REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D1128/10

In the matter between:

CROSSROADS DISTRIBUTION (PTY) LIMITED **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD

FREIGHT INDUSTRY **First Respondent**

MLUNGISI SABELA N.O **Second Respondent**

SATAWU obo MLAMLI ZORAN NGESE **Third Respondent**

Heard: **5 March 2013**

Delivered: **6 June 2014**

Summary: **The arbitrator's omission to deal with some of the charges which led to the third respondent's dismissal rendered his award unreasonable.**

Review in terms of section 145 of the LRA-dismissal for misconduct.

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LALLIE, J

Introduction

[1] This is an application to review and set aside an arbitration award of the second respondent ('the arbitrator') in which he found the individual third respondent's dismissal substantively unfair and ordered his reinstatement. It is opposed by the third respondent.

[2] The third respondent filed the answering affidavit late and applied for condonation of the lateness. The condonation application is opposed by the applicant.

[3] In *F v Minister of Safety and Security and Another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of Women's Legal Centre as Amici Curiae)*,[1] it was held as follows:

> '…. It is now trite that condonation will be granted if it is in the interests of justice to do so, and if there appear to be reasonable prospects of success on appeal. Factors to be considered with regard to the interests of justice include the reason for the delay, and the extent of the prejudice, if any, that was suffered by the other party.'

[4] The above approach is consistent with the decision in *Melane v Santam Insurance Co Ltd*[2] where is was held that among the factors to be considered in determining whether an applicant has shown good cause in condonation applications are, the degree of lateness, its explanation, prospects of success and the importance of the case. Both parties must be treated with fairness. The Court sounded a warning against treating the condonation application in a piecemeal approach and expressed the view that the factors are interrelated and not individually decisive.

[5] The answering affidavit was filed four months late and it is common cause that the degree of lateness is excessive. The explanation proffered by the third respondent for the delay is that at some point, the applicant communicated

[1] (2012) 33 ILJ 93 (CC) at para 28.
[2] 1962 (4) SA 531 A.

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with the individual third respondent, Mr Ngese (Ngese) directly in an attempt to settle the dispute. Mr Madlala (Madlala), the official of the third respondent trade union (SATAWU), was called by Ngese in January 2012 enquiring about the progress of his case. Steps were then taken to file the condonation application. Further delay was caused by the unavailability of documents. The inability to locate Ngese who had returned to the Eastern Cape and whose telephone was constantly switched off exacerbated maters.

[6] The applicant relied on *Wium v Zondi and Others*[3] and *National Construction Building and Allied Workers Union v Masinga and Others*[4] and sought the dismissal of the condonation application on the basis that the explanation for the delay lacked detail, it did not explain the default fully and is wholly unsatisfactory. Both decisions can be distinguished from the present application because they dealt with condonation of the late filing of review applications by applicants who were *dominus litis*. The fundamental difference is that the applicant could have taken steps to avoid the extended delay by applying for the review application to be heard in the absence of the third respondent's answering affidavit.

[7] The third respondent submitted that it had good prospects of success. The applicant submitted that there were none. The third respondent was not required to prove on a balance of probabilities that he had prospects of success. He needed to prove *prima facie* that he had reasonable prospects of success. In addition, he needed to prove that he was acting *bona fide*. The above requirement is fulfilled when the third respondent proves that he could succeed in the review application. Such averments have been made.

[8] The applicant argued that it will be extremely prejudiced should the application be granted. The Constitutional Court clarified in *F v Minister of Safety and Security* (*supra*) that it is the extent of the prejudice that needs to be considered. The extent of prejudice that the third respondent stands to suffer in the event of this application being refused is greater than that the applicant will suffer in the event of this application being granted. The third respondent

[3] [2002] 11 BLCR 1117 (LC).
[4] (2002) 21 ILJ 411 (LC).

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will be deprived of the right to oppose the review application. The applicant submitted that the condonation application consists of hearsay evidence as Ngese did not file a confirmatory affidavit. It is not impermissible to admit hearsay evidence. Efforts to find Ngese have been futile and in terms of section 200 of the Labour Relation Act 66 of 1995 a union may act on behalf of any of its members in any dispute to which any member is a party. Had SATAWU not given up the hope of finding Ngese the delay would have been worse. On a conspectus of all the facts and circumstances the third respondent has shown good cause and it is in the interests of justice that this application be granted.

Factual background

[9] The applicant employed Ngese as a truck driver on 7 April 2004. Employees of the applicant including Ngese were aware of the terms of the service agreement between the applicant and the South African Post Office Limited ('SAPO') which required the applicant to comply with delivery for SAPO on a 99% delivery service basis. The applicant advised its employees of their routes via a roster which was distributed a month before the effective date. Employees could request an alteration of the roster when they had family crisis they needed to attend to. Ngese was scheduled to make a delivery in the Ladysmith route on 6 December 2009. He expressed his desire to work on the Port Elizabeth route as he wanted to have his laundry done in Port Elizabeth. An unpleasant verbal exchange ensued between Ngese and some senior employees of the applicant. It resulted in Ngese being subjected to a disciplinary enquiry and dismissed for refusal to obey a lawful instruction by refusing to go to Ladysmith, gross insubordination by making derogatory remarks to the fleet planner and management as well as threatening the manager with assault. The third respondent challenged the fairness of the dismissal at the third respondent where the arbitrator issued the award which is the subject matter of this application.

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The award

[10] The arbitrator made a finding that Ngese did not make himself guilty of gross insubordination because Mr Moodley ('Moodley'), the applicant's national contracts manager testified that he was told by a supervisor, Mr Wiseman Nzimande (Nzimande) that Ngese had refused to go to Ladysmith and that he had spoken to him rudely. His evidence was, however, not corroborated by Nzimande. It is Moodley who told Ngese not to go to Ladysmith as he wanted to charge him. The arbitrator was persuaded by the discrepancies to reject Moodley's evidence in its totality.

[11] The arbitrator further rejected the applicant's version that Ngese shouted at and had been disrespectful to Ms Umsha Neermal (Ms Neermal) the fleet planner. His reason was that Neermal testified that she phoned Moodley after Ngese had shouted and displayed disrespectful conduct towards her. Moodley's version was different, it was that he was already aware of the incident as Ngese had already phoned the office. The arbitrator also mentioned that Moodley and Neermal were not together when Ngese phoned them on separate occasions and they are the only witnesses who claimed that Ngese had been rude and refused to follow instructions.

[12] The arbitrator was impressed by Ngese as a witness whose evidence was consistent. His evidence was corroborated by Mr Sotsaka (Sotsaka) who was present when Ngese made the phone calls to Moodley and Neermal. The arbitrator concluded that no evidence was led to prove that Ngese failed to go to Ladysmith when he was supposed to. He was instead instructed by Moodley not to go to Ladysmith. He also accepted Ngese's evidence that he had no reason to be rude or disrespectful to Neermal as he was asking for a favour. He found Ngese's dismissal substantively unfair and ordered his reinstatement with effect form 5 May 2010.

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Grounds for review

[13] The applicant submitted that the arbitrator reached an unreasonable decision because he failed to consider all the evidence before him in deciding that Ngese's dismissal was substantively unfair. A further manifestation of the unreasonableness was the issuing of the reinstatement order in the face of evidence that the employment relationship had irretrievably broken down as a result of Ngese's conduct and the arbitrator's failure to apply his mind.

[14] The correct approach to be adopted in review applications is expressed as follows in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[5] as follows:

> '[18] In a review conducted under section 145 (2) (a)(c)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'

The Court held as follows in paragraph 20:

> '[20] … The questions to ask are these: (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 or she 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 dealt with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another

[5] [2014] 1BLLR 20 LAC at paras 18 and 20.

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> decision-maker could reasonably have arrived at based on the evidence?'

[15] An assessment of the award reflects that the arbitrator dealt with the main issue before him which was Ngese's dismissal for committing acts of misconduct. On the charge of refusal to obey a lawful instruction by Nzimande on 6 December 2009 by refusing to carry out the instructions to do the Ladysmith route on 7 December, the arbitrator rejected the applicant's version because evidence of its witness was inconsistent. A reading of the record reflects that on 6 December, the applicant asked Nzimande to help him by placing him on the Port Elizabeth route. As Nzimande was waiting for the roster from Neermal, he promised to phone and inform him of his route on receipt of the roster and also convey his request to Neermal. Nzimande phoned Ngese and informed him that he was scheduled to do the Ladysmith route and that his request had been declined by Neermal. Ngese responded that he was going to talk to Neermal himself. The arbitrator's finding is based on the evidence before him which failed to prove the allegation that Ngese refused to take instructions from Nzimande by refusing. Nzimande adduced no evidence that Ngesi argued vigorously with him or behaved in an unacceptable manner towards him. The arbitrator's finding on the first charge cannot be faulted.

[16] The arbitrator's finding that Ngese did not go to Ladysmith out of insubordination but on Moodley's instructions is based on the evidence before him.

[17] On the evidence before the arbitrator, Ngese did not refuse to go to Ladysmith when told by Nzimande that he was scheduled to go there. He told him that he would phone Neermal and ask to do the Port Elizabeth route. Neermal conceded that Ngese had asked to have his route changed on a number of occasions in the past and she had granted his requests. It was not Neermal's evidence that Ngese refused to go to Ladysmith during the discussion that they held over the phone. Her evidence was that he shouted at her for not acceding to his request. Moodley conceded that he told Ngese not to go to Ladysmith as he wanted to give him his charges and the letter of suspension.

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None of Ngese's conduct in terms of the applicant's witnesses constituted refusal to obey a lawful instruction by his superior on 6 December 2009.

[18] John Grogan,[6] expresses the view that insubordination is more serious than rudeness as it presupposes a calculated breach by the employee, of the duty to obey the employer's instructions. On the evidence before the arbitrator, it cannot be said that Ngese showed gross insubordination by wilfully and deliberately challenging and arguing vigorously with supervisors and a manager regarding the allocation of his route on 6 December 2009. Nzimande led evidence to the contrary. The arbitrator rejected the applicant's version because of the inconsistency in the evidence of Neermal and Moodley on the issue. He compared the inconsistency against reliable evidence led by Ngese and his witness and rejected the applicant's version.

[19] There are two acts of misconduct the arbitrator omitted to deal with, namely, that Ngese made derogatory remarks to the fleet planner and management and threatening a manager with assault. These two charges form an integral part of the principal issue before the arbitrator as they are part of the reasons for Ngese's dismissal. The arbitrator had to determine the fairness of Ngese's dismissal for the reasons he was dismissed for. The charges the arbitrator omitted to deal with are significant.

[20] The arbitrator's omission to deal with the two charges constituted a gross irregularity which led him to reach a decision a reasonable decision-maker could not reach. A reasonable decision maker could not reach a decision on the substantive fairness of Ngese's dismissal without dealing with all the charges which formed the basis of his dismissal. The award, therefore, falls outside the bounds of reasonableness.

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

10.1 The arbitration award under case number KZNRFBC 10728 and dated 16 September 2010 is reviewed and set aside.

[6] Workplace Law, Tenth Edition Juta and Company Ltd, 2009 at 218.

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20.2 The matter is remitted to the first respondent to be arbitrated *de novo* by an arbitrator other than the second respondent.

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Lallie J

Judge of the Labour Court of South Africa

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Appearances

For the Applicant: Ms Chenia of Glyn Marais Inc

For the Respondent: Mrs Mitti of Mitti Attorneys

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