



REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 3166/10

In the matter between:

NEDBANK LIMITED

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER NKOSINATHI MASEKO

Second Respondent

DIANA MUSARA

Third Respondent

Heard: 22 August 2013

Delivered: 13 September 2013

Summary: The commissioner's failure to apply the principle of consistency properly and his omission to give reasons for the amount of compensation he awarded are material defects which influenced the commissioner to reach a decision a reasonable decision maker could not reach. They rendered his award reviewable. Review in terms of Section 145 of the LRA. Dismissal for misconduct.

JUDGMENT

LALLIE, J

- [1] This is an application to review and set aside the arbitration award of the second respondent (the commissioner) in which he found the third respondent's dismissal substantively unfair based on inconsistency and ordered the applicant to pay her compensation equal to her six months' net salary. The application is opposed by the third respondent.
- [2] In its supplementary affidavit the applicant sought an order in terms of section 77(4) of the Basic Conditions of Employment Act 75 of 1997 compelling the third respondent to pay it a sum of R 650,000.00 as damages for breach of contract alternatively an order that it was entitled to deduct the amount of R650, 000.00 from the compensation awarded. The applicant acknowledged that the claim had prescribed as it was raised 4 years from the date of dismissal.

Factual Background

- [3] The third respondent was employed by the applicant as a Divisional General Manager for Nedbank Home Loan, Collection and Recoveries. As part of her duties she allocated work on a monthly basis to firms of attorneys on the applicant's panel. In breach of the applicant's policies she allocated a large amount of work to a firm known as Findlay and Niemeyer Attorneys in exchange for gifts and favours which she failed to disclose to the applicant. The gifts and favours the third respondent received from Findlay and Niemeyer Attorneys and Mr Croucamp (Croucamp), a partner at the firm, were in excess of R650,000.00. Other employees of the applicant were also involved in allocating work irregularly to the same firm of attorneys in exchange for gifts and favours.
- [4] The third respondent was subjected to a disciplinary enquiry for her role in the irregularities and dismissed. She referred an unfair dismissal dispute to the first respondent. Part of the evidence which served before the commissioner consisted of proof that the third respondent had made

herself guilty of the acts of misconduct which led to her dismissal. Evidence was led to the effect that other senior employees of the applicant also received gifts and legal services from Croucamp which they neither disclosed nor paid for. No disciplinary action was taken against some and others were issued with sanctions less than dismissal. The commissioner found that the third respondent failed to declare the gifts and favours, acted dishonestly and breached the trust relationship between herself and the applicant. He found that her conduct warranted dismissal. He concluded that inconsistency rendered the third respondent's dismissal unfair and ordered that she be paid compensation equivalent to her six months' net salary. It is that award that forms the subject matter of this review application.

Grounds for review

- [5] The grounds on which the applicant primarily sought to rely on are that the first respondent breached its statutory duty of providing a complete record of the arbitration proceedings. The commissioner failed to apply his mind when dealing with both inconsistency and compensation. The applicant alleged that the award was both substantively and dialectically unreasonable.

The test for review

- [6] The test for review is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹. It was clarified as follows in *Andre Herholdt v Nedbank Limited and Congress of South African Trade Unions* an unreported decision of the SCA under case number 701/2012 at Para 25, 'In summary, the position regarding the review of CCMA awards is this: A review of the CCMA awards is permissible if defects in the proceedings fall 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

¹ (2007) 28 ILJ 2405 (CC)

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 before the arbitrator. Material error 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 reasonable’.

- [7] The third respondent submitted that the review application should be dismissed with costs solely on the basis that the applicant failed to place a complete record of the arbitration proceedings before court. She sought to rely on *Metalogik Engineering and Manufacturing CC v Fernandes and Others*².
- [8] The applicant submitted that the approach adopted by the third respondent would have disastrous consequences in that it will violate its right to a review application through no fault on its part. It submitted that a court may consider a review application even in the absence of the transcript where it can be shown that the mechanically recorded arbitration record is missing or the parties are unable to reconstruct the record. See *Mabogoane v Commission for Conciliation Mediation and Arbitration and Others*³. Where the record is incomplete and the applicant has taken no steps to reconstruct it, the court will determine whether the award is reviewable and consider the available evidence and the incomplete record. See *Metalogik (supra)*. It is common cause that the first respondent failed to carry out its statutory duty of generating, keeping in its custody and making the mechanically recorded record of the arbitration proceedings for purpose of this application. The applicant and the third respondent reconstructed a part of the missing record, they however, could not reconstruct evidence of Mr Salter (Salter) one of the applicant’s witness. Both the applicant and the third respondent submitted that it is possible to determine the review application even in the absence of Salter’s evidence. While Salter gave crucial evidence on

² (2002) 23 ILJ 1592 (LC)

³ [2012]33 ILJ 1874(LC)

inconsistency which forms a material part of this application, having considered the available part of the record I am satisfied that this application can be determined properly and fairly on the material before court. The first respondent was remiss in its duty to file a complete record of the arbitration proceedings, however, such remissness did not make the award susceptible to review. The first ground of review is therefore not valid.

- [9] The applicant's second ground of review is that the commissioner did not apply his mind when dealing with the question of inconsistency. It is common cause that other employees of the applicant were recipients of gifts, favours and free legal services which they did not disclose from Findlay and Niemeyer and Croucamp. Ms Pienaar (Pienaar) a bank manager, received gifts and legal services to the value of R9000.00 she later made a payment and was subjected to a disciplinary discussion. Mrs Rule (Rule) received free legal services and a gift voucher. She was issued with a final written warning and instructed to pay back the amount involved. Mr Danckwerts (Danckwerts), the General Manager, Home Loan and Systems received free legal services and gifts from Croucamp. He was reprimanded.
- [10] In dealing with the issue of inconsistency the commissioner made a number of observations and findings. They include the third respondent's position of being a very senior executive. She had a fiduciary duty to act honestly and in the applicant's best interest. She committed a serious offence of acting dishonestly by not disclosing that Croucamp had transferred free of charge a property she co-owned in Brynston. She breached the relationship of trust between her and the applicant and her conduct warranted dismissal. The commissioner rejected the evidence that the applicant did not act inconsistently by charging the third respondent because of the severity of the offence and the position she held. The commissioner found that a serious infraction becomes severe irrespective of the position one holds and that the position cannot change the severity of the sanction. He relied on *National Union of Mine Workers*

of *SA v Haggie Rand Ltd*⁴ in finding that an employer who does not treat like cases alike may be found to have acted unfairly on grounds of inconsistency. He added that an employer may justifiably treat same or similar cases differently. He relied on *Early Bird Farms (Pty) Ltd v Mlambo*⁵ where it was held that an employer may differentiate between employees who had committed the same or similar offence by taking into account personal circumstances and the merits of the case.

- [11] The commissioner made a finding that there were senior executives who had committed the same or similar infractions to those which led to the third respondent's dismissal but were either reprimanded or subjected to a disciplinary discussion. He concluded that he was unable to find exceptional personal circumstances which could have justified a different treatment. He however, added that it may be argued that the third respondent was literally looting and acted in a disgraceful and deplorable manner but found no justification for the manner in which the third respondent was treated. He justified his finding by stating that if the applicant had a zero tolerance to the infraction the third respondent was dismissed for there should have been no different treatment for other executive or senior employees who had committed similar infractions.
- [12] The purpose of requiring employers to enforce discipline consistently is mainly to protect employees against discrimination. The parity principle does not require employers to mete out the same treatment to employees who have committed the same misconduct. In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*⁶ the court adopted the following approach in applying the parity principle: 'When deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention'. Where the employee's actions breached the trust relationship the parity principle cannot rescue an employee. See *Miyambo v Commission for Conciliation, Mediation and Arbitration and Others*⁷.

⁴ (1991) 12 ILJ 1022 (LAC)

⁵ [1997] 5 BLLR 541 (LAC)

⁶ [2008] 3 BLLR 241 at para 36

⁷ (2010)31 ILJ 2031 (LAC)

[13] In determining the issue of inconsistency the commissioner relied on decisions which were based on the predecessor to the current Labour Relation Act (LRA) and found that personal circumstances or the merits of the case must be such that different treatment for the commission of the same or similar infraction is justified. He applied the incorrect test in reaching his conclusion. He failed to apply the correct legal principle. It is common cause that the benefits the third respondent received from Findlay and Niemeyer and Croucamp exceeded those received by other employees of the applicant by far. The commissioner acknowledges the extent by stating that she looted from the applicant. In concluding that she had been treated differently from her fellow employees unfairly, the commissioner neglected to consider the gravity of her misconduct. The commissioner concluded that the third respondent's misconduct destroyed the trust relationship between herself and the applicant. Having made that finding he omitted to consider that an employee may not seek to rely on the parity principle when his or her misconduct has breached the relationship of trust. It is common cause that some of the third respondent's comparators were her juniors. The commissioner omitted to consider the material distinguishing factors between the third respondent and her comparators which involved her seniority and the amount by which each benefited.

[14] In *Greater Letaba Local Municipality v Mankgabe NO and Others*⁸, the court adopted the liberal approach, and found that the arbitrator did not adequately or properly consider the consistency factor but concluded that the substantive fairness of the reason for the dismissal was not extinguished by its procedural fairness. Even though the commissioner found that the applicant had acted inconsistently by dismissing the third respondent in concluding that but for the inconsistency the third respondent's dismissal would have been substantively fair, he overlooked the fact that the inconsistency did not diminish the substantive fairness of the third respondent's dismissal.

⁸ (2008) 29 ILJ 1167 (LC)

- [15] A commissioner has a duty to apply his or her mind when conducting arbitration proceedings. Failure to do renders the award reviewable. See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (supra)* and *CUSA v Tao Ying Metal Industries and Others*⁹. The commissioner's failure to apply the principle of consistency correctly is a manifestation of his failure to apply his mind to the issue. It rendered his award assailable in that his failure to apply his mind led him to reach a decision which a reasonable decision maker could not reach. The applicant's second ground for review is therefore valid and constitutes a basis to have his award reviewed and set aside.
- [16] The applicant's last ground of review is the quantum of the compensation the commissioner awarded which is equivalent to the third respondent's remuneration for a period of six months and his omission to give reasons for awarding the amount.
- [17] The commissioner found that had the applicant not acted inconsistently, the third respondent's dismissal would have been substantively fair. He found the dismissal procedurally fair. Section 194 (1) of the LRA requires compensation that may be awarded to an employee whose dismissal is found to be substantively unfair for reasons relating to his or her conduct to be just and equitable in all the circumstances to a maximum equivalent to that employee's 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. The commissioner is therefore enjoined by section 194 (1) of the LRA to give reasons for the quantum of compensation he or she decides to award and illustrate how the amount is just and equitable in all the circumstances. The reasons need not be elaborate. The award must, however, show that the commissioner applied his or her mind in deciding the amount of compensation. The commissioner in the present matter did not provide a single reason for the amount of compensation he awarded. There is no proof of compliance with the provisions of section 194 (1) either in the record or ex facie the award. I have considered the third respondent's submission that the amount of compensation the commissioner awarded

⁹ (2008) 29 ILJ 2461 (CC)

is an amount which a reasonable arbitrator could have awarded. It however does not cure the commissioner's omission. A commissioner's failure to give reasons for awarding compensation is irrational. See *SA Airways (Pty) Ltd v Blackburn and Others*¹⁰.

- [18] When an arbitration award is considered in its totality it reveals that the commissioner applied the principle of consistency incorrectly. He failed to give reasons for the amount of compensation he awarded. Both defects rendered his award reviewable as they influenced the commissioner to reach a decision a reasonable decision-maker could not reach on the material before him.
- [19] The parties were in agreement that should I find the award reviewable based on inconsistency and the relief I should order that the matter be remitted to the first respondent for the determination of those two issues only. I could find no reason for refusing the order.

Costs

- [20] The third respondent launched an application for the dismissal of the review application owing to the applicant's inordinate delay in prosecuting it. The delay was caused by the unavailability of a complete record of the arbitration proceedings owing to the first respondent's failure to generate it and provide it when needed. The applicant and the third respondent reconstructed some parts of the missing record but could not reconstruct evidence of a crucial witness of the applicant whose testimony included the issue of inconsistency. The applicant's legal representative at the arbitration passed away and his absence contributed to the delay. When this matter was argued it was ripe for hearing.
- [21] Most of the delay can be attributed to the first respondent and the passing away of the applicant's legal representative at the arbitration. The delay which could be attributed to the applicant was not inordinate and the applicant had prospects of success. It would therefore not be

¹⁰ [2010] 3 BLLR 305 (LC) at para 35

appropriate to grant a costs order against the applicant for the delay in the prosecution of the review application.

Order

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

22.1 The arbitration award issued by the second respondent under case number GAJB 31069-08 and dated 18 October 2010 is reviewed and set aside.

22.2 The matter is remitted to first respondent for the issue of inconsistency and relief due to the third respondent, if any, to be determined by a commissioner other than the second respondent.

22.3 No order as to costs.

Lallie, J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Orr

Instructed by: Cliffe Dekker and Hofmeyer Attorneys

For the Third Respondent: Mr Hinds of Anthony Hinds Attorneys

LABOUR COURT