



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 232/2013

In the matter between:

MAFALENA ZACHARIA MODIBA

Applicant

and

SAMANCOR EASTERN CHROME MINE

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

KHAZAMOLA SAMUEL NTSUMELA N.O

Third Respondent

Heard: 25 May 2016

Delivered: 22 July 2016

Summary: Review application. The test for review restated. The Commissioner requiring the employee to prove that the equipment used to test cannabis in his blood was not functioning properly.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award of the third respondent (the Commissioner) made under case number LP 6958 –12 dated 13 December 2012, in terms of which the dismissal of the applicant, Mr Modiba (hereinafter referred to as the “employee”), was found to have been both substantively and procedurally fair. The employee’s claim of unfair dismissal was, accordingly, dismissed.
- [2] The employee was prior to his dismissal employed by the first respondent as a diesel mechanic. He was charged and dismissed for the following offence:
- ‘(He) tested positive for being under the influence of drugs whilst reporting for duty on 24/08/2012.’
- [3] The charge which had been proffered against the employee arose from the drug test which was conducted by a nurse employed by the first respondent. The test found the employee to be positive of the cannabis drug.
- [4] Subsequent to his dismissal, the employee referred an unfair dismissal dispute to the CCMA. The Commissioner found his dismissal to be both procedurally and substantively fair and, accordingly, dismissed his claim. The employee was aggrieved by that finding and, accordingly, instituted the current review proceedings.

The grounds for review

- [5] The employee has raised several grounds of review amongst which he contends that the arbitration award is not supported by the evidence which was properly before the Commissioner. He further contends that the Commissioner failed:
- To appreciate that he had disputed having had cannabis in his blood.
 - To appreciate that the onus was not on him to prove the fairness of the dismissal.
 - The evidence of the respondent was inadmissible, was hearsay because the person who testified was not the one who conducted the test.
 - To appreciate and apply his mind to the totality of the evidence before him.
 - To appreciate that the respondent did not prove the results of the tests on 24 August 2012 and the authenticity of the equipment which was used.
 - Appreciate that the sanction of dismissal was not appropriate in the circumstances.

The arbitration award

- [6] In arriving at the conclusion that the dismissal of the applicant was fair, the Commissioner reasoned:

[12] The Applicant was dismissed for testing positive for cannabis. This followed routine drug test conducted on 24 August 2012. The Applicant did not dispute the fact that he tested positive. However, his defence is to the effect that the equipment used for the test is not reliable. I rejected this defence as inconceivable. Firstly, the Applicant tested negative in the subsequent test conducted on 4 September 2012. Unlike the earlier test results, the Applicant indicated that he accepted the test results for 4 September 2012.

[13] Obviously the Applicant accepted the test results for the tests conducted on 4 September because it is for his own convenience. Secondly, the Applicant failed to prove that the apparatus used during the 24 August tests were unreliable. Furthermore, the Applicants explanation that at the time of the test he had consumed traditional medicine is unconvincing.'

Evaluation

[7] The test to apply in considering whether to interfere with the Commissioner's arbitration award is that of a reasonable decision-maker as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.¹ The test was clarified in *Herholdt v Nedbank (COSATU as Amicus Curiae)*,² in the following terms:

[25] 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 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 arbitrator must have misconceived the nature of the inquiry 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 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.'

[8] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*,³ the LAC stated that the questions that need to be asked in determining whether a defect as envisaged in s 145 (2) (a) (i) of the LRA, exists in an arbitration award are the following:

¹ (2007) 28 ILJ 2405 (CC) at para 110.

² (2013) 11 BLLR 1074 (SCA) at para 25.

³ [2014] 1 BLLR 20 (LAC) at para 20.

[20] ... (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?"

[9] In dealing with the grounds of review under s 145 (2) of the LRA, the LAC in *Department of Education v Mofokeng and Others*,⁴ held that:

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a

⁴ [2015] 1 BLLR 50 (LAC) at para 33.

misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

- [10] It is trite that the onus to prove that a dismissal of an employee is fair rests with the employer. Failing to adduce evidence to show that the dismissal was for a fair reason will result in the dismissal being found to be unfair.
- [11] In arriving at the conclusion that the dismissal was fair, the Commissioner based his decision on two main grounds. He found that the employee did not dispute that he tested positive of cannabis and that his defense was that the equipment was defective.
- [12] As indicated earlier, the Commissioner rejected the defense of the employee that the equipment used in testing his blood was unreliable because he had tested negative in the subsequent test which was conducted on 4 September 2012, the results of which he had accepted. The Commissioner seems to accept that there was a need to prove the reliability of the equipment used in testing whether there was cannabis in the employee's blood. In this respect, the critical evidence to prove that the equipment at the time of the testing was functioning properly was that of the nursing sister who conducted the test. She was not called as a witness by any of the parties.
- [13] The Commissioner, in his finding, places the burden of proving that the equipment was reliable or functioned properly on the employee. This is clearly a fundamental misconception of the legal principle relating to onus of proof. The question of the authenticity of the equipment forms a basis for determining the validity or fairness of the dismissal.
- [14] It is eminently clear from the reading of the transcript of the arbitration hearing that the issue of the reliability of the equipment was key to the defense of the employee. Accordingly, the principal issue which the Commissioner had to

determine relates to the reliability of the equipment used to test the presence of cannabis in the employee's blood stream. This issue has a material bearing on the issue in dispute. In this respect, the Commissioner, at the commencement of the hearing, included the issue of the reliability of the equipment as one of the issues he had to deal with.

- [15] Before dealing with the issue of the reliability of the equipment, it should be pointed out that the issues of consent to undergo the testing by the employee and the outcome of the other test are inconsequential to the real issue which the Commissioner had to determine. In other words the fact that the equipment produce certain results on an particular day does not mean it will always function properly in all the test. It also does not mean that the fact that it function properly on a particular day, does not validate its previous performance.
- [16] Turning to the issue of the reliability of the equipment, it should be noted that the person who operated the equipment in conducting the test, the nursing sister, was not called to testify. Mr Maimane, the HR practitioner, testified on behalf of the first respondent regarding the testing. He testified that the test was conducted by a nursing sister at the site clinic. He conceded that he could not say much about the test itself except to rely on the report submitted by the nursing sister. He thus could not testify on the reliability of the equipment used to conduct the blood test.
- [17] In my view, the Commissioner failed to appreciate the incidence of onus in relation to the authenticity of the test and reliability of the equipment used to test the blood of the employee for cannabis. This misconception was a serious misdirection that resulted in the decision which no reasonable decision-maker could have reached. The misconception rendered award reviewable.
- [18] In my view, it was as result of the misconception regarding the fact that the onus to prove the fairness of the dismissal rested on the first respondent that the Commissioner failed to apply his mind properly to the facts before him. Had he fully appreciated that the nature of the dispute before him required the first

respondent to prove on the balance of probability the fairness of the dismissal, he would have found that the first respondent had failed to discharge its duty. He would thus have found that the dismissal of the employee to be substantively unfair.

[19] In light of the above, I find that the applicant has made a case for the review of the arbitration award of the Commissioner. I also see no reason in light of all material that appears on the record why the matter should be remitted to the second respondent for a rehearing.

[20] Furthermore, I see no reason why, in fairness and law, costs should not follow the results.

Order

[21] In the circumstances, the following order is made:

1. The arbitration award made by the third respondent under case number LP 6958 –12 dated 13 December 2012, is reviewed and set aside.
2. The arbitration award is substituted with an order to the effect that the dismissal of the applicant was substantively unfair and that the first respondent is ordered to reinstate the applicant retrospective to the date of the dismissal without any loss of benefit that may have accrued including back pay.
3. The first defendant is to pay the costs of the applicant.

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M E S Makinta of Makinta Attorneys

For the Respondent: Advocate Z M Navsa

Instructed by: Saloman Holmes Attorneys