



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 839/2011

In the matter between:

BOSAL AFRIKA (PTY) LTD

Applicant

and

NUMSA obo ITUMELENG MAWELELA

First Respondent

ADVOCATE PC PIO

Second Respondent

THE DISPUTE RESOLUTION CENTRE

Third Respondent

Heard: 25 April 2017

Delivered: 8 February 2018

JUDGMENT

MAHOSI. AJ

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 second respondent (arbitrator) acting under the auspices of the third respondent Dispute Resolution Centre (DRC), on 31 March 2011 under case reference number MIPT10101 in terms of

¹ Act 66 of 1995 as amended.

which the arbitrator found that the dismissal of Itumeleng Mawelela (the employee) was procedurally and substantively unfair.

- [2] The key question is whether, by finding that the applicant should have followed an incapacity procedure instead of misconduct procedure, the arbitrator's decision is one which a reasonable decision maker could not reach.

The parties

- [3] The applicant is Bosal Africa (Pty) Ltd, a company incorporated in terms of the laws of the Republic of South Africa. It manufactures automotive accessories.
- [4] The first respondent is the National Union of Mine Workers (NUMSA), a registered trade union acting on behalf of the employee.
- [5] The second respondent is Advocate P.C. Pio who is cited in these proceedings as a commissioner of the third respondent.
- [6] The third respondent the DRC, is a statutory body registered and formed in terms of the LRA.

Background

- [7] The applicant employed the employee as a bender from 2004. At the time of his dismissal, the employee was paid a salary of R3784.45 per month. On 21 June 2010, the employee was issued with a notice to attend a disciplinary enquiry that was scheduled for 24 June 2010. The charge against the employee was as follows:

'Violation of company rules 6.5 Regular Sickness Absence (Non Mandatory) alternatively 10.11 Pattern of unacceptable behaviour (Non Mandatory). In that you have been frequently off work,

developing unsatisfactory time keeping and/or pattern of unacceptable behaviour'

- [8] At the end of the disciplinary enquiry, the employee was dismissed. As a result, the employee referred a dispute of unfair dismissal to the DRC. The dispute was conciliated unsuccessfully before it could proceed to arbitration. The arbitration was held on 25 January 2011 and 10 March 2011. At the end of the arbitration, the arbitrator found that the dismissal of the employee was both procedurally and substantively unfair. The arbitrator ordered the applicant to retrospectively reinstate the employee to a position he occupied prior to his dismissal. The arbitrator further ordered the applicant to pay the employee back pay, amounting to R34060.05. Dissatisfied with the arbitrator's award, the applicant lodged this application.

Arbitration award

- [9] The evidence relevant to the issues in question was summarised by the arbitrator in his award as follows:
- 'a) The applicant has a history of warnings for absenteeism and poor timekeeping, but at the time of his dismissal all these warnings had lapsed.
 - b) The applicant was off sick on various occasions. In fact, in a period of 30 months the applicant was off sick on 59 days.
 - c) During 2009 the applicant had exhausted his sick leave and had to take a company loan to survive.
 - d) On all the occasions when the applicant was off sick, except for one occasion when he had visited the traditional healer, the applicant submitted valid medical certificates to substantiate his absence.
 - e) On the issue of the traditional healer, the applicant's area supervisor, Mr Petros Magudu, conceded that the applicant's visit to the traditional healer took place with his consent.

Traditional healers are also recognised as medical doctors for purposes of sick leave by the respondent.

- f) During the period in question, the applicant regularly visited the in-house company sister who immediately referred him to medical doctors.
- g) During 2009 the applicant was diagnosed with a urological problem. As a result, the applicant underwent surgery and spent some time in hospital. According to the applicant he had spent two periods in hospital as the problem reoccurred. The respondent's witnesses were not aware of the second period.
- h) The urological problem cleared up in 2009, but the applicant's tendency to take sick leave did not stop as a result, as the applicant continued to be booked off sick for various ailments by various doctors.
- i) Mr Magudu testified that applicant's regular absence was very disruptive on the production line as a replacement had to be found for the applicant on every occasion he failed to report. According to Mr Magudu, the respondent had lost R1.4 million due to delays in production. Mr Magudu testified that the applicant contributed to the delay in production. The applicant disputed that his absence had caused any disruption. In fact, the applicant was abhorred by any notion that this irregular absence contributed in any way to a loss in production.
- j) During the first six months of 2010 the applicant was again off sick for 9 days. Apparently this was seen by the respondent as the proverbial last straw and resulted in the applicant being charged and dismissed.
- k) The applicant was not charged for poor timekeeping. However, after the applicant's conviction at the disciplinary enquiry, allegations of poor timekeeping were levelled at the applicant during the stage when submissions of aggravating factors were entertained by the chairperson. These allegations were also taken into account when the decision to dismiss was made.
- l) The allegations of poor timekeeping were part of the respondent's case against the applicant at the arbitration hearing. The respondent submitted a document reflecting the applicant clocking times into evidence. The applicant denied

the allegations of poor timekeeping and testified that the discrepancies in his clocking were *inter alia* caused by Metro rail strike that affected the majority of the workforce.

- m) The applicant has not secured alternative employment and seeks reinstatement.'

[10] In his analysis, the arbitrator took the view that, any employer could dismiss any employee who disrupts its operation by being absent from work for an unreasonable period of time provided the procedure stipulated in Item 10 of Schedule 8² of the LRA was followed.

[11] In this case, the arbitrator acknowledged that the employee was dismissed for misconduct. The arbitrator was of the opinion that, as a matter of principle, an employee could never commit misconduct by taking sick leave. He took a view that the applicant's attempt, in its rules, to elevate the taking of valid sick leave to misconduct did not change the principle. From this premise, he found that the nature of the dispute before him was dismissal based on incapacity and not misconduct.

[12] The arbitrator dismissed the applicant's argument that the employee could not prove that he was genuinely incapacitated as stated in his referral on the basis that it was artificial. He further dismissed the applicant's reliance on the allegations of timekeeping to substantiate the employee's dismissal on the basis that it was not an allegation he (the employee) had to meet at the disciplinary enquiry. This is evident from his award where he states as follows:

'Although there is a reference to poor timekeeping in the charge, evidence regarding the discrepancies in his clocking was tendered in order to secure a conviction. Had the applicant been acquitted at the disciplinary hearing (which would have been the correct final

² Item 10 of Schedule 8 deals with guidelines and procedures in cases of of an employee's incapacity, illhealth and injury.

outcome on the evidence that was before the chairperson), the allegations of poor timekeeping would never have surfaced'

- [13] The arbitrator arrived at the conclusion that this was a case where procedural and substantive fairness could not be dealt with separately as procedural fairness directly impacted on substantive fairness. The arbitrator found that the applicant should have followed the incapacity procedure as provided for in Item 10 of Schedule 8 of the LRA. As a result, he found that the employee's dismissal was both procedurally and substantively unfair. It is this finding that the applicant seeks to challenge.

Grounds of Review

- [14] The applicant challenged the arbitrator's award on various grounds which may effectively be summarised to two grounds. The first ground is that the arbitrator failed to take into account pertinent evidence of misconduct, which resulted in his failure to appreciate the true nature of the enquiry before him and thus leading in the applicant not being afforded a fair hearing. This, the applicant argued, rendered the arbitration award unreasonable and reviewable.
- [15] The second ground is that the arbitrator exceeded his powers by finding that the employee's dismissal was both procedurally and substantively unfair when procedural fairness was not in dispute.

Applicable law and analysis

- [16] 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.

- [17] The test for review which has been authoritatively stated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ was reiterated in *Herholdt v Nedbank Ltd and Congress of South African Trade Unions*⁴ 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 sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁵

- [18] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁶ 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.

³ 2007 (28) ILJ 2405 (CC) para 25.

⁴ 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA).

⁵ At para 25.

⁶ [2014] 1 BLLR 20 (LAC) at para 17 and 18.

[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.'

[19] In *Head of the Department of Education v Mofokeng and Others*⁷ the LAC confirmed *Herholdt* and *Mofokeng* 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.

[20] The LAC further held as follows:

'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

⁷ [2015] 1 BLLR 50 (LAC) at para 30.

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.’⁸

[Footnotes omitted]

- [21] The applicant’s submission was that the dispute between the parties was an issue of misconduct relating to late coming, poor time keeping and abuse of sick leave. NUMSA’s submission was that the arbitrator was correct to categorise the dispute as one of incapacity in that the employee was initially charged for violating the applicant’s rule relating to what they call “regular sickness absence.”
- [22] It is trite that the arbitrator is not only entitled but also required to assess the evidence before him for the purpose of identifying the real dispute between the parties. In *CUSA v Tao Ying Metal Industries and Others*⁹ the Constitutional Court stated as follows:

‘A commissioner must, as the LRA requires, “deal with the substantial merits of the dispute”. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the

⁸ At para 33.

⁹ 2009 (1) BCLR 1 (CC).

legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process, which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.¹⁰

[Footnotes omitted]

[23] The question is whether the arbitrator addressed the questions raised for determination; evaluated the facts presented before him and arrived at a conclusion that is reasonable.¹¹ It is common cause that when NUMSA referred the dispute to the DRC, it described the dispute as being about unfair dismissal due to alleged incapacity. In fact, the reasons for dismissal were stated as follows:

- '1. Company made a false presumption that the applicant should not have been sick after her operation (2009).
2. Company failed to apply the incapacity procedure properly to the case of the applicant.
3. Company took into account and based its case mainly on sick leave taken in 2008 and 2009...'¹²

[24] The evidence before the arbitrator demonstrated that the employee had an extensive record of absenteeism relating to medical reasons and poor time keeping. It is common cause that prior to his dismissal, for the period between 2008 and 2010, the employee had been absent

¹⁰ At paras 64-65.

¹¹ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at para 16.

¹² Index to opposed review application, page 87.

from work for medical reasons for a total of 59 days. This excludes the period from 7 to 9 June 2010 when the employee allegedly consulted a traditional healer. It is further common cause that the employee regularly consulted the applicant's nursing sister who ultimately referred him to a medical doctor. In fact, in 2009 the employee had exhausted his sick leave. During the same year, the employee underwent surgery after being diagnosed with a urological problem. In 2010, the employee was off sick for 9 days. This resulted in him being charged and dismissed.

- [25] NUMSA's submission was that the employee was charged with Rule 6.5 of the applicant's Disciplinary Code, which states as follows:

'Personnel who are frequently absent through sickness may be liable for disciplinary action up to and including dismissal on the grounds of incapacity to fulfil the job function or satisfactorily timekeeping.'

- [26] At the end of the arbitration proceedings, the parties submitted written closing arguments. The applicant's submission was that its case was that of "regular sickness/pattern of unacceptable behaviour in that the employee was frequently off work and misconducted himself in terms of timekeeping".¹³ The applicant further submitted that the employee's case must stand and fall on his ability to substantiate his genuine incapacity and on its failure to address such genuine illness in a fair manner.¹⁴

- [27] This argument was persisted with in these proceedings. In its supplementary affidavit, the applicant submitted that the employee was dismissed for "impossibility of performance" in that he could not meet his obligation in terms of his contract of employment. The applicant further submitted, in its replying affidavit, that the employee failed to render his services due to him being absent for no specific medical

¹³ Index to opposed review application, page 110 at para 2.6.

¹⁴ Index to opposed review application, page 110 at para 2.7.

reason, but for various soft medical reasons. According to the applicant, the procedure set out in the Code of Good Practice dealing with medical incapacity would not have been appropriate as there was no specific medical condition that could be addressed through such process.

[28] The question is whether the real dispute relates to the employees' ill health or whether a sufficient basis has been established to trigger the applicant's duties under Item 10 of Schedule 8 of the LRA. The arbitrator was aware that, although NUMSA referred a dismissal dispute relating to incapacity, the employee was dismissed for misconduct. It follows that the only dispute before the arbitrator was whether the reason for the employee's dismissal was fair as the procedural fairness was not in dispute. However, the arbitrator based his award on the question whether the employee was fairly dismissed for incapacity on the grounds of ill health. He found that the employee's dismissal for incapacity was procedurally and substantively unfair. In so doing, he misconceived the nature of the enquiry before him. In the premise, the arbitrator's award must be reviewed and set aside.

[29] On the basis that not the full record of the arbitration proceedings was before this Court, this is not a case where the Court should substitute its decision for that of the arbitrator. The dispute should be remitted to the third respondent to be heard by an arbitrator other than the second respondent to determine whether the dismissal of the employee was substantively unfair.

[30] 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.

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

Order

1. The arbitration award dated 31 March 2011, handed down by the second respondent acting under the auspices of the third respondent under case number MIPT10101 is reviewed and set aside. The matter is remitted back to the third respondent for a hearing *de novo*.
2. The third respondent is directed to set the unfair dismissal dispute referred by the first respondent for arbitration to be heard by an arbitrator other than the second respondent to determine whether or not the dismissal of the applicant was substantively unfair.
3. There is no order as to costs.

D. Mahosi

Acting Judge of the Labour Court (then)

Appearances

For the Applicant: Mr Henk Wissing of Henk Wissing Inc. Attorneys

For the Respondent: Mr Mtutuzeli Ngqeleni, NUMSA official.

LABOUR COURT