REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 182/11

In the matter between:

IMPACT LTD (MONDI PACKAGING SA (PTY) LTD **Applicant**

and

NATIONAL BARGAINING COUNCIL

FOR THE WOOD AND PAPER SECTOR **First Respondent**

COMMISSIONER KHABO MAMBA N O **Second Respondent**

DANIEL SIPHELELE MALINGA **Third Respondent**

Heard: **10 January 2013**

Delivered: **12 April 2013**

Summary: Review – dismissal for deemed desertion following employee taking unauthorized leave in excess of 5 days - provision in Code for dismissal after five days of unauthorized absence – commissioner's decision that dismissal substantively unfair reviewed and set aside for various irregularities, including commissioner `s failure to determine issue of justification for absence and instead focusing on intention to desert – award reviewed and set aside.

JUDGMENT

MARCUS, AJ

Introduction

[1] This is an application in terms of section 145 (1) and (2) of the Labour Relations Act 66 of 1995 to review and set aside the award dated 18 November 2010 issued by the Second Respondent under the auspices of First Respondent under case reference WPS-GP-10-10-027, in terms of which Third Respondent's dismissal by the Applicant was found to be procedurally fair but substantively unfair. Inasmuch as Third Respondent sought compensation for his unfair dismissal and not reinstatement, he was awarded compensation of ten months wages in the sum of R224, 720.

Background

[2] Third Respondent ("the employee") was employed by the Applicant ("the employer") as a fitter and turner with six years service and a clean disciplinary record to his credit, prior to his dismissal for deemed desertion in terms of a phonogram despatched to him on 13 September 2010, following the employee's unreported absence from work from 6 September 2010 when employee was due to report for work following his leave. In terms of the dismissal letter, he was advised of his right to appeal against his dismissal which in terms of the company's policy, followed upon his unreported absence for more than five days. Whilst the company's disciplinary guidelines provide for a graded system of penalties for lesser periods of absence without leave, in respect of a period of unreported and unauthorised absence exceeding five days, the recommended penalty is immediate dismissal for a first infringement.

[3] In his answering papers, employee avers that he received the dismissal notice on 15 September 2010 when he returned to Springs from his homeland area where he had gone to attend a traditional family ceremony. Notwithstanding that he was advised of his right to appeal the decision to dismiss him, both in the dismissal letter and verbally by the Transformation officer Mosala upon employee's return to the company on 17 September 2010, it is common cause the employee elected not to appeal his dismissal. The third respondent avers that on his return, he "explained to Mosala that I was sick and then he explained to me that I could appeal and I refused and then he stated that I need to sign a letter to formalise the process and to facilitate the payment of my outstanding salaries and pension fund benefits'.

The termination forms were completed by the employee to enable the release of his pension fund benefits. He then left his employment without further discussion and, foregoing his right to appeal his dismissal as conveyed to him by Mosala, chose instead to refer an unfair dismissal claim to the Bargaining Council in which he sought compensation for his unfair dismissal and not reinstatement.

Arbitration Award

[4] Inasmuch as the employee was dismissed for deemed desertion in terms of the phonogram despatched to him on 13 September 2010, following his failure to report for work or explain his absence from 6 September 2010 onwards, the Commissioner concluded that for this to be a fair reason for the dismissal, the Applicant was required to establish that the employee intimated expressly or by implication that he had no intention to return to work.

Finding of substantive unfairness based on two grounds

[5] The first ground of substantive unfairness found by the Commissioner derived from her finding that the Applicant had failed to establish an intention to desert on the part of the employee.

[6] The second ground of substantive unfairness was that even if it could be said that an intention to desert or abscond from his employment was established, dismissal would not be an appropriate sanction in light of employee's eight years of service and clean record and in the absence of the employer having taken prior corrective measures before dismissing him for unauthorised absenteeism.

[7] These findings which led to the Commissioner concluding that the dismissal was substantively unfair, together with others such as the finding that the employee had sent an sms to his supervisor informing him that he was ill, are attacked by the Applicant on review as gross irregularities in terms of section 145(2), not supported by the evidence before the Commissioner, and further as conclusions to which no reasonable Commissioner could have come to, on the application of the standard of review enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[1]

[8] Applicant submits the award is further replete with misdirections such as the Commissioner's focusing on the label for misconduct in the form of desertion rather than applying her mind to the established facts that respondent had offered no justifiable excuse for his extended absence from 6-16 September 2010; had not proffered any explanation for his absence at any time prior to the arbitration proceedings; had declined the opportunity to make use of the appeal procedure offered to him in order to do so; had shown no remorse for his actions on his return or subsequently; and had failed to produce independent proof of his alleged illness. These failures by the Commissioner to have regard to the salient facts and issues in the dispute are contended to be gross irregularities by the Commissioner, as with her failure to appreciate that, whatever label be given to the misconduct, "the main grievance against the employee was that his absence from 6-16 September 2010 was not explained". Applicant submits that the outcome of these material omissions and misdirections was an award of ten months

[1] (2007) 28 ILJ 2405 (CC) at para 110.

compensation in circumstances where only two months had passed since the date of dismissal to conclusion of the Arbitration, which Applicants says amounts to 'rewarding the Third Respondent with a huge sum of money for gross misconduct', argued to be a finding that no reasonable Commissioner could have arrived at and as such, reviewable in terms of the Sidumo test. I proceed to deal with some of these arguments.

Commissioner's finding that for respondent's extended absence exceeding five days to be a fair reason for the dismissal, the Applicant was required and had failed to establish an intention to desert on the part of the employee.

[9] In my view, there are two major flaws inherent in this finding, both of which are reviewable irregularities which prevented the Applicant from having its case fully and fairly determined.

[10] In the first place, in terms of the employer's policy whereby it infers an intention to desert from the employee's unreported unauthorised absence for a period exceeding five days, the Applicant is not required to prove an actual intention to desert by establishing "that the employee intimated expressly or by implication that he had no intention to return to work" as ruled by the Commissioner. In terms of the employer's practice, the employee's intention to desert is, at least on a *prima facie* basis and in the absence of evidence to the contrary, inferred merely from employee's unauthorised uncommunicated absence for a period exceeding five days. In *Tubatse Chrome (Pty)Ltd v MEIBC and Others*,[2] I took the view that this was not an unreasonable inference to draw from the employee's extended unexplained absence, my view there being that it was not unfair to dismiss the employee in these circumstances on the assumption that he did not intend returning to work, provided the dismissal was not final and did not close the door to the possibility of the dismissal being reversed upon the employee, should he return, being able to rebut the inference of desertion which dictated the dismissal by providing a

[2] Case No JR2679/10 (delivered on 08 February 2013 by Marcus AJ, not yet reported).

satisfactory explanation for his absence and failure to inform his employer thereof. Should he return to work, fairness requires that he be afforded a fair opportunity to do so.[3]

[11] Whilst the Applicant does not make express provision in its code for a dismissal being effected *in absentia* on these grounds, following third respondent's withdrawal of his counter review, procedural fairness of respondent's dismissal was not an issue in the review. The Commissioner ruled the dismissal to be procedurally fair.

[12] The second major flaw in the Commissioner's finding finds expression in Applicant's complaint that in her ruling that for the dismissal to be substantively fair, Applicant was required to establish an intention to desert on the part of the employee, the Commissioner failed to appreciate that, however the misconduct is labeled, "the employer's main grievance against the employee was that his absence from 6-16 September 2010 was not explained".

[13] Inasmuch as the Applicant's disciplinary guidelines provide for the dismissal of an employee who is absent without leave for more than five days, a dismissal in these circumstances would be justified in the absence of the employee being able to justify his absence. It is self evident that the employee bears the onus of providing satisfactory justification for his absence, this being a matter within the sole knowledge of the employee. Failing the provision of such justification, the dismissal is justified.

[14] Whilst the Applicant, in sending him a notice of dismissal on 13 September 2010, was justified in inferring from his extended unreported absence that the respondent did not intend returning to work and had deserted his employment, this was not a final or irrefutable conclusion inasmuch as it was still capable of being rebutted by the respondent proving able, upon his return, to justify his absence. Should he have done so, the *prima facie* inference of desertion

[3] Ibid at para 5, page 4.

underlying the dismissal notice would have been controverted. On the other hand, if the employee fails to return to work or, upon his return, to proffer a reasonable explanation for his unauthorised absence or failure to report same after being afforded a fair opportunity to do so, his dismissal for unauthorised absence exceeding five days would be justified, and there would be no basis for the employer to reverse the dismissal for presumed desertion effected in the employee's absence.

[15] It is evident from the logic of this process that upon the Third Respondent's return on 17 September 2010, he was required to provide his employer with a satisfactory explanation for his absence from 6-16 September 2010 and failure to report same, failing which the dismissal would be justified. Hence Applicant's complaint in its replying papers, that the Commissioner failed to appreciate that, whatever label be given to the respondent's misconduct, "the employer's main grievance against the employee was that his absence from 6-16 September 2010 was not explained". The logic of the situation and the nature of the misconduct complained of required such explanation from third respondent, failing which his dismissal for unauthorised absence for a period exceeding five days would be justified in terms of Applicant's disciplinary guidelines.

[16] As in *Tubatse Chrome*, in determining whether there was a fair reason for the dismissal, these are the issues to which the Commissioner was required to apply herself and determine inasmuch as, upon respondent's return on 17 September 2010, the issue of 'intention to desert" had been overtaken by the issue as to whether the employee had offered satisfactory justification for his unauthorised absence. Instead of determining whether Third Respondent had justified his absence, the Commissioner focused instead on the issue as to whether the employer had established "intention to desert" when, in terms of its practice, such intention was justifiably inferred by the employer from the mere fact of the employee's extended

uncommunicated absence, and hence was not an issue requiring determination by the Commissioner.

[17] Her finding that the Applicant had not established that Respondent had deserted his employment and did not intend to return also rested on her further finding that she "had no reason to disbelieve the employee's version that he, on the contrary, had sent an sms to Stoltz informing him of his whereabouts".[4] In coming to such conclusion, the Commissioner has overlooked the fact that on his own version, the employee is not contending that the sms he avers to have sent to his supervisor stating he was sick, was in fact received by Stoltz. In his answering papers, employee rather argues that the fact "that Stoltz never received the sms, does not mean that I did not send it". Inasmuch as Stoltz's denial of receiving the sms is then not disputed by the Respondent, it follows that Applicant's assumption of desertion which gave rise to the phonogram dismissing the employee on that ground, was justified. Although the Respondent could have attempted to rebut this assumption in meeting with Mosala on his return on 17 September 2010, it is common cause that he made no mention of the alleged sms to Mosala, nor did he make use of the opportunity to appeal his dismissal, offered him by Mosala on his return, in which process he could have explained, *inter alia*, that he had sent the averred sms. The first mention he made of the averred sms was in the course of his testimony at the Arbitration hearing.

[18] To complete the issue of the disputed sms advising Stoltz that he was sick, which employee alleges had to be sent by some young boys from another place when the employee was unable to get a signal on his phone; the Applicant argues that respondent's allegation of sending an sms was so improbable and devoid of credibility, that the Commissioner's acceptance of this evidence was in itself a gross reviewable irregularity. There is some force in this submission. Whilst Applicant's arguments in respect of the differing versions in

[4] Award,para 6.5.

Respondent's explanation on this issue and the high improbability of Stoltz, who testified that he always checks for sms's received on his phone, having taken the trouble to send a shop steward to look for the Respondent at his home when he knew respondent was sick, could arguably be met by the employee's submission referred to earlier that the fact "that Stoltz never received the sms, does not mean that I did not send it"; what the employee overlooks in this submission is his statement in his answering papers in the review, that when the young boys he allegedly sent to an area from which they could send the sms, returned with the employee's phone, "I observed that the sms was sent".[5] At bundle 179, Respondent confirms this version, stating that when the young boys went to send the sms and then "returned my phone to me, I observed that the sms was sent".[6] If his phone indicated the sms was sent as averred by Respondent, the inevitable conclusion is that the message would have been received on Stoltz's phone which is disputed by Stoltz. This renders Respondent's averment that he sent Stoltz an sms, highly improbable, a conclusion reinforced by the employee's failure to mention the sms in the course of his conversation with Mosala on his return, when he was asked by Mosala for an explanation for his extended absence. If his absence was genuinely attributable to illness, which if properly established, would be a valid excuse even for an extended absence, when employee returned to Springs on 15 September 2010 and received the notice of his dismissal *in absentia*, one would naturally expect him to have immediately contacted his supervisor to explain that he had been away sick and had sent Stoltz an sms explaining this. Yet the first mention he makes of the averred sms is in the course of his testimony at the Arbitration. He does not claim to have made mention of it on meeting with Mosala on his return on 17 September 2010, a glaring omission that on the probabilities, severely detracts from the credibility of his assertion that he had sent an sms advising Stoltz he was ill. Whilst Respondent does claim in his papers and in his testimony at Arbitration to have informed

[5] Bundle at 164.
[6] Bundle at 179.

Mosala on his return that he was sick (although he does not claim to have advised him that he `d consulted a traditional healer), this was disputed by Mosala in his questioning of respondent at the arbitration (bundle 95). At bundle 113 (record 37), when Mosala asked the Respondent why he had not told him that he had attended a traditional healer, Respondent answered he was scared that Mosala 'would tell the lawyers'. When it was then put to him that an employer cannot trust he was sick if he omits to divulge this, employee's response was contradictory and incoherent. At p115, respondent states "I did not see the reason why I must tell you because its not the first time for me to be sick. That is the reason I told you I would rather go to CCMA'. When he was again asked how he can expect the employer to know he was sick if this is not disclosed to the employer, respondent answered that 'there was no need for [him] to tell [the employer] [he] was sick because [he] was dismissed already".[7]

[19] Clearly, there is no credibility in Respondent's version that he told Mosala he was sick on his return. It is obvious that the employee's evidence of having given this explanation to Mosala, should have been rejected by the Commissioner in the face of the blatant contradictions in the employee's evidence on this issue, and Mosala's denial accepted.

[20] In the premises, I am inclined to Applicant's view that the Commissioner's unreasoned acceptance of Respondent's evidence of having sent his supervisor an sms, was a gross irregularity in terms of section 145 (2), as was her failure to properly consider and reject Respondent `s evidence of having advised Mosala that he was sick.

[21] For the above reasons, I have no doubt that the Commissioner's ruling that the establishing of substantive fairness required the Applicant "to establish that the employee intimated expressly or by implication that he had no intention to return to work" was a gross misdirection of such

[7] Record 40, bundle 116.

a nature as to prevent her from applying herself to and determining the real issue underlying substantive fairness, namely, whether the employee had offered satisfactory justification for his extended unauthorised absence. The Commissioner's failure to consider and determine the issue of justification for absence in determining the dismissal to be substantively unfair, was a gross irregularity which ultimately precluded a proper and rational determination of the issue of substantive fairness.

Substantive fairness

[22] I have alluded to the fact that in terms of Applicant's disciplinary guidelines, respondent's dismissal for unauthorised absence for a period exceeding five days was justified. On the expiry of the five day period, Applicant was justified in inferring an intention to desert his employment from the employee's disappearance from work without reporting his whereabouts, which left the employer in ignorance as to his whereabouts or the reasons for his absence. Thus the employee's dismissal *in absentia* was substantively justified at the time, provided this did not close the door to the possibility of reversing the decision if the employee returned and was able to satisfactorily justify his absence. (I have indicated that procedural fairness was not in issue in the review). As mentioned earlier, if the employee failed to justify his absence on his return, his dismissal in terms of the code was justified, the onus being on the employee to justify his absence.

[23] *In casu*, when Respondent returned on 17 September 2010 and was asked by Mosala to account for his absence, he failed to do so. His later testimony at arbitration that he had advised Mosala he was sick, should have been rejected by the Commissioner as devoid of credibility, yet she appears not to have made a finding on this material issue. Employee also made no mention to Mosala of visiting a traditional healer or of having sent an sms to his supervisor stating he was ill. Apart from the fact that these material omissions in his discussion with Mosala on his return, serve to substantially detract from

the credibility of the excuse for absence proffered at arbitration (i.e that he was ill), the effect of employee failing to furnish an explanation for his extended absence on his return on 17 September 2010, meant that his unauthorised absence from 6-16 September 2010 had not been justified, which in turn meant that in terms of the employer's code, his dismissal was justified on this ground. This meant there were no grounds or justification for overturning the dismissal in terms of the phonogram of 13 September 2010. On his return, employee was offered by Mosala (and in the dismissal letter), a further and proper opportunity to justify his absence in an appeal process, in which he would have been able to put whatever case he had to the employer for the decision to be overturned. It is common cause the employee elected not to make use of this process, on the grounds that he had already been dismissed and that he lacked faith in the employer `s processes. Whatever the merits in this thinking, its effect, as I have repeatedly pointed out, was to leave his extended absence from 6-16 September 2010 unjustified, thereby leaving the Applicant with no cause or basis for reversing the dismissal. Here again, the Commissioner was guilty of a further misdirection in considering the reasons for absence proffered by Respondent at arbitration as potential justification for his absence. In my view, it was not open to Respondent to wait for the Arbitration to justify his unauthorised absence. His election not to provide an explanation in justification of his absence to his employer when afforded the opportunity to do so, both on his return on 17 September 2010 when an explanation accounting for his absence was sought by Mosala, and in the course of the proffered Appeal which he elected not to pursue, meant that his employer became entitled to dismiss him in terms of the code, for unjustified absence in excess of five days. In my view, his seeking to justify his absence at the subsequent arbitration was too late and could not affect the validity of his dismissal for deemed desertion, which in effect became confirmed by the employee's election on his return, not to proffer an explanation in justification of his absence. The fact that the first time for him to proffer justification for his absence in the form of

alleged illness was in the course of his testimony at arbitration, also serves to substantially detract from the credibility of this assertion as a ground of justification, as does employee's failure to obtain any form of sick note from the traditional healer allegedly visited by him, whether this would be accepted by the Applicant as a valid sick note or not. When asked by Mosala at the arbitration why he had failed to produce a sick note from the traditional healer in proof of his condition as is commonly required for such extended absence, employee claimed his shop steward advised him such note would not be accepted by the Applicant. When Mosala put to him that legislation provides for notes from registered traditional healers, the employee offered to make plans to obtain a sick note, but failed to do so.[8] In his answering papers, employee contradicts this offer in his statement that 'the Applicant continues to suggest that I must go and obtain a sick note from the traditional healer when there is clearly no way that the healer would now provide one whereas he did not do so at the time" (bundle 180). In the absence of any form of objective evidence being tendered by the employee to support his averment at arbitration that he was sick, employee had not satisfactorily justified his absence, even at arbitration.

[24] Had the Commissioner applied her mind to whether Respondent had satisfactorily justified his absence, she could not have found he had done so in the absence of employee offering any explanation to Mosala in justification of his absence on his return, despite Mosala's request therefor, or in the course of lodging an appeal against his dismissal as had been offered to him and which he rejected, and in the face of all these omissions, incongruities, inconsistencies, and contradictions in his testimony.

[25] I might add that I remain unconvinced by Respondent's excuses for not pursuing the appeal process. Whether he was already dismissed or not, clearly the purpose of an appeal would be to enable respondent to

[8] At bundle 96.

account for his absence which he had not done as yet, and to controvert the inference of desertion which triggered his dismissal, and to make representations to overturn his dismissal on these grounds. Respondent must bear the consequences of his election not to take advantage of the opportunity to do so. Whilst his professed lack of faith in the employer's grievance or appeal processes might or might not have justification, clearly this was not an ordinary appeal from a process in which the employee had already submitted his version. His dismissal was effected in his absence on grounds of his deemed desertion. This meant that on his return on 17 September 2010, Respondent's explanation in justification of his absence had as yet not been disclosed to his employer. Obviously, his invoking his right to appeal his dismissal, would have afforded respondent the opportunity to place his explanation before the employer for the first time, which suggests the appeal would have been more in the nature of an original hearing on the issue of justification for his absence, than an appeal. In rejecting this opportunity, Respondent in effect elected not to disclose the reasons for his extended absence until the arbitration hearing. This was not an option open to the employee in my view. He could not, as he did, wait for the arbitration to furnish an explanation in justification of his absence. This is because, as I have alluded to, in the absence of his satisfying the employer that his absence was justified, it was entitled to dismiss him for unauthorised absence of more than five days. Thus for employee to seek to provide such justification at an arbitration after his dismissal was already final, makes no sense. Applicant was entitled to dismiss him in the absence of his providing satisfactory justification for his absence, which he elected not to do. He did not have the option of waiting for the arbitration to do so. The confirmation of his dismissal following his failure to satisfactorily account for his extended absence was justified, both logically and in terms of Applicant's Code. Formal confirmation was not required, in that employee had already been dismissed for deemed desertion. The respondent having elected on his return not to provide the Applicant with an explanation in justification of his absence, meant there was no

cause or basis for Applicant to overturn the dismissal for deemed desertion. In effect, the Respondent can be said to have dismissed himself by his actions.

Commissioner's finding that that even if it could be said that an intention to desert was established, dismissal would not be an appropriate sanction in light of employee's eight years of service and clean record and in the absence of the employer having taken prior corrective measures before dismissing him for unauthorised absenteeism.

[26] This is clearly an untenable finding incapable of justification and as such, one no reasonable Commissioner could arrive at. On the face of it, the Commissioner appears to be suggesting that even if the Respondent absented himself for some ten days for no justifiable reason and even on the basis that he had deserted his employment and had no intention of returning, she was still justified in awarding him ten months compensation of R224,720 for unfair dismissal in light of his years of service and clean record and the absence of corrective measures being taken by the employer.

[27] In so finding, it is clear the Commissioner has failed to discern the nature and gravity of the employee's offence and to appreciate that employee has failed to justify his extended absence, even at arbitration which in my view would have been too late in any event. In coming to this conclusion, she has failed to take into account that the employer's code provides for dismissal for unauthorised absence in excess of five days, that employee produced no objective evidence such as a traditional healer's sick note in justification of his absence, and that employee chose not to provide an explanation to the employer in justification of his absence until the arbitration hearing and has shown no remorse for his actions. Indeed, Respondent's decision not to offer an explanation for his extended absence on his return, *ipso facto* justifies his dismissal for unauthorised absence in excess of five days, and serves to preclude any suggestion that dismissal was too harsh or an inappropriate sanction. Where the employee elects not to offer an

explanation in justification of his absence or make submissions in mitigation of sanction or as to why dismissal is not appropriate, which respondent was offered a full opportunity of doing in the course of an appeal which opportunity he spurned and elected not to take advantage of, it hardly lies in respondent's mouth to seek to argue, after his dismissal becomes final, that dismissal is not an appropriate sanction; still less can an arbitrator be justified in finding this to be the case in the face of the employee's calculated decision not to challenge his dismissal in a properly convened process offered to him for that purpose. The Commissioner's finding that dismissal was over harsh and an inappropriate sanction is in the circumstances a gross irregularity justifying the review of the award.

Applicant's attack on the quantum of compensation awarded

[28] Applicant attacks the quantum of compensation awarded on grounds of the Commissioner's failure to give reasons for "rewarding the Third Respondent with a huge sum of money for gross misconduct", and for awarding the employee 10 months compensation in circumstances where only two months had passed since the date of dismissal to conclusion of the Arbitration, in other words, where there is no evidence of financial loss resulting from the dismissal. Employee did not seek reinstatement. Even if the Commissioner believed dismissal was too harsh or inappropriate, surely this would not justify her awarding this "huge sum of money" to an employee who absented himself for an extended period without justification. If she had grounds for finding dismissal to be inappropriate (which she did not), then the rational award would have been reinstatement without compensation. Of course, respondent did not seek reinstatement in this case. Where compensation is justified in unfair dismissal cases, its primary purpose is to compensate an employee for financial loss arising from the dismissal.[9] In these circumstances, I have to concur with Applicant's counsel that in the absence of reasons being furnished by the

[9] See *Kemp v Rawlins* [2009] 30 ILJ 2679 (LAC) and *Rawlins v Kemp t/a central Med* [2011] 1 (BLLR) 9 (SCA).

Commissioner for awarding the sum in question, an award of ten months compensation is inexplicable and liable to be reviewed as a gross irregularity.

Section 158 application

[29] Third Respondent's attorney Mr Goldberg brought a section 158 application to make the award an order of court after having obtained section 143 certification of the award and a writ of execution which he subsequently agreed not to execute pending the determination of this review. Applicant's counsel Mr Boda argued that Third Respondent should be ordered to pay Applicant's costs incurred in opposing the section 158 application inasmuch as it was superfluous and rendered unnecessary by the fact that Third Respondent had obtained a writ of execution which could be executed should the review fail, nor was it necessary to interrupt prescription of the award in terms of decided cases on this issue. However, I understand the effect of certification on prescription of awards is still controversial and has as yet not been finally determined by this Court or the LAC. In these circumstances, I cannot find that Third Respondent's attorney acted in bad faith in bringing a section 158 application, such as to warrant he or his client being mulcted in costs. I decline to make a costs order, either in regard to the section 158 application or the application for review.

Review of Commissioner's award: conclusions

[30] In *Herholdt v Nedbank Ltd*,[10] the Court stated that a 'proper consideration of all the material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor …the resulting decision will not be reasonable in a dialectic sense. Likewise where a commissioner does not apply his or her mind to the issues in a case, the decision will not be reasonable.' The Court went on to state that it would be sufficient (to warrant a review) that the Commissioner has failed to apply his mind to certain of

[10] (2012) 33 ILJ 1789 (LAC) at para 36.

the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different'.[11]

[31] In conclusion, I find the commissioner, in concluding the dismissal to be substantively unfair, has ignored or discounted relevant evidence, has taken into account irrelevant evidence, and has failed to properly apply her mind to material issues and as a consequence has committed gross irregularities in the conduct of the arbitration which have precluded the Applicant from having its case fully and fairly determined. The decision was, in my view, also one that a reasonable Commissioner would not have come to. On both these grounds, I am of the view that the award is liable to be set aside in terms of section 145 of the Act. In light of this conclusion, there is no need for me to have regard to the further grounds of review raised by the applicant, nor is there any need to further delay the finalisation of this matter by remitting it to First Respondent to be arbitrated afresh by another Commissioner. All the relevant facts required in the determination of this matter are before me.

[32] I make the following order:

1. The award dated 18 November 2010 issued by the Second Respondent under the auspices of First Respondent, is reviewed and set aside and replaced with a finding that Third Respondent `s dismissal was substantively and procedurally fair.

2. Third Respondent `s application in terms of section 158 is dismissed, with no order being made as to costs of that application.

3. I make no order as to costs in the review.

[11] Ibid at para 39.

Marcus, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv F.A Boda
Instructed by: Norton Rose

For the Third Respondent: Mr Goldberg
Instructed by: Goldberg Attorneys