REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D 869/2011

In the matter between:

METRORAIL **Applicant**

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

JABULANI NGWANE N.O **Second Respondent**

ZAKHELE MZWAMANDLA BUTHELEZI AND 2 OTHERS **Third and further Respondents**

Heard: 12 November 2013

Delivered: 07 November 2014

Summary: Review of an arbitration award – Point *in limine* was upheld by the Commissioner – Commissioner made findings and came to conclusions not supported by the facts placed before him and the award is reviewed and set aside.

JUDGMENT

PRINSLOO, AJ

Introduction

[1] The Applicant is seeking to review and set aside an arbitration award issued on 18 September 2011. Alternatively the Applicant seeks an order correcting the arbitration award by finding the dismissal of the Third and Further Respondents ("the employees") to be fair.

[2] The Second Respondent ("the arbitrator") upheld certain points *in limine* raised by the employees and found their dismissals to be unfair and ordered their reinstatement.

[3] The application is opposed.

Background facts

[4] The brief history of this matter is as follows:

[5] The Applicant dismissed one Mr Ndlela for misuse of the Applicant's vehicles and for claiming that he was executing his duties when he was in fact busy with private trips with the Applicant's vehicles.

[6] Subsequent to the dismissal of Mr Ndlela the Applicant initiated an investigation into the use of its vehicles by other section managers. The Chief Protection Official: Investigations, Mr Cassim was tasked to investigate the allegations of misuse or abuse of the Applicant's vehicles and the committing of fraud in that there were fraudulent claims for hours worked when those hours were in fact not actually worked.

[7] Mr Cassim investigated the allegations and found that the employees abused the Applicant's vehicles and committed fraud and he recommended that disciplinary action be taken against the employees. This report was submitted to the employees' line manager on 18 March 2011.

[8] On 19 May 2011 the employees were served with notices to attend disciplinary enquiries and subsequent to the disciplinary enquiry, the employees were

found guilty of misconduct and dismissed on different dates between 7 and 21 June 2011. The misconduct they were dismissed for was dishonesty, gross negligence and misuse of company vehicles.

[9] The employees referred an unfair dismissal dispute to the First Respondent ("the CCMA").

The arbitration proceedings and award

[10] The dispute was set down for arbitration on 6 September 2011 and on this day the employees' representative raised three points *in limine.*

[11] The three points were firstly that the suspension of the employees was irregular, secondly that the Applicant contravened clause 4.4 of the Disciplinary Code and Procedure ("the Code") and lastly that there had been a delay in finalising the disciplinary enquiry. The arbitrator did not consider the first point *in limine* regarding the suspension of the employees.

[12] Clause 4.4 of the Code reads as follows:

> "Disciplinary hearing shall be conducted and finalised within a period of thirty (30) calendar days after the incident is brought to management's attention. Should extension of this period be sought, permission shall be sought from the Regional Manager's / Executive Manager's Office upon furnishing substantive and legitimate grounds for the delay. If not obtained, the case will be withdrawn."

[13] During the arbitration the employees' representative submitted that the Applicant's management was aware of the transgressions in September 2010, when Mr Ndlela was hijacked and an investigation into the use of company vehicles was called for. The employees were only charged for misconduct in May 2011. The 30 day period as envisaged in clause 4.4 started to run from 16 September 2010 and therefore the charges against the employees were levelled outside the 30 day period and the case should have been withdrawn. The employees sought for the charges to be quashed on the basis of the delay as they were charged with misconduct 9 months after the date of the transgression.

[14] The Applicant submitted that Mr Ndlela was hijacked and subsequent to that, an investigation was launched, but initially the investigation focussed on Mr Ndlela and that on 16 September 2010 the Applicant was unaware of the fact that the employees committed the misconduct for which they were subsequently dismissed. At that stage the Applicant merely called for an investigation on all company vehicles for deviations and use for any other purpose than company purposes. Priority was given to Mr Ndlela's vehicle at that point. In September 2010 the Applicant was only aware of Mr Ndlela's transgression.

[15] An investigation was conducted and on 18 March 2011 the investigation report identifying the transgressing employees and recommending that disciplinary action be taken was brought to the line manager's attention. The disciplinary enquiry should have been concluded by 18 April 2011; however on 1 April 2011 a request for extension of the 30-day period was approved. It was the Applicant's case that the request for extension was made and approved within and prior to the expiry of the 30-day period and therefore there was compliance with clause 4.4 of the Code.

[16] The Applicant's case was that it only became aware of the transgressions committed by the employees on 18 March 2011, the employees were charged with misconduct in May 2011 and their disciplinary enquiries were finalised in June 2011. There was no inordinate delay and an extension of the 30-day period was in any event granted.

[17] The arbitrator found that it was common cause that an extension for the disciplinary enquiries to be held outside the 30-day period from the date of the incident was made on 20 March 2011 and that such extension was approved in respect of the employees on 1 April 2011.

[18] The arbitrator made the following findings in respect of the two points *in limine* he considered:

i. The Applicant's failure to conduct and finalise the employees' disciplinary hearing within 30 days after the incident was brought to its attention was dilatory and thus unfair. The arbitrator found that a tracker report that was part of the Applicant's bundle showed that a trip log was

printed on 26 January 2011 and thus the incident was brought to management's attention on 26 January 2011 and he based his calculation of the 30 days on the finding that it was brought to the Applicant's attention on 26 January 2011.

ii. The Applicant failed to apply for extension of the 30-day period before expiry of the period. This finding is based on the fact that the arbitrator found that the incident was brought to management's attention on 26 January 2011 and therefore the disciplinary hearing had to be concluded within 30 days and therefore it was to be concluded by 25 February 2011. There was no application for extension during this period and therefore proceeding with the disciplinary hearing outside of the 30-day period and failure to apply for the requisite extension was a violation of the provisions of clause 4.4 of the Code.

iii. The Applicant ought not to have proceeded with the disciplinary hearing and the case against the employees ought to have been withdrawn.

iv. The delay from the date the incident was brought to management's attention to the date of finalising the disciplinary hearing was 4 months and it was not substantiated or explained and thus unfair.

v. The points *in limine* succeeded and the arbitrator declared the dismissal of the employees unfair and ordered their re-instatement.

The test on review

[19] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others;*[1] as 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' 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.

[1] (2007) 28 ILJ 2405 (CC) at para 110.

[20] In the decision of *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[2] the Supreme Court of Appeal held that:

> "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 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."

[21] In the subsequent judgment of *Goldfields Mining South Africa (Kloof Mine) v CCMA and others*[3] the Labour Appeal Court held that:

> "In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[22] It is in view of this test that the Applicant's grounds for review must be assessed.

Grounds for review

[23] The Applicant raised a number of grounds for review.

[24] In my view the main ground for review relates to the arbitrator's finding that the incidents were brought to the Applicant's attention on 26 January 2011, as most of the arbitrator's other findings flow from this finding that the relevant date was 26 January 2011 and all other calculations were done in accordance with that date.

[25] The Applicant's case is that the finding that the incidents were brought to management's attention on 26 January 2011 is not reasonable as it was never the employee's case that the relevant date was 26 January 2011, the parties

[2] (2013) 34 ILJ 2795 (SCA).
[3] ***(***2014) 35 ILJ 943 (LAC).

were never invited to present any argument and to explain why the trip log was printed on 26 January 2011, the circumstances surrounding the printout were never established such as who printed the document, for what purpose and whether it was even brought to management's attention on that date or at all. The arbitrator made a finding based on a document that was not canvassed during the arbitration hearing.

[26] Further the Applicant's case is that the printed trip log indicated the trips undertaken and it does not show whether the employees committed any misconduct. A further investigation was required to analyse the trip log with the employees' time sheets to determine if the employees committed any misconduct. The printed trip log sheet did not constitute proof that the Applicant was aware of the incidents or misconduct of the employees on 26 January 2011.

[27] It follows that the Applicant's case is that there was no need to apply for an extension of the 30-day period from 26 January 2011 and the findings in this regard were unreasonable. The Applicant submitted that the period between 18 March 2011 and the date the disciplinary hearings were finalised in June 2011 is not unreasonable and there was no delay in finalising the disciplinary hearings.

[28] The Applicant's further ground for review is that the arbitrator overlooked binding authorities and committed misconduct when his findings came to the conclusion that the Applicant's right to discipline the employees was waived when it failed to convene the disciplinary enquiry within the agreed time limits.

[29] In opposing the application for review the employees defend the arbitration award as one that is sound and well reasoned. The employees submitted that the parties agreed, prior to the commencement of the arbitration proceedings that bundles will be placed before the arbitrator and that the documents contained in the bundles were to be accepted as what they purport to be. The employees submitted that the arbitrator was entitled to consider the documentary evidence introduced and agreed upon by the parties and therefore he was entitled to consider the trip log sheet printed on 26 January 2011.

[30] The employees submitted that the Applicant became aware of the incident on 26 January 2011 when the detailed trip log was printed. I find this submission strange as it was never the employees' case during the arbitration and it appears that they are adapting their case to fit in with the arbitrator's findings.

[31] It is not disputed that the Applicant applied for and was granted an extension of the 30-day period within which the disciplinary enquiries had to be concluded.

Analysis and conclusion

[32] The Applicant seeks to review and set aside the arbitration award wherein the arbitrator upheld the points *in limine* and found the employees' dismissals to be unfair.

[33] It is evident from a perusal of the transcribed record of the arbitration proceedings that the printed log sheet report of 26 January 2011 was never mentioned or canvassed at the arbitration. The log sheet report was never put in context and it is not known who printed it, what the purpose thereof was and whether it was brought to management's attention on 26 January 2011. All that is evident from the printed log sheet is that it was printed on 26 January 2011.

[34] During the arbitration the issue was whether the incident was brought to management's attention on 16 September 2010, as per the employees' version or on 18 March 2011, as per the Applicant's version.

[35] The arbitrator found that the incidents were brought to management's attention on 26 January 2011. In my view this finding is based on nothing but an assumption.

[36] There was no evidence and no facts before the arbitrator to support his finding that the incidents were brought to management's attention on 26 January 2011. At best the document he considered showed that a log sheet was printed on 26 January 2011. It did not show that the employees committed any misconduct nor did it show that any incident was brought to management's attention on 26 January 2011.

[37] The arbitrator cannot make findings not supported by the facts placed before him and most certainly is he not allowed to make findings based on nothing but assumptions and speculation.

[38] The arbitrator made assumptions and drew inferences that were not reasonable and not supported by what was placed before him.

[39] The employees submitted that the parties agreed, prior to the commencement of the arbitration proceedings that bundles will be placed before the arbitrator and that the arbitrator was entitled to consider the documentary evidence introduced and agreed upon by the parties. The employees submitted that the arbitrator was thus entitled to consider the trip log sheet printed on 26 January 2011. Although I agree that the arbitrator was entitled to consider documents placed before him, he was not entitled to go beyond that and to make findings that do not appear from a simple perusal of the document, but are based on his own assumptions and inferences.

[40] The employees further submitted that the trip log sheet printed on 26 January 2011 does not need any investigation, as the information is readily available and required no interpretation. Their case is the fact that their vehicles were making unauthorised trips came to management's attention when the report was printed on 26 January 2011.

[41] I cannot accept this argument. The printed trip log sheet shows details about dates, times and places where a particular vehicle was at any given time. The report however requires an analysis and determination of whether the trips were indeed authorised in respect of the date, time and place, as it appeared on the trip log report. The printed trip log report merely indicated the trips undertaken. I accept that a further investigation was required to analyse the trip log sheet and compare it with the employees' time sheets to determine whether the trips were authorised and whether the employees committed any misconduct. The printed trip log sheet did not show whether trips were authorised or not and it needed further investigation and interpretation.

[42] I am of the view that the arbitrator misdirected himself and committed a gross irregularity. He failed to have regard to material facts and his conduct prevented a fair determination of the dispute.

Conclusion

[43] In reviewing the arbitration award, the ground for review as raised by the Applicant must be assessed and this Court can only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[44] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review raised by the Applicant, I cannot find that the arbitrator's decision fell within the the band of decisions to which a reasonable decision maker could come to. The decision to uphold the point *in limine* and to re-instate the employees is one that no reasonable decision maker could have come to and is to be set aside on review.

[45] I considered the relief sought by the Applicant. I am of the view that this Court is not in a position to substitute the award with a finding that the employees' dismissals were fair as the fairness or not of the dismissal was not determined on the merits of the case. It was merely determined on a point *in limine* and this Court is in no position to substitute the finding in the absence of evidence. The most prudent way to deal with this matter would be to remit it to the CCMA for a hearing *de novo* on the merits of the case. What is to be determined is whether the employees were fairly dismissed or not. There is no merit in the allegation that there was an unreasonable delay in finalising the disciplinary action taken against the employees and the matter is not remitted for a determination *de novo* of the points *in limine.*

[46] The employees opposed this application and I can see no reason why the costs should not follow the result.

Order

[47] In the premises I make the following order:

47.1 The arbitration award issued on 18 September 2011 under case number KNDB8606-11 is reviewed and set aside;

47.2 The matter is remitted to the First Respondent for the fairness of the Third and Further Respondents' dismissals to be determined *de novo* by a commissioner other than the Second Respondent;

47.3 The Third and Further Respondents' are ordered to pay the costs.

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Prinsloo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant : A P Shangase Attorneys

For the Third and

Further Respondents: Advocate H K Gunase

Instructed by : Mhlanga Attorneys