REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 530/2014

In the matter between:

MARINA OPPERMAN	Applicant
and	
CCMA	First Respondent
Commissioner C L MAKAMA N.O.	Second Respondent
HARMONY GOLD MINING CO LTD	Third Respondent

Heard: 4 August 2016

Delivered: 17 August 2016

Summary: Review – error of law -- misconduct – sanction. Employee given final written warning for being under the influence of alcohol at work. Sanction substituted for that of dismissal in internal appeal by employer. Arbitrator found sanction to be fair. Arbitrator referred to but not applying principle in *Rennies Distribution Services (Pty) Ltd v Bierman.* Error of law led to unreasonable result. Award set aside and substituted with an award reinstating sanction imposed by chairperson of disciplinary hearing.

JUDGMENT

STEENKAMP J

Introduction

[1] It is rare for an arbitrator's finding on sanction in a dismissal case to be set aside on review. This is such a case. The arbitrator made an error of law that led to an unreasonable result. The award is reviewable for that reason.

Background facts

[2] The applicant employee, Ms Marinda Opperman, is a professional nurse. She had been employed by the third respondent, Harmony Gold Mining Company Ltd, for ten years without incident when, one morning, she was asked to undergo a breathalyser test. She had been drinking the previous night and tested positive for alcohol.

[3] After a disciplinary hearing, the employee was given a "severe written warning" valid for 12 months. She lodged an internal appeal against the sanction only. She would rue the day that she did, as the appeal tribunal amended the sanction to one of dismissal.

[4] The employee referred an unfair dismissal dispute to the CCMA. The Commissioner (the second respondent) found that the dismissal was substantively fair but procedurally unfair. He ordered the company to compensate the employee with three months' salary.

[5] The employee now seeks to have the award on substantive fairness reviewed and set aside. She relies, firstly, on an error of law; and secondly, she argues that the arbitrator grossly misapplied the law pertaining to inconsistency. That, she says, led to an unreasonable outcome.

The award

[6] At the arbitration, the parties identified the issues in dispute as the following:

6.1 Did the company act inconsistently by dismissing the employee?

6.2 Did the appeal chairperson exceed his powers outlined in the disciplinary code by imposing a harsher sanction?

6.3 Should the appeal chairperson have advised the employee that a harsher penalty may be imposed on appeal?

Inconsistency

[7] The arbitrator considered the disciplinary code of the company. It provides for dismissal as a sanction where an employee is found to be under the influence of alcohol. Three other employees who had been under the influence of alcohol were not dismissed. One got a written warning valid for six months while the other two got "severe written warnings" valid for 12 months. The arbitrator found that the employer had not been consistent in its application of sanctions for the same misconduct. However, he took into account that the general manager had issued a memorandum stating that: "Serious disciplinary action which may lead to dismissal will be taken against those who come to work under the influence of alcohol or drugs or taking [*sic*] alcohol and drugs while at work". He found that the employee was aware of the memorandum; and that the company could not be said to have been inconsistent in dismissing her.

Sanction on appeal

[8] The arbitrator considered the second and third issues relating to the powers of the appeal chairperson together. The company's disciplinary code states the following with regard to the powers of the appeal chairperson:

> "The chairman of the appeal hearing will determine whether the disciplinary hearing was procedurally and substantively fair and whether further evidence is required. The appeal hearing may therefore be conducted as follows: consideration of the grounds for appeal, or consideration of the

> grounds for appeal plus any additional evidence, or a total rehearing of the entire case, if so dictated by circumstances. The appeal chairman will forward his/her verdict to the accused [*sic*] within two working days of hearing the appeal, or as soon thereafter as may be reasonably possible. The decision of the appeal chairperson will be final and will take effect immediately after being handed down to the accused [*sic*]."

[9] The arbitrator noted that the code does not state that the appeal chairperson may reduce or increase the sanction initially imposed. He stated that he was "unable to find that the appeal chairperson has exceeded his powers without being pointed as to which powers he exceeded".

[10] The arbitrator was referred to the dictum by Basson J in *Rennies Distribution Services (Pty) Ltd v Bierman N.O.*[1] where the learned judge ventured that "an employee should be warned that the chairperson [on appeal] is contemplating increasing the sanction imposed by the chairperson of the disciplinary hearing and the employee should be granted the opportunity either to withdraw the appeal and accept the sanction imposed by the disciplinary hearing or present argument to the appeal hearing why the sanction should not be increased".

[11] Having considered this judgement, the arbitrator accepted that the employee had not been warned that a "severe sanction" would or could be imposed on her and that she was not afforded an opportunity to argue why a more severe sanction should not be imposed. He found that dismissal was substantively fair, but procedurally unfair.

Review grounds

[12] The main thrust of Mr *Whyte*'s argument was that the arbitrator committed an error of law by disregarding the ratio in *Rennies.* Secondly, he argued that the arbitrator grossly misapplied the law pertaining to inconsistency with the result that he came to findings that no reasonable arbitrator could make.

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[1] (2008) 29 *ILJ* 3021 (LC); [2009] 7 BLLR 685 (LC).

Evaluation / Analysis

[13] I shall first consider the "error of law" argument and then the issue of inconsistency.

Error of law?

[14] The arbitrator found that it was permissible for the employer to increase the sanction on appeal as there was no prohibition on this course of action contained in its disciplinary code.

[15] Mr *Whyte* argued that, in so doing, the arbitrator disregarded the ratio in *Rennies*; and that his finding amounts to a gross error of law, is unreasonable, and inconsistent with the facts before him.

[16] The question that the arbitrator had determine was whether it was permissible for the employer to increase the sanction imposed by the disciplinary tribunal once the employee had instituted an internal appeal in terms of the employer's disciplinary code. The code itself was silent on the question of whether the appeal to person was entitled to impose a more serious sanction.

[17] To consider the impact of the decision in *Rennies* to which the arbitrator was referred and with which he appears to agree in his award, despite his finding that the dismissal was substantively fair, it is necessary to quote extensively from that judgement. Basson J said:[2]

> "*Is it fair to increase a sanction on appeal?*
>
> [19] Although I am satisfied for the reasons set out in the aforegoing paragraphs that the review should be dismissed, there is one further point raised in Govender's papers and that relates to the fact that the chairperson of the appeal hearing set aside the final written warning imposed by the chairperson of the disciplinary hearing and replaced it with a harsher sanction of dismissal. The Commissioner did not rule on this point but I am of the view that this is an additional important point upon which the dismissal of Govender was substantively unfair.[3]

[2] *Rennies* (above n 1) paras 19-24.

[3] My underlining.

Broad principles:

[20] In criminal cases a court of appeal has the right to interfere with a sanction imposed by the court *a quo* and replace it with an appropriate sanction (provided that an appeal was lodged against the sanction). The Court derives this power from the express provisions of section 322(6) of the Criminal Procedures Act 51 of 1977 which sets out the powers of the court (sitting as a court of appeal) in detail. It would appear that a court on appeal has this power only because it is specifically empowered by the legislature in terms of section 322(6) of the Criminal Procedures Act.

[21] It would, in my view, be unfair to allow a chairperson in an appeal hearing (as part of a disciplinary process) to simply increase a disciplinary sanction except in circumstances where the disciplinary code expressly allows for such a power.

[22] Moreover, notwithstanding the provisions of section 322(6) of the Criminal Procedures Act which allows for the power to increase the sanction, courts on appeal are, in any event, reluctant to increase sanctions on appeal in light of the prejudice that an accused (in a criminal case) may suffer as a result. Moreover, even where the court of appeal may be open to the argument to increase the sanction on appeal, the affected accused must be afforded an opportunity to present argument to the court of appeal to persuade the court as to why the sanction should not be increased. The *audi alteram partem* rule is thus fundamental even in circumstances where a court of appeal (in a criminal case) has the right to increase a sanction. A similar rule, should, in my view, apply in cases where the chairperson in an appeal hearing (as part of an employer's disciplinary procedures) is empowered to increase a sanction on appeal. An employee should be warned that the chairperson is contemplating increasing the sanction imposed by the chairperson of the disciplinary hearing and the employer should be granted the opportunity either to withdraw the appeal and accept the sanction imposed by the disciplinary hearing or present argument to the appeal hearing why the sanction should not be increased.

[23] I am, of course, mindful of the fact that a disciplinary enquiry should not be equated with a criminal trial. The Court in *Avril Elizabeth Home for the Mentally Handicapped v CCMA & Others* 2006 (27) *ILJ* 1644 (LC) correctly cautioned against such approached. However, the rationale

underlying the reasons why a criminal court on appeal should caution against increasing a sanction is equally valid in respect of disciplinary enquiries. Just as the court on appeal should ensure that a sentenced individual receives a just and fair trail, so must the Labour Court ensure that an employee receives a fair hearing (albeit less formalistic than a criminal trial). There is some authority which supports the principle namely that a chairperson on appeal should not have an unfettered power to increase a sanction except in circumstances where the disciplinary code provides for such a power. See in this regard *UASA obo Melville and SA Airways Technical (Pty) Ltd* (2002) 11 AMSSA 1.11.1 at paragraph 21 where the CCMA rejected the argument that a chairperson on appeal has the right to increase a sanction on appeal in the absence of an express provision to that effect:

'21. A collective agreement is one legal constraint on the power of an employer that obliges the employer not to act in conflict with the provisions of that agreement. Beyond those constraints, the employer may act within a particular sphere subject to any constraints imposed by statute or the common law of employment.

22. In discerning the extent of the powers of an appeal chairperson I should, so it was argued by the employer, have regard to the "common law" relating to appeal enquiries. I am inclined to agree with the respondent that one can have regard to those incidental powers a chairperson requires to perform the function of appeal hearing chairperson. But I do not believe the very ambit of that chairperson's decision making power in respect of the decision appealed against can be established in this way. Moreover, I was not referred to any specific common law authority on this issue.'

[24] In summary: Firstly, except where express provision is made for such a power, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. Secondly, even if it has such a power the chairperson must adhere to the fundamental principles of natural justice which require that *audi alteram partem* must be afforded to the employee who may be prejudiced by the imposition of a more severe sanction."

[18] Despite quoting extensively from this judgement, the arbitrator did not apply it. Basson J expressly held that, except where express provision is made for such a power, a chairperson on appeal does not have the

necessary power to consider imposing a harsher sanction. Secondly, even if it has such a power the chairperson must adhere to the fundamental principles of natural justice which require that *audi alteram partem* must be afforded to the employee who may be prejudiced by the imposition of a more severe sanction. In this case, Harmony Gold's disciplinary code did not give the chairperson on appeal the express power to increase the sanction on appeal; and what is more, Ms Opperman was not given the opportunity to make submissions why a harsher penalty should not be imposed.

[19] In declining to follow this judgement, the arbitrator committed an error of law. Whether that in itself makes an award reviewable, is a matter of contentious debate.

[20] In *Head of the Department of Education v Mofokeng*[4] Murphy AJA stated that:

> "Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her."

[21] In *DENOSA obo Du Toit v Western Cape Department of Health*[5] Davis JA asked, "Does an error of law on its own justify a review in a case such as the present dispute?" He embarked on an analysis of the doctrine of error of law as it was stated in *Hira v Booysen*[6] that, in terms of common law review:

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[4] (2015) 36 *ILJ* 2802 (LAC) at para 32.

[5] [2016] ZALAC 15 (12 May 2016).

[6] 1992 (4) SA 69 (A) 93 D-F.

> "'Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.
>
> Where the tribunal exercises powers or functions of a purely judicial nature, as for example where it is merely required to decide whether or not a person's conduct falls within a defined and objectively ascertainable statutory criterion, then the Court will be slow to conclude that the tribunal is intended to have exclusive jurisdiction to decide all question, including the meaning to be attached to the statutory criterion, and that a misinterpretation of the statutory criterion will not render the decision assailed by way common-law review. In a particular case it may appear that the tribunal was intended to have such exclusive jurisdiction, but then the legislative intent must be clear."

[22] Davis JA in *DENOSA*[7] then noted:

> "Since the advent of the Constitution of the Republic of South Africa Act 1996 ('the Constitution'), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome."

[23] The most important remark by Davis JA[8] appears to be *obiter*, but it is important for the argument in this case:

> "To recap, Navsa AJ said in *Sidumo* at para 105, that the review powers in terms of s 145 'must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair'. Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of the error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside of the award depending on the facts as established in the particular case."

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[7] Above para 21.

[8] *DENOSA* para 22.

[24] Following on *DENOSA*, the LAC in *MacDonald's Transport*[9] said:

> "In my view, there is much to be said for the proposition that an arbitrator in the CCMA or in a Bargaining Council Forum who wrongly interprets an instrument commits a reviewable irregularity as envisaged by Section 145 of the LRA; ie, a reasonable arbitrator does not get a legal point wrong. If so, the reasonableness test is appropriate to both value judgments and legal interpretations."

[25] In the case before me, the arbitrator committed an error of law by referring to and then not following the dictum of Basson J in *Rennies.* But even if that in itself does not make the award reviewable, it led to an unreasonable result. It must be reviewed and set aside on that basis.

Inconsistency

[26] Given my finding on the error of law, it is not strictly speaking necessary to consider the issue of inconsistency as well. But I am persuaded that the award must be reviewed on that basis as well.

[27] It is common cause that a lesser sanction was imposed in three previous similar cases. The requirement that an employer must be consistent in the exercise of discipline (often referred to as the 'parity principle') has its genesis in the self-evident requirement that an employee is entitled to be aware of the standard of conduct expected by the employer, and is entitled to know, in advance, what the consequences of non-compliance will be. The parity principle is nothing more than a general principle the discipline should not be arbitrary and unfair.[10]

[28] In *CEPPWAWU v Metrofile (Pty) Ltd*[11] the LAC confirmed that inconsistent treatment rendered dismissals arbitrary and substantively unfair, thereby giving rise to the right of reinstatement. It is for the employer to demonstrate why like cases of misconduct should not be treated in the

[9] *MacDonald's Transport Upington (Pty) Ltd v AMCU* [2016] ZALAC 32 (28 June 2016) para 30 [per Sutherland JA].

[10] *NUMSA v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 *ILJ* 1257 (A).

[11] (2004) 25 *ILJ* 231 (LAC) paras 42 and 57-59.

same way but adequately distinguishing between those cases on a fair basis.[12] In this case, that did not happen.

[29] In *Cape Town City Council v Mashito*[13] the LAC set out the principle as follows:

> "… In the absence of material distinguishing features equity would generally demand parity treatment".
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> …
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> "Fairness, of course, is a value judgement, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way… Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias."

[30] In this case, Ms Opperman had a clean disciplinary record for ten years. Three other employees who had committed the same misconduct as she did received written warnings and were not dismissed. She was not drinking at work; the breathalyser test found residual traces of alcohol slightly above 0,02 mg/l in her blood because she had been drinking the previous evening. The chairperson of the disciplinary hearing was prepared to impose a "severe written warning" valid for 12 months, consistent with the sanction imposed on previous offenders. The inconsistent treatment of Ms Opperman was unfair. The arbitrator's finding to the contrary was, in my view, so unreasonable that no reasonable arbitrator could have come to the same conclusion.

Conclusion

[31] I have found that the arbitrator's award must be reviewed and set aside. I agree that, with all the evidence before me, it would serve no purpose to

[12] *NUMSA v Atlantis Forge (Pty) Ltd* (2005) 26 *ILJ* 1984 (LC).

[13] (2000) 21 *ILJ* 1957 (LAC) 1961 A-F.

remit the dispute to the CCMA for a fresh hearing before another arbitrator.

[32] The chairperson of the disciplinary hearing imposed a fair sanction. The employee should be reinstated subject to the same sanction. However, two years have passed since the arbitration award was handed down. In my view, it would not be fair to hold the company responsible for the payment of the employee's salary for that period of time in circumstances where it had an arbitration award in its favour and where the employee's previous attorneys did not act expeditiously in ensuring that the review application be heard. Also, the company had already paid the employee three months' salary in accordance with the arbitration award for procedural unfairness. The parties' legal representatives agreed that I had a discretion with regard to back pay. I think it would be fair to reinstate the employee retrospectively, but to limit the back pay due to her from the date of dismissal to the date of the arbitration award.

[33] With regard to costs, I take into account that there is an ongoing relationship between the employee and the company, and also between her trade union, the National Union of Mineworkers (that represented her at the arbitration) and the company. Furthermore, the arbitration award was in favour of Harmony Gold and it had little option but to defend it. In law and fairness, I do not consider a costs award to be appropriate.

Order

[34] I therefore make the following order:

34.1 The arbitration award of the second respondent, Commissioner Collins Lenkwasi Makama, under CCMA case number NWKD 3964-13 dated 1 June 2014, is reviewed and set aside.

34.2 It is replaced with an award that the dismissal of the employee, Ms Marina Opperman, was substantively and procedurally unfair.

34.3 The third respondent, Harmony Gold, is ordered to reinstate Ms Opperman retrospectively to the date of her dismissal.

34.4 The back pay due to Ms Opperman is limited to the period from her date of dismissal to the date of the arbitration award, 1 June 2014.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Jason Whyte of Cheadle Thompson & Haysom.

THIRD RESPONDENT: Prevot van der Merwe of Webber Wentzel.