REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2404/10

In the matter between:

INDICO RISK SERVICES CC **Applicant**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER JACKSON MTHUKWANE **Second Respondent**

FREEMAN S MJUNGULA **Third Respondent**

Heard: **18 July 2013**

Delivered:

Summary: **Review in terms of Section 145 of the LRA. Review process distinguished from an appeal. Credibility findings in a Court of review.**

JUDGMENT

LEPPAN, AJ

Introduction

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[1] This is an application brought in terms of section 145 of the Labour Relations Act[1] ("LRA") to review and set aside the arbitration award ("the Award") dated 15 September 2010, issued by the Second Respondent, but only in so far as a finding of substantive fairness was made. The Second Respondent was awarded 6 months' compensation in the sum of R14 202.00.

[2] Although this matter was opposed by the Third Respondent, neither he nor his attorney of record were present at the hearing of this matter.

The Facts

[3] On 1 September 2007, the Third Respondent commenced employment with Odyssey Security Solutions (Pty) Ltd ("Odyssey"). The Third Respondent was employed as a security officer. Odyssey had enjoyed a contract to provide services to its client, Exclusive Books, and the Third Respondent carried out security functions at the client's premises.

[4] On 21 October 2008, the Third Respondent was informed by Odyssey that the Applicant would be taking over its obligations to provide services to Exclusive Books and, with effect from 1 November 2008, the Third Respondent's employment was to be transferred to the Applicant. It was a transfer contemplated in terms of Section 197 of the LRA.

[5] During November 2008, when the Applicant presented the Third Respondent with a limited duration contract of employment for his signature, the Third Respondent refused to sign citing a number of reasons, namely that this new contract of employment was for a limited period and also placed him on probation; it failed to recognise that he had been a permanent employee of Odyssey, it failed to recognise his previous length of service with Odyssey. Furthermore, a number of conditions of service were likewise omitted from the contract, for example, a uniform allowance and a 36 day sick leave entitlement in each sick leave cycle.

[6] During the course of his employment with the Applicant, the Third Respondent raised a raft of pay-related queries, which resulted in the Applicant investigating and resolving any short payments and confirming the

[1] Act 66 of 1995

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correct position with regard to the payment of provident fund contributions to the applicable provident fund. It serves to mention that the Third Respondent was a member of Legal Wise and a similar such service provider called Lipco and utilised those services to voice his pay grievances with the Applicant.

[7] There was a further occasion when the Third Respondent referred a dispute about a pay issue to the First Respondent and, on 4 September 2009, this dispute was resolved such that if the Third Respondent had any similar future queries, he would follow the Applicant's internal grievance procedure without resorting to outside service providers as a first port of call.

[8] On the day preceding the settlement of the pay related dispute at the CCMA, on 4 September 2009, the Third Respondent was issued with a "final warning", which was imposed by the Managing Director of the Applicant, Mr Ian Veldman ("Veldman"). The reason for this final warning was apparent gross insubordination by the Third Respondent towards the Applicant's Operations Director, Mr Hermanus Van Zyl ("Van Zyl"),[2] and poor performance in that the Third Respondent had "not made (one) arrest in (five) years on site". Quite how this latter complaint could be levelled against the Third Respondent when at best his overall length of service was 2 years, one served with Odyssey and one with the Applicant, defies logic. Needless to say, the Third Respondent refused to sign acknowledgement of this final warning.

[9] Thereafter, during November 2009, the Third Respondent lodged another pay issue which the Applicant investigated and paid the Third Respondent for a shortfall in pay.

[10] On 1 December 2009, the Third Respondent lodged another pay related query with his manager, Mr Fanual ("Fanual") who instructed the Third Respondent to telefax the query to Mr Justice Nemaname ("Nemaname"), the Applicant's National Operations Manager. Shortly after attending to telefax his compliant to Nemaname, the Third Respondent received a telephone call from Van Zyl. Nemaname and another employee, Mr Moses Makapela, were in Van Zyl's presence when the telephone call to the Third

[2] Van Zyl is referred to as "Sam" in the transcribed record of proceedings (See: page 144 of the Record).

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Respondent was made. According to the Third Respondent, Van Zyl was highly agitated and was insistent that the Applicant owed him nothing. The query, on the Third Respondent's version, related to him having swopped or exchanged shifts with another employee on the instructions of Fanual. Van Zyl said that in those circumstances, the Applicant was not obliged to pay the Third Respondent because he had not worked the shift. The Third Respondent was adamant that he should be paid because he had performed his duties on the swopped shift. According to the Third Respondent, Van Zyl became angry and insulted him by saying:

> 'listen carefully… you stupid Kaffir fuck you, you must go to your lawyers and police station we are not going to pay you anything.'[3]

[11] The Third Respondent was seriously aggrieved by this turn of events and sought to refer an unfair labour practice dispute to the First Respondent about the behaviour of Van Zyl. The Third Respondent recorded the words used by Van Zyl in the dispute referral, whereupon the Applicant instituted disciplinary proceedings against the Third Respondent on the pretext that he had made false allegations against Van Zyl both during the telephone call and in the dispute referral. The Third Respondent was found guilty and dismissed and this precipitated his unfair dismissal dispute before the First Respondent upon the failure of his internal appeal request.

The Evidence Before the Second Respondent

[12] In his unfair dismissal dispute referral form 7.11, the Third Respondent indicated that he had been dismissed because he alleged that Van Zyl had sworn at him and because he had lodged a grievance regarding work related concerns.

[13] The arbitration hearing centred upon whether there was a good and sufficient reason to dismiss the Third Respondent for making false allegations about the acrimonious telephonic conversation with Van Zyl, and whether he failed to follow correct internal procedures by failing to report queries to the Applicant's Area Manager after the "CCMA" had directed that he do so.

[3] Page 255 of the Record.

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[14] Veldman confirmed that the Third Respondent's raft of queries had come to the attention of senior management in that his name had kept "popping up". This had become a source of irritation yet, when Veldman testified before the Second Respondent, he conceded that all the Third Respondent's pay issues up until the events leading to his dismissal, had been resolved.

[15] On 9 December 2010, which was the day of the telephonic argument between Van Zyl and the Third Respondent, Van Zyl reported the incident to Veldman that the Third Respondent was alleging that Van Zyl had called him a "…stupid fucking kaffir".

[16] Van Zyl denied using the offensive words and claimed that Nemaname and Makapela were in the boardroom at the time of the telephonic argument in question and could corroborate his version. Van Zyl conceded under cross examination that this telephonic discussion was a "heated" one. What was also top of mind for Van Zyl that morning was receipt of an email from Exclusive Books reporting that 12 books in the psychology section had been stolen the previous day with the impression that this had occurred under the Third Respondent's watch. Van Zyl testified that whilst dealing with this serious complaint, the Third Respondent kept telephoning about his pay query and failed to follow internal procedures when doing so, by not reporting to the Area Manager. Van Zyl said:

> '… he phoned the office, not once, not twice, three times and said when are you paying my pay query? Where the lady told him your pay query was paid on the 8th… it is sorted out. It is done… he carried on procedure by saying his pay query was not paid, not on paper, phoning the office the whole time harassing the staff after my manager went to him and said there is a problem they are stealing the books…'

[17] It is apparent from the record that Van Zyl was adamant that he did not swear at his staff. He had the heated discussion in which he told the Third Respondent to stop harassing the staff about pay related issues and to cease telephoning the head office.

[18] Nenamane testified that he had been called to the boardroom by Van Zyl to witness the telephone call he was about to have with the Third Respondent. Nenamane confirmed he was in the company of Makapela when this call was

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made. Nenamane said he could not hear what the Third Respondent said to Van Zyl but denied that Van Zyl had used "bad words to other person" and claimed the debate between them over a pay query related to a swapped shift. Nenamane said Van Zyl was "very calm" and that Van Zyl was not upset. Nenamane later conceded under cross examination that he did not hear the entire conversation which took place. Makapela did not testify in the arbitration hearing for undisclosed reasons.

[19] The Third Respondent testified that the conversation he had with Van Zyl on 9 December 2010 had not been "*nice*"; in that he had been insulted and called a "stupid kaffir". He had tried to follow procedure in lodging his pay related grievances. At the disciplinary enquiry, which led to the decision to dismiss him, he stood accused of contacting Van Zyl direct, when in fact it had been Van Zyl who had confronted him telephonically.

[20] It was common cause that Van Zyl and the Third Respondent had not met or spoken to each other prior to the incident of 9 December 2010. Van Zyl knew of the Third Respondent as well as the details of all his pay related issues.

[21] The Third Respondent testified that he was distressed about the words used by Van Zyl. He testified that, he (the Third Respondent) –

> '… felt very bad as such that the staff of the shop I was working told me that I was crying. I don't know, because they have said I was crying…'

[22] The Third Respondent was asked if there was a reason why he would fabricate lies about Van Zyl. The Third Respondent replied:

> 'there was no reason because I never talk to him, I never have an argument with him…'

[23] Importantly, the cross examination of the Third Respondent by the Applicant's representative at the arbitration hearing never tackled the Third Respondent's version about what transpired during the telephonic argument nor the offensive words used by Van Zyl.

[24] For completeness sake, it serves to mention that Ms Liezl Veldman, a payroll administrator of the Applicant, testified about the nature of the pay issues raised by the Third Respondent and gave a detailed account of how they

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were resolved. Nothing turned on her evidence, save for the Third Respondent testifying that he accepted her version but no one had ever provided him with such a detailed explanation of his difficulties previously.

The Award of the Second Respondent

[25] The Second Respondent presented a well crafted Award.

[26] The Second Respondent found that, in relation to a charge of making false allegations against Van Zyl that the Third Respondent had used racist language during their conversation –

26.1 it was common cause between Van Zyl and the Third Respondent that their telephonic discussion had been "heated";

26.2 the Third Respondent's testified that Van Zyl was angry;

26.3 Nemaname's evidence was rejected as it was apparent to the Second Respondent that he had tried to "protect" Van Zyl, for example, when he testified that Van Zyl had been "very calm" during their conversation, where this was at odds with the facts of the matter. When comparing the version of Van Zyl against that of the Third Respondent, it was probable that Van Zyl had "snapped" during the heated argument and "insulted" the Third Respondent in the manner alleged; and

26.4 Accordingly, the Second Respondent found that there was no reason to find the Third Respondent guilty on this charge.

[27] The Second Respondent also found, in relation to the charge of failing to follow internal procedures regarding pay issues, that –

27.1 many of the Third Respondent's pay queries had been valid as confirmed by the Applicant often having to reimburse the Third Respondent for shortfalls;

27.2 the settlement agreement, reached under the auspices of the First Respondent on 4 September 2009, did not stipulate that the Third Respondent could only submit queries to the Applicant's Area Manager.

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It simply recorded that in future the grievance procedure should be used;

27.3 no "CCMA" agreement could be used to prevent an employee from referring future disputes to the First Respondent as this would result in an unfair and unlawful limitation of an employee's rights;

27.4 on a charge of failing internal procedures when raising pay queries, the Second Respondent found the Third Respondent not guilty.

[28] The Second Respondent found the Third Respondent's dismissal to be substantively unfair and awarded the Third Respondent compensation, given the Third Respondent's reticence to accept reinstatement in the Applicant's employ.

The Applicant's Grounds for Review

[29] In the Applicant's review application, and in its heads of argument before this Court, the Applicant lodged a number of grounds for review with which I deal *ad seriatim*.

[30] The Second Respondent incorrectly recorded the evidence tendered by the parties. The only example given was the date when the Third Respondent commenced employment with the Applicant. The Second Respondent recorded this date as 1 September 2007 when the Applicant contended it should have been 1 November 2008. This ground of review has no merit. The transaction between Odyssey, the Applicant and Excusive Books was treated as a Section 197 transfer. This was admitted by the Applicant's own witness, Veldman. It is trite in our law that such a transfer does not interrupt an employee's continuity of employment.[4] The Second Respondent was correct in recording this evidence in the manner in which he did.

[31] The Second Respondent committed a gross irregularity in the performance of his duties in that the conclusion does not follow from the reasons provided. The Applicant fashions the test of review on the defunct decision of *Carephone (Pty) Ltd v Marcus NO and Others*.[5] I shall return to this aspect

[4] See *Keil v Foodgro (a division of Leisurenet Ltd* (1999) 4 BLLR 345 (LC).
[5] (1998) 19 ILJ (LAC).

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later in this judgment. The Second Respondent found that Van Zyl was angered by the Third Respondent's constant pay queries but that the Applicant argued that it cannot follow that he called the Third Respondent a "stupid kaffir". According to the Applicant such a conclusion was "absurd" for the reason that the evidence of Van Zyl was corroborated by another witness, namely Nemaname. The Second Respondent rejected the evidence of Nemaname on plausible grounds, Nemaname's version was at odds with the factual matrix of this matter. Nemaname was found to have lacked credibility. The Second Respondent had two opposing versions, namely that of Van Zyl and that of the Third Respondent. The Second Respondent weighed the evidence of both and found the version of the Third Respondent more probable and rightly so. The Third Respondent's version of the events of 9 December 2009 had always been consistent; he had laid valid claims about pay distortions; he had become an irritation to the Applicant and its management; he had exhausted their patience in the matter. Van Zyl, in the heat of the moment on learning about the theft of stock at Exclusive Books, took it upon himself to tackle the Third Respondent in a telephone call. Such a conversation could never have been constructive where the Third Respondent was adamant that he had not received the shortfall in his pay. It is not surprising that a heated row ensued and the finding reached by the Second Respondent that racially abusive language was used by Van Zyl was probable.

[32] The Second Respondent's finding was based on the fact that the Third Respondent had taken immediate steps to complain to the First Respondent about Van Zyl's offensive conduct. Although not evident in the award, the record demonstrates that the Third Respondent, according to Van Zyl, also lodged criminal proceedings against him. It begs the question why an aggrieved employee who did not know Van Zyl, and had never engaged with him before, would go to these extremes unless the employee's version was correct. After all, the Third Respondent's evidence in chief regarding what Van Zyl said to him, and the words used, was never challenged by the Applicant in cross examination.

[33] In the circumstances, the Applicant's complaint that the Second Respondent had “merely favoured the Third Respondent's version of events” and had

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shown "bias" in that regard is at odds with the fabric of the evidence tendered at the arbitration. There is no basis on the record that imputes the conduct of the Second Respondent.

The Review Test

[34] In its heads of argument, the Applicant's attorney made reference to the review test in the seminal decision of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[6] namely 'was the decision reached by the Commissioner one that a reasonable decision maker could not reach?' In answer to that question, the Applicant posited the following –

> 'It is submitted that the Second Respondent did not take into account all the relevant evidence place before him… Further the (Constitutional) Court took into consideration certain factors when applying the standard of review. These included, inter alia, determining whether the trust relationship had broken down. In the application of these factors to the present matter, it is submitted that the nature of the misconduct did warrant the sanction of dismissal.'

[35] The Applicant's understanding of the test for the review of an arbitration award is misconceived. It does not appreciate the *Sidumo* test nor what Section 145 of the LRA enjoins a review litigant to do. The *Sidumo* test centres upon whether the outcome is reasonable. It is a robust test which looks at the outcome holistically. If the outcome falls within the range of decisions that a reasonable decision maker could reach, then the award is not reviewable.

[36] The challenge by the Applicant, where it sought to complain that the Second Respondent committed a gross irregularity on the basis of a failure to take into account material considerations, was ill-conceived because the material facts before him were properly assessed. An irregularity in the proceedings must surely take the form of an act or omission by the trier of fact which has prevented a party from having his case fully and fairly determined.

[37] In reality, the Applicant mistook a review for an appeal process. The Applicant's grounds for review were essentially couched in the *locus* of an

[6] (2009) 28 ILJ 2405 (CC).

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appeal by virtue of the fact that it requested this Court to make a finding on the credibility attributed to the witnesses by the Second Respondent. Ntsebeza AJ, in the matter of *Moodley v Illovo Gledhow and Others*[7] raises an important precept of review proceedings, the learned Judge held that:

> 'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across… I cannot see that I can interfere merely on the assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.'

Moreover, Prof. Hoexter, in her seminal work on administrative law[8] provides a concise distinction between the underlying function that an appeal and a review provide. She correctly states that a review only concerns itself with the question of whether the decision in dispute was arrived at in an acceptable manner. Thus, where the Applicant requests that a review Judge make a substantive finding on the merits of the matter and the credibility of certain witnesses, such a request is misdirected and should not be entertained by a Court of review.

[38] Lastly, the case of *Pepkor Retirement Fund and Another v Financial Services Board and Another*[9] the Supreme Court of Appeal emphasised that –

> 'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review.'

[39] On a full conspectus of this matter, I find that the Second Respondent properly construed all the relevant facts. The decision fell squarely within the parameters of a decision that a reasonable decision maker could have reached, and therefore the review must fail.

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[7] (2004) JOL 12463 (LC).
[8] Administrative Law of South Africa, 2nd Edition, 2012.
[9] (2003) 3 ALLSA 21 (SCA) at para 48.

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Order

[40] The review application is dismissed with costs up to but excluding the hearing before this Court on 18 July 2013.

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Leppan, AJ

Acting Judge of the Labour Court

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Appearances

For the Applicant:	Clifford Levin of Clifford Levin Attorneys
For the Third Respondent	No Appearance

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