



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 972/16

In the matter between

SIMPHIWE SINGAMA

Applicant

and

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

First Respondent

CHITANE SOZA N.O

Second Respondent

SUPA CRUSH (PTY) LTD

Third Respondent

Heard: 03 November 2017

Delivered: 31 October 2018

JUDGMENT

MAHOSI, J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award issued by the second respondent (arbitrator) under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), under case number NC 260-16, dated 25 April 2016 in terms of which the arbitrator found that the dismissal of the applicant was procedurally and substantively fair and the application was dismissed.
- [2] The applicant seeks that the matter should be referred back to the first respondent to be heard *de novo* before an arbitrator other than the second respondent.
- [3] The key question is whether the arbitrator's decision is one which a reasonable decision-maker could not reach².

Background Facts

- [4] The applicant was employed by the third respondent on 17 July 2011 as a dump truck operator. It is common cause between the parties that on 10 January 2016, the dump truck tipped over while the applicant was operating it. On 21 January 2016 he was suspended and issued with a notice to attend a disciplinary hearing that was scheduled for 23 January 2016. The charges that he had to answer to were as follows:

'Gross misconduct in that you:'

1. Failed to follow an instruction given by supervisor, Richard Moseneke regarding the hauling of the material.
2. Breached health and safety rules by not adhering to traffic signs, resulting in the dumper truck tipping over.

¹ Act 66 of 1995 as amended.

² See: *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] 12 BLLR 1097 (CC).

3. Breached health and safety rules by operating a dumper truck at excessive speeds, resulting in dumper truck tipping over.'

[5] At the disciplinary hearing, the applicant pleaded guilty to the second charge and he was dismissed on 26 January 2016. The applicant then referred the dismissal dispute to the CCMA that was unsuccessfully conciliated. The arbitration was held on 22 April 2016. At the end of the arbitration, the arbitrator issued an award in which he found that the applicant's dismissal was procedurally and substantively fair.

Grounds of Review

[6] The applicant's grounds of review are as follows:

- 5.1 The commissioner's findings based on the evidence before him were wholly unreasonable.
- 5.2 The commissioner should not have considered the other charges as he was dismissed for charge 2.
- 5.3 It was unreasonable for the commissioner not to consider that the previous warnings were not related to healthy and safety and the dismissal was harsh.
- 5.4 The commissioner did not take into the account the evidence of inconsistency that was led.
- 5.5 It was unreasonable for the commissioner not to consider that if he was speeding there would have been a damage to the truck, the applicant disputes that he was speeding.
- 5.6 It was inappropriate for the commissioner to find that dismissal was the appropriate sanction when there was no evidence that the trust relationship was broken.'

The Test for review

[7] The test for review has become trite law. The test is whether the decision reached by the commissioner is one that a reasonable commissioner could have reached. The decision must fall within a radius of reasonableness.

[8] In *Head of the Department of Education v Mofokeng and Others*³ the Labour Appeal Court (LAC) confirmed the *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.’⁴

[9] 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 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

³ [2015] 1 BLLR 50 (LAC).

⁴ At para 30.

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.⁵ [Footnotes omitted]

[10] The applicant alleged that the arbitrator's findings were wholly unreasonable in that although he was dismissed for charge 2, the arbitrator found that he breached the safety rules by failing to stop when he felt that the truck was overloaded and to follow a speed limit. The third respondent submitted that the traffic sign which the applicant failed to adhere to was a 10km/h speed limit sign. By pleading guilty to charge 2, the applicant admitted that he breached the safety rule by not following the speed limit which means that he was travelling beyond the speed limit. There is therefore no merit to the applicant's submission that the arbitrator considered a charge that he was not dismissed for. I find no irregularity or misconduct in relation to this ground of review.

[11] The applicant's further submission was that it was unreasonable for the commissioner to consider the nature of his previous warnings as they were unrelated to health and safety. Further that the sanction of dismissal was too harsh. 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

⁵ At para 33.

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 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.'

[12] Thus, in determining the appropriateness of the sanction, the arbitrator must enquire into the gravity of the contravention of the disciplinary rule; the consistent application of the disciplinary rule and sanction; and the mitigating and aggravating factors. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,⁶ 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.'⁷

[13] In determining whether the sanction imposed by the employer is fair, the arbitrator is required to take into account the totality of circumstances.⁸ In this case, the arbitrator took into account the seriousness of the misconduct the employee was charged with, the importance thereof, the applicant's total disregard of its gravity and the effect the said misconduct had on the continued employment relationship between the parties to arrive at the conclusion that

⁶ [2007] 12 BLLR 1097 (CC).

⁷ At para 78.

⁸ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

dismissal was an appropriate sanction. The arbitrator further took into consideration the evidence led in relation to the allegation of lack of consistency in the application of the rule and found that the applicant could not substantiate his claim.

[14] It is apparent that the arbitrator took into account the evidence before him and applied his mind before arriving at the conclusion that the applicant's dismissal was procedurally and substantively fair. It cannot be said that he reached an unreasonable conclusion. There is, therefore, no reason for this Court to interfere with his award.

[15] I have had regard to the issue of costs and I find that taking into account the requirements of law and equity, there should be no order as to costs.

[16] In the circumstances, I make the following order.

Order

1. The application to review and set aside the arbitration award issued by the second respondent under the auspices of the first respondent under case number NC 260-16, dated 25 April 2016 is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant

Mr Singama (in person)

For the respondent

Mr Melany Fouche of Jacques Du Preez attorneys

LABOUR COURT