Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 430/15

In the matter between:

ESKOM HOLDINGS SOC LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
NORMAN MBELENGWA (*N.O.*)	**Second Respondent**
NUM OBO SYLVESTER LEIEE	**Third Respondent**

Heard: 18 August 2016

Delivered: 23 August 2016

Summary: (Review-alleged unreasonable determination of sanction – arbitrator holding dismissal unfair on account of inconsistent treatment - to consider irregularity in the form of unreasonableness applicant must demonstrate that the alleged flaw was fatal to the arbitrator's reasoning-centrality of *ratio* in Sidumo in evaluating arbitrator's determination of an appropriate sanction)

JUDGMENT

LABOUR COURT

LAGRANGE J

Introduction

[1] In this application, the third respondent Mr S Leiee ('Leiee'), was dismissed on 5 November 2013 for failing to follow standard operating procedures which resulted in him omitting to earth a transformer and electrocuting himself. Leiee lost an arm as a result of the electrocution.

[2] At the arbitration, Leiee acknowledged he was guilty of the charges which resulted in his dismissal. His explanation for the accident was that he had gone outside to get some tools and when he returned he climbed the ladder on the transformer in question thinking it was the transformer that he was about to work on. He claimed to have been distracted by personal concerns at the time.

[3] The arbitrator was satisfied that, if Leiee had followed the procedures, the accident would not have occurred. Leiee contended at the arbitration that his dismissal was unfair because other employees who had committed similar offences were not dismissed. Leiee pleaded guilty to the charge when the Commissioner explained to him that in the other cases, the employees had accepted they were guilty and unless he also accepted he was guilty of the misconduct he was charged with, no comparison could be made those cases. He said that if he was reinstated he would teach other people not to take their duties lightly and that the rules and regulations had to be strictly complied with.

[4] He also complained that he should not have been permitted to perform the work in question by the controller because he was not authorised to work on 132KV circuits but only 33KV circuits. Eskom did not dispute this but pointed out that he also knew that he was not authorised to work on 132 kV circuits and could have refused to do so.

[5] At the disciplinary enquiry, the applicant did not plead guilty but left the enquiry with his representative when the chairperson refused a postponement. In his evidence, Leiee said he left the enquiry because he acted on the advice of his representative. As a result of not testifying at the

LABOUR COURT

internal enquiry, no evidence of remorse on the part of Leiee was before the chairperson, nor had the applicant pleaded guilty.

[6] The salient features of the two other cases of similar misconduct in issue in the arbitration, which Leiee claimed were evidence of inconsistent treatment on the part of the Eskom may be summarised thus:

6.1 In the case of Mr P Madubaduba, a senior supervisor ('Madubaduba'), he failed to earth one of four mini substations he and his subordinates were working on. As a result, one of his team was electrocuted when he worked on the unearthed substation and sustained burns on his hands. At the disciplinary enquiry, in which Madubaduba testified and expressed remorse, he was found guilty and issued with a sanction in the form of an unpaid suspension for 14 days.

6.2 In the other case of Mr T Moloko ('Moloko') who had worked on a live line without following the operating instructions (the same offence that Leiee was charged for) and allowing one of his team to work without a safety vest. He pleaded guilty at the disciplinary enquiry, apologised for what he had done and undertook never to do it again and was issued with 14 days suspension as a penalty in that he showed remorse for his actions. In his case, there were no injuries or fatalities experienced as a result of his conduct.

<u>The review</u>

[7] The only issue raised on review by the applicant is that, the arbitrator allegedly committed gross misconduct in failing to apply his mind to the issue of sanction because he failed to take into account the reasons why the employer had imposed the sanction of dismissal and the seriousness of the allegations. The applicant submits that because of this, the award is not one that a reasonable Commissioner faced with the same task can arrive at. The thrust of the complaint is that, whereas the two other employees who had committed similar misconduct had pleaded guilty and had been remorseful, Leiee had walked out of the enquiry and had not pleaded guilty or expressed any remorse. In short, the applicant argues

LABOUR COURT

that the arbitrator's failure to take this into account renders his finding on sanction unreasonable.

[8] In ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***[1], the LAC expressed the test for setting aside an award based on unreasonableness:

> "[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 B 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 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 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."[2]

(Emphasis added)

In other words, the alleged failure of the Commissioner to consider or take significant account of Leiee's failure to plead guilty or shown remorse at the disciplinary enquiry of necessity renders his findings unreasonable. A corollary of this approach is that, if the factor which the Commissioner allegedly discounted was taken into account, his conclusion could not reasonably stand. Similarly, in ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others***[3], the LAC stressed the importance of not conflating a review based on unreasonableness with an appeal. Once again it emphasised that for a Commissioner's failure to attach significance to certain evidence, the effect must be one that makes the conclusion insupportable:

> "[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an

[1] **(2013) 34 ILJ 2795 (SCA)**

[2] At 2806

[3] **(2014) 35 *ILJ* 943 (LAC)**

LABOUR COURT

unreasonable outcome (see Minister of Health & another NO v New Clicks SA (Pty) Ltd & others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."

(emphasis added)

[9] The arbitrator concluded that Eskom had failed to justify the difference in the sanction imposed on Leiee when compared to the sanction imposed on the other two employees and this amounted to the inconsistent application of discipline. He found that Leiee should also have been subjected to 14 days suspension without pay as was the case with the others. Nonetheless, the arbitrator deemed full reinstatement with backpay to be inappropriate given that Leiee committed a serious offence, despite the injuries he sustained.

[10] In reaching this conclusion, the arbitrator reasoned along these lines:

10.1 The misconduct which the three employees had been found guilty of was essentially the same despite the different work they did.

10.2 The fact that in Moloko's case nobody was actually injured was not a material consideration.

10.3 In Moloko's case, the chairperson appeared to have opted for unpaid suspension because the employee had apologised and shown remorse, but the chairperson failed to take into account the importance of the non-compliance with the regulations.

10.4 By contrast, in Madubaduba's case the chairperson had correctly emphasised the importance of non-compliance with the regulations and described Madubaduba's action as being grossly negligent, but nonetheless, again opted for suspension because Madubaduba

LABOUR COURT

changed his plea from not guilty to guilty and showed remorse. The arbitrator also was critical of the chairperson taking into consideration Madubaduba's role as a full-time shop steward who had showed good leadership and had respected the hearing process.

10.5 The arbitrator accepted that Leiee did not attend his enquiry as a result of advice given to him by the representative and noted his change of plea in the arbitration and his commitment to warn others of the dangers of taking safety procedures lightly.

10.6 The employer had led evidence that the dismissal of Leiee was appropriate because he had breached a life-saving rule. The arbitrator noted that this principle was not applied when it came to his two colleagues and they ought to have been dismissed also if that principle was paramount.

10.7 The arbitrator concluded that the reason for dismissing Leiee was because he left the enquiry.

[11] The first thing to note is that the arbitrator clearly did consider the employer's reliance on Leiee leaving his enquiry as a factor which played a role in its decision to dismiss him. He also considered the fact that the contrition shown by the other two employees at their enquiries had played a role in the decision. However, what clearly concerned the arbitrator was that, in his view that consideration could not justify the gulf between the relatively light sanction imposed on them and the contrastingly heavy sanction imposed on Leiee given the justifiable importance attached to compliance with standard operating procedures as a fundamental safety rule.

[12] It is apparent that he believed that the sanction imposed on Leiee's former colleagues was far too light given the gravity of the offence and hence he declined to award reinstatement with backpay to Leiee. Thus, the arbitrator imposed what he believed was an appropriate sanction in the circumstances taking into account the fact that he could not accept the justification for the relatively lenient treatment meted out to Leiee's colleagues for similarly serious misconduct, simply because they had shown contrition at the time of their hearings, whereas it was only at the

LABOUR COURT

arbitration that Leiee changed his plea. It should be noted that prior to altering his plea to one of guilt, Leiee did not really dispute that he had acted contrary to the standard operating procedures. His defence was one that sought to diminish some of his accountability for what happened on the basis that he should not have been allowed to perform that work in any event because he was not qualified to work on such high voltage circuits and that it was an inadvertent error which had led him to climb the ladder on the transformer which had been switched on, rather than a conscious decision not to follow the safety procedures.

[13] In these circumstances, it is difficult to say that the arbitrator's decision on sanction would necessarily have been different because firstly, he plainly did consider the issue of contrition as a distinguishing feature, but on his own evaluation dismissed that as insufficient to warrant the yawning disparity in the sanctions imposed. In my view, the applicant has not demonstrated that the arbitrator's finding can be faulted on the basis that it is irrational for failing to attach significance to the factor which the applicant attaches overriding importance to. I am reinforced in this conclusion by the central ratio of the decision of the Constitutional Court in ***Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*** where it emphasised that, it is the arbitrator's sense of fairness which must prevail in determining if the dismissal was a fair sanction.[4]

[14] On the question of costs, the respondent party did not press for an adverse cost award in the event the applicant was unsuccessful and given that Leiee will be reinstated, I am disinclined to make a cost award.

Order

[15] In view of the reasoning above, the review application is dismissed with no order as to costs.

_____

[4] (2007) 28 *ILJ* 2405 (CC) at 2433, para 79

LABOUR COURT

_____

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	C Mogane of Mohlaba & Moshoana Inc.
THIRD RESPONDENT:	D Maimane of K D Maimane Inc

LABOUR COURT