IN THE LABOUR COURT OF SOUTH AFRICA

(WESTERN CAPE LABOUR COURT, CAPE TOWN)

CASE NUMBER: C295/2015

DATE: 16 MARCH 2016

In the matter between:

HILTON RAYMOND DAVIDS Applicant

and

CCMA First respondent

MADELEINE LOYSON (Commissioner) Second respondent

TONGAAT HULETT SUGAR LIMITED Third respondent

J U D G M E N T

STEENKAMP, J:

This is an application to have an arbitration award by the second respondent, Commissioner Madeleine Loyson, reviewed and set aside. It arises from the dismissal of the applicant, Mr Davids, by the third respondent, Tongaat Hulett Sugar Limited.

Mr Davids was employed as a senior merchandiser. He admits that he failed to call on stores which were part of his routine daily call schedule. However, he denied that he had

deliberately supplied false information to his manager. That led to the arbitration after he had been dismissed on those two allegations of misconduct.

It must be said at the outset that the arbitration award is a model one. The arbitration took place over two days. The arbitrator very carefully summarised the evidence of the witnesses before her. They were the employer's HR manager, Ms Mshengu; the sales manager to whom Mr Davids reported, that is Mr AG Lakay; and the divisional manager, Mr D Elliott. The arbitrator then considered the evidence of the employee, Mr Davids;and that of Messrs Andre Carolissen, Ricardo Adams and Quentin Thomas. She then considered the submissions in writing that were submitted by both parties, analysed the argument and the evidence. She then carefully set out the relevant legal principles and applied those legal principles to the evidence that she had heard. She found, having taken all that into account and having weighed up the credibility of the witnesses and the probabilities, that the dismissal of the employee was substantively fair.

Mr Davids, who represented himself, set out a number of grounds of review in his founding affidavit. The grounds are somewhat vague and they amount on the whole to grounds of appeal rather than review. He further distilled the grounds in

his written heads of argument and in his oral argument before the Court today. The first thing that he took issue with is that he was unrepresented at the arbitration, as he was today, while the employer was represented by Mr *Lawrence*, an attorney, who also represented it here today.

Although I have sympathy with his complaint that the playing fields may not have been level, it is clear from a reading of the transcript that the arbitrator considered the parity of arms and that she properly advised the employee, as the Court had to do today, that the person that was advising him and who is also present in Court today was not allowed to represent him as he was not a legal representative or a trade union representative. However, the employee at the arbitration indicated at the outset of the proceedings that he had no objection to legal representation and that he would represent himself, as he did eloquently today. The arbitrator went out of her way to explain the processes to him and to make sure that he is in no way prejudiced. I am quite satisfied on a reading of the transcript and of the evidence that the employee had a fair hearing.

Concerning the main attack on the award, it was as I have said in the nature of an appeal rather than a review. Mr Davids, in his oral argument today, attempted on the whole to re-argue his case. Given that he is unrepresented, the Court showed

him significant latitude but the fact remains that this is a review, not an appeal. Mr Davids was hard-pressed to explain to the Court in what manner the award of the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion, i.e. in what way it did not pass muster on the test as set out in SIdumo v Rustenburg Platinum Mines 2007 (28) *ILJ* 2405 (CC).

The five instances where he complained that the arbitrator did not properly apply her mind to the evidence before her, are not borne out by the summary of the evidence as compared to the transcript.

The arbitrator firstly considered the evidence of Ms Mshengu, the HR manager. She pointed out that Mshengu was informed by Lakay about an incident that had occurred involving a sales representative, Mr Rodney Cloete, who was not completing his daily call schedule but had signed off the daily call sheet. Cloete was dismissed. It is that incident that led to the investigation into Mr Davids. The arbitrator also took into account the evidence of Mshengu that the employees were called in by Lakay and Elliott, including the applicant, and cautioned about the seriousness of misrepresentation on the daily call sheets.

Concerning this so-called call sheets, Mr Davids's main bone of contention in argument today was that the employer could not show him such a call sheet. In response Mr *Lawrence* pointed out that this was traversed in some detail at the arbitration and he pointed to the example that was also explained to the arbitrator where Mr Davids's superior, Mr Marshall Kleintjies, as well as the employee had signed off on what was referred to in shorthand as a "time sheet" showing that they supposedly visited ten stores whereas in reality they had only visited four.

The arbitrator also pointed out that another sales representative, Mr Enrico Armino, who was also found to have misrepresented time schedules, resigned just before he could be disciplined and that both the employee (Mr Davids) and Mr Kleintjies were dismissed. The other person involved, Cloete, was not dismissed but received a final written warning. The reason for that was that he had signed the time sheets off in the morning before they had been completed by Cloete and did not later check them to see that Cloete had inserted the correct information before handing in the time sheets to management.

Importantly, Lakay testified that the employees are given a daily call schedule and that counselling meetings and further

meetings had taken place to remind those involved, i.e. the sales representatives, of their duties. He checked the store register against the schedule of the employee and Kleintjies on 3 September 2014 after a visit to the Lansdowne Shoprite from which it became clear that the time sheets did not gel with the store's visit schedule. That is what led to this further investigation showing the discrepancies on the other dates such as 28 August 2014. An important aspect of his evidence is that, when he asked the employee to provide an explanation, the employee eventually admitted that he had either only visited certain stores, had not visited some of the stores or had not completed some of the schedules.

Mr Elliott, the divisional manager, gave more detail about the structures in place. Importantly, he had impressed upon both sales representatives and merchandisers, it is their responsibility to ensure open and honest reporting on their activities as well as the consequences should such incidents of misrepresentation of activities and fraudulent submissions of time sheets be repeated.

Mr Davids, having denied the allegations against him, conceded under cross-examination that there were several meetings held, including the one on 28 October 2013, where it was made clear what their duties were and that they were

required to ensure that what they signed off was accurate.

The arbitrator, considering all of the evidence before her, found that the employer's witnesses were "extremely compelling". They testified in great detail and especially Lakay spoke from the heart in a completely uninhibited fashion. Their versions were credible and factual with no signs of any tailoring and most importantly their versions were corroborated in every respect by each other.

The arbitrator found that the employee, on the other hand, was not a good witness. His defence rested solely on a blatant denial of any guilt at all. He attempted to distance himself from any responsibility for anything and he was blatantly unremorseful and sought to place the blame for everything on Kleintjies. Most surprising of al,l the arbitrator found, the employee sought to argue (very unconvincingly and almost in unintelligible fashion) that he no longer had any key performance areas in respect of his job. This argument failed before the arbitrator.

The arbitrator concluded that there was no doubt that the employee clearly knew the consequences of his actions but continued, possibly thinking that given his long service he had somehow become immune to any form of action against him or

that he too would first receive a written warning and not be dismissed outright. The arbitrator also noted that the employee was trusted by the employer and because that trust was breached, his seniority and length of service only served in aggravation. She also found that the employee was dishonest and that therefore the dismissal was fair. Insofar as the employee's complaint of inconsistent application of the sanction of dismissal was concerned, she noted that the evidence was clear that the cases of Thomas and Adams could not be compared to that of the employee. His offences were committed after the incidents of Cloete, Thomas and Adams and after Lakay and Elliott had repeatedly warned employees of the consequences of similar conduct in the future. The line had been drawn in the sand. The actual conduct of Thomas and Adams was also different to that of the employee. The arbitrator considered the law on inconsistency. She referred, for example, to the judgment of the Labour Appeal Court in SACCAWU v Irvin and Johnson (1999) 20 *ILJ* 2302 (LAC) where Conradie, JA stated:

> "In my view too great an emphasis is quite frequently sought to be placed on the principle of disciplinary consistency, also called the parity principle. There is really no separate principle involved. Consistency is simply an element of

> disciplinary fairness. Every employee must be measured by the same standards. Discipline must not be capricious. It is really the perception of bias inherent in selective discipline which makes it unfair. Where however one is faced with a large number of offending employees, the best that one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly but incorrectly exercises his or her discretion in a particular case, in a particular way, it would not mean that there was unfairness towards the other employees. It would mean no more than that his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision."

The arbitrator also referred to the sentiments expressed by Professor John Grogan in *Employment Law*, Volume 15, Number 3, August 1999 in an article titled "Just Deserts: The Limits of the Parity Principle" where he says:

> "One of the lessons to be learned from the *Irvin and Johnson* decision is that when deciding on whether the parity principle applies, a Court or arbitrator should not lose sight of the gravity of the misconduct of the employee who seeks to rely on that principle. Another is that if a disciplinary officer errs on the side of leniency in respect of one employee, the employer may not be burdened with the error to the extent of having to reinstate or compensate those employees who, viewed independently, ought to be dismissed."

The arbitrator concluded that dishonesty of this type committed by the employee is totally and entirely unacceptable and justifies the most severe of sanctions because it breaches the relationship of trust as testified to by Lakay and Elliott in particular. It is against that background that she found the dismissal to be fair. I have already referred to the review test as set out in Sidumo that was expanded upon by the SCA in Heroldt v Nedbank where the SCA says:

> "In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of

> the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. The result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors 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 unreasonable."

And it went on to say that:

> "That does not mean that a latent irregularity as Schreiner, J originally used that term in the Goldfields Investments case, is not a gross irregularity within the meaning of section 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."

In this case the arbitrator undertook the enquiry in exactly the correct manner. She, in the words of *Kloof Gold Mining*, asked the right question and, having asked that question, decided the dispute before her in the light of the evidence before her. She did so in the proper manner by assessing the credibility and reliability of the witnesses and the probabilities. She came to a conclusion on the probabilities that another reasonable arbitrator could reasonably have arrived at. The award is not open to review.

With regard to costs, I do take into account that the employee is not represented by an attorney; however, as he pointed out at the arbitration and in this Court, he has had the benefit of advice, apparently by an acquaintance. It is clear from his heads of argument, apparently drawn with the help of that advisor, that he was made aware of the test on review. In fact, he quotes Sidumo verbatim. Against that background he, assisted by his advisor, should have known that this application had no prospects of success. He nevertheless proceeded with the case in circumstances where there was a clear and reasonable award drawn in a very detailed fashion that reasonably went against him. It is the aim of the Labour Relations Act that arbitrations should be final and binding. The matter should have rested there.

The arbitrator did not make any order as to costs. Nevertheless the employee persisted with this application, thus forcing the employer to incur unnecessary costs in opposing it. There is no longer any employment relationship between the parties. In those circumstances, in law and fairness, costs should follow the result.

THE APPLICATION FOR REVIEW IS DISMISSED WITH COSTS.

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STEENKAMP, J