REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

CASE NO C 62/09

Not reportable

In the matter between:

S DENNER	**APPLICANT**
and	
CCMA	**1ST RESPONDENT**
COMMISSIONER M VAN ROOYEN	**2ND RESPONDENT**
PROUDFOOT CONSULTING AFRICA (PTY) LTD	**3RD RESPONDENT**

Application heard: 23 October 2013

Judgment delivered: 4 November 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) on 15 December 2007. In her award, the commissioner found that the applicant's dismissal was both substantively and

procedurally unfair, and awarded the applicant compensation in a sum equivalent to half a month's salary. The applicant attacks only the quantum of the award, and submits that the amount of compensation awarded is egregious and induces a sense of shock, to the extent that the commissioner wholly misconceived her duties.

Material facts

[2] The material facts are recorded in the arbitrator's award, and I do not intend to repeat them here. In brief, the third respondent approached the applicant through Kieser, a recruitment specialist, with a view to his appointment as an account executive. On 27 September 2007, an offer was made to the applicant in terms of which he would commence employment on 1 November 2007. After a meeting between the parties in the mid-October 2007, the start date was discussed, after the third respondent had proposed that the start date be revised to 1 January 2008. A number of subsequent discussions on the start date and the terms of compensation requested by the applicant consequent on the delay had the result that on 7 November 2007, the applicant was advised ultimately that the third respondent did not intend pursuing an employment relationship with him. The arbitrator found that a contract of employment came into existence on 1 November 2007, and that the effect of the third respondent's notice to the applicant on 7 November that it did not intend to pursue an opponent relationship amounted to a dismissal for the purposes of the LRA.

[3] What is important for present purposes is the commissioner's reasoning in relation to the award of compensation. The commissioner correctly noted that section 194 of the LRA required that any amount of compensation awarded must be just and equitable. She referred further to *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) where the Labour Appeal Court set out the factors to be taken into account when assessing an appropriate amount of compensation. These include the actual financial loss suffered, the foreseeability of that loss the obligation to mitigate any loss suffered, and the like. In the commissioner's view the relevant circumstances to be taken into account were the following:

- ‘The applicant had not accepted the offer prior to the imposition of the global hiring freeze and the respondent was therefore entitled to move the starting date of employment;
- Moodley instructed Kieser (the recruitment specialist) on 31 October 2007 to withdraw the offer extended to the applicant. Kieser failed to do this and the applicant accepted the offer on 1 November 2007;
- The applicant accepted the offer the last minute after he was advised by Kieser that there was absolutely no further room for movement and that Moodley was threatening to withdraw the offer;
- For a very short period of time between 1 November and 7 November 2007 the applicant laboured under the incorrect impression that the respondent would engage as an employee on 1 January 2008; the respondent was under the impression that the offer was withdrawn by Kieser before its acceptance;
- The applicant’s appointment was conditional on the successful completion of a six-month probationary period;
- The applicant had not actually started working for the respondent;
- The applicant was not due to start employment before 1 January 2008 (seven weeks after he was informed the respondent was not to engage him);
- The applicant was self-employed when he was approached by the respondent;
- The applicant testified he released present clients before he accepted the respondent’s offer on 1 November 2008. It would be patently unfair to require the respondent to compensate the applicant for loss of income from clients released at his own peril before the contract was concluded. On his own estimate he released work to the value of R120 000 prior to accepting the offer of employment…
- The applicant’s testimony that he lost approximately a year’s income due to the respondent’s failure to honour the contract of employment is unlikely given the fact that only a period of 7 days left between his acceptance of the offer of employment and him being informed that the respondent not intend engaging him as an employee;

- On 29 May 2008 at the *in limine* proceedings the applicant rejected a with prejudice offer of settlement from the respondent in the amount of R175 000.'

[4] The commissioner concluded as follows:

> '19. Having considered the above factors I am of the view that the applicant failed to show that the alleged financial losses he experienced were the result of the respondent's decision not to pursue his employment. Given the short period of seven days during which the applicant laboured under the impression that he would commence employment with the respondent on 1 January 2008, the amount of his estimated damages are unlikely to be accurate and appear to be grossly inflated. An award for compensation more than a nominal amount would be unfair in all circumstances."

[5] The commissioner went on to award, as I've indicated above, compensation in an amount equivalent to half a month's basic salary, i.e. R 29166 .67.

The applicable legal principles

[6] The test to be applied is that enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC), recently affirmed by the Supreme Court of appeal in *Herholdt v Nedbank* (701/2012 5 September 2013). In the latter judgment, the court summarised the position as follows:

> '[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 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.'

[7] As the court observed, this threshold admits a review only in exceptional circumstances. An applicant in any application to review and set aside an arbitration award on the grounds of a gross irregularity must necessarily establish that the commissioner misconceived the whole nature of the enquiry and as a result misconceived his or her mandate will duties in conducting the enquiry, or, applying the reasonableness requirement imported by the *Sidumo* test, to establish that in the light of the issues raised by the dispute, the outcome or result reached by the arbitrator is not one that could reasonably be reached on the evidence or other material properly before the arbitrator (see paragraph [12] of the judgment). The casting of the test in the negative is significant – as the court observed, the test is whether the decision is one that *could not* reasonably be reached; a more stringent test than asking whether the decision is one that the arbitrator could reasonably reach.

[8] To the extent that this approach is concerned primarily with the result rather than the process of reasoning of the arbitrator, it should be recalled that the *Sidumo* judgment was concerned particularly with the appropriateness of dismissal as a sanction for misconduct. The court recognised that when a commissioner decides on an appropriate penalty for establish misconduct, the commissioner exercises a value judgement. A reviewing court is entitled to interfere with that judgement only in the circumstances set out above. The same must hold true for reviews in respect of awards of compensation. The discretion to award compensation and a decision on the amount to award is ultimately a value judgement – it involves the exercise of what sometimes been referred to as a narrow discretion. The scope for interference in these circumstances on appeal is very limited, even more so in the case of a review. The threshold that an applicant is required to meet on review is to establish, as I have indicated above, that the arbitrator's decision on compensation is one that could not reasonably be reached on the available evidence.

[9] In the present instance, the arbitrator was called upon to determine an amount of compensation that is fair. She clearly appreciated the nature and extent of the

discretion that she was to exercise. She also had regard to the relevant factors and applied them to the facts of the case. The arbitrator's finding is not entirely disconnected with the evidence, nor is it one that is not supported by the evidence, or which is purely speculative. Nor, in my view, can it be said that on the available evidence, the commissioner's conclusion is one that falls outside of the band of decisions to which a reasonable decision-maker could come.

[10] For these reasons, the applicant has failed to establish that the arbitrator's award stands to be reviewed and set aside.

[11] In relation to costs, the Labour Appeal Court has recently emphasised that in matters concerning individual employees, the court ought to be cautious in making costs orders since to do so routinely may have the effect of discouraging employee who seek in good faith to have their disputes determined by the court, from doing so. Although the applicant has not succeeded in the present application, I accept that he was genuinely aggrieved at the outcome of the arbitration hearing and that he has sought to review that outcome in good faith. In these circumstances, I do not intend to make any costs order.

I make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant; Mr B Guy, Guy and Associates

For the third respondent: Adv G Leslie, instructed by Goldman Judin Inc