



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1020/16

In the matter between:

MICHELLE VISSER

Applicant

and

VECTOR LOGISTICS (PTY) LTD

First Respondent

**COMMON FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

HLALELE MOLOTSI N.O

Third Respondent

Date heard: 23 May 2018

Date delivered: 02 November 2018

JUDGMENT

BALOYI AJ,

Introduction

- [1] Two separate review applications were filed in challenge of the arbitration award issued by Commissioner Hlalele Molotsi sitting at the Commission for

Conciliation, Mediation and Arbitration (CCMA) offices at Tshwane. In the award he found the dismissal of the applicant, Ms Michelle Visser (Visser) substantively unfair and awarded her compensation equivalent to four months' remuneration. The first respondent, Vector Logistics (Pty) Ltd (Vector Logistics) filed the first review application at the Durban seat of this Court challenging the findings made by the Commissioner as well as the relief awarded. Ms Visser subsequently filed a second review application under the above case number at the Johannesburg seat of this Court. At the instances of Ms Visser an order was obtained from the Johannesburg Court for the transfer of the Durban case to Johannesburg. The matter is now proceeding under the Johannesburg case number and for purposes of this judgment the parties will be referred to as cited in the Johannesburg case.

- [2] It deserves mention at this early stage that a number of episodes, accompanied by each party's accusations towards another regarding non-compliance with the rules, took centre stage in this matter. This has in no doubt brought in some deviations from the real issues for determination due to a lack of co-operation between the parties' representatives. This overly technical manner of litigation should be discouraged particularly where parties have legal assistance at their disposal. The court had to sift through a box filled with lever arch files to find what may be relevant for purposes of dealing with this matter.

The Chronology of events

- [3] Following the issuing of the arbitration award dated 12 May 2015 Vector Logistics filed a review application in the Durban Court on 3 June 2015. On 26 February 2016 Vector Logistics served a record in terms of Rule 7A (6). On 24 May 2016 Ms Visser filed her review application. On 23 June 2016 Vector Logistics filed a notice in terms of Rule 7A(8). On 30 June 2016 Ms Visser filed a notice of irregular step wherein the issue of the lapse of the review application was raised. On 4 August 2016 Ms Visser filed an application seeking an order declaring that the Vector Logistics review application had lapsed.

- [4] Ms Visser proceeded with the serving of its notice in terms of Rule 7A (8) on 01 July 2016 but only filed it on 19 August 2016. On 18 July 2016 Vector Logistics filed an answering affidavit to Ms Visser's review application. On 01 August 2016 Vector Logistics filed the condonation application for the late filing of the record which Ms Visser opposed on 18 August 2016. On 23 May 2017 the Court sitting in Durban granted condonation of the late filing of the record and dismissed the application to declare an irregular step on the part of Vector Logistics. On 23 May 2017 the application for transfer of the Durban matter to Johannesburg was granted.
- [5] The issue in dispute is the dismissal of Ms Visser by Vector Logistics on 25 August 2014 following a guilty finding on charges of misconduct. Ms Visser referred an unfair dismissal dispute to the CCMA which was ultimately arbitrated upon by the Third Respondent.

The arbitration award

- [6] What came before the commissioner is that Ms Visser was dismissed after a guilty finding on three charges. At the end of the arbitration proceedings he found Ms Visser not guilty of committing misconduct on the first two charges but found her guilty on the third. He found the dismissal substantively unfair, firstly, that the sanction of dismissal was inappropriate and too harsh, and secondly, that Ms Visser's colleague who committed a similar misconduct was not dismissed.
- [7] He found the employment relationship to be capable of being restored through training and instruction and that he was not bound by the disciplinary code which provided for dismissal as a sanction for the misconduct in question. Further, in the award he viewed Ms Visser's remarks made during the disciplinary hearing, that she would not hesitate doing it again should the opportunity arise as lack of remorse. He made a finding that the remarks rendered the employment relationship intolerable, thereby limiting the relief awarded to Ms Visser to four months' remuneration.

- [8] Vector Logistics, as a Transport and Logistics Company, keeps goods belonging to its clients at its warehouses, in furtherance of its distribution tasks and Ms Visser was stationed at one of these warehouses. McCain, a client of Vector Logistics permitted them to dispose of its damaged stock by way of discounted sale to the warehouse employees. The office of Ms Visser was administering such sales and safe keeping of the proceeds of such sales. The charges against Ms Visser emanated from her utilizing the cash collected from sales to provide loans to Vector Logistics's employees, namely Mr Singh and Mr Van Der Walt in the sums of R6 000-00 and R1 800-00 respectively.
- [9] It was common cause that Ms Visser did not follow HR procedures when advancing these loans and therefore exposed Vector Logistics to financial risk, particularly since the funds in question belonged to a client. Mr Singh and Mr Van der Walt acknowledged taking the loans from Ms Visser, and eventually settled same.
- [10] Ms Visser faced three charges. The first two charges Ms Visser was charged with were gross negligence and derelictions of duty for failure to account on cash sales for damaged stock and selling of stock on credit. On these two she was charged with her colleague Mr Neo Molwantoa, both were found not guilty, and Mr Molwantoa was not dismissed. Ms Visser then faced a third charge as set out below. Vector Logistics did point out during the arbitration proceedings that the third charge only related to Ms Visser.
- [11] Despite the evidence that the principle of inconsistency was not applicable as Mr Molwantoa did not face the third charge, the commissioner nevertheless found Ms Visser's dismissal unfair on the basis that Vector Logistics failed to give reasons for dismissing Ms Visser and not Molwantoa.
- [12] The grounds upon which both review applications are sought are rooted on the third charge which reads as follows:

“3 Gross negligence in that you have exposed the company to financial risk by borrowing/lending money out to staff from McCain cash sales without following company loan procedure”.

- [13] Ms Visser is seeking a review in so far as the relief awarded, that is, reinstatement was an appropriate relief instead of compensation. The essence of her case is that the commissioner should not have found her guilty at all. While admitting her failure to follow procedures, she maintained that it was out of necessity that she had to lend monies to both Singh and Van Der Walt who eventually paid back such monies. The statement she made in the disciplinary hearing was misconstrued.
- [14] The reason for the late filing of Ms Visser’s review is centred around the Registrar’s advice to Ms Visser’s attorney to file a new review application in Johannesburg accompanied by a condonation application because the Vector Logistics’s review application had lapsed. It is indisputable that Ms Visser’s review application is approximately 11 months late.

Vector Logistics’s review application

- [15] In its grounds, Vector Logistics’s case is firstly rested on the commissioner’s failure to apply his mind to the seriousness of the misconduct which he noted in his award exposed Vector Logistics to financial risk. His decision is in this respect attacked for not taking into account Ms Visser’s blatant display of lack of remorse. The second attack is on the commissioner’s finding of inconsistency based on comparison with Molwantoa who was not dismissed while Ms Visser was dismissed. The commissioner had, despite evidence placed before him to the effect that Molwantoa did not face the same third charge, failed to apply her mind and found the dismissal unfair on the basis of inconsistency. Thirdly the decision made in the midst of contradictory findings that the misconduct rendered the employment relationship intolerable while on the other hand it was restorable.

- [16] It is notable that Vector Logistics's review application as it stands is unopposed. Ms Visser is however holding an opposite view, as pointed by Mr Ackerman in his arguments, that the opposition is in fact contained in Ms Visser's review application. Furthermore, a letter was written to the Vector Logistics's attorneys conveying applicant's intentions to filing a cross review.
- [17] Be that as it may, I hold a strong view that this matter deserves to be determined in a manner that will result in a ventilation of all material aspects of the dispute. In so doing, the Court has to look at what was before the commissioner and whether he understood his mandate when determining the dispute between the parties. As pointed out above, I am loathe to play a role in the mudslinging exercises between the parties' representatives by ruling on all technical points around accusations of non-compliance with the rules and the practice manual. In my view upholding or the dismissal of such points have no bearing on the outcome of any of the two review applications. Without further labouring onto anything having to do with these points, I see it necessary to deal firstly with Ms Visser's review application.
- [18] In her own words she was always aware that the award was issued on 12 May 2015. In the absence of a specific averment as to when she received it, the court is compelled to assume that it was received on the same date. The six weeks period therefore expired on 23 June 2015. The review application was only filed on 24 May 2016. The application is thus 11 months late. The explanation for the delay is solely rested on the advice given to her attorney that she should file the review application in view of the lapse of Vector Logistics's review application.
- [19] As to prospect of success she referred the court to another part of her founding affidavit where merits of her case are canvassed. In essence she maintained that she is not guilty of charge 3 and the finding of Vector Logistics was wrong in this respect. While acknowledging not following the procedures,

she denied placing them in financial risk. Singh and Van der Walt did in any event settle the loans. The commissioner was supposed to have reinstated her, alternatively, awarded her eight months' compensation.

- [20] It is inescapable that the condonation application requires attention. On this note it is thus of high importance to consider whether there is a case made out for the granting of the condonation application. The test for condonation is now undoubtedly settled and I have elected to take guidance from the Labour Appeal Court's decision in *National Union of Mineworkers v Council for Mineral Technology*¹ where it was stated that:

"... The approach is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated: they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused..."

- [21] The merit of Ms Visser's case is solely rested on the decision of the commissioner being wrong for having found her guilty on the third charge as there was no proof that she did anything wrong and therefore she was never grossly negligent. Her admission to not following procedure did not in any way imply that she committed misconduct. In so far as condonation is concerned it remains unassailable from the above *dicta* that an explanation for the delay is at the top of the elements in the test for condonation. At the same time the

¹ (JA94/97) [1998] ZALAC 22 (17 August 1998) at para 10.

explanation has to be considered with the merits of the review application to determine if Ms Visser has shown any prospect of success. The commissioner's decision is attacked on the basis of wrongfulness. The concept of wrongfulness is foreign to review applications as it has no place in the grounds set out in section 145 of the Labour Relations Act² (LRA) and the Constitutional grounds based on unreasonableness. I find no reason to disagree with Vector Logistics that Ms Visser's explanation as well as her conduct post the issuing of the award demonstrated any intentions of challenging it. Denial of guilt in the midst of her concessions that she had indeed violated the procedures, reveals lack of prospects of success. On this note it cannot be said that Ms Visser has made a case warranting the granting of the condonation application. Her review application is bound to fail under the circumstances.

- [22] I now turn to Vector Logistics's review application which is rested on two points, namely, the challenge to the findings of harshness of the sanction and inconsistency. In dealing with these points the test for review of arbitration awards deserves a visit. The Constitutional Court in paragraph in *Sidumo & Another v Rustenburg Platinum Mines*³ summarised the review test as follows:

"To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair".

² 66 of 1995, as amended.

³ [2007] 12 BLLR 1097 (CC) at para 110.

- [23] For convenience sake I wish to discuss the Labour Appeal Court case of *Edcon v Pillemer No & Others*⁴ where Sangoni JA summarized in the facts of the case as follows:

“The so called ‘reasonable decision maker-test’ serves as a basis for the decision in *Sidumo*. If the commissioner made a decision that a reasonable decision maker could not reach, he/she would have acted unreasonably which could then result in interference with the award. This in my view, boils down to saying the decision of the commissioner is to be reasonable. To my understanding the dictum in *Sidumo* is not about shifting from the ‘reasonable employer test’ in favour of the so called reasonable employee test. Instead, meaningful strides are taken to refocus attention on the supposed impartiality of the commissioner as a decision maker at the arbitration whose function it is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision. It is in fact the relevant factors and the circumstances of each case, objectively viewed, that should inform the element of reasonableness or lack thereof”.

- [24] I must confess that there is a reason for this Court to also pay attention to the facts of *Sidumo*. This court is sitting with a matter characterized by failure to follow procedures. Post *Sidumo* the approach to review applications in terms of the test took a major turn, thus placing more effort on Ms Visser to establish the unreasonableness of the award. In other words, even if the reasoning may not be good to a point that the Court would have ruled differently sitting in the position of the commissioner as long as the reasoning of the commissioner doesn’t bring about an unreasonable result, the award cannot be interfered with.

⁴ [2010] 1 BLLR 1 (SCA).

[25] In *Fidelity Cash Management Service v CCMA & Others*⁵ the Labour Appeal Court (LAC) had in this respect held as follows:

“[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the Court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the Court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the Court would interfere with every decision or arbitration award of the CCMA simply because it, that is the Court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review”.

[26] The LAC took this further in *Head of the Department of Education v Mofokeng*⁶ where it was stated that:

“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 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 inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues”.

[27] When considering Vector Logistics’s review application, specifically at what was placed before the commissioner, Ms Visser conceded to not having followed procedures and denied that she was negligent nor exposed Vector Logistics to financial risks. Since the record shows that Molwantoa was not charged with charge 3, the finding of unfairness based on inconsistency boils

⁵ (2008) 3 BLLR 197 LAC at para 98.

⁶ (2015) 1 BLLR 50 LAC at para 31.

down to the commissioner's misconstruction of the inquiry he was required to undertake.

- [28] In light of the unsustainability of the inconsistency claim, the harshness of the sanction appears to be the remaining issue which vitiated the finding of unfairness of the dismissal. The commissioner's reasoning that this harshness is founded on hopes of restoration of the employment relationship depending on additional training and instruction to Ms Visser. It does not appear on any material placed before the commissioner that Ms Visser's commission of misconduct in question was precipitated by a deficiency in requisite skills or knowledge in performance of her duties. In the absence of any material before the commissioner that provision of training and instruction would lead to an improvement of performance of her duties, this once again points to a misconstruction of the nature of the enquiry he was tasked to deal with.
- [29] The commissioner was in fact caught up with Ms Visser's persistence of having done nothing wrong. This took him to the extent of making a finding that Ms Visser lacked remorse. His finding of unfairness in this regard goes far more than the relevant material placed before him. It does not appear that Ms Visser had a sense of acknowledgement that the misconduct was in deed committed out of mistake. The commissioner's decision cannot in the context of the *Sidumo* case be found to be that of a reasonable decision maker. There exist reasons for the award to be interfered with.
- [30] Based on all factors dealt with above, the case is made in terms of Vector Logistics's application to review and set aside the award. The record is, in so far as relevant issues for determination of the dispute, sufficient for the Court to making a finding on the fairness of the dismissal. The commissioner's finding that the dismissal was unfair is untenable. I am of the view that the dramatic exercises undertaken by the parties in this matter came out of their

own doing and any cost incurred should be borne by the parties themselves. This Court is therefore not inclined to make any cost order in this regard.

[31] In the premises the following order is made:

Order

1. The arbitration award issued by the commissioner under case number GATW 12330-14 is reviewed and set aside and is substituted with an order that:

1.1 The Applicant's dismissal is found to be substantively fair.

2. There is no order as to costs.

M. M. Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Ackerman

Instructed by: DBM Attorneys

For the First Respondent: Mr Pretorius and Ms Govender of MacGregor
Erasmus Attorneys

LABOUR COURT