REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR2584/2012

In the matter between:

ASSMANG LIMITED
(ASSMANG CHROME DWARSRIVER MINE) Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

MATSEPE, H N; *N.O.* Second Respondent

CASPER DU PLESSIS Third Respondent

NATIONAL UNION OF MINEWORKERS Fourth respondent

Heard: 01 July 2014

Delivered: 14 January 2015

Summary: Application for review in terms of s. 145 of the LRA; Commissioner finding that the evidence is evenly balanced and deciding the dispute on the onus of proof; No attempt made to weigh up or balance the probabilities; No consideration of the credibility of the witnesses; Commissioner misconceiving the nature of the

enquiry and his duties in relation thereto, thereby committing gross irregularity within the meaning of s. 145(2)(a)(ii) of the LRA; Outcome not one that a reasonable decision maker could reach; Arbitration award set aside with no order as to costs.

JUDGMENT

VOYI AJ

Introduction

[1] This is an application to review and set aside an arbitration award that was issued by Commissioner Harold Ntale Matsepe (hereinafter "the Commissioner") on 10 September 2012 under case number LP1053-12. The application is launched under s. 145 of the Labour Relations Act.[1]

[2] In his arbitration award, the Commissioner concluded that the dismissal of the Third Respondent, by the Applicant (hereinafter "the Applicant" or "the employer"), was procedurally fair but substantively unfair.

[3] As relief, the Commissioner granted retrospective reinstatement with no order as to costs.

[4] The application for review is opposed by the Third and Fourth Respondents, who contend *inter alia* that the Applicant has failed to prove that there are any defects in the arbitration proceedings within one of the grounds envisaged in s. 145(2)(a) of the LRA.

The arbitration award under review

[5] Following the undisputed dismissal of the Third Respondent, being Mr Casper du Plessis ("Mr du Plessis"), his Trade Union (the Fourth Respondent herein) lodged on his behalf an unfair dismissal dispute with the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), the First Respondent herein.

[1] No. 66 of 1995 ("the LRA")

[6] The dispute was ultimately arbitrated by the Commissioner, who thereafter handed down the arbitration award under review.

[7] In his analysis of evidence and argument, the Commissioner accepted that dismissal was common cause. He, accordingly, held that the 'onus' was on the employer to prove that Mr du Plessis was fairly dismissed.

[8] Having realised that he was practically faced with two conflicting versions,[2] the Commissioner took the view that he had '…no basis on which to discredit any of the two versions'.

[9] In arriving at his ultimate decision, the Commissioner articulated himself as follows:

> '8.14 When the totality of the evidence is viewed on a balance of probabilities it cannot be said that the [employer] succeeded to prove the fairness of [Mr du Plessis'] dismissal. This is due to the fact that where evidence of both sides is evenly balanced [the employer] cannot be deemed to have succeeded to discharge its onus.
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> 8.15 My finding therefore is that the [employer] did not succeed to prove that [Mr du Plessis] was fairly dismissed.' (the underlining is mine)

[10] Before coming to the above decisive finding, the Commissioner highlighted the two conflicting versions. His synopsis of the testimony given by the Applicant's main and only witness was as follows:

> '8.5 Mr. Joubert testified inter alia, that he found the workplace unsafe and he took pictures to show that the said workplace was unsafe. He gave extensive evidence on how the photos are to be linked to the areas of strike 7. He also testified extensively in how explosives bag was found and the danger associated with the bag being left open whilst full of explosives.'

[2] This meant that the acceptance of the one entailed the rejection of the other, as both versions could not be true.

[11] Having recorded the above, the Commissioner found that the evidence of the Applicant's witness was, when viewed on its own, '…satisfactory and seems reasonably possibly true.'

[12] The Commissioner noted that Mr Joubert's testimony was directly opposed by that of Mr du Plessis and his witness, the latter being Mr Jaco Bezuidenhout ("Mr Bezuidenhout"), who was the shift boss at the time of the incident which resulted in the dismissal of Mr du Plessis.

[13] In outlining the testimony of Mr Bezuidenhout, the Commissioner stated the following:

> '8.8 The evidence of the shift boss, which is recorded above, is that he allowed [Mr du Plessis] to leave at 13H15. He took over from [Mr du Plessis] and received a locked explosives bag, as he has a blasting certificate.
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> 8.9 He further testified that [Mr du Plessis] declared the workplace safe. He also checked and ensured that it was safe. He opposed the testimony of Mr. Joubert that the workers were withdrawn. His version is that the workers were not withdrawn and that the said area is of high production that they could not just withdrawn employees.
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> 8.10 He further opposed the issue of photos by stating that the photos could have been taken anyway (sic) since they do not show the markings of the workplace as well as machines and support structures. Further that he saw Mr. Joubert take pictures at the back area where no work is done.
>
> 8.11 His position is that barring is a continuous process but does not mean that the work place was never declared safe.'

[14] In dealing with the conflicting versions, the Commissioner simply found that he '…had no basis on which to discredit any of the two versions.' The crux of the Commissioner's decision was that '…where the evidence of both sides is evenly balanced [the employer] cannot be deemed to have succeeded to

discharge its onus.' It was, therefore, on this basis that he found against the Applicant.

Evaluation

[15] To put matters in context, I commence by pointing out that arbitration awards of the CCMA are final and binding.[3] It also warrants mentioning that no appeal lies against a CCMA arbitration award.[4]

[16] Therefore, the only remedy available to a party aggrieved by an outcome of arbitration proceedings under the auspices of the CCMA is to launch 'review' proceedings before this Court. Under s.145 (2) (a) of the LRA, three grounds for review are provided for.[5]

[17] The Commissioner's arbitration award is being challenged on the basis of only one of the three allowable grounds for review under s. 145(2) (a) of the LRA, namely, that the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings. It is, therefore, not the Applicant's case that the Commissioner committed 'misconduct' or 'exceeded is powers'.

[18] In dealing with applications for review, the standard test to be applied was postulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.[6] That test basically asks the question: 'Is the decision reached by the commissioner one that a reasonable decision maker could not reach?'

[19] It has been held that the aforesaid standard test has not extinguished the specific grounds for review permitted under s. 145(2)(a) and (b) of the LRA.[7] Instead, those specific grounds are to be 'suffused' with the constitutional

[3] Under s.143 (1) of the LRA, it is particularly stipulated that an '…*award issued by a commissioner is final and binding*...'
[4] *Shoprite Checkers (Pty) Ltd v CCMA and Others* (2009) 30 *ILJ* 829 (SCA) at para 26; *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* (2011) 32 *ILJ* 1618 (SCA) at para 5
[5] The first is that the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator. The second is that he committed a gross irregularity in the conduct of the arbitration proceedings. The third is that he exceeded the commissioner's powers.
[6] (2007) 28 *ILJ* 2405 (CC) at para 110
[7] *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at para 14

standard of reasonableness.[8] On this point, the Labour Appeal Court ("the LAC") also had occasion to express itself as follows:

> 'Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness...'[9]

[20] In rejecting the 'process related review' approach, the LAC stated in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) CCMA and Others*[10] that what is required in matters of the present nature is '…first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo.*'

[21] In this matter, the starting point should be whether or not the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings as contemplated by s. 145(2)(a)(ii) of the LRA.

[22] I have no hesitation in rejecting the Applicant's complaint that the Commissioner failed to consider and/or rejected/or omitted to attach the appropriate weight to the photographic evidence (and the testimony presented therein) tendered in support of the charges proffered against Mr du Plessis.

[23] I agree with the Third and Fourth Respondents' submission that the weight and relevance to be attached to particular facts are not in and of themselves sufficient for the award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable. This position emanates from the decision of the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* (*supra*).[11]

[24] I, equally, have no hesitating in rejecting the complaint that the Commissioner failed to properly apply his mind to the evidence before him to the extent contended by the Applicant. It is clear from the heads of argument submitted by the Applicant that this complaint was informed by the 'process related

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[8] *Ibid*
[9] *Fidelity Cash Management Service v CCMA and Others* (2008) 29 *ILJ* 964 (LAC) at para 101
[10] (2014) 35 *ILJ* 943 (LAC) at para 15
[11] At para 25

unreasonableness' which has since been rejected by both the SCA[12] and the LAC.[13]

[25] The concept of 'gross irregularity' was aptly explained by Schreiner J (as he then was) in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another*,[14] wherein it was held that gross irregularities fall broadly into two classes, they being 'patent' irregularities and 'latent' irregularities.

[26] In upholding the aforesaid second class of 'gross irregularities'[15] as still being good law in the context of s. 145(2)(a)(ii) of the LRA, the SCA held as follows in *Herholdt v Nedbank Ltd* (*supra*):[16]

> 'That does not mean that a latent irregularity, as Schreiner J originally used that term in the *Goldfield Investments* case, is not a gross irregularity within the meaning of s 145(2)(a)(ii). It is, but only in the limited sense mentioned earlier, where the decision maker has undertaken the wrong enquiry or undertaken the enquiry in the wrong manner...'

[27] It was, particularly, the reasoning of Schreiner J in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* (*supra*) that a mistake which '…leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to it misconceiving the whole nature of the enquiry, or of its duties in connection therewith…' amounts to a gross irregularity.

[28] In ultimately endorsing this reasoning, the SCA pertinently held as follows in *Herholdt v Nedbank Ltd* (*supra*):[17]

> '…A review of a 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 a

[12] In *Herholdt v Nedbank Ltd* (*supra*) at para's 16 - 21
[13] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (*supra*) at para 15
[14] 1938 TPD 551
[15] It being that of 'latent irregularities'.
[16] At para 21
[17] At para 25

> 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...' (the underlining is mine)

[29] In this matter, the Commissioner found that the evidence of both parties was evenly balanced, and as a result he was unable to come to the conclusion that the Applicant had discharged its onus. The Commissioner, therefore, decided the dispute before him purely on the basis of onus of proof.

[30] As the 'pans of the scale' were, according to the Commissioner evenly balanced, his decisive finding was that in such an instance the employer '…cannot be deemed to have succeeded to discharge its onus.'

[31] This ordinarily occurs where a trial court is not satisfied with the version of either party as to exactly what occurred and ends up deciding the matter simply on the 'onus' of proof by an order for absolution from the instance.[18]

[32] The approach adopted by the Commissioner attempts to resemble the conclusion reach in *National Employers' General Insurance Co Ltd v Jagers*,[19] where Eksteen AJP held thus:

> '…Where therefore the probabilities are evenly balanced, and where there can be no finding on the relative credibility of the witnesses, it seems to me that the only conclusion to which the Court could have come was that the respondent had failed to discharge the *onus* which rested on him.'

[33] My reading of the above-quoted conclusion highlights two pivotal aspects which the Commissioner missed in the present matter. The first is that there has to be a balancing of the probabilities. The second is that there has to be a consideration of the credibility of the witnesses.

[34] In my considered view, it is only when these two undertakings do not offer any assistance that a court (or a commissioner in the present context) would

[18] *Sager Motors (Pvt) Ltd v Patel* 1968 (4) SA 98 (R.,AD) at p.101G-H
[19] 1984 (4) SA 437 (E) at p.444A-C

inevitably come to the conclusion that the party upon whom the 'onus' rested had failed to discharge same.

[35] In deciding on an alleged unfair dismissal dispute, a commissioner of the CCMA goes by balancing the probabilities. In making a decision on the dispute before him or her, the appointed commissioner establishes facts by a preponderance of probability. That is the ordinary standard of proof in civil proceedings.

[36] It is, accordingly, a CCMA commissioner's duty to weigh up or balance the probabilities. It has to be accepted that in so doing, the commissioner would not exclude every reasonable doubt. The standard of proof in civil proceedings is lower than that the criminal standard of proof beyond reasonable doubt.

[37] It is worth reiterating that there is a clear distinction between probabilities and credibility. At times, these two concepts are not dealt with in their proper context. In my view, the probabilities are at the heart of the enquiry in arbitration proceedings. They have to be established as they are decisive to the outcome.

[38] Although I align myself with the judgment of Fourie AJ in *Solidarity obo van Zyl v KPMG Services (Pty) Ltd and Others*[20] in relation to the effect of failure to address the credibility of the witnesses at arbitration, I find that failure to weigh up the probabilities can amount to a reviewable irregularity. I expand on this later in this judgment.

[39] For a commissioner to simply find that the evidence of both sides is evenly balanced and to, therefore, decide a dispute purely on the question of onus is wanting in the extreme. That is more so if the evidence of both sides is diametrically opposed, as it was the case in the present matter at arbitration.

[40] In *Selamolele v Makhado*,[21] the approach to the question whether the onus has been discharged was dealt with as follows:

[20] (2014) 35 *ILJ* 1656 (LC)
[21] 1988 (2) SA 372 (VSC) at pp.374J-375B

> 'Ultimately the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable.'

[41] In this matter, there was simply no attempt made to weigh up or test any of the conflicting versions against the inherent or general probabilities. The Commissioner took the view that neither of the two conflicting versions could be discredited.

[42] Logically, I find difficulties in accepting the Commissioner's approach. As there were two conflicting versions before him, the Commissioner ought to have accepted that these versions were mutually destructive. They both could not stand. The technique that was espoused by the SCA in *Stellenbosch Farmers' Winery Ground Ltd and Another v Martell et Cie*[22] to resolve factual disputes identifies three considerations, they being (a) credibility of the witnesses, (b) their reliability, and (c) the 'probabilities'.

[43] The last of these considerations was explained to necessitate '…an analysis and evaluation of the probabilities or improbabilities of each party's version on each of the disputed issues.'[23]

[44] As indicated herein before, there was no attempt made by the Commissioner to weigh up the probabilities or improbabilities of the two conflicting versions before him**.**

[45] In my view, this is not a matter where it can be said that there were simply no probabilities; one way or the other. There was the testimony of three witnesses who testified before the Commissioner at arbitration. In addition, there was documentary and photographic evidence that was tendered by the

[22] 2003 (1) SA 11 (SCA) at para 5
[23] *Ibid*

parties, and upon which evidence was led. There was, even, much in the way of surrounding circumstances to create strong probabilities.

[46] In *African Eagle Life Assurance Co Ltd v Cainer*,[24] it was held that once probabilities exist, they '…have to be weighed up to determine whether the plaintiff has discharged its onus…'

[47] In the context of this matter, the following passage from *Stellenbosch Farmers' Winery Ground Ltd and Another v Martell et Cie* (*supra*) is also of relevance:

> '…In the light of its assessment of (*a*), (*b*) and (*c*) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it...'

[48] It is, therefore, clear that the ultimate determination of whether the onus of proof has been discharged is a final step after the assessment of (a) the credibility of the witnesses, (b) their reliability and, most importantly, (c) the 'probabilities'.

[49] It is possible for a Commissioner to arrive at his decision simply on the probabilities and without having to make specific findings of the credibility of the witnesses. In *National Employers' General Insurance Co Ltd v Jagers* (*supra*),[25] it was held thus:

> '…it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[50] In the present matter, the Commissioner went on to deal with the final step of determining whether the onus of proof was discharged without having embarked upon the consideration of the probabilities. He did not even attempt to make any finding on the credibility of the witnesses that testified before him.

[51] It is, therefore, my judgment that the Commissioner not only misconceived the nature of the enquiry, he equally misconceived his duties in connection with

[24] 1980 (2) SA 234 (W) at p.238A-C
[25] At pp.440H - 441B

the proceedings before him. This amounts to gross irregularity as contemplated by s. 145(2)(a)(ii) of the LRA.

[52] Having found that the Commissioner committed 'a gross irregularity' within the meaning of s. 145(2)(a)(ii), as aforesaid, I am called upon to determine if the award is, in any event, one that a reasonable commissioner could not reach.

[53] The enquiry into the reasonableness of the decision arrived at by the Commissioner requires that I examine the merits of the case. This task is informed by the standard review test in *Sidumo*, as it was explained in *Herholdt v Nedbank Ltd* (*supra*) in the following terms:

> '…That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.'[26]

[54] In embarking upon this task, I am mindful of the fact that I must avoid 'judicial overzealousness' in setting aside an award which does not coincide with my own views.

[55] The decision reached by the Commissioner in this matter was that the Applicant had not succeeded in proving that Mr du Plessis was fairly dismissed and therefore the dismissal was substantively unfair.

[26] At para 12

[56] In this matter, I am unable to divorce the archetypal conclusion that the dismissal was substantively unfair from the decisive finding that the Applicant did not succeed to prove that the dismissal was fair. The latter was to me the outcome or the decision reached by the Commissioner in this matter.

[57] All things considered, it is my judgment that the Commissioner's award is clearly one that no reasonable decision maker could have reached. The Commissioner had himself found that the evidence of the Applicant's witness was, on its own, satisfactory and appeared reasonably possibly true. He, particularly, could not find any basis to discredit the version of Mr Joubert, the Applicant's witness. These two factors, when viewed against the seriousness of the misconduct charges that were levelled against Mr du Plessis, render the Commissioner's decision unsustainable on review. The Commissioner's decision, in my view, clearly fall outside the realm of what is reasonable.

[58] It is not my task to determine the merits of the dismissal *de novo*. Mine is to simply examine the decision reached by the Commissioner against what is reasonable.

[59] I have already identified the decision for consideration in this regard. It is, to me, one that no reasonable decision maker could have reached. It was informed by the Commissioner having misconceived the nature of the enquiry and his duties in connection therewith.

[60] It is axiomatic that a reasonable commissioner could not have misconceived the nature of the enquiry, let alone his duties in connection with such an enquiry. It is my judgment, therefore, that the Commissioner did not only commit gross irregularity in the conduct of the arbitration proceedings, his award is equally one that no reasonable decision maker could have reached under the circumstances.

[61] In the circumstances of this matter, I come to the conclusion that the application for review must succeed. As for costs I am of the view that each party should bear their respective costs. The requirements of law and fairness dictate that I should not condemn in costs Respondents who were simply defending a relief that was afforded to them by a CCMA commissioner.

Order

[62] I, accordingly, make the following order:

(i) The arbitration award handed down by Commissioner Harold Ntale Matsepe on 10 September 2012 under case number LP1053-12 is hereby reviewed and set aside.

(ii) The dispute is referred back to the First Respondent for arbitration *de novo* before a different commissioner.

(iii) There is no order as to costs.

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Voyi AJ

Acting Judge of the Labour

Court of South Africa

APPEARANCES:

For the Applicant: Advocate A. Mosam

Instructed by: Cliffe Dekker Hofmeyr Inc.

For the Respondent: Advocate P. Nkutha

Instructed by: Finger Phukubje Inc.