

IN THE LABOUR OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1907/18

In the matter between:

PREMIER FOODS FMCG (PTY) LTD

Applicant

and

MAROPENG STEWARD LEKOKOTLA

First Respondent

COMMISSIONER HARRY HAPPY MATHEBULA N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 25 February 2020

Delivered: 13 March 2020

J U D G M E N T

NIEUWOUDT, AJ

Introduction

- [1] The notice of set down was not served on the first respondent but Rule 7(6) provides that the registrar need not notify a respondent, who has not delivered an answering affidavit, of the set down.

- [2] The applicant applies to have the arbitration award issued by the second respondent under case number MP3389-12 on 16 August 2018 reviewed and substituted with a decision that the first respondent's dismissal was substantively fair, alternatively, remitted for arbitration by a commissioner other than the second respondent.

Legal principles

- [3] The applicant relied on a minority judgment *Sidumo & another v Rustenburg Platinum Mines Ltd & others*¹ in support of its submission that the award falls to be reviewed because the second respondent had failed to apply his mind to the evidence. Much has been written about this topic but it will suffice to refer to the well-known passage in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*² where the SCA decided that an award would only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. This is now settled law. The Court held that:

'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 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 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.'

Facts

- [4] The Court intends to apply this principle to the facts that served before the second respondent. The first respondent had been employed by the applicant

¹ (2007) 28 ILJ 2405 (CC) at para 267 -268.

² (2013) 34 ILJ 2795 (SCA) at para 25.

as an AM supervisor. Part of his duties was responsibility for sending out drivers and ensuring that drivers had PDP licences.

- [5] On 10 February 2012 at approximately 04h00 a driver, Mr Zitha, who did not have a PDP licence, left the premises in a company vehicle. Later that morning he was involved in an accident in which another driver employed by the applicant, was killed. This led to the applicant being charged. Only two of these charges are relevant as the third one had been withdrawn. These charges are:

- 5.1 "Gross negligence, in that you have allowed a Driver to operate a company vehicle without a valid PrDP, which resulted in the Driver being involved in an accident in which a person was killed."
- 5.2 "Gross insubordination, in that, after numerous correspondence you still neglected to put controls in place which would prevent Drivers from operating company vehicles without a valid PrDP."

- [6] In support of its case before the second respondent, the applicant relied on three emails and the evidence of two witnesses. The essence of the emails is:

- 6.1 On 4 January 2012, a Ms Kukkuk informed the first respondent that Mr Zitha must go for his PrDP licence.
- 6.2 On the same date a Mr Fennel informed the first respondent that he must ensure that no driver without a valid PrDP drives any of the trucks of the applicant and stated that "this cannot be negotiable".
- 6.3 On 18 January 2012, Ms Kukkuk requested first respondent to ask three drivers, including Mr Zitha to go for their PrDP licences and stated that drivers may not go on route if they did not have one.

- [7] A Mr Brits, who had not been in the employment of applicant in 2012, testified that if an AM supervisor was told that a vehicle was being driven by a driver without a PrDP, the vehicle should be stopped and the driver should be taken off the vehicle immediately. According to him somebody from the applicant

should have gone out to stop the vehicle driven by Mr Zitha, even if they were only informed of the fact some two hours after the truck had left the applicant's premises.

- [8] Mr Brits was not able to refer to a written policy in support of his evidence. He also was not able to refer to the first respondent's job description in order to support it.
- [9] Mr Nkuna was employed as a security officer by an entity who rendered security services to the applicant. He testified that on 10 February 2012, after he had commenced his shift, he received a call from one of the guards that Mr Zitha had taken a track truck to a driver, who had been supposed to be on duty but did not report. He then phoned the applicant to tell him what had happened and the applicant responded according to the transcript "you can tell the guard to continue delivering the bread". The court assumes that the reference to "guard" is incorrect. This occurred at 06h35 and the truck had left at 04h00. There is a form that requires that the security at the gate must check that the driver had a licence, but this never happened.
- [10] The first respondent testified that he had not placed Mr Zitha's name on the list of drivers who were supposed to go out on that day. The "DAILY DELIVERY AND RETURN CONTROL SHEET" for 10 February 2012 which, for some reason appears in the record twice, does not contain the name of Mr Zitha and appears to confirm the statement. When Mr Nkuna had phoned him, he used his private cell number to try and call Mr Zitha but the latter's phone was off at the time. He did not tell Mr Nkuna to tell Mr Zitha to continue delivering bread. Under cross-examination it was put to him that he should have reported the incident to the depot manager, have asked a representative to go and see whether he could get hold of Mr Zitha or that he should have used his own car to go and seek Mr Zitha.

Analysis

- [11] It is indeed unfortunate that a fatal accident was caused by Mr Zitha. The question however is whether, on the material properly before him, the second respondent's conclusion that the dismissal of the first respondent was

substantively unfair, was one that a reasonable Commissioner could not reach.

- [12] The appropriate point of departure for deciding this question would be the charges.
- [13] There simply was no evidence before the second respondent that the first respondent was guilty of gross insubordination. There were control measures in place; the security guards were supposed to check the licences of the drivers, but that did not happen on the morning of the incident.
- [14] The charge of gross negligence is founded on the fact that the first respondent had allowed Mr Zitha to continue to drive the vehicle without a licence, when that fact was brought to his attention at approximately 06h30.
- [15] The first aspect that must be considered is the content of the telephone conversation between Mr Nkuna and the first respondent. In her heads of argument, Ms Rogers, who appeared for the applicant, submitted that the first respondent had initially given a bare denial of the fact that the telephone call had occurred. This does not accord with the opening statement of the first respondent; he stated that he was not informed of the fact that Mr Zitha was driving the truck by Mr Nkuna. The error is probably occasioned by a typographical error in the record which recorded the first respondent, at the commencement of his evidence, as saying that he was “now disputing” the telephone call. It is clear that it should have recorded that he was not disputing the telephone call.
- [16] Mr Zitha and Mr Nkuna gave conflicting versions of the content of the conversation. As Ms Rogers correctly submitted, this brought the test set out in *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others*³ into play. This test enjoins a decision-maker who is faced with conflicting evidence, to make findings on credibility, reliability and the probabilities. It stipulates that, if all factors are equipoised, the probabilities must prevail. The Court does not have the advantage of having seen the first

³ 2003 (1) SA 11 (SCA) at para 5.

respondent or Mr Nkuna performing the witness box. However, it is highly improbable that the first respondent would have informed Mr Nkuna to phone Mr Zitha in order to tell the latter to continue with the deliveries. Had that been what the first respondent wished to occur, it would not have been necessary for him to ask Mr Nkuna to call Mr Zitha, just leaving things as they were would have sufficed.

[17] This leaves the evidence of Mr Brits. It is difficult to accept that there was an obligation on the first respondent to, stating it broadly, physically cause Mr Zitha to stop driving. This obligation is not recorded in any policy and practically speaking, the only way to achieve it would have been for somebody to go out with a substitute driver, to find the truck and to substitute Mr Zitha. There was simply not enough evidence to prove this obligation.

[18] The essence of the finding of the second respondent is that the applicant “failed to prove (sic) on a balance of probabilities that the [first respondent] broke a company rule”. Although his reasoning is not free of errors, this conclusion is not one that a reasonable decision-maker could not reach.

[19] Accordingly, the following order is made:

Order:

1. The application for review is dismissed.

H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms P Rogers

Instructed by:

Edward Nathan Sonnenbergs Inc.