Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: JR 239/16

In the matter between:

RONALD RATSIBVUMO	**First Applicant**
EDWARD KAPA	**Second Respondent**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION.	**First Respondent**
L M TAYLOR *N O*	**Second Respondent**
LA CONCORDE BAKERY (PTY) LTD	**Third Respondent**

Heard: **25 October 2017**

Delivered: **27 October 2017**

Summary: (Review – misdirection – plea of guilty in disciplinary enquiry not dispositive of need to consider guilt in arbitration proceedings – finding of guilt nonetheless justifiable on a proper consideration of the evidence – application dismissed)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award.

[2] The arbitrator found that she had two central issues to determine. Firstly, did the applicants admit they were guilty of the charge of the unauthorized removal of property, misusing the employer's vehicle and bringing the employer into disrepute? The charges arose from the applicants allegedly removing a geyser from the basement of the premises of a client of the employer where they had gone to deliver bread. It was alleged they had used the employer's delivery van to remove it. Secondly, was the applicants' dismissal substantively fair?

[3] In summary, the arbitrator concluded that the applicants were unable to refute the evidence of three witnesses of the employer, including the interpreter at the disciplinary enquiry who confirmed that they had pleaded guilty to the charges in the disciplinary enquiry. It was common cause the employer had led no evidence at the disciplinary enquiry. However , having found that the applicant's had pleaded guilty at the disciplinary enquiry the arbitrator held:

> "I have found that the applicants pleaded guilty at the hearing and as such am not obliged to consider the respondents witnesses and testimony in relation to the allegations and circumstances leading to the applicants dismissal even though such evidence was led. All I have 'to now consider is whether dismissal was appropriate under the circumstances…"

(emphasis added)

[4] The arbitrator held that the misconduct which she found the applicants had pleaded guilty to at the disciplinary enquiry was tantamount to theft and that the fact that they used their employer's vehicle to remove the geyser aggravated matters. The fact that they previously had clean disciplinary records outweighed the gravity of their misconduct and their dismissal was substantively fair.

The review application

[5] The applicants claim that arbitrator committed a gross irregularity in deciding that he had to determine whether or not they had pleaded guilty at the disciplinary enquiry. Instead, the arbitrator should have conducted an enquiry *de novo*. The employer argued that the arbitrator did in fact consider the evidence led in the arbitration hearing pertaining to whether or not the applicants were guilty of the alleged misconduct, apart from considering whether or not they had pleaded guilty in the disciplinary enquiry. I agree with the applicants that this is not what the arbitrator did. It is apparent that although other evidence was led which was relevant to the determination of whether or not they were guilty of the misconduct, the arbitrator clearly decided that it was sufficient to make a finding on whether or not they had pleaded guilty in the original disciplinary enquiry. The arbitrator clearly did not take on board the fact that apart from disputing whether they had pleaded guilty, the applicants at the arbitration hearing now denied their guilt.

[6] Clearly, if the applicants pleaded guilty in the original disciplinary enquiry that is a significant factor in evaluating the evidence for and against their guilt in the *de novo* hearing before the arbitrator. But given the fact that they disputed such a plea and given that they now disputed they were guilty of the misconduct, the arbitrator was obliged to make her own finding on the question of the guilt, taking all the evidence into account. Her failure to do so resulted in her failing to determine a fundamental issue in the performance of her functions, which was not merely to determine if the applicants had pleaded guilty in the disciplinary enquiry but whether in the light of all the evidence before they were probably guilty of the misconduct. Her finding on how they pleaded in the disciplinary enquiry could not logically be dispositive of this question.

[7] However a misdirection does not automatically result in a successful review. If the final result might still have been obtained on the evidence before the arbitrator, without the misdirection, there is no need to set the

award aside. The most recent iteration of the review principle by the LAC in ***SA Breweries (Pty) Ltd v Hansen & others***[1] put it thus:

> "[10] The test that the Labour Court is required to apply in a review of an arbitrator's award was settled by the Constitutional Court in Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo). It is that an arbitration award is reviewable if the decision reached by the arbitrator was one that a reasonable decision maker could not reach. Essentially, this test requires the Labour Court, sitting as a court of review, to enquire whether the decision under review is one that a reasonable decision maker could not reach on the evidential material available. On this test, an arbitration award based on defective reasoning by an arbitrator may still pass the muster required A in reviews, provided that the result is one that a reasonable decision maker could have reached. This was clarified by the Supreme Court of Appeal in Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) as follows:
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> > '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, are not in and of themselves sufficient for an award to be set aside, but are only of any C consequence if their effect is to render the outcome unreasonable.'
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> [11] In Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (Gold Fields), this court refined the Sidumo test by introducing a two-stage enquiry. In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome <u>by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator</u>. An arbitration award will, therefore, be considered to be

[1] (2017) 38 ILJ 1766 (LAC)

> reasonable when there is a material connection between the evidence and the result."[2]

(emphasis added - footnotes omitted)

Evaluation

[8] The parties agreed that if the award should be set aside on account of the misdirection mentioned, that the court should substitute the arbitration award based on the available record and not remit the matter back to be heard *de novo* by another arbitrator. For the reasons below that turns out to be unnecessary.

[9] During the course of the arbitration, the employer had attempted to introduce video footage supposedly showing the loading of the geyser at the client's premises into its van but initial attempts to replay the video footage were unsuccessful. Although the arbitrator believed the video footage would be vital, when the arbitration hearing resumed the employer advised that having viewed the video footage again, it was of the view that the applicants could not be clearly identified from the footage. Instead, the employer led the evidence of a security officer who said he had been present when the applicants returned to the client's premises to return the geyser and who had also called the police.

[10] The employer had previously led evidence of Mr Misibeni, a manager to the effect that he had been phoned by a security official of the client to say that the applicants had removed a geyser from its premises in the firm's vehicle and he had phoned the first applicant and instructed them to return the geyser. He also testified that he received another call from the client asking the firm to collect its vehicle because the applicants had been arrested by police for removing the geyser from the client's premises without permission. The applicant's representative never disputed this evidence. It was only in their own evidence in chief that the applicants denied receiving a call to return to the client and return the geyser.

[11] The security officer who testified was not materially shaken on his core testimony that he saw the applicant's unloading the geyser on their return

[2] At 1771-2

to the client's premises and that he called the police to the premises. His version was consistent with Mr Misibeni's evidence summarized above. There was no dispute that the applicants were arrested by police who had been summoned by the client. The applicants' version was that they were simply returning to the client's premises to collect crates they had used to make the earlier delivery. They also claim that the police never saw any geyser when they arrived at the premises. Little of this version was put to the employer's witnesses. In effect, the applicants' version was that the entire story about them removing a geyser and returning it was simply a fabricated tale made up by the employer and the client. No plausible explanation was offered why such an elaborate story would have been made up to implicate them.

[12] It was also pointed out that they dishonestly claimed not to have got proper notice of the disciplinary hearing. On the question of whether they had pleaded guilty in the original disciplinary enquiry, I cannot criticise the arbitrator's finding on that issue. Even if this was an appeal, I am satisfied that the evidence of the employer's three witnesses on a balance of probabilities was more plausible than the applicants' claim that they never pleaded guilty at the disciplinary enquiry, especially when it is taken into account that the employer did not see the need to lead any evidence on the charges at the disciplinary enquiry.

[13] On the merits of whether or not the applicants were guilty of the misconduct, the employer's version of events based on its witnesses was internally coherent, corroborative and plausible. By contrast, the applicants' version that they were just going about their normal business and police had been called on account of the removal of an imaginary geyser is inherently implausible. It was suggested in argument that if they had taken the geyser without authority they would not have returned it to the client. However, such conduct must also be considered in the light of their plea of guilty at the disciplinary enquiry. It is not implausible to think that there could be another explanation for returning the geyser, namely to avoid a charge of theft once their action had been discovered.

[14] One of the applicant's alternative grounds of review was that the arbitrator failed to take account of the employer's ultimate failure to present the video evidence which supposedly showed the geyser being loaded into the van. Since the arbitrator had seen this as crucial during the arbitration, it was argued that the failure to adduce that evidence necessarily meant the case was weak. However, the arbitrator's comment on the crucial nature of the video evidence was made before the eyewitness testimony of the security officer was led. His evidence concerned the offloading of the geyser by the applicants after he had phoned their employer and after they had been instructed to return the geyser. In the absence of the applicant's being able to offer a plausible innocent explanation why two bakery delivery staff would have a client's geyser in their employer's van, it is entirely reasonable to conclude that it was because they had intended to take it. They offered no explanation, but instead had to settle for simply denying that they were in any way involved in handling the geyser and even went so far as to claim that the police never saw it when they came to arrest them, version which was not put the security officer. Having led the security officer's eyewitness testimony it was not incumbent on the employer to also lead the evidence of the video footage, particularly if it claimed the applicants could not be clearly identified in that footage.

[15] It is trite law that a party not required to be the best evidence available and if it chooses to lead eyewitness testimony instead of video footage, if that eyewitness testimony is sufficient as direct evidence of the incident, the failure to other evidence to corroborate the eyewitness testimony is neither here nor there, and the arbitrator was entitled to draw conclusions based on that evidence notwithstanding the fact that other evidence might have been available but was not introduced.

[16] On the issue of credibility, it not a case which in my view requires credibility findings to be made, since it can be decided on the inherent relative plausibility of the two competing versions. However, if credibility is considered it is the applicants who have the problem. Given that the finding is sound that they admitted guilt in the enquiry, they were not consistent in this regard when it came to the arbitration. Secondly, they

were shown to have lied about being notified of the disciplinary enquiry. Similar credibility issues do not arise with the employer's witnesses.

[17] Having regard to the evidence, I am satisfied that it is more likely the applicant's returned to the client's premises and unloaded the geyser they had removed. It is self-evident that their conduct would reflect poorly on the company they worked for in the eyes of the client. Accordingly, I am satisfied the charges against them were proven and I agree with the arbitrator that the seriousness of the misconduct which was tantamount to theft justified their dismissal notwithstanding the mitigating factors he mentioned. Thus the ultimate conclusions of the arbitrator that the applicants were guilty and that their misconduct warranted dismissal must still stand, even though the arbitrator had decided they were guilty on the basis of a serious misdirection about the effect of them pleading guilty at the disciplinary enquiry.

Costs

[18] Strictly speaking, the applicants were successful in their claim that the arbitrator misdirected herself and accordingly her finding of guilt was arrived at by means of a material misdirection. On the other hand the same ultimate findings are justifiable on the evidence before her after correcting the skewed approach to the evidence resulting from her misdirection. Accordingly, the applicants were ultimately unsuccessful. Given that their main point on review was substantially correct but not enough to warrant the award being overturned, it is more appropriate that the parties bear their own costs.

Order

[19] The review application is dismissed.

[20] No order is made as to costs

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANTS:	B Khanyile of Bongani Khanyile Attorneys
THIRD RESPONDENT:	M E Duvenhage of Duvenhage Attorneys