REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D498/13

Reportable

In the matter between:

THE HEALTH AND OTHER SERVICES PERSONNEL TRADE UNION OF SOUTH AFRICA ('HOSPERSA') **First Applicant**

LOUIS JACOBUS VAN WYK **Second Applicant**

and

CCMA **First Respondent**

GERALD JACOBS N.O. **Second Respondent**

SANPARKS **Third Respondent**

Heard: **11 July 2014**

Delivered: **12 August 2014**

JUDGMENT

WHITCHER A.J

Introduction

[1] The matter before the court is an application to review the arbitration award issued by the second respondent ("the commissioner") on 25 March 2013

under case number NC1944-12 and in which he held that the dismissal of second applicant for negligent driving was substantively and procedurally fair. The applicants contend that the commissioner's determination that the sanction of dismissal was fair and appropriate is unreasonable.

[2] The third respondent submitted that the application was bad in law and should be summarily dismissed because the applicants failed to plead and identify a defect in the arbitration proceedings, as defined under s 145(2) of the LRA.

[3] Section 145(1) of the Labour Relations Act, 1995 ("the LRA") provides that:

> "[an]y party to a dispute who alleges a defect in any arbitration proceedings under the auspices of [the CCMA] may apply to the Labour Court for an order setting aside the arbitration award-…".

[4] Defects in arbitration proceedings are listed and defined under s 145(2) of the LRA.

[5] In *Sidumo v Rustenburg Platinum Mines & others*,[1] the Constitutional Court ruled that, because statutory arbitrators exercise statutory powers, their awards are reviewable if they do not meet the constitutional requirement of 'reasonableness' set by the Constitution. [2] In this regard the Court stated that the reviewing court must:

> *"Is the decision made by the arbitrator one that a reasonable decision-maker could not reach on the available evidence?*[3]

[6] Does this mean that applicants for review of statutory arbitrations may approach the court with applications in which they merely plead and cite 'unreasonableness' as a ground of review?

[7] In the case of *Fidelity Cash Management Services v CCMA & Others,*[4] the Labour Appeal Court held that:

[1] *Sidumo v Rustenburg Platinum Mines & others* (2007) 28 ILJ 2405 (CC).
[2] *Sidumo* at par 110.
[3] *Sidumo* at par 110.
[4] *Fidelity Cash Management Services v CCMA & Others* (2008) 29 ILJ 964 (LAC).

"Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said they are suffused by reasonableness."[5]

[8] The LAC further held in *National Commissioner of the SA Police Service v Myer & Others*[6] that:

"It should be noted, however, that the standard of review as formulated by the Constitutional Court in *Sidumo* does not replace the grounds of review contained in s 145(2) of the LRA. The grounds of review referred to in s 145(2) still remain relevant."[7]

[9] In the case of *Herholdt v Nedbank Ltd and Another,*[8] the Supreme Court of Appeal reiterated the so-called Sidumo test in the following terms:

'(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.

[10] In a recent decision, the Labour Court in *Naidoo v NBCC & Others*[9] held as follows:

"It is not sufficient for an applicant applying to review and set aside an award of an arbitrator to simply pay lip service to the provision of section 145 of the LRA."[10]

[11] Grogan wrote that the ruling in *Sidumo:*

"…does not mean that applicants for review of statutory arbitrations may approach the court directly with applications for 'constitutional review': in *Sidumo* the court ruled that the constitutional standard of reasonableness

[5] *Fidelity* at par 101.
[6] *National Commissioner of the SA Police Service v Myer & Others* (2012) 33 ILJ 1417 (LAC).
[7] *Meyer* at par 41.
[8] *Herholdt v Nedbank Ltd and Another* [2013] 11 BLLR 1074 (SCA).
[9] *Naidoo v NBCC & Others* (2012) 9 BLLR 915 (LC).
[10] *Naidoo* at par 22.

> must be taken to have "suffused" the review grounds set out in the Act … In practice though the infusion of the requirement of reasonableness into the statutory review grounds has added another requirement to the limited grounds set out in the Act. While 'unreasonableness' may be demonstrated by 'misconduct' on the part of the arbitrator, or a 'gross irregularity in the proceedings, or the procurement of the award in some irregular way or an excess of power on the part of the arbitrator, it may still be that the unreasonableness takes some form that would not be accepted as fitting within the limited grounds set out in the Act."[11]

[12] The judgments cited above confirm that a litigant may not bypass the peremptory provisions of s 145(2) of the LRA by relying directly on the 'constitutional' test of 'unreasonableness'.

[13] They confirm that the starting point in seeking to review and set aside arbitration proceedings conducted in terms of the LRA is the permitting legislative instrument: it being s 145 of the LRA. Section 145 of the LRA permits this Court to set aside an arbitration award for one or other *defect* listed in s 145(2). The ground/s upon which a litigant may seek to review and set aside an arbitration award, as they appear under s 145(2) of the LRA, still exist as a prerequisite for an Order reviewing and setting aside such an award. Section 145 of the LRA requires applicants in review proceedings brought under s 145 to identify the particular defect in the arbitration proceedings, as defined under s 145(2) of the LRA. In other words, they must make out a case for review and setting aside the arbitration award with reference to a defect or defects specified in s 145(2) of the LRA.

[14] In this review application, the applicants made no specific reference to defects in the arbitration proceedings as defined under section 145(2) of the LRA and simply relied directly on the constitutional ground of 'unreasonableness'. In my view, the application falls to be dismissed on this ground alone. And, if one accepts Grogan's view, the unreasonableness they aver to do not take some form that would not be accepted as fitting within the limited grounds set out in section 145(2) of the Act.

[11] Grogan *Labour Litigation and Dispute Resolution* 288.

[15] In the event that my decision is wrong, I proceed hereunder to examine the applicants' contention that the commissioner's determination that the sanction of dismissal was fair and appropriate is unreasonable.

[16] The second applicant was employed as a technical officer and his duties involved driving duties. The commissioner summarised the other material facts placed before him as follows:

> "The employee had received two warning for committing the same offence prior to his dismissal. [He] was warned of his reckless driving and was also warned to keep within the speed limits. [The third respondent] communicated the warnings through emails to the employee. In the emails [the third respondent] explained to the employee how to correct his behaviour. At the time the employee committed the last offence his final written warning was still valid. What makes matters worse was that the employee was responsible for driving his co-workers' children to and from school".

[17] The commissioner further recorded that a parent testified at the arbitration that her child had often complained that the second applicant "drove too fast" and caused him to "bounce around in the vehicle".

[18] According to the award, the second applicant did not testify in his defence at the arbitration; nor did he lead other evidence in his defence.

[19] The commissioner accepted the third respondent's conclusion that there was an irretrievable breakdown in the trust relationship. This conclusion was based on the averment that second applicant had demonstrated by his actions, especially his repeated misconduct and his failure to heed warnings, that he could no longer be relied upon. Moreover, the third respondent had to repose a high degree of trust and self-supervision to the second applicant because of the nature of his job. The commissioner noted further that the second applicant had shown no remorse for his actions.

[20] The applicants listed all the factors set out in the Code on dismissal and sanction in Schedule 8 to the LRA and contended that, in weighing up all the relevant factors, the commissioner failed to take into account and give due weight to the following factors: the second applicant was a first offender, no

actual harm, injury or losses were suffered as a result of his conduct and his conduct did not involve dishonesty.

[21] They further contended that the commissioner had attached weight to the second applicant "having a complete disregard of the employer's operations" when there was no evidence that he had done so and to the second applicant supposedly having shown no remorse for his actions when in fact he had apologised for his actions at the disciplinary hearing.

[22] These contentions fail on a number of levels.

[23] Firstly, nowhere in their affidavits do the applicants demonstrate, with reference to the record, that any of the evidence relied upon by the commissioner is untrue or unreliable, particularly the fact that the second applicant was not a first offender and had shown no remorse. In fact, the applicants, in their affidavits, make no particular or direct reference to the record of the proceedings.

[24] In *Naidoo* (supra), this court held as follows:

> "In circumstances where an applicant wishes to rely on an averment that the arbitrator failed to take into account evidence properly placed before him in reaching his award it should be even more obvious that the applicant should at the very least refer to that evidence [and those parts of the award] which demonstrate the proposition".[12]

[25] Secondly, the Code is not an exhaustive checklist to be applied without reference to the particular circumstances and facts of the case before the commissioner. Some factors in the list may be more or less relevant depending on the peculiar circumstances of the case at hand. Thus the issue of potential harm is just as relevant as actual harm in a case involving driving duties and transporting children and where acts of reckless driving have been established. There is also nothing in the Code or any law which suggests that dismissal is only justifiable where the misconduct involves dishonesty.

[12] *Naidoo* at par 21. Brackets added.

[26] The applicants have thus established no acts on the part of the commissioner that amount to errors of fact or law, let alone material errors capable of rendering the outcome unreasonable.

[27] The sanction upheld by the commissioner did cause the Court to pause and ponder, as any sanction of dismissal would, but the Court finds that the commissioner's decision fell within a band in which reasonable commissioners might reasonably agree that dismissal is appropriate in light of the material that was properly before him.

Conclusion

[28] For the reasons set out above, there is no basis to interfere with the award of the second respondent.

Order

[29] The application for review is dismissed. There is no order as to costs.

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Whitcher AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: P J Blomkamp

Instructed by: Llewellyn Cain Attorneys

For the Third Respondent: N P Voyi of Ndumiso Voyi Incorporated