the employee to arrive at the conclusion that dismissal was an appropriate sanction. It can, therefore, not be said that the arbitrator failed to apply his mind to the relevant evidence presented before him.

[19] It is my view that none of the grounds of review raised by the applicants muster the applicable test of unreasonableness. In this case, the arbitrator's award is not only clear but it contains the detailed exposition of the evidence presented before him during the arbitration, followed by an equally detailed analysis of the evidence and argument.

[20] It is abundantly clear from the applicant's founding affidavit and its supplementary affidavit that the applicants have not established any basis upon which the court could find that the first respondent's award was reviewable. The applicant failed to discharge the *onus* of establishing that the arbitrator either committed misconduct in relation to his duties of the commissioner as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or exceeded his powers.

[21] It is apparent from the reading of the award that the arbitrator took into consideration all the evidence that was led before him, and applied his mind to the issues before him. In my view, the arbitrator dealt exhaustively with the evidence before him, and considered all relevant factors before coming to the conclusion that the employee's dismissal was substantively fair.

[22] Considering the depth of his treatment with the evidence, it cannot be said that the arbitrator failed to apply his mind to the issues before him or even that he reached an illogical and unjustifiable conclusion or reached an unreasonable conclusion. There is, therefore, no reason for this court to interfere with the arbitrator's award.

[23] With regard to costs, taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[24] In the premise, I make the following order:

Order

1. The applicant's review application is dismissed.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:	Advocate J Eastes
	Instructed by Ruth Edmonds Inc. Attorneys
FOR THE RESPONDENT:	Advocate Russel Moletsane
	Instructed by Collin Ncini Inc.