REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA
DURBAN

Not reportable

Case no: D507/14

In the matter between:

DEPARTMENT OF HEALTH, KZN **Applicant**

and

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL **First Respondent**

PATRICK STILLWELL *N.O* **Second Respondent**

ADRIAAN I HARMSE **Third Respondent**

Heard: 10 March 2016

Delivered: 29 April 2016

Summary: Review application. Applicant's grounds for review dismissed.

JUDGMENT

PRINSLOO J**.**

Introduction

[1] The Applicant seeks to review and set aside an arbitration award issued on 3 May 2014 wherein the Second Respondent ('the arbitrator') found the Third

Respondent's ('Harmse') dismissal substantively unfair and ordered the Applicant to re-instate Harmse retrospectively.

[2] Harmse opposed the application.

Background facts

[3] The Applicant employed Harmse from 1 July 1988 and at the time of his dismissal in June 2013 he was employed as an asset manager.

[4] Harmse was a member of the Applicant's bid evaluating committee ('BEC') at the Addington Hospital for more than five years and from time to time he acted as the chairperson of the BEC.

[5] The BEC would evaluate and verify tenders and quotations received for services to be rendered or goods to be purchased and make a recommendation to the bid adjudicating committee ('BAC'), who in turn would make the final decision on whether to award a bid or tender and if so, to which service provider. It is common cause that the BEC has no decision-making powers, but can only make recommendations to the BAC where the final decision is taken. The chief executive officer ('CEO') of the Addington Hospital was the chairperson of the BAC.

[6] The Addington Hospital needed to procure training equipment and Dr Rangiah, who was in charge of the training programme, compiled a list of the items he required for the training. The items Dr Rangiah required were non-stock items and as the hospital did not have the required items, it had to be procured from outside suppliers. Dr Rangiah approached Survival Technologies ('ST') and requested that they supply the Applicant with the required medical training equipment.

[7] ST provided a quotation, based on the list of equipment required, with a letter informing Dr Rangiah that they were the sole supplier of the goods required. Dr Rangiah's list accompanied by the quotation and letter from ST were sent to the finance section of the supply chain management ('SCM') directorate for approval.

[8] On 8 February 2011, a BEC meeting was held. This meeting was chaired by Harmse and the BEC recommended that the items be purchased from ST on the basis *inter alia* that ST was the sole supplier.

[9] The Applicant's case was that although it appeared that ST was the sole supplier, SCM should have tried to source the items from other suppliers and it was the duty of the BEC to ensure that this was done and that there was compliance with the procurement process and where there were errors, to bring it to the attention of the BAC.

[10] The Applicant identified a number of irregularities in the procurement of equipment from ST. Those are *inter alia* that the quotation was not invited by the SCM, but by a medical doctor and there was no written motivation for a sole supplier. These irregularities and shortcomings should have been picked up by the BEC, but it was not and the recommendation was sent to the BAC, which approved the recommendation and the equipment was purchased from ST. The Applicant received the goods from ST and the Applicant's case is not that the goods were not in good order or were not delivered, but that the correct procedures were not followed.

[11] As a result, all the individuals who were involved were charged with misconduct, including Dr Rangiah and all the members of the BEC and the BAC. Dr Rangiah resigned as a result of a settlement between the parties and all other members of the BEC and BAC were issued with final written warnings, except Harmse who was dismissed. The Applicant's case was that the difference between Harmse and those individuals who were given final written warnings is the fact that they all pleaded guilty and Harmse did not.

[12] Harmse was dismissed on 10 June 2013 and he subsequently referred an unfair dismissal dispute to the First Respondent ('PHSDSBC'). The issue that was to be decided was whether his dismissal was substantively and procedurally fair.

<u>The test on review</u>

[13] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been rehashed innumerable times since *Sidumo and*

Another v Rustenburg Platinum Mines Ltd and Others[1] as whether the decision reached by the arbitrator is one that a reasonable decision maker could not have reached. 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.

[14] In *Goldfields Mining South Africa v Moreki*[2] 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."

[15] Following the Supreme Court of Appeal judgment in *Herholdt*[3] and the Labour Appeal Court's judgment in *Gold Fields*,[4] the Labour Appeal Court handed down another important judgment in *Head of the Department of Education v Mofokeng.*[5] In this judgment the Court provided the following exposition of the review test:

> "Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result.
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> The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the

[1] (2007) 28 ILJ 2405 (CC) at para 110.
[2] (2014) 35 *ILJ* 943 (LAC).
[3] [2013] 11 BLLR 1074 (SCA).
[4] [2014] 1 BLLR 20 (LAC).
[5] [2015] 1 BLLR 50 (LAC), para 33.

objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination".

[16] This *dictum* in *Mofokeng* was further interpreted and in *Shoprite Checkers v CCMA and others*[6] this Court considered the guidance *Mofokeng* provides for determining when the failure by an arbitrator to consider facts will be reviewable. The Court accepted the following mode of analysis:

a. the first enquiry is whether the facts ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;

b. if this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable;

c. a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and

d. if the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).

Analysis of the arbitrator's findings and grounds for review

[17] The arbitrator found the employee's dismissal substantively unfair and ordered his reinstatement.

[18] The Applicant raised two main grounds for review.

[19] Before dealing with the grounds for review, it is pertinent to consider the arbitrator's analysis of and findings based on the evidence before him. The arbitrator made three main findings. The first relates to the SCM procedures,

[6] (2015) 36 ILJ 2908 (LC).

the second relates to Item 7 of Schedule 8 of the Labour Relations Act[7] ('the Act') and the last finding relates to consistency.

[20] The arbitrator accepted the Applicant's testimony in respect of the SCM procedures and found that the correct SCM procedures were not followed when the BEC made the recommendation to the BAC on 8 February 2011.

[21] The arbitrator then considered the provisions of Item 7 of Schedule 8 of the Act. He found that the probabilities favoured Harmse's version that he did not know he was doing anything wrong. This was supported by the fact that Augustine, who was the SCM expert and part of the BEC process, did not object thereto and Augustine's silence contributed to Harmse's believe that the BEC acted correctly. He also questioned why Harmse would put his entire career in jeopardy when he would gain nothing from it.

[22] On the issue of consistency the arbitrator found that the Applicant acted inconsistently when it dismissed Harmse and not the others. He found that the Applicant's justification for contemporaneous inconsistency was the application of different sanctions on the basis that those who pleaded guilty were issued final written warnings and Harmse was dismissed because he did not plead guilty.

[23] These are the findings the Applicant seeks to review and set aside. The grounds for review are that the arbitrator committed gross misconduct in relation to his duties and that he committed a gross irregularity in the conduct of the arbitration proceedings.

[24] The first ground for review relates specifically to paragraph 5.2 of the arbitration award wherein the arbitrator dealt with the provisions of Schedule 8 of the Act and the inherent probabilities and found that the probabilities favour Harmse and paragraph 5.3 wherein the arbitrator found inconsistency.

[25] In respect of paragraph 5.2 of the arbitration award the Applicant's case is that the arbitrator cited the incorrect sub paragraph of Item 7 of schedule 8 of the Act. The arbitrator found that Item 7(a)(i) provides that it should be established that the employee was aware of the rule, whereas it is in fact 7(b)(ii) that provides that it should be established whether the employee was aware of

[7] Act 66 of 1995.

could be reasonably be expected to be aware of the rule. The Applicant's case is that it proved during the arbitration proceedings that Harmse was aware of the rule, alternatively that he should have been aware of it and there is no justification in the arbitrator's decision to accept Harmse's version.

[26] In my view the reference to the incorrect sub paragraph of Item 7 has to be considered in accordance with the question whether the incorrect reference produced an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In my view the answer to this is no and the incorrect reference is neither here nor there.

[27] The Applicant submitted that the totality of the evidence presented proved that Harmse ought to have known that there was a contravention of the relevant procedures and it was unreasonable to reach the decision that the probabilities favoured Harmse.

[28] I do not find that the arbitrator's conclusion that the probabilities favour Harmse is unreasonable, as it was evident from the evidence that the conduct of all the members of the BEC and the BAC, including SCM, showed that no one was aware of the rules and the procedures they ought to have followed but did not, which resulted in disciplinary action. Even if am wrong on this aspect, the final analysis will depend on the materiality of the error or irregularity and its relation to the result and this Court is not to take a piecemeal approach but should consider the arbitration award and the evidence adduced holistically. In my view the Applicant's challenge is to show that the award, seen holistically, is unreasonable.

[29] In respect of paragraph 5.3 it is the Applicant's case that different sanctions did not only follow from the type of plea that was entered by the charged employees, but also followed from the roles played by the members of the BEC and the BAC as well as the knowledge and expertise of the employees and the arbitrator should not have found that it was incorrect to follow such approach.

[30] This ground for review is not supported by the evidence. The Applicant's representative, in cross-examination of Harmse, put it to Harmse in no uncertain terms and in respect of the other employees who were charged for

the same misconduct but not dismissed that *"they were not dismissed because they pleaded guilty…."*. The issue that the others pleaded guilty to the charges and Harmse not was a theme that remained throughout the cross-examination of Harmse.

[31] Schedule 8 of the Act requires that employers should apply the penalty of dismissal consistently with the way it was applied in the past (historic consistency) and as between two or more employees who participate in the same misconduct (contemporaneous consistency). Consistency is an element of fairness and an important consideration in the determination of the fairness of a dismissal.

[32] *In casu* the arbitrator was faced with a question of contemporaneous inconsistency where all other employees who were charged with the same or similar misconduct as Harmse and who were part of the same BEC and BAC process, were not dismissed. A perusal of the transcript of the arbitration leaves no other conclusion that all the other employees who were part of the BEC and BAC when ST was appointed and who were charged for the same or similar misconduct as Harmse, were not dismissed but either resigned, reached a settlement with the Applicant or were issued final written warnings and the main reason to differentiate was because they pleaded guilty.

[33] The fact that Harmse was the only member of the BEC who was dismissed for the reasons related to the BEC of 8 February 2011, clearly shows inconsistency and without justification for the differentiation other than a plea of guilty, rendered his dismissal unfair.

[34] The arbitrator's findings on inconsistency are supported by the evidence that was adduced and are not unreasonable in view of the evidence that was placed before him. I can see no reason to interfere with the arbitrator's findings on inconsistency and as contained in paragraph 5.3 of the arbitration award.

[35] The second ground for review is that the arbitrator committed a gross irregularity in that the totality of his reasoning is flawed, his decision is not connected to the evidence led and is not rational. Apart from this sweeping and bold statement, the Applicant did not make any averments to substantiate

or explain in what respect the arbitrator's reasoning is flawed and the decision disconnected from the evidence.

[36] In my view more is needed than a mere, unsubstantiated allegation of irregularity. It is simply not enough to say that the totality of the arbitrator's reasoning is flawed and this Court cannot and should not entertain unsubstantiated claims of irregularity, more so where the test on review is a stringent one.

[37] Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. Without any averments setting out what the irregularity is, such an assessment is impossible and the ground for review cannot stand.

[38] In summary, where it is alleged in review proceedings that an arbitrator ignored certain material facts, the enquiry is whether indeed this was the case, and if so, whether these facts were material. If it is found that they were indeed ignored as alleged, and were material, it follows that the arbitrator would have come to a different conclusion had he taken them into account, and therefore the result arrived at would *prima facie* be unreasonable[8].

[39] In *Herholdt v Nedbank Ltd* the Supreme Court of Appeal amplified the review test as follows:

> " … 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."

[8] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC). See also *Shoprite Checkers v CCMA and others* (unreported case no: JR2471/13) at paragraph [10] where it was held that;

> *"The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable"*

[40] I must ascertain whether the arbitrator ignored material facts, considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable.

[41] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I cannot find that the arbitrator ignored material facts. The onus was on the Applicant to prove that Harmse's dismissal was fair and it failed to do so. The arbitrator could, on the evidence before him, make the findings and reached the conclusions he did.

[42] Viewed cumulatively, and in line with *Harold* and *Mofokeng,* I am not convinced that the arbitrator's decision was one that a reasonable arbitrator could not have reached on the full conspectus of all the facts before him.

[43] Having found that relevant facts were not ignored by the arbitrator, there is no need to proceed with the full *Mofokeng* analysis.

[44] The award and findings contained therein are reasonable and are not to be interfered with on review. It follows that the application in terms of section 145 of the Act fails.

[45] Both parties argued that the costs should follow the result and I can see no reason to disagree.

Order

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

46.1 The application for review is dismissed with costs.

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C. Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant: Advocate V Naidu

Instructed by : State Attorney

For the Third Respondent: Mr E Geldenhuys of Tomlinson Mnguni James Attorneys