IN THE LABOUR COURT SOUTH AFRICA, DURBAN

Not Reportable

Case No: D1417/19

In the matter between:

NUMSA obo G GAZU **APPLICANT**

And

DEFY APPLIANCES (PTY) LTD **FIRST RESPONDENT**

COMMISSIONER H NDABA N.O **SECOND RESPONDENT**

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL ("MEIBC") **THIRD RESPONDENT**

Heard: **02 June 2022**

Delivered: **This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 14h00 on 05 August 2022**

Summary: **Opposed Review**

***EX-TEMPORE* JUDGMENT**

LAWRENCE AJ

[1] This is my ex tempore judgment in the matter between NUMSA on behalf of Goodman Gazu, the Applicant, and Defy Appliances (Pty) Limited, the First Respondent and Others.

[2] This is a review application that has been brought in terms of Section 145 of the Labour Relations Act 66 of 1995.

[3] The arbitration award that was issued by the Second Respondent is dated the 7th October 2019, but the events that played themselves out in this matter go as far back as May 2012.

[4] The Applicant was dismissed on the 22nd of May 2012 and referred a dispute to the Third Respondent where an initial award was handed down by Commissioner Lyster. In that award, Commissioner Lyster found for the Applicant on the basis that there had been inconsistent application of discipline and awarded compensation to the Applicant without ordering reinstatement or re-employment. In argument before this Court it was contended on behalf of the First Respondent that the Applicant had been paid the compensation awarded by Lyster and had in spite of this still proceeded with the review application. There was no indication in argument from either party's representative, nor for that matter was there any indication in the papers filed in this matter, as to whether the issue of pre-emption was ever raised.

[5] What is abundantly clear, is that on review, as a result of an inability to reconstruct the record, the matter was remitted back to the Third Respondent, where it came before the Second Respondent.

[6] The Second Respondent effectively found that the dismissal of the Applicant was substantively and procedurally fair.

[7] The facts in this matter were fairly straight forward and substantially common cause between the parties.

[8] The Applicant was employed by the First Respondent during or about July 1995.

[9] At the time of his dismissal he was employed in the position as senior technician earning a salary of approximately R15 522,00 per month.

[10] In the course and scope of his employment the Applicant had use of a Company vehicle and this appeared to the case even on weekends.

[11] The Applicant worked alongside another senior technician namely Salim Rahman.

[12] The Applicant was entitled to take three breaks a day namely; a 30 minute lunch break and 15 minute tea breaks in the morning and afternoon respectively.

[13] The Applicant and Rahman were entitled to consolidate their tea breaks into their lunch breaks so as to obtain a continuous lunch break which, however, could not exceed 60 minutes in extent.

[14] At a particular point in time in 2011 the First Respondent became concerned about the productivity of the Applicant and Rahman.

[15] One of the managers namely Mr Rivett spoke to Rahman in the presence of another manager namely, Ralph Macdonald. The subject that was discussed with Rahman apparently related to his “early knock of practises” and Rahman was told that if he was knocking off early he should stop.

[16] It was contended on behalf of the First Respondent, that when Macdonald testified at the Arbitration proceedings, he unequivocally stated that the conversation between Rivett and Rahman was a casual conversation which lasted no more than between 30 to 60 seconds.

[17] It is the First Respondent's further contention that this was not a disciplinary process that was being undertaken by the First Respondent.

[18] The Applicant on the other hand, has contended that this so called "warning" that was handed to Rahman for being away from work without authorisation was indicative of inconsistency as the Applicant was dismissed when he was indicted on a similar charge.

[19] The Second Respondent clearly rejected the argument of inconsistency and in his award he found that paragraph 76 that:-

"No discussions were held with the Applicant prior to his disciplinary hearing. This in my view does not mean there was unfairness warranting a relief of some sort for the Applicant. The Applicant was a manager who should have lead by example. The inconsistency in my view should deal with the verdict or sanction imposed. In this matter no punitive sanction in the form of a warning was issued."

[20] In essence the Third Respondent did not construe Rivett's discussion with Rahman as disciplinary process or for that matter as the meting out of a disciplinary sanction.

[21] The First Respondent subsequently undertook an investigation into the Applicant and Rahman's movements utilising *inter alia* the Bid Track System that was fitted to the First Respondent's vehicle, including the vehicles that the Applicant and Rahman used.

[22] It emerged during the investigation that when the Applicant was at any client's premises he would switch off the ignition to the vehicle but when he went home during working hours he would leave it on.

[23] During the arbitration proceedings the First Respondent called a Mr Paul Sarjoo to give evidence in relation to the tracking system that was inserted in the vehicles.

[24] He testified that he had twelve (12) years' experience in Bid Tracking Systems and confirmed that he had given evidence in Rahman's hearing as well.

[25] He explained that the Bid Track Systems that were fitted to the vehicles of the First Respondent produced multiple reports which included journey summaries and trip log reports.

[26] He explained that he had analysed the reports that had been generated. He found that the vehicle that the Applicant had used had spent between 8 minutes to 30 minutes at his home during working hours with the ignition on.

[27] He stated however when the Applicant went home after work with the vehicle the ignition would be switched off.

[28] It was contended on behalf of the First Respondent, that the Applicant had purposely left the ignition on whilst at home in order to conceal his whereabouts as the tracking report would not show that the vehicle was stationery. The First

Respondent contended that this conduct was indicative of dishonesty and done with the clear knowledge that there was a tracker system in the vehicle.

[29] The excuse that the Applicant gave for leaving the vehicle ignition on was that he was in the habit of listening to the radio through the vehicle's sound system whilst at home at lunchtime.

[30] It was further contended on behalf of the Applicant that he had adopted a similar practise of listening to the radio on weekends and outside of working hours and various examples was cited ranging from the 8 October 2011 to the 20 October 2011.

[31] In respect of these dates it was contended that the Applicant outside of working hours left the vehicle on in a similar fashion to that which he had undertaken whilst at home at lunch time.

[32] The Applicant was charged with "*dishonesty –deliberate attempts to conceal your home visits during working hours by leaving the vehicle ignition on as indicated in the attached list*. "

[33] Rahman was similarly charged and dismissed after a disciplinary hearing.

[34] The Applicant gave evidence at Rahman's hearing and he indicated that he also left work early to pick up his lunch.

[35] He stated that they could go home during working hours without the need to first seek permission.

[36] Rahman called his manager Mr Rivett to support the contention that permission was not required from Rivett.

[37] Unfortunately for Rehman, Rivett apparently indicated that he was unaware of the Applicant and Rahman going home during working hours and that they in fact were required to obtain prior permission to do so where home visits fell during the day, even if this was for lunch.

[38] At the hearing before the Second Respondent the Applicant changed his version and it became common cause that he did not have the right to go home during working hours and needed to obtain prior permission to do so.

[39] The Second Respondent, in his Award, found that the most plausible inference to be drawn on the balance of probabilities *"is that the Applicant acted dishonestly by not switching off his vehicle whilst at home because this had the effect of concealing his home visits to the Respondent who relied on the journey summary"*

[40] The Second Respondent went on to find that there was a rule in place which the Applicant had breached and that the appropriate sanction was dismissal.

[41] In the present review application the Applicant raises principally three grounds of review.

[42] The first ground of review related to alleged procedural unfairness in that the Applicant felt that the Second Respondent should have found that the Applicant had not been given an opportunity to attend the disciplinary proceedings which were held in *abstentia.*

[43] Essentially, the reason for the Applicant challenging procedural fairness was based on the refusal by the chairperson, Derek Kerr to postpone the hearing.

[44] In tandem with that, on review, it was argued on behalf of the Applicant that Kerr should have been called as a witness to give evidence at the arbitration proceedings.

[45] The Applicant was originally asked to attend a disciplinary hearing on the 11th May 2012 but failed to do so.

[46] The hearing was postponed from that date to the 17th of May 2012 and it had to be again postponed on account of the Applicant's alleged illness.

[47] Delport was called by the First Respondent as its witness and – as it turned out – was the author of the correspondence that had gone between the Applicant and the First Respondent, relating to the inadequacy of his sick notes.

[48] The Second Respondent, in his award, deals with the issue of procedural unfairness at paragraph 78 and he finds that the First Respondent had made reasonable attempts to secure the attendance of the Applicant at the disciplinary hearing.

[49] The Second Respondent proceeded, in essence, to find that the Applicant's conduct was tantamount to a refusal to participate in the disciplinary enquiry proceedings.

[50] In support of his findings, the second respondent refers to **Old Mutual Life Assurance Company of South Africa v Gumbi** [1] where the Supreme Court of Appeal effectively found that, where there is a calculated intention to avoid attending a disciplinary enquiry, through deliberate absence, it did not warrant

[1] 2007 (4) ALL SA 866 (SCA)

a finding of procedural impropriety if the employer proceeded with the enquiry in *abstentia*.

[51] Whilst certain arbitrators may have found that it was unfair for the First Respondent to have proceeded with the enquiry, there are equally other arbitrators who would be inclined to have found that there was nothing untoward about the enquiry continuing in the absence of the Applicant, who, it could be argued, had been given adequate opportunity to participate in that enquiry and had not taken up the offer by the First Respondent of seeing its medical doctor.

[52] I therefore find that this aspect of the Second Respondent's award is not so unreasonable as to constitute a reviewable irregularity.

[53] This Court cannot lose sight of the finding of the Supreme Court of Appeal in **Heroldt v Nedbank & Others** .[2] In that particular case, the Supreme Court of Appeal referred to the test that had been espoused in Sidumo and went on to find as follows at paragraph 25 as follows:

"*For a defect in the conduct of proceedings to amount to a gross irregularity, as contemplated by Section 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 the particular facts are not in themselves sufficient for an award to be set aside but are only of any consequence if their effect is to render the outcome unreasonable."*

[2] 2013 11 BLLR 1074 (SCA)

The second challenge that has been raised by the Applicant relates to the issue of substantive unfairness. In dealing with the issue of substantive unfairness, I refer to the Labour Appeal case of **Goldfields Mining South Africa Limited v CCMA** [3] In that particular case, the Labour Appeal Court, following on from the Herholdt case, explained the approach of a reviewing court as follows at paragraph 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 employ give the parties a full opportunity to have their say in respect of the dispute?

(ii) Did the arbitrator identify the dispute he 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 deal with the substantial merits of the dispute? and

(v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on all of the evidence?"

[54] That test, it goes without saying, is a fairly strict test.

[55] Mr Seery, in raising the issue of substantive unfairness, dealt essentially with the issue of the weight and focus that the Second Respondent had sought place upon the so-called "unauthorized conduct" of Mr Gazu, the Applicant.

[3] 2014 35 ILJ (LAC)

[56] He argued that there was a disconnection between the Second Respondent's assessment of the matter and what really was in issue as far as the Applicant was concerned.

[57] In submission, Mr Seery argued that the First Respondent had not established any dishonesty on the part of the Applicant who was firstly not acting out of character in listening to the radio from the car at lunch time and secondly that the Applicant had not been aware of the Bid Track system in the car.

[58] Mr Pemberton, in dealing with this particular issue, took us through the background events that had led to the led to the arbitrator arriving at the decision that he came to.

[59] It was argued that the Applicant had given a different version at arbitration to the version he had initially given at Rahman's disciplinary hearing. It was argued, on behalf of the First Respondent, the ineluctable conclusion to be drawn from the Applicant changing his version was that he was trying to tailor and choreograph his story to conform with Rivett's version that the Applicant and Rahman needed prior permission to go home for lunch and that Rivett was unaware of the home visits by the Applicant.

[60] While Mr Seery did refer, at paragraph 13 of his Supplementary Heads to the Tracker reports, revealing that the Applicant had adopted a similar approach of listening to the radio on weekends and outside working hours, this, in itself, does not mean that the finding that was reached, by the Second Respondent, on the dishonesty of the Applicant, is so entirely unreasonable to render it reviewable. I refer again to the decision in the Goldfields case *supra*. The Second Respondent's decision on the issue of dishonesty is one that can be sequentially tracked back to the evidence that was placed before him.

[61] It was quite clear that the Applicant was unable to give a completely cogent explanation as to why he would leave the vehicle on to listen to the radio when he had a radio and television set in the house. When viewed in conjunction with the inexplicable version change that occurred after the Applicant testified at Rahman's disciplinary enquiry, the inferences and conclusions reached, by the Second Respondent, appear ever more compelling and reasonable in context.

[62] Furthermore, the evidence of Sarjoo, about how the tracking system works and what the effect of leaving the ignition of the vehicle on, adds further cogency to the Second Respondent's assessment of the probabilities of the matter.

[63] In these circumstances I find that the finding of substantive fairness by the Second Respondent is not so unreasonable that one could say that it is a decision that no reasonable arbitrator could have come to.

[64] Before leaving this issue, it bears mentioning that while my sympathies lie with the Applicant, given his years of service and particularly the nature of the offence that he was charged with, that in itself does not merit this Court interfering with either that particular finding of substantive unfairness by the Second Respondent or his decision to uphold the sanction of dishonesty.

[65] The third issue raised by the Applicant was on the issue of inconsistency of discipline. In this regard it was argued that Rahman had been given a warning when it was ascertained that he may have been involved in conduct of this nature and was not subjected to a disciplinary enquiry.

[66] It is clear that that particular process undertaken by Rivett (and which I have already alluded to above), did not amount to a disciplinary hearing.

[67] At best Rivett appears to have been articulating his concerns about possible suspicious behaviour on the part of Mr Rahman that led to him cautioning Rahman to desist from any errant conduct of leaving work early, if he was indeed engaging in that conduct.

[68] There has been no demonstration of any preferential treatment directed to Rahman, who ironically ultimately ended up being dismissed for the very conduct that the Applicant was charged with by the First Respondent.

[69] I therefore find that there is no content to the complaint about inconsistency.

[70] Turning to the issue of costs, it is trite that the Constitutional Court and the Labour Appeal Court have come out against generally awarding costs in labour matters.

[71] In particular I am mindful of the dicta of the Constitutional Court in National Union of Mineworkers on behalf of ***National Union of Mineworkers obo Masha and Others v SAMANCOR Limited (Eastern Chromes Mines) and Others*** [4] where the court stated as follows:

" It is trite principle that a court considering of costs exercises a discretion. This discretion is to be exercised judicially and in accordance with the correct principles of law."

[4] 2021 (10) BCLR 1191 (CC)

[72] I accordingly make the following order:

1. The application to review and set aside the Second Respondent's award is dismissed.

2. There is no order as to costs.

I Lawrence

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR APPLICANT: Adv T Seery (instructed by Harkoo Brijal & Reddy Inc)
ca2@hbr.co.za

FOR FIRST RESPONDENT: Mr R Pemberton - Eversheds Sutherland Attorneys
RichardPemberton@eversheds-sutherland.co.za