THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR987/15

In the matter between

MASS WAREHOUSE (PTY) LTD T/A MAKRO SA **Applicant**

and

SACCAWU obo BILLY MTHIMUNYE **First Respondent**

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

COMMISSIONER JACKSON MTHUKWANE N.O **Third Respondent**

Heard: 31 October 2018

Delivered: 07 June 2019

JUDGMENT

BALOYI, AJ

Introduction

[1] The arbitration award issued by the third respondent is the subject matter of this application. In terms of the very award, the third respondent found the dismissal of the first respondent to be substantively unfair and awarded him

reinstatement retrospectively. The applicant is seeking an order reviewing and setting aside the award. The first respondent is opposing the application.

Factual Background

[2] The applicant and the first respondent entered into an employment relationship in September 1991. The relationship which the applicant terminated on 29 July 2014 after finding the first respondent guilty of gross negligence. The first respondent was at the time of his dismissal occupying the position of Back Returns Clerks. He was based at Makro, Centurion.

[3] The applicant conducts a retail business of various merchandise. Certain items sold by the applicant were for a variety of reasons, brought back to the store for repairs. It was the duty of the Back Returns Clerks to book out the items due for repairs to the relevant suppliers. Once the repairs were done, the driver identified as Godfrey was sent out to pick up such repaired goods. The Back Returns Clerks were further responsible for receiving the repaired goods from the suppliers after being collected by the driver.

[4] The first respondent as a Back Returns Clerk was responsible for following up with the suppliers on whether the goods sent for repairs were attended to and ready for collection. The process of following up went to the extent of ensuring that the goods collected by the driver reached the store. The first respondent was faulted for not ensuring that the repaired goods reached the store after being collected from the suppliers. Furthermore, he failed to inform the relevant manager about the non-arrival of such repaired goods. According to the applicant's records, the third respondent had in no less than 16 occasions failed to record that the repaired goods collected from the suppliers were received back into the store. The applicant was able to link these omissions to the first respondent due to his username appearing on such records. The repaired goods remained unaccounted for after their collection from the suppliers and the applicant had as a result, suffered losses. The misconduct in question was said to have been committed on an ongoing basis during 2012 and 2013.

[5] The first of the applicant's two witnesses was Ms Nomasonto Masuku (Ms Masuku), the Process Controller at the very store in which the applicant was based. The initial investigations were carried out by the applicant's second witness, Mr Jacobus Paulsen (Mr Paulsen) who was the Executive Manager: Receiving. Mr Paulsen submitted the outcome of his investigations to Ms Masuku for her further attention. Her evidence and that of Mr Paulsen was mainly based on the outcome of the investigations that the repaired goods collected from the suppliers did not reach the store. They were not part of the Back Returns Department during 2012 and 2013.

[6] Mr Paulsen started managing the Back Returns Department in February 2014 following his transfer from the applicant's other branches. The evidence of the applicant's witnesses was respectively based on documents sourced out during investigations and information gathered when interviewing the Back Returns Clerks. One of the Back Returns Clerks who worked with the third respondent resigned immediately after being interviewed by Mr Paulsen. Mr Paulsen confirmed receiving a single report from the third respondent about certain items that did not reach the store after repairs. He went further to state that the report in question was however made after the investigations had commenced. When he assumed management of the Back Office Department, all the Clerks were performing the same duties and continued as such under him.

[7] The first respondent had from the onset, denied being negligent. He was not working alone in the Back Returns Department, he cannot under such circumstances, be blamed for all the wrongs that took place in that department. Due to separate duties performed by the Back Returns Clerks, he was not required to make follow ups on the collected repaired goods. He further maintained that he did make follow ups with suppliers hence the driver was able to go out and collect the repaired goods. The driver's failure to bring the repaired goods should not be attributed to him because he did what was required of him. At the time he was still reporting to one Lungile and he was not required to make follow ups beyond sending a driver to collect the repaired goods. At some point Lungile assisted him in contacting the

suppliers. He had in any event reported the issue of goods not returning to the store to Mr Paulsen; as such no misconduct was committed by him.

[8] The third respondent's findings in his award are heavily rested on the applicant's failure to lead evidence demonstrating the breakdown of specific duties of the Back Return Clerks. Since none of the applicant's witnesses had worked in the department at the time of the losses, the first respondent's version that he was only responsible for booking back the repaired stock from the technicians remained undisputed. Secondly, that the applicant failed to call Lungile who was the manager at the material times to rebut the first respondent's version regarding separate responsibilities of the Back Returns Clerks. Thirdly, the applicant had as a result of having not properly investigated the allegation against the first respondent, failed to prove that the third respondent was guilty of gross negligence. Lastly, the applicant tendered no credible evidence to justify the applicant's dismissal. Based on these findings, he ruled that the first respondent's dismissal was substantively unfair and awarded him reinstatement with back pay.

[9] Now before this Court the applicant is seeking an order for the review and set aside of the arbitration award based on the third respondent's commission of gross irregularity. His decision is criticized for putting more weight on Mr Paulsen not been present at the time of commission of misconduct. He failed to take into account the documentary evidence that plainly revealed that the first respondent failed to do what was required of him when coming to following up on the goods taken out for repairs. His failure to accurately record the evidence as presented before him led to his inability to understand the evidence in question. This effectively led him to preferring a wrong version in his determination of the dispute. His finding that the applicant failed to lead evidence to demonstrate that the Back Returns Clerks performed separate duties is inconsistent with Mr Paulsen's evidence that the employees in the department performed the same duties. He failed to consider the credibility, reliability and probabilities associated with both parties' evidence.

[10] The first respondent contends that the third respondent's decision is a reasonable one and therefore the application should be dismissed. The

applicant's witnesses contradicted each other regarding the number of employees working at the Back Returns Department. The applicant failed to dispute that the back returns employees performed different duties. The first respondent had in deed reported the non-return of goods to Mr Paulsen.

Evaluation

[11] The test for review of arbitration awards based on the constitutional ground of reasonableness is well established and it is in fact accepted as a settled legal position. The award falls to be reviewed if it is amongst others, established that the arbitrator's decision is not one which a reasonable decision maker could reach[1]. The court when confronted with a review application cannot ignore that a decision of an arbitrator cannot be easily interfered with. This extends to the point where the court holds a view that it would have decided otherwise had it been tasked with the determination of the dispute at arbitration level. In essence, the determination of unfair dismissal disputes is primarily vested on the arbitrators and the court's interference should be exceptionally minimal. The court may be compelled to interfere with the arbitrator's decision only if the irregularity is so gross to a point that no reasonable decision maker could arrive at a decision that is subject to review. The Labour Appeal Court (LAC) in *Fidelity Cash Management Services v CCMA and Others* [2] had in this respect said the following at paragraph 98:

> "[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

[1] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 109, CC at par 110 when the constitutional court raised a critical question in respect of test for review, ie, "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?" .
[2] [2008] 3 BLLR 197 (LAC).

decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review."

[12] The misconstruction of the nature of the inquiry which is in itself an irregularity does often call for the Court's interference with the arbitration award if such irregularity has the effect of bringing about an unreasonable result. The Supreme Court of Appeal (SCA) in *Herholdt v Nedbank LTD and Others* [3] at paragraph 25 held 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 within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry 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 facts, 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."

[13] The negligence that gave rise to the dispute between the parties is founded on the first respondent's failure to follow the required working procedures. The third respondent began his analysis of evidence by making reference to item 7 of schedule 8 of Code of Good Practice on dismissals[4]. He regurgitated same

in paragraph 15 of his award. In the next paragraph he identified the relevant issues for consideration on his way to determination of the dispute as follows:

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[3] [2013] 11 BLLR 1074 (SCA)

[4] Any person who is determining whether a dismissal for misconduct is unfair should consider—

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
(b) if a rule or standard was contravened, whether or not—
(i) the rule was a valid or reasonable rule or standard;
(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
(iii) the rule or standard has been consistently applied by the employer; and
(iv) dismissal with an appropriate sanction for the contravention of the rule or standard.

> "It was common cause between the parties that stock that had been sent to technicians for repairs, was repaired, collected by the driver and his assistant but it never reached the store. Paulsen started to manage the applicant only on 14 February 2014, and the alleged gross negligence took place during 2012 and 2013.Nomasonto Masuku testified that the applicant during that period worked with two other employees in that department. Paulsen testified that only one other employee worked with the applicant in that department. The applicant stated that he worked with Johannes and Sibusiso"

[14] From this point he went on to analyze the facts of the matter based on the above *dicta* to arrive at his conclusion. It does not appear in his award as to why item 7 of schedule 8 of Code of Good Practice was introduced as a tool for determination of the dispute but was left unused. It glaringly appears in the award that the third respondent determined the dispute based on the applicant's inability to tender sufficient evident to justify dismissal. In the presence of the applicant's records backed by oral evidence, particularly that of Mr Paulsen, there is no doubt that the third respondent has failed to apply the legal tools that he deemed relevant for determination of this matter to the facts placed before him.

[15] In view of the above, it is also of prime importance for the Court to look at the source of the finding that the applicant's case carried no sufficient evidence. The third respondent found that the applicant made no effort to lead evidence that the first respondent performed separate duties to those performed by his fellow Back Returns Clerks. The applicant received criticism from the third respondent for not calling Lungile to clarify the separation of duties. The issue at hand as understood by the third respondent, was the first respondent's duties of booking back the stock that had been repaired by the technicians. These are indeed matters of evidence identified by the third respondent.

[16] What appears to reveal difficulties in the third respondent's reasoning has largely to do with application of rules of evidence. Proper application of the rules of evidence should definitely be consistent with accurate capturing of the evidence. The third respondent identified the non-return of repaired

goods to the store as a common cause issue. Consequently, it was incumbent on the first respondent to establish the whereabouts of the collected repaired goods. If such goods did not reach the store, the next thing for him to do was to bring this to his superiors' attention. The core of the first respondent's case is that he followed up on the repairs and reported to Mr Paulsen. On the other hand, he was not responsible for reporting the repaired goods that did not reach the store. What causes further problems to the third respondent's case is that Mr Paulsen whom he reported the non-arrival of goods, was seen as an incompetent witness because he did not work in the department in 2012 and 2013.

[17] With the issues for determination clearly identified, it remains difficult to understand why the third respondent was not able to notice that the first respondent's case was loaded with several mutually exclusive versions. What is more troubling is that the third respondent sourced the evidence about Lungile from the first respondent's testimony which only came into the record after the close of the applicant's case. As the record stands none of the applicant's witnesses were confronted with this version during cross examination to enable them to respond or to enable the applicant to consider calling further witnesses if need be. It does not appear in his analysis of the evidence that the first respondent's other version about the driver's failure to return the repaired goods to the store should not be blamed on him was ever considered. There is no indication in the award on whether this version was found to be acceptable or otherwise. Based on what was placed before the third respondent, this forms part of the critical issues deserving consideration for purposes of the determination of the dispute.

[18] It does under the circumstances, conspicuously appear from the above that the third respondent failed to consider the totality of facts placed before him[5]. On whatever facts he elected to consider, he failed to properly apply the rules of evidence. He identified all pertinent issues that were clearly common cause. The only identifiable contentious issue was whether the third

[5] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC) at paragraph 21 the Labour Appeal Court restated that the arbitrator's failure to have regard to the material facts is likely to make him/her to fail to arrive at a reasonable decision.

respondent made follow ups on the return of the repaired goods to the store after sending the driver to collect them. Once the applicant raised an issue about the goods which the first respondent was to receive after being collected from the technicians, logically the first respondent remained with a duty to explain what happened to the goods, most particularly where their disappearance was never reported to his superiors. The fate of the first respondent was mainly rested on whether he had a good explanation for such goods not having reached the store.

[19] With the third respondent's ignorance of the totality of factors placed before him, he certainly came to an unreasonable conclusion by finding that the applicant failed to produce sufficient evidence to justify the third respondent's dismissal. This is not consistent with the documentary evidence which revealed that the first respondent had in no less than 16 occasions neglected his duties of ensuring that the repaired goods reached the store. The applicant was able to link this negligence to the first respondent through his username and this was not disputed. The third respondent has in no doubt misconstrued the evidence which effectively turns on the nature of the inquiry he was faced with. This in no doubt brings about an unreasonable result. His award is thus open for review and to be accordingly set aside.

[20] Regarding costs, both parties were not at each other's throats on the issue. It will therefore be within the requirements of law and fairness not to make a cost order.

[21] In the premises, the following order is therefore made:

Order

1. The arbitration award issued by the third respondent under case number GATW 11443-14 is reviewed and set aside and substituted with an order that:

    1.1 The dismissal of the first respondent is found to be substantively fair.

2. There is no order as to cost.

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MM Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr B Masuku of Mervyn Taback Inc

For the Respondent: Mr L Marakalala of SACCAWU