REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Not of interest to other judges

Case no: JR 1412/11

In the matter between:

BIDVEST BANK LIMITED **Applicant**

and

NASIMA RAFEE **First Respondent**

CCMA **Second Respondent**

RICHARD HARVEY **Third Respondent**

Heard: **05 February 2013**

Delivered: **08 February 2013**

Summary: Review of an award in instances where the Arbitrator is alleged to have not acted reasonably.

JUDGMENT

MOSHOANA AJ

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Introduction

[1] This is an application to review and set aside an award issued by the first respondent under the auspices of the second respondent.

[2] The second respondent found that the dismissal of the third respondent was procedurally and substantively unfair. Whereafter, he ordered the applicant to reinstate the third respondent on the same terms and conditions that existed prior to his dismissal on 09 November 2010. She ordered payment of back pay and performance bonus.

Background facts

[3] The third respondent was employed as a trade services manger. There were allegations of complaints by customers of the applicant. The third respondent was suspended around May 2010. No disciplinary steps were taken against him as a result. Instead, allegations of incompatibility were leveled against the third respondent. Numerous meetings were held in an attempt to reach an amicable solution. On 9 November 2010, the third respondent received a letter advising him of his dismissal due to incompatibility.

[4] Aggrieved by his dismissal, the third respondent referred his dispute of alleged unfair dismissal to the second respondent. The first respondent arbitrated the dispute and issued an award in favour of the third respondent. The applicant was aggrieved thereby and launched this application. The application is opposed by the third respondent.

Evaluation

[5] This being a review application, this court shall be guided by the test as developed in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* judgment.[1] The test requires no repetition in this judgment. It is by now well known in the labour law community. The heads filed on behalf of the applicant were lengthy, confusing and unhelpful to a large

[1] (2007) 28 ILJ 2405 (CC).

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degree. Mosam, appearing for the applicant, did not refer to them and somewhat abandoned most of the grounds contended therein. He submitted that in line with *CWUSA v Tao Ying Metal industries and Others* judgment,[2] the award is reviewable. He submitted that the first respondent did not apply her mind, she failed to give reasons for her findings and did not engage in an exercise of considering the probabilities. He submitted that the first respondent determined the issue of suspension when it was not before her. She ignored the relevant evidence of Nkosi. In determining the issue of the performance bonus, she failed to consider that there was no evidence with regard to the performance of the business. He submitted that in ordering reinstatement in the face of a letter appearing on page 55 of the bundles amounts to an irregularity.

[6] Goosen on the other hand argued that the "devil is in the detail". He submitted that the allegations of incompatibility lacked details. It was about unknown customers and fellow employees. He relied on the judgment of *Jabari v Telkom SA*[3]. He submitted that the emails complained of were not presented at arbitration in the circumstances the onus lied on the applicant to justify the dismissal. There was no evidence to suggest that the third respondent was given an opportunity to improve and no minutes of the alleged meeting-consultations were made available. He submitted that page 55 was issued after the award and accordingly was irrelevant. On the bonus issue, he argued that the issue was referred and there was direct evidence that the third respondent was entitled to a bonus and was not paid. This direct evidence was not challenged.

[7] I do not agree with Mosam that the issue of suspension was determined by the first respondent. If she did, would have awarded a relief to the effect that the suspension of the third respondent was unfair. What she found to be unfair was the fact that the third respondent was suspended and no disciplinary action was instituted and or uplifting of the

[2] (2008) 29 ILJ 2461 (CC).
[3] (2006) ILJ 1854 (LC.

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suspension. There is nothing wrong with this remark. She also remarked that the suspension of the salary for two months was unfair. Regarding the allegation that the first respondent did not give reasons, she only made findings, I again cannot agree with Mosam. In terms of section 138 of the LRA, commissioners are enjoined to give brief reasons. On allegations of incompatibility, she clearly states that no details of the complaint by a customer were furnished. She found that the allegations were bald and without substance. The evidence of Nkosi on the record is vague and of no assistance. Actually it amounted to inadmissible hearsay evidence.

[8] This is not an award wehre the reviewing court is left to a guess work. It is clear that the allegations were indeed bald and no details of the complaint were given. I am not persuaded that the award is reviewable within the contemplation of the *CWUSA* judgment.

[9] With regard to procedural unfairness, it is clear that she rejected the contention that the meetings were indicative of following proper procedure. In her view, no charges were presented to the third respondent and he was not afforded an opportunity to rebut the charges. I cannot fault this.

[10] Regarding the bonus issue, I agree with Goosen that there was direct evidence to the effect that the third respondent considered himself and the revenue to have performed. The fact that Nkosi only gave his own interpretation to the bonus clause is of no moment. I asked Mosam to direct me in the record where the direct evidence was contradicted. He instead referred to the evidence of the R10 million achieved in 2009, where it was alleged that the third respondent was not part of the team. In my view that did not challenge the direct evidence. In the result, I find no reason to fault the finding by the first respondent that the applicant did not dispute that the third respondent was entitled to a performance bonus.

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[11] I turn now to the issue of jurisdiction. The issue was raised by the applicant's representative at arbitration. He was correctly advised by the first respondent to raise it in argument. The parties were afforded an opportunity to make oral address. Upon perusal of the record it is apparent that the point was not pursued as advised. However a jurisdictional point is a point of law. It can be raised any time. In terms of section 74 of the Basic Conditions of Employment Act, a statutory claim can be determined by an arbitrator together with a section 191 of the LRA dismissal referral. The claim for bonus arose from the third respondent's contract of employment. In my view, that claim is justiciable in terms of the BCEA. I, accordingly, find that it was not only an unfair labour practice claim but also a claim arising from a contract of employment. Therefore, the third respondent had a choice on how he claims it. Since it has been claimed together with the unfair dismissal referral, there was nothing to prevent the first respondent to determine it. I, therefore, find that the first respondent had powers to determine the contractual claim for bonus.

[12] I turn now to the appropriateness of the relief of reinstatement. I agree with Goosen that the events that allegedly prevented the first respondent to order a primary relief occurred after the award. Reinstatement is a primary relief and can only be excluded if the circumstances in the LRA are met. I cannot agree with Mosam that events after the award are relevant as a consideration. To that extent, I see no reasons why this court should interfere with the relief in the circumstances where the exclusions do not find application.

[13] The LAC recently quoted with approval the decision of this court in *Southern Sun Hotel Interest (Pty) Ltd v CCMA and Others*[4] in the judgment of *Herholdt v Nedbank Limited*. In essence, the LAC approved the sentiment that if a commissioner fails to take into account material evidence or have regard to irrelevant evidence commits misconduct and

[4] (2009) 11 BLLR 1128 (LC)

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or gross irregularity. I find that the first respondent to have not done that in the light of the above evaluation.

[14] In the premises, I am not persuaded that the award is reviewable.

Order

[15] In the results, I make the following order:

[16] The application for review is dismissed with costs.

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Moshoana,AJ

Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Advocate A Mosam

Instructed by: M M Baloyi Attorneys, Johannesburg

For the Third Respondent: Advocate C Goosen

Instructed by: Horn Attorneys, Centurion

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