

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH**JUDGMENT****Not reportable****CASE NO: PR 81/2016**

In the matter between:

MERCEDES BENZ SOUTH AFRICA**(PTY) LTD****Applicant**

and

THE COMMISSION OF CONCILIATION**MEDIATION AND ARBITRATION****First Respondent****M NDUZULWANA N.O****Second Respondent****NUMSA****Third Respondent****P.A WAGENAAR****Fourth Respondent****Heard: 20 February 2019****Judgment delivered: 21 February 2019**

JUDGMENT

VAN NIEKERK J

- [1] The fourth respondent (the employee) was dismissed by the applicant for breaching a rule relating to the searching of employees in the workplace. At the time of the incident that gave rise to his dismissal, the employee had 25 years' service and a clean disciplinary record. The employee disputed the fairness of his dismissal, and the matter was ultimately referred to an arbitration hearing before first respondent (the commissioner). The commissioner found that the employee had been unfairly dismissed and reinstated him with retrospective effect, but subject to a final written warning, valid for six months.
- [2] The charge against the employee was that he had *'refused to show security officer the item's (sic) you had in your hand when you were requested to do so. You instead pushed the security officer out of your way in an aggressive manner and proceeded to swipe out through the turnstile No 4 and left the company premises'*. As I have indicated, the charge has its roots in a policy that applies to the right to search employees. The policy provides for the right to search of vehicles and possessions on a routine basis and further that an unreasonable refusal to comply with the policy constitutes misconduct. Indeed, the policy provides the following:
- Employees are therefore advised that in future, the usual penalty for refusing to be searched will be dismissal unless there is some justifiable and acceptable reason for the refusal. Note that it is not a justifiable and acceptable reason that the employee is in a hurry to get home or catch a lift.
- [3] After a review of the evidence, the commissioner came to the following conclusion:
20. I have already found that the employee's failure to submit to search was motivated by a desire to go home quickly. In the circumstances I do not agree with Mr. Diggins inference that the employee's failure to submit to search was "he did not wish to be searched and was more likely than not in an unauthorized possession of the respondent's property." There is not a scrap of evidence before (sic) substantiating the allegation that the employee's refusal to submit search for

he was in fact informed by a desire to hide the position of the employer's property. The evidence of Ms. Nkumanda is that of the employee over a long time had a tendency to resist search mode that it was delaying them. Irrespective of the fact that such attitude was incorrect, it does not in my view amount to theft or unauthorized possession of employer's property or dishonesty. Further I do not agree with Mr. Diggins that the leading of untrue or contradictory evidence at arbitration amounts to dishonesty that renders continued employment relationship intolerable. If that was the case Ms. Ntsholo and Mr Waters said the employee was carrying something that looked like an umbrella when in fact that is not true as demonstrated by the video footage. The mistake of the employer in this case is that it confused failure to submit to a search with unauthorized possession of employer's property and dishonesty when in fact are the two are different. In the circumstances I find that the employer has failed to prove that a failure to submit to a search where it is informed by desire to go home, constitutes the offensive unauthorized position, or theft or dishonesty.

- [4] The commissioner went on to find that the misconduct committed by the employee amounted to no more than a failure to submit fully to a search, an offence that fell into a category of general offences and breaches of company policy for the purposes of the applicant's disciplinary code and which ordinarily attracted a final written warning. The commissioner considered that the effect of the rule was that the security officer should complete the search of the employee, and release him or her thereafter. On this basis, the commissioner concluded that the employee had 'breached the rule regulating search at the workplace'. In other words, the misconduct committed by the employee amounted to his failure to permit the security officer to complete the search and release him. Specifically, the commissioner found that at the time of the search, after an object was detected in his pocket, the employee had taken his keys out of his pocket and held them up. He then moved past the security official and left before being authorised to do so. The commissioner concluded:

Having regard to the business necessity of the rule to submit to search as a means of risk management to prevent theft and posed a real risk to the company, I do not accept that the employee's failure to submit to full search was motivated

by theft as Ms. Nkumanda had in the past managed to conduct the search and had found no unauthorized removal of the employer's property and further on the day in question there is no evidence put before me proving that the employee had unauthorized possession of employer's property or had stolen employer's property.

In relation to the second element of the charge against the employee, the commissioner found that the employee had not pushed the security official as she had alleged.

- [5] Having found that the employee had only partially submitted to a search, and in relation to sanction, the commissioner said the following:

22 ...The employee asked me to order the employer to reinstate him retrospectively. He has been unemployed since his dismissal on eight to May 2015. I have found that the circumstances surrounding the dismissal on that such that a continued employment relationship would be intolerable and there is no evidence proving that it is not reasonably practicable for the employer to reinstate. In the circumstances I find that reinstatement retrospectively is an appropriate remedy. The employee has been without employment since the date of his dismissal on 8 May 2015 meaning he had no source of income. I find that fairness dictates that reinstatement with a final written warning is a fair sanction to the parties...

- [6] The commissioner proceeded to make an award, as I have recorded above, that requires the applicant to reinstate the employee, subject to a final written warning valid for six months.
- [7] The applicant raises two grounds for review. The first is that the fairness of the sanction was never in issue before the commissioner, and to the extent that he evaluated the fairness of the sanction imposed on the employee and granted him relief on that basis, the commissioner exceeded his powers. Secondly, the applicant contends that even if the commissioner had been entitled to consider the issue of sanction, he failed to apply his mind to the issue in a reasonable manner and by failing to uphold the employee's dismissal, he came to a result

that falls outside of the band of decisions to which reasonable decision-makers could come on the available material.

- [8] The applicant does not attack the factual findings made by the commissioner and in particular, the findings that the employee did not push the security guard, and that when he was requested to remove items from his pocket, the employee removed his keys from his pocket and held them up while being searched. (The fact that the employee removed keys from his pocket was a fact that became apparent only at the stage of arbitration. However, in the absence of an attack on this factual finding, I accept the commissioner properly came to the finding that what the employee had in his pocket and held up in his hand was a bunch of his own keys.)
- [9] In short, the undisputed factual findings by the commissioner were that the employee had initially agreed to be searched with what is described as the 'garret machine' (presumably a Garrett hand-held scanner), that the scanner detected something in his pocket, that the security officer asked what it was, that the employee removed an item from his pocket and that he refused to disclose to the security officer what it was, that he later stated that the object was a bunch of his personal keys and that he did not push the security officer as alleged but made his way out of the exit before being told that he could do so.
- [10] The test to be applied is clear. This court is entitled to intervene if and only if the commissioner's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. The *locus classicus* remains *Mofokeng*, where the LAC said the following

[30] 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...

[32] ...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] 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 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.

[11] More recently, in relation to 'sanction reviews', in *Duncanmec (Pty) Ltd v Gaylard NO and others* [2018] 12 BLLR 1137 (CC), the Constitutional Court affirmed that the determination of the fairness of the sanction of dismissal is a '*moral or value judgment to established facts and circumstances*'. The court also reaffirmed the nature of the reasonableness enquiry, a requirement that acknowledges that decision-makers acting reasonably may reach different conclusions on the fairness of sanction, and which ultimately serves to protect parties from decisions not that are not reasonable or rational. On this issue, the court concluded:

[40] As is apparent from *Sidumo*, the genesis of the reasonableness standard of review is section 33(1) of the Constitution which confers on everyone the right to administrative action that is lawful, reasonable and procedurally fair. Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in section 145 of the LRA. However, to some extent the latter grounds may overlap with the constitutional requirements. But the reasonableness standard is sourced from section 33 of the Constitution alone. It does not form part of the overlap.

[41] *Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.

- [12] Turning then to the first ground for review, the applicant contends that the only issue that served before the commissioner and that he was required to decide was whether the third respondent was guilty of the offence with which he was charged. The applicant quotes the following passage from the award in support of this contention:

It is common cause that the employees work with valuable motor vehicle items that are undermined from syndicates thereby necessitating strict compliance with the rules to search, honesty, etc. Accordingly, Mr Diggins the employer has a zero tolerance for non-compliance with the rules and regulations thereby making the sanction of dismissal appropriate for the first offence. It is not in dispute that the employee was aware of the rule to submit to search and that the rule was fair.

- [13] In other words, so the applicant submits, once the commissioner had found that the employee was guilty of the offence of a failure to comply with the search policy, that ought to have been the end of the matter – the commissioner ought to have found without further enquiry that the sanction of dismissal was fair. His failure to do so constitutes a reviewable irregularity and warrants a setting aside of the award.
- [14] I am not persuaded that the question of the fairness of the sanction imposed by the applicant was not an issue that the commissioner was required to address. The employee had claimed that his dismissal was substantively unfair, with no limitation of the dispute to the existence or otherwise of the misconduct alleged by the applicant. There was no pre-arbitration minute that narrowed the issues to this single element of substantive fairness. It is clear from the opening statements that both the existence of any misconduct and the issue of the fairness of the sanction imposed were raised. The charge against the employee

was that he had refused to show the security officer items in his hand and that he had pushed her out of his way. The employee's representative made specific reference to the trust relationship (which he submitted had not irretrievably broken down); the applicant's representative made clear that in the applicant's view, any form of dishonesty (he included the employee's conduct in this category) breached the trust relationship irrevocably. Evidence of the applicant's 'zero tolerance' policy was given by at least two witnesses (Walters and MacMaster), who both testified that in respect of offences involving dishonesty, an employee found guilty of this form of misconduct had demonstrated that he or she could not be trusted, and that was the basis of the sanction of dismissal in those circumstances. In the closing submissions filed by the applicant's representative, much was made of the integrity code and the applicant's policy of zero tolerance of any form of dishonesty. Misconduct that involves an element of dishonesty results in dismissal, even for a first offence. The issue of trust was emphasised, as was the applicant's right to protect itself against financial losses on account of theft. The applicant's representative submitted that when an employee refused to be searched, the inference to be drawn was that the employee has something to hide, or was in unauthorised possession of company property. The sanction for refusing to be searched was the same sanction for refusing to be searched – this prevented employees who were in unauthorized possession of company property from electing to refuse to be searched, and thus escaping with a more lenient penalty. In his submission, the applicant's not showing an item from his pocket on request was tantamount to a refusal to be searched and a *'lesser sanction than dismissal in such circumstances would create an unacceptable precedent for the respondent. It would undermine the effect that the consistent application of the rule had (by deterrent) on positively mitigating the risk posed to the Respondent's viability'*.

- [15] When regard is had to the record (and in particular, the submissions made by the applicant's own representative), the applicant's first ground for review is nothing less than disingenuous. It is no answer to say, as the applicant's representative does in these proceedings, that the representative in the arbitration hearing was

a lay person who made submissions according to a template, and that his comprehensive submissions on a fair sanction were misplaced and should be disregarded. The commissioner, like any decision-maker in these circumstances, was guided by the parties' submissions. The commissioner dealt with the submissions made by the applicant's representative (as he was obliged to do), and found them without merit. The commissioner cannot now be said to have committed a reviewable irregularity because he had regard to the evidence and submissions presented by the applicant precisely to establish the fairness of the penalty of dismissal.

- [16] To the extent that the applicant contends that the employee conceded the fairness of the sanction during the arbitration proceedings, the applicant relies on the following exchange:

MR DIGGINS: Okay, know the rules, which means you know the penalty for refusing to be searched?

MR WAGENAAR: Yes, dismissal.

MR DIGGINS: So you know that. If the commissioner decides that he believes the security guards version of events do you acknowledge that is that you refused to be searched and that you should be dismissed?

MR WAGENAAR: Yes.

At best for the applicant, all that the employee displayed was awareness of the fact that it is the applicant's policy to provide for the sanction of dismissal for breaches of the rule concerned. While the employee's evidence was that dismissal could in principle be imposed in respect of any refusal to be searched, the crisp issue before the commissioner was whether that sanction was fair, on the specific facts of the case. Those facts did not disclose a point blank refusal to be searched. In any event, the employee's evidence is clearly predicated on the commissioner upholding the security guards' version of events. In the result, the commissioner did not believe the security guards. Their evidence was rejected in material respects, to the extent that the gravity of the misconduct found to have

been committed was much reduced from what would have been the case had their version been accepted in its entirety.

- [17] In short: the commissioner did not commit a reviewable irregularity by regarding the issue of a fair sanction as an issue in dispute. The arbitration hearing was conducted on that basis, and a finding on that issue was clearly invited by the applicant's representative.
- [18] Turning then to the second ground for review, the basis on which commissioners must approach the issue of sanction is described in the authorities referred to above. In essence, it requires a commissioner to exercise a value judgment, having regard to all of the relevant factors, including the respective interests of the employer and employee. In the present instance, the commissioner took into account the nature of the misconduct which he found to have been committed (the limited non-compliance with the search protocol), and the fact that the nature of the employee's misconduct was not such so as to render a continued employment relationship intolerable. To the extent that the applicant now contends that the issue of dishonesty was never in dispute and that the commissioner erred in making any finding in this regard, the award must necessarily be scrutinised in the context of the material that the parties presented at the hearing. As I have indicated with reference to the record, the applicant's representative called on the commissioner to make findings that the employee had breached the search policy, and that he had pushed a security guard. Specifically, he submitted that the employee was guilty of misconduct involving an element of dishonesty, or at least that any refusal to search should be equated with unauthorised possession of company property. To the extent that the applicant now submits that the very purpose of the rule regulating searches was to relieve it of the obligation to prove motive or intent on the part of an employee and that the issues of dishonesty and unauthorised possession of company property are consequently irrelevant, this was not the case made by the applicant at arbitration. Again, the commissioner made a decision on the material that served before him, as he was required to do.

- [19] It should be recalled too that the commissioner's finding on the facts was that the employee had not pushed the security guard as alleged, that he had submitted (initially at least) and that the nature of his offence was therefore a partial refusal to submit to the search protocol, in the form of his leaving the premises before being instructed to proceed. While the commissioner's reasoning in relation to an appropriate sanction is not spelled out as clearly as it might have been, the award read as a whole suggests that what weighed heavily with him was the limited nature of the employee's misconduct in comparison to the more extensive charges that had formed the basis of the employer's decision to dismiss. Clearly, the commissioner thought that the diminished degree of misconduct was not in itself sufficiently serious to warrant dismissal, as opposed to the lesser penalty of a final written warning. It is also clear that the commissioner took into account the fact the employee had 26 years of service with the applicant and had a clean disciplinary record. To the extent that the applicant submits that the commissioner ignored the applicant's proprietary interests and its interests in preserving the integrity of its business, these are the considerations that compelled the commissioner to reinstate the employee subject to a final written warning.
- [20] In summary: the commissioner did not misconceive the nature of the enquiry, and there is nothing improper or unreasonable about the manner in which he identified the issues in dispute. The decision to which he came on sanction (and in particular his decision to substitute the sanction of dismissal with a final written warning) is a decision that falls within a range of decisions to which reasonable decision-makers could come on the available material.
- [21] Neither party pursued an order for costs. In the exercise of the discretion conferred by s 162, given particularly that the parties are parties to a collective bargaining relationship, the interests of justice and fairness are best served by there being no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr C Kirchman, Kirchman Attorneys

For the respondent: Adv. F le Roux, instructed by Gray Moodliar.