THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: D144/2021

In the matter between:

SAVALAN GOVENDER **Applicant**

and

MONDI SOUTH AFRICA (PTY) LTD **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE WOOD AND PAPER SECTOR **Second Respondent**

COMMISSIONER GERHARD GERTENBACH **Third Respondent**

Heard: 10 July 2024

Delivered: 6 November 2024

JUDGMENT

HADEBE, AJ

Introduction

[1] The applicant has applied to review an arbitration award handed down on 11 January 2021 by the third respondent, in terms of which the dismissal was found to be procedurally and substantively fair. The application is opposed by the first respondent.

Condonation

[2] The review application was launched timeously on 09 March 2021, but the record was filed outside the period of 60 days of launching the application. The applicant filed an application for condonation for his non-compliance with clause 11.2.2 of the Practice Manual. I am satisfied with the reasons advanced by the Applicant for the non-compliance. The Respondents did not oppose the application for condonation. In the circumstances, I do not see a reason of not condoning the applicant's non-compliance with the practice manual. The condonation application is granted accordingly.

Background

[3] The applicant commenced employment with the first respondent as a fitter and turner on 31 October 2005. He was employed a s stores clerk multi-skill at the time of his dismissal.[1] On 3 April 2019, the applicant was found guilty of insubordination and refusal to obey a lawful and reasonable instruction and was dismissed on the same day. He lodged an appeal against the sanction within 20 days which was dismissed on 25 April 2019. It appears that on 20 August 2019, he referred the dispute of unfair discrimination to the Commission for Conciliation, Mediation and Arbitration (CCMA) which was unsuccessful.

[4] Before the arbitration, the legal representatives of the Applicant and first respondent compiled a pre-arbitration minute. The following was recorded in the minutes as issues that are common cause and in dispute:

[1] Para 3.1 of the Pre-Arbitration minutes.

‘2. Hearing de novo

2.2. Whilst the proceedings will be commencing de novo the parties have agreed that the evidence of Sewnarain will be admitted into evidence without Sewnarain will be admitted into evidence without Sewnarain having to testify again.

2.3. The parties have further agreed that the evidence of Kobus Maree may be given remotely subject to the agreement of the Bargaining Council and the arbitrator.

3. Facts that are common cause or not in dispute

3.1 The applicant commenced the employment with the respondent as a fitter and turner on 31 October 2005 and was dismissed on 3 April 2019. The applicant was employed as a stores clerk multi-skill at the time of his dismissal.

3.2 On 19 December 2017, Govender was appointed stores clerk multi-skill because he was unable to work as a fitter and turner as a result of his medical condition.

3.3 In August 2018 the applicant and Theonus Sewnarain applied for the position of stores supervisor. Sewnarain’s application was successful and he was appointed to the position of stores supervisor.

3.4 The annual shut for 2019 was scheduled for 25 March to 8 April 2019 to conduct maintenance work.

3.5 On 6 March 2019 at a meeting of the spares team, Sewnarain issued an instruction to members of the team in relation to where the annual shut spares should be placed. Specific details of the instruction issued by Sewnarain to Govender and Govender’s response are in dispute between the parties.

3.6 On 15 March 2019 the applicant referred to Sewnarain and the head of stores, Vernon Naidoo, as racists and refused to take instructions from them and threatened to escalate an issue to senior management.

3.7 On 18 March 2019 the applicant was given notice to attend the disciplinary hearing. He was charged with:

3.7.1 Refusal to obey and reasonable instruction;

3.7.2 Insubordination

3.8 On 18 March 2019 Govender lodged a grievance against Vernon Naidoo.

3.9 On 18 March 2019 Govender lodged a grievance against Sewnarain.

3.10 The disciplinary hearing was held on 25, 26 and 28 March and 1 and 3 April 2019. The disciplinary hearing was chaired by JL Maree, the process laboratory manager. The complainant was Sewnarain (the stores supervisor) and the was represented by TV Gumede (the UASA shop steward).

3.11 On 2 April 2009 the applicant was given a second charge sheet for the following charges:

3.11.1 Disorderly conduct;

3.11.2 Racially abusive language;

3.11.3 Refusing to obey a lawful and reasonable instruction

3.12 On 3 April 2019 the applicant was dismissed for refusing to obey a lawful and reasonable instruction and insubordination. On the same day he lodged a notice of appeal, the one ground being that the disciplinary action taken was too severe because it was his first offense. The appeal hearing was chaired by Gary Jones, the Commercial Manager, who dismissed the appeal on 25 April 2019.

3.13 On 9 May 2019, the applicant referred an unfair dismissal dispute to the National Bargaining Council for the Wood and Paper Sector. The unfair dismissal dispute was not resolved at the conciliation held on 1 July 2019 and on 9 July 2019 the applicant filed and request for arbitration with the Bargaining Council.

3.14 On 20 August 2019 the applicant referred an unfair discrimination dispute to the CCMA on 1 October 2019 Commissioner Vermaak made a ruling that the CCMA did not have jurisdiction to conciliate/arbitrate the applicants unfair discrimination dispute.

3.15 The applicant's unfair dismissal dispute proceeded to arbitration on 16 and 17 January and 16 March 2020 before Commissioner Demello Mochado. The Commissioner recused herself on 16 March 2020

5. Issues that the Commissioner is required to determine

5.1. Whether the dismissal of the applicant was procedurally unfair

5.1.1. The chairperson did not keep handwritten minutes or typed minutes or any video recording and was therefore unable to examine the minutes and the evidence to establish guilty or the sanction;

5.1.2. Because there were no minutes or audio recording of the disciplinary enquiry, the chairperson did not consider the

evidence of the witnesses which supported the applicant's version that he was not insubordinate;

5.1.3. The applicant was not given a fair opportunity to cross minded witnesses;

5.1.4. The respondent waited for the applicant to give his evidence and for the other witnesses to give evidence and then the respondent charged the applicant with additional charges after closing argument;

5.1.5. The chairperson was not independent and the decision to dismiss the applicant was predetermined;

5.1.6. The chairperson did not consider the closing argument of the applicant which showed that he was not disobeying a lawful instruction;

5.1.7. The Chairperson did not consider evidence in mitigation.

5.2. Whether the applicant's dismissal was substantively unfair

5.2.1. The applicant did not breach or contravene the rule of "refusing to obey a lawful and reasonable instruction" and "insubordination".

5.2.2. The instruction that was issued to the applicant was not low full and reasonable because it was unsafe;

5.2.3. Dismissal was not the appropriate sanction because:

5.2.3.1. The applicant had a clean disciplinary record;

5.2.3.2. The applicant had 14 years of service

5.2.4. The rules were not consistently applied because the following employees committed similar offences but were not dismissed:

(1) Melissa Rassie…

(2) Sunshine Mkhize…

(3) Calvin…'

[5] The matter was heard by the third respondent during arbitration. He was requested to decide whether or not the applicant's dismissal was substantively and procedurally unfair. On 11 January 2021, the second respondent issued the award which is the subject of this review application.

Grounds of review

[6] The applicant applied to this court to review and set aside the award, essentially on the following grounds:

6.1 That the commissioner:

6.1.1 Committed misconduct in relation to the duties of the commissioner as an arbitrator;

6.1.2 Committed a gross irregularity in the conduct of the arbitration proceedings; or

6.1.3 Exceeded the commissioner's powers; or

6.2 That the award has been improperly obtained.

[7] The summary of the applicant's arguments is that according to the first respondent's disciplinary code, the relevant line official is obliged to conduct a careful and proper investigation when an alleged offence is committed by an employee. The first respondent's witness confirmed that no such investigation was conducted. Despite this confirmation, the third respondent found that there was no procedural unfairness. In relation to substantive fairness, the applicant submits that he raised concerns about the safety of the instruction. The same instruction was also given to other employees, Melissa Rassie and Sunshine Mkhize who did not follow the instruction and were not charged. He contends that he was not guilty of the charge. The applicant further submitted that the sanction of dismissal was unfair. The third respondent failed to apply his mind to the effect of mitigating against the applicant's dismissal.

[8] The first respondent opposed the review application essentially on the basis that the third respondent considered and analysed all the evidence placed before him. The third respondent's conclusion reached is reasonable and rational. It is submitted that a reasonable decision-maker faced with the same facts would reasonably arrive at the same decision. It is submitted that the third respondent properly found that the dismissal is the appropriate sanction as in terms of the first respondent's disciplinary code, refusing to obey a lawful and reasonable instruction is a dismissible offence. The applicant refused and failed to carry out instructions over a period of four weeks. It is submitted that the applicant's review application is to be dismissed with costs.

Legal principles

[9] It is trite that the arbitrator ought to impartially determine whether a dismissal was fair or not, taking into account the totality of relevant circumstances. The test has been set in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[2] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make. Navsa AJ (for the majority) stated that an arbitrator ought to impartially determine whether dismissal was fair or not, taking into totality of relevant circumstances, and deference to the decision of the employer is not required. Simply put, a commissioner is not required to rubberstamp the decision of the employer but should make a determination on the fairness of sanction independently within the confines of the factual metrix.

[10] In *Herholdt v Nedbank Ltd*[3], the court stated that:

> 'In summary, the position regarding the review of CCMA awards is this: A review of 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 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 the 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.'

[11] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[4], the Labour Appeal Court (LAC) affirmed the test to be applied in review proceedings and held that:

---

[2] (2007) 28 ILJ 2405 (CC).
[3] 2013 (6) SA 224 (SCA) at para 25.
[4] (2014) 35 ILJ 943 (LAC) (Gold Fields) at para 16.

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

[12] In *Head of the Department of Education v Mofokeng and others*[5], it was stated as follows:

> '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 misconceived the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues…
>
> However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exiting powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. 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 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, and 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 enquiry or a decision which not reasonable decision-maker could reach on all the matter that was before him or her.
>
> …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 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

[5] (2015) 36 ILJ 2802 (LAC) at para 32.

> 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 the 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 the determination.'

Analysis

[13] The applicant has raised new grounds of review in the supplementary heads of argument which were not raised in his founding affidavit. This has been objected by the first respondent as it is not permissible. The first respondent has relied on various authorities to support its objection. It is trite that the role of the reviewing court is limited to deciding issues that are raised in the applicant's founding (and supplementary) affidavit. This was confirmed by the constitutional court in *Commercial Workers Union of SA v Tao Ying Metal Industries and others (Tao Ying)*[6] where it was held that:

> '… the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

[14] I agree with the contention of the first respondent regarding the issue of the new grounds of review raised by the applicant. The court is limited to decide on the grounds raised in the applicant's founding (and supplementary) affidavit.

[6] (2008) 29 ILJ 2461 (CC) at para 66.

[15] The content of the letter by the legal representative of the first respondent dated 01 July 2024 suggests that the applicant was not persisting with the allegations concerning procedural fairness. It is worth noting that the applicant and first respondent were legally represented during the arbitration hearing. In any event, the third respondent dealt with this issue and came to the conclusion that the dismissal was procedurally fair. In my view, the third respondent's findings are not unreasonable.

[16] The charge that the applicant was found guilty on is no doubt one of the most serious offences and it is a dismissible offence in terms of first respondent's disciplinary code. At the arbitration hearing, the first respondent bore the onus to prove on a balance of probabilities that the applicant's dismissal was procedurally and substantively fair. In my view, the third respondent considered all the evidence that was presented to him which reasonably justified his findings. His findings fall within a band of reasonableness based on the evidence that was placed before him. He did not commit any reviewable irregularity by deciding that the applicant's dismissal was procedurally and substantively fair.

[17] In the circumstances, there is no basis for this court to interfere with the third respondent's award.

Costs

[18] The court has a broad discretion to make orders for costs in terms of the principles of the law and fitness. In *Zungu v Premier of Province of KwaZulu-Natal and Others*[7] , the Constitutional Court confirmed that costs following the result does not apply in labour matters. In my view, this is a matter where the interests of justice will be best served by making no order as to costs.

[19] In the premises, the following order is made:

[7] (2018) 39 ILJ 523 (CC) at para 24.

Order

1. The applicant's non-compliance with clause 11.2.2 of the Practice Manual is hereby condoned;
2. The review application is dismissed
3. No order is made as to costs.

_____

S. Hadebe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Roy Ramdaw of Roy Ramdaw and Associates Incorporated

For the First Respondent: Mr Murray Alexander of Norton Rose Fullbright South Africa Inc