

SOUTH AFRICA / JUDGMENT

Masuluke v Imperial Cold Logistics and Others (JR871/18) [2021] ZALCJHB 13 (8 February 2021)

[2021] ZALCJHB 13

COURT

Labour Court Johannesburg

BEFORE

T Deane

CASE / FILE NUMBER

JR871/18

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR871/18

In the matter between:

KHOMISANI VICTOR
MASULUKE
Applicant
And
IMPERIAL COLD
LOGISTICS
First Respondent
COMMISSION
FOR CONCILIATION
Second
Respondent
MEDIATION AND
ARBITRATION
COMMISSIONER
JOSEPH MPHAPHULI N.O
Third
Respondent

Heard:

13
January 2020

Delivered:

08 February 2021

Summary:

Application to review and set aside arbitration award – condonation ruling – condonation granted in the interests of justice and to bring finality – commissioner’s decision was reasonable - review application dismissed – no costs

JUDGMENT

DEANE AJ

Introduction

- [1] This is an application brought in terms of section 145 of the Labour Relations Act 66 of 1995 (The LRA) for an order to review and set aside an arbitration award dated 16 March 2018, granted by the Third Respondent under case number GAJB24284-17; alternatively, that the matter be remitted to the Second Respondent to be considered afresh by an arbitrator other than the Third Respondent.
- [2] The Applicant delayed in bringing the review application and filed an application to have the delay condoned.
- [3] The First Respondent does not oppose the condonation application; but opposes the review application.
- [4] I will first deal with the issue of condonation.

Condonation Application

- [5] A decision to grant or refuse condonation requires this Court to exercise its discretion when deciding whether the Applicant has shown good cause why the late referral should be condoned. Any application seeking condonation must set out the grounds established in *Melane v Santam Insurance Company Limited*.^[1] This, in turn, must deal with the degree of lateness, the reasons for lateness, the prospects of success and any prejudice to the other party.
- [6] The delay in this matter is not excessive;^[2] the explanation proffered by the Applicant in terms of the condonation application^[3] serves as a reasonable reason^[4] and the outcome of this review will serve the interests of justice^[5] as the outcome will bring legal certainty; and in any event, the First Respondent’s representative has not opposed the application for condonation.

Material Background

Facts

- [7] The Applicant was employed as a Truck Driver by the First Respondent on 01 March 2013.
- [8] The Applicant had been assigned to deliver 50 bags of product code 20023 to a Usave White river on 21 August 2017. The stock was not delivered but returned to the depot for delivery the next day.
- [9] The returned stock comprised of 45 bags of product with code 20023 and 5 bags of product 20013. The Applicant was 5 bags short of product code 20023.
- [10] The Applicant's truck was dispatched with 50 bags for delivery. The goods were dispatched with code number 20023. The Applicant did not deliver the goods due to time constraints. As mentioned, the Applicant returned to the company premises with 45 bags with code number 20023 and another 5 bags with code number 20013. The Applicant did not account for the whereabouts of the missing 5 bags with code number 20023.
- [11] It was not disputed that the 5 bags with code number 20013 belonged to another driver; Lindiwe's consignment.
- [12] The mix up according to the Applicant took place at the cross-load point.
- [13] At a disciplinary hearing on 28 September 2017[6] the Applicant was charged with and dismissed on the following allegations:

13.1 Gross Misconduct (Misappropriation of Stock); wherein it is alleged that on the 21st of August 2017 the Applicant short debriefed 5 bags of shipment number 6100403313.

13.2 Gross Dishonesty; in that on the 21st of August 2017 the Applicant is alleged to have misled the debriefer to believe that 5 bags of shipment returned by the Applicant was extra stock returned instead of declaring that they belonged to another driver (Lindiwe Zindela).

Grounds of review

- [14] In summary, the Applicant's grounds of review are that in respect of the findings on misconduct, the Third Respondent (Commissioner) failed to take into account the fact that when loading in the workplace there is a possibility of loading products with a wrong code; and that during the process of cross-offloading there was a possibility that the other driver might have taken the five bags of product code 20023; that other employees are not dismissed for a shortfall but are instead ordered to pay the shortfall, and that the Commissioner found that the Applicant had a final written warning in circumstances where the Applicant disputed same, and the Commissioner failed to interrogate such final written warning.

Test for Review

[15] The test for review does not require repetition at every turn. It is trite that only decisions that a reasonable commissioner cannot make are reviewable.

[16] The test that the Labour Court is required to apply in a review of an arbitrator's award is, "is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"[7]

[17] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, [8] the Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable

decision-maker could make, and the reasonableness test is still aptly described in the pre-Sidumo case of *Computicket v Marcus NO and Others* [9] where it was held that "the question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable".

[18] As it was stated in *Ekurhuleni Metropolitan Municipality v SA Municipal Workers Union & others*; [10]

'...The test is concerned with outcomes, not the process by which the outcomes are achieved. Only when the outcome is one which no reasonable arbitrator, with the material that was to hand, could produce, is an award liable to be set aside. The frailties of an

arbitrator's reasoning, or inattention to mentioning every facet of relevance, or clumsiness in articulation are unimportant,

unless they are causally connected to an unfair outcome.' [11]

[19] This court is entitled to interfere with an award made by an arbitrator if and only if the arbitrator misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result.

[20] As the Court rightly pointed out in *The National Commissioner of the South African Police Service v Myers and Others* [12] "...whatever one's personal view may be, the test as set out in *Sidumo* ... is whether or not the arbitrator's decision that dismissal is an appropriate sanction is a decision that a reasonable

decision-maker could reach".

[21] In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the Arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. [13] The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator. [14]

[22] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.

[23] In *Fidelity Cash Management Service v CCMA and Others*[15] Zondo JP (as he then was) applied the Sidumo test thus:

'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently.'

And that:

'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.'

[24] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.

[25] It is on this basis that I proceed with the merits of the application below.

Analysis

[26] Both the Applicant and First Respondent's versions are recorded in detail in the Transcribed Record[16] and in the Arbitrator's Award[17] and it will therefore not be repeated in detail herein. Only those salient facts pertinent to this Review Application will be referred to.

[27] The dispute came before the Commissioner, who was tasked with determining the fairness of the dismissal.

The First Respondent's case

- [28] Mr Themba Vilakazi gave evidence in support of the First Respondent. He was employed as a Transport Controller at the First Respondent for 25 years; 20 of which was spent as transport controller.
- [29] He indicated that he had received a call from one Lindiwe, another delivery truck driver on the day of the incident.
- [30] Lindiwe who was making a delivery at a customer at the time, indicated that after she had offloaded her stock at the customer she was short of 5 bags with code number 20013.[18] This followed a cross-load between Lindiwe and the Applicant. The cross-load was aimed at reducing the over loaded Applicant's

truck. The process was later reversed in which case the Applicant's bags were loaded back onto the Applicant's truck.

- [31] It later turned out that the five bags belonging to Lindiwe landed on the Applicant's truck.

The Applicant's case

- [32] The Applicant gave evidence under oath that he left the First Respondent's premises with 50 bags of consignment and later returned with 50 bags.[19] He conceded under cross-examination that only 45 of those bags were from the original consignment and that the other 5 bags were Lindiwe's.
- [33] Regarding the issue of dismissal as a sanction, he argues that the company had forged a final written warning which was live at the time and that there was inconsistent application of disciplinary measures by the First Respondent.
- [34] The Applicant called one Mr Chris Moropana (Moropana), as witness. Moropana represented the Applicant in the initial disciplinary hearing. He testified that the Applicant "came back with a complete stock it was a surprise to me when I found out that he was dismissed"[20].
- [35] On the ground of review that "the third respondent failed to take into account the fact that when loading in the workplace there is a possibility of loading products with a wrong code"; I find that the First Respondent's evidence in terms of the debriefing forms and codes indicate that 50 bags with the code 20023 were indeed initially dispatched.
- [36] Looking at the evidence in totality before me, it is undisputed that the Applicant's truck was dispatched with 50 bags of product code 20023 for delivery at Usave White River. The Applicant admits to not delivering the goods but to returning to the company premises with only 45 bags of product code 20023 and an additional 5 bags of product code 20013.
- [37] It is also clear from the Transcript that the 5 bags of product code 20013 belonged to another driver's consignment (Lindiwe's).

- [38] The Applicant also denies having knowledge of what happened to the 5 bags.[21] The Applicant was asked the following; “because the issue here is those 5 bags are missing and are unaccounted for, we want to know what happened to those?”[22]. The Applicant’s response was “but those 5 bags I don’t know if whether those (inaudible) loaded wrong the bags or what I don’t know”[23] (sic).
- [39] Looking at the transcript and the arbitration award, the Applicant’s defence is that he was dispatched with 50 bags of consignment and he came back with 50 bags. He argues that he therefore does not understand why he is being charged because according to him he came back with a complete stock.[24] He clearly ignores that the issue is not that he left and returned with 50 bags but that 5 of his 50 bags that he was initially dispatched with, is missing.
- [40] He later however indicates that the problem could have occurred when the stock was loaded. He argues that “according to me you cannot differentiate the.....those bags that this is 20023 or 20013”[25]. Once again he fails to understand and account for the bags that have been unaccounted for. This failure to understand or account for the bags is not based on any concrete evidence but on a pure denial of the facts; that is; he left with 50 bags of his consignment with code 20023 and despite not making the delivery he returned with only 45 bags of his consignment with code 20023.
- [41] Furthermore; the Applicant in his Founding Affidavit[26] argues that “I am not responsible for loading at the workplace. When loading it happens sometimes that bags with other product code can be loaded.”[27] He was supposed to deliver the goods to Shopright in Mpumalanga and stated that “when I approached the weigh bridge I could not pass as the load was big” [28]. To reduce the load a truck, of which Lindiwe was the driver, was sent to take some of the load. During cross-offloading, it happened that some of Lindiwe’s stock was put onto the Applicant’s truck. The Applicant states that “anything could have happened when we were cross offloading therefore cannot be blamed for dishonesty for such”[29].
- [42] On the ground of review that the Commissioner failed to take into account that “during the process of cross offloading there was a possibility that the other driver might have taken the five bags of product code 20023”; it is clear from the transcript that Lindiwe only called the First Respondent after offloading at her last customer and it was then when she realised that she was 5 bags short.[30] At the hearing evidence was led that Lindiwe did not come back to the employer’s premises with any or unaccounted for stock. There is simply no evidence to assume that the stock was taken and never returned by Lindiwe, as is the clear implication by the Applicant.
- [43] I am therefore satisfied in accepting that the most natural and plausible conclusion to be drawn from the evidence in this case is that “there were a number of shortcomings in the Applicant’s case”[31] and that the Applicant was indeed guilty of the allegations. The Commissioner further found that “in the first place the fact that the Applicant admitted to not having delivered 50 bags but only returned 45 bags put the Applicant in a precarious

position.” He further found, “in the second place, the fact that the Applicant had no explanation for the missing bags when he was responsible and answerable for his consignment equally weakened his case”.^[32] It is noted that there are responses that was given by the Applicant but the responses or so-called reasons proffered by the Applicant was so weak as to constitute no explanation at all.

[44] The Commissioner also found that “the dice was heavily loaded against the Applicant”, as “the Applicant could not extricate himself and his witness’s testimony did not add value to his case”.^[33] In fact, it is true that the Commissioner noted that “the witness completely missed the mark by testifying only about the fifty bags returned when the dispute was not about the total number of bags” but the missing 5 bags that remained unaccounted for and “the total number of bags destined to a particular client”.^[34]

[45] Looking at the evidence and the Transcript; the Commissioner’s finding that this was indeed the case is thus entirely sustainable, and certainly not irregular. It is, in short, a reasonable outcome that finds correlation in the evidence before him.

[46] Regarding the sanction; at the time of the misconduct a final written warning dated 21 December 2015 was still active. Despite allegations to the contrary by the Applicant, no evidence was put before the Commissioner to show that the final written warning was indeed forged or that the First Respondent applied inconsistent disciplinary measures. In fact, the Applicant’s witness Moropana indicated that approximately six people were subject to an enquiry and that Lindiwe herself was charged.^[35] No plausible contrary evidence was put before the Commissioner to indicate otherwise. The Commissioner wrote that “the

existence of a final written warning; an active one for that matter further worsened the Applicant’s situation” ^[36]; and that the “misconduct broke the trust relationship between the parties and was a fair reason to terminate the Applicant’s services”^[37]. I agree.

[47] The seriousness of the misconduct together with the final written warning was grounds for dismissal as an appropriate sanction.

Conclusion

[48] In conclusion, the Applicant’s review has no basis as the Commissioner’s finding of dismissal being a fair reason was substantiated by the evidence against the Applicant and is therefore not in any way irregular.

[49] The conclusion that the Commissioner reached is one that a reasonable decision-maker would have come to and I am, therefore, unable to conclude that his decision was one that a reasonable decision-maker could not reach.

[50] The Commissioner’s finding must accordingly, be upheld.

Order

[51] In the premises, I make the following order:

- (1) The Condonation Application is granted.
- (2) The Review Application is dismissed.
- (3) There is no order as to costs.

T Deane

Acting Judge of the Labour Court

Appearances:

For the Applicant: Dzudzani

Sithole Attorneys

For the First Respondent: Adv Mpho

Matela Sibanyoni and Associates Inc

[1] 1962

(4) SA 531(A).

[2] At the hearing the Applicant's representative stated that the application was 4 weeks late.

[3] Applicant's Heads of Argument court stamped 27/01/2020 and Founding Affidavit dated 18 May 2018.

[4] The Applicant's representative argued that the Applicant was a member of legalwise but he has struggled to obtain and secure the services of a representative.

[5] See page 5 of the Applicant's Heads of Argument court stamped 27/01/2020.

[6] There are various different dates in the Arbitration Award and the CCMA proceedings but the disciplinary hearing date states 28 September 2017.

[7] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at para 110. (Sidumo).

[8] Ibid at paras 118-119.

[9] Computicket v Marcus NO and Others 1999

(20) ILJ 343 (LC) 346.

[10] [2018] 3 BLLR 246 (LAC); (2018) 39 ILJ 546 (LAC).

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- [11] Ekurhuleni Metropolitan Municipality at para 18.
- [12] The National Commissioner of the South African Police Service v Myers and Others CA 4/09 (unreported), Labour Appeal Court, Cape Town (2 March 2012) at paras 103-104. (Myers).
- [13] See National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others 2011 ZASCA 74 (25 May 2011).
- [14] Herholdt v Nedbank Ltd (701/2012) 2013 ZASCA 97; 2013 (6) SA 224 (SCA); 2013 (11) BLLR 1074 (SCA); 2013 (34) ILJ 2795 (SCA) (5 September 2013). (Herholdt).
- [15] Fidelity Cash Management Service v CCMA and Others [2008] 3 BLLR 197 (LAC) at paras 98-100. (Fidelity Cash Management Service).
- [16] See Transcribed Record.
- [17] Arbitration Award dated 16 March 2018. (Arbitration Award)
- [18] Pages 4-5 of the Transcript or pgs 84-85 of the Bundle of Documents.
- [19] See top of pg 22 of the Transcript or pg 102 of the Bundle of Documents.
- [20] Pg 54 of the Transcript or pg 124 of the Bundle of Documents.
- [21] See pgs 27-28 of the Transcript or pgs 107-108 of the Bundle of Documents.
- [22] See pg 21 of the Transcript of pg 101 of the Bundle of Documents.
- [23] See pg 22 of the Transcript of pg 102 of the Bundle of Documents.
- [24] Pg 40 of the Transcript or pg 120 of the Bundle of Documents.
- [25] Pg 39 of the Transcript or pg 120 of the Bundle of Documents.
- [26] Dated 18 May 2018.
- [27] Para 11 of Applicant's Founding Affidavit.
- [28] Para 11 of Applicant's Founding Affidavit.
- [29] Para 14 of Applicant's Founding Affidavit.
- [30] From pg 17 of the Transcript.
- [31] The Award, pg 3.
- [32] The Award, pg 4.
- [33] The Award, pg 4.
- [34] The Award, pg 4.
- [35] See pgs 56-57 of the Transcript or pgs 136-137 of the Bundle of Documents.

[36] The Award, pg 4.

[37] The Award, pg 4.

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