



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1709/14

In the matter between:

BRIDGESTONE SA (PROPRIETARY) LIMITED

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

LERATO SIKWANE N.O

Second Respondent

DIKOBE ELIAS SHIME

Third Respondent

Heard: 17 August 2017

Delivered: 15 March 2018

JUDGMENT

MAHOSI J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) in which the applicant seeks an order to review and set aside the arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number GATW 2188-14 dated 28 July 2014. In his award, the arbitrator found the dismissal of the third respondent (the employee) to be substantively unfair and ordered that the employee be reinstated by the applicant without back pay with effect from 15 August 2014.
- [2] The applicant seeks that the arbitration award be substituted with a finding that the dismissal of the employee was substantively fair. Alternatively, that the dispute be referred back to the CCMA for an arbitration *de novo* before a different arbitrator.
- [3] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.

Material background facts

- [4] The employee was employed by the applicant as a classifier and he was dismissed on 2 February 2014 having been charged and found guilty at the disciplinary enquiry for the following charge:
- 'Gross negligence, on 19 January 2014, you failed to stop and report defects to curing. This resulted in 15 tyres scrap'.
- [5] The charge relate to the employee's failure to detect and/or report defects in respect of tyres that had been produced resulting in the production of 15 defective tyres that had to be scrapped. The applicant suffered damages I the amount of R15 000.00 (fifteen thousand rand). Dissatisfied with the outcome of the disciplinary enquiry, the employee referred an unfair dismissal dispute to the CCMA. The dispute was conciliated unsuccessfully and as a result, it

¹ Act 66 of 1995 as amended.

proceeded to arbitration. As aforesaid, the arbitrator found the employee guilty of misconduct guilty of the offence but found the sanction of dismissal to be unfair. It is this finding that the applicant seeks to review and set aside.

Arbitration award

- [6] In his analysis, the arbitrator noted that the employee's position was very sensitive and that it required a high degree of care as his main responsibility was to check the quality of tyres. The arbitrator admitted the applicant's evidence that the employee failed to produce a quick action report for all the 15 damaged tyres and further that his conduct caused the applicant financial loss amounting to R15 000.00.
- [7] The arbitrator rejected the employee's submission that the damage on the tyres was as the result of a backlog that occurred during the previous shift on the basis that there was no evidence to prove his submission. During arbitration, the employee blamed a curing foreman, Mr Thabo Ntseke (Mr Ntseke), and submitted that he (Mr Ntseke) even acknowledged in a meeting that he was responsible for the said damage. The arbitrator rejected this submission on the basis that Mr. Ntseke was not called to confirm the employee's allegation. The employee's submission that he was ignorant of the rules relevant to his area of operation was found not to be convincing by the arbitrator because at the time of his dismissal, he was a senior inspector having other inspectors reporting to him.
- [8] In essence, the arbitrator found the employee guilty of misconduct but concluded that the dismissal was not an appropriate sanction. In arriving at his conclusion, the arbitrator took into consideration the fact that (1) the employee had 11 years and 5 months service with the applicant; (2) the employee had no written warning between 10 October 2007 and February 2014; and (3) the employee was dismissed for gross negligence and not dishonesty. The arbitrator's view was that employer should adopt or follow progressive discipline on matters pertaining to negligence. For this reason, the arbitrator found the employee's dismissal substantively unfair and ordered his reinstatement.

Grounds of Review

- [9] The applicant contends that the arbitrator committed a gross irregularity, alternatively, misconduct in the conduct of the arbitration proceedings by failing to apply his mind to the evidence that was led and the applicable legal principles to be applied in relation to the imposition of sanction. The applicant further contends that the arbitrator's failure to do so has resulted in him coming to a decision a reasonable decision-maker could not reach.
- [10] In its supplementary affidavit, the applicant contends that the arbitrator failed to take into account that the employee produced documents at the arbitration proceedings that he had never relied upon or produced at the disciplinary hearing and further that the employee disingenuously denied he had received training even accusing his immediate manager of having lied in relation to his training despite extensive evidence by the applicant's witnesses. The applicant contends that the evidence was led to support a complete breakdown of the relationship and trust.
- [11] The employee contends that the award by the arbitrator was fair and reasonable and was in line with the evidence that was adduced at the arbitration proceedings. He further contends that his misconduct does not amount to dishonesty and therefore a dismissal would under the circumstances, have been unfair and a severe sanction. According to the employee, the arbitrator was correct in his findings.
- [12] The employee disputes that he failed to stop the machine and to follow the correct procedure of reporting the fault that resulted in the production of 15 scrap tyres. He submitted that he had not been in the position in question for a long time, and that he had not been found guilty of any misconduct similar to the one he was dismissed for. In his version, "the production of the said scrap tyres was a result of the backlog caused by the previous shift".

Applicable law and analysis

- [13] 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.

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

- [15] 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.

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).

⁴ At para 25.

⁵ [2014] 1 BLLR 20 (LAC) at paras 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.'

[16] *In Head of the Department of Education v Mofokeng and Others*⁶ 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.

[17] 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 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

⁶ [2015] 1 BLLR 50 (LAC) at para 30.

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]

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

'3. Disciplinary measures short of dismissal.

Disciplinary procedures prior to dismissal.

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

⁷ At para 33.

required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.

- (3) Formal procedures do not have to be invoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor violations of work discipline. Repeated misconduct will warrant warnings, which themselves may be graded according to degrees of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences.
- (4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.
- (5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself.
- (6) The employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same and other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.'

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

mitigating and aggravating factors. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁸ the Constitutional Court held that:

'In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.'⁹

- [20] In determining whether the sanction imposed by the employer is fair, the arbitrator is required to take into account the totality of circumstances.¹⁰ In this case, the arbitrator only based his finding (i.e. that the sanction of dismissal was harsh) on considering the employee's length of service, disciplinary record and the nature of the misconduct he was charged with.
- [21] On the nature of the misconduct the employee was charged with, the arbitrator took the view that misconduct relating to gross negligence did not warrant dismissal and that the employer should adopt or follow progressive discipline in matters pertaining to negligence. In essence, the arbitrator's finding that the employee's sanction of dismissal was harsh was based on the fact that he was dismissed for gross negligence as opposed to dishonesty. There is no basis for the arbitrator to trivialize the seriousness of a misconduct relating to gross negligence and in particular that which was committed by the employee. The employee was a classifier with managerial responsibility for final inspection of the applicant's products, he failed to exercise the standard of care and skill that was reasonably expected of an employee with his degree of skill and experience and his conduct resulted in financial loss to the applicant. In addition, it was not in dispute that his conduct and/or omission

⁸ [2007] 12 BLLR 1097 (CC).

⁹ At para 78.

¹⁰ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

was serious in itself. The applicant was entitled to discipline him because he owes a duty of care to it (the applicant), its clients and his own colleagues.

[22] The arbitrator put more emphasis on the employee's long-term service and the fact that his previous warning was no longer valid. He failed to appreciate the nature and the importance of the rule breached; the consistency of application of the disciplinary rule and sanction; and aggravating factors. The applicant led relevant evidence that the employee was aware of the procedure to be taken to prevent the damage caused; his negligent conduct resulted in the applicant's financial loss; he failed to report the incident immediately; and he failed to display remorse, to appreciate or to acknowledge his wrongdoing at the disciplinary enquiry and at the arbitration proceedings. Instead, he shifted the blame to the previous shift and to Mr. Ntseke. It is apparent that the arbitrator did not take the above factors into consideration before arriving at the finding that the sanction of dismissal was too harsh.

[23] Had the arbitrator considered all the material that was before him, he would have arrived at a different conclusion. The arbitrator's decision could, therefore, not be one that a reasonable decision-maker could arrive at. As such, his award falls to be reviewed and set aside. With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

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

Order

1. The arbitration award issued by the second respondent (the arbitrator) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), under case number GATW 2188-14 on 28 July 2014 is reviewed and set aside and replaced with the following order:

- a) The employee's dismissal was substantively fair.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

J Moyo

Moyo Incorporated Attorneys

FOR THE THIRD RESPONDENT:

Pieter Moll

Edward Nathan Sonnenbergs Inc. Attorneys