THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR756/2013

MOGALE CITY LOCAL MUNICIPALITY **Applicant**

and

COMMISSIONER ML MATLALA **First Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL **Second Respondent**

IMATU obo COLBERT MPHAPHULI **Third Respondent**

Heard: **14 January 2016**

Delivered: **21 April 2016**

JUDGMENT

BAKKER, AJ

Introduction

[1] The Applicant asks this court to review and set aside an arbitration award of the second Respondent. The grounds of review, as pleaded, are that the arbitrator:

i. failed to apply his mind to the facts,

ii. did not deal with the charges before him,

iii. failed to apply the correct legal principles, and

iv. erred in arriving at certain inferences he did.

1 The Applicant's case was not crafted in clear terms and it is difficult to see where the pleaded grounds of review are to fit into the permissible grounds of review set out in section 145 of the LRA. The Applicant has done no more than to allege that the arbitrator has committed an error of fact and law without clearly identifying where he had erred. During argument, Mr Sibuyi, appearing for the Applicant, advanced two main grounds of review in oral argument, firstly; that that the arbitrator committed a gross irregularity in that he failed to apply his mind to the facts before him, that his findings were not sustained by the evidence and that he was biased. Secondly; that his award was unreasonable. Ms Burns-Coetzee for the third Respondent asserted that the employer has not proven its case against the employee and that the arbitrator reached a decision that falls within the band of reasonableness.

The salient features

[3] Mr. Mphaphuli was employed by the municipality from 1986 until his dismissal on 29 July 2011. At the time of his dismissal, he was employed in the capacity of a meter reader.

[4] Mr. Mphaphuli was dismissed for tampering with the electricity meter at his private residence and defrauding his employer, the municipality.

[5] He challenged his dismissal and sought reinstatement.

[6] The first Respondent arbitrated the dispute and held that the dismissal was procedurally unfair (mainly on account of non-compliance with peremptory procedural requirements of the applicable disciplinary code) and substantively unfair (for failing to prove the allegations of tampering levied against the third Respondent). The arbitrator awarded reinstatement with retrospective back-pay to the third Respondent employee.

The review test

[7] Applying the *Sidumo* test, I have to determine whether or not the decision reached by the first Respondent is one that a reasonable decision-maker could not reach. The *Sidumo* (reasonableness) test, as explained in *Herholdt v Nedbank Ltd (COSATU as amicus curiae)*:

> '… involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the Commissioner was not one that could reasonably be reached on the evidence and other material properly before the Commissioner.... The reasons are still considered in order to see how the Commissioner reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision- maker could reach in the light of the issues and the evidence.'

and

> '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 Commissioner must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Commissioner could not reach on all the material that was before the Commissioner. 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] For the reasons set out below, the first Respondent's award is judicially correct and unassailable. I can find no reason that justifies interference on review.

The issues*:*

[9] Two main issues emerged in this review:

i. the consequence of the admitted non-compliance with the time-bar provisions of the Disciplinary Procedure and Code Collective Agreement (the Code) and failure to obtain condonation (the delay issue); and

ii. whether the Applicant had adduced evidence sufficient to prove on a balance of probabilities that Mr Mphaphuli tampered with his electricity meter? (the evidence issue)

The delay of the disciplinary enquiry

[10] The Code binding between the parties provides at clause 6.3 that:

> 'The employer shall proceed forthwith or as soon as reasonably possible with the disciplinary hearing but in any event not later than three months from the date upon which the employer became aware of the alleged misconduct. Should the employer fail to proceed within the period stipulated above, and still wish to pursue the matter, it shall apply for condonation to the relevant division of the SALGBC.'

[11] The Municipality does not deny its failure to comply with the time-bar provisions of the applicable disciplinary code. Condonation was a precondition for initiating the disciplinary enquiry. The Municipality has not sought or obtained condonation.

[12] Although I accept that failure to follow an agreed process does not in itself mean that the process actually followed was unfair, the Municipality has proffered no explanation (in the arbitration before the first Respondent or before me in this Court) for its failure to follow the agreed process. Employers are not at liberty to depart from agreed procedures for no valid reason.

[13] The non-compliance with the agreed procedure made the third respondent unhappy and it was painful to him. It is unclear if the arbitrator believed that Mr. Mphaphuli was actually prejudiced by the delay.

[14] I do not accept the suggestion that, by participating in the disciplinary enquiry without objection, Mr Mphaphuli somehow waived his rights to a fair process and specific performance of the provisions of the collective agreement disciplinary code. The third Respondent was entitled to challenge the procedural fairness of his dismissal at arbitration.

[15] I would be remiss not to mention the conflicting judgments of this Court in relation to the validity of disciplinary enquiries following non-compliance with the peremptory requirements of clause 6.3. In *SAMWU obo Jacobs v City of Cape Town and Others*, Steenkamp, J believed that by proceeding with the disciplinary hearing beyond the peremptory three-month period in clause 6.3 of the Code (without having obtained Condonation) rendered the disciplinary hearing invalid and of no force and effect. Rabkin-Naicker, J disagreed in *Tsengwa v Knysna Municipality* and held, correctly in my view, that arbitrators are enjoined to determine the (procedural) fairness of dismissals and not the validity of the domestic proceedings. Notwithstanding these judgments, I believe Mr. Mphaphuli was entitled to raise, as a type of collateral attack, the legality of the non-compliant disciplinary hearing. This constituted a relevant consideration that

informed the first Respondent's decision that the disciplinary enquiry was procedurally unfair. To this end, the arbitrator's decision is one that falls within the band of reasonableness and merits no interference on review.

The evidence presented at arbitration

[16] I have read the transcribed record of the arbitration proceedings and I am not persuaded that the arbitrator ignored any substantial evidence in his arbitration award. It seems to me that he has dealt with the considerable merits of the matter before him and reached a conclusion that is not unreasonable or disconnected from the evidence presented during arbitration.

[17] Although I agree that the arbitrator needlessly emphasised the semantics in relation to the container/box (wherein the electricity meter was stowed) and the electricity meter itself, in the end, the weight that he attached to the dissimilarities made no difference to his principal conclusion that the applicant failed to prove its case against the employee. In *Head of the Department of Education v Mofokeng* Murphy, AJA clarified the review test as follows:

> '[33] 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. 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 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.'

[18] On the affidavits exchanged before this Court, it is common cause that the Applicant's evidence, during the arbitration, suggested that Mr. Shadrack Maimane performed some or all of the normal duties of the third Respondent whilst the latter was on leave. This included reading the electricity meter inside the yard of the third Respondent's private residence. Mr. Maimane established that the third Respondent's electricity meter was tampered with and was not aware if the third Respondent had reported a damaged meter.

[19] The real and only issue was if the Applicant established, on a balance of probabilities, that it was in fact the Third Respondent that had tampered with the electricity meter. In its heads of argument, the Applicant conceded that the evidence that it tendered during arbitration was 'by and large circumstantial'.

[20] Testifying for the Applicant, Mr. Maimane did not allege that the Third Respondent tampered with the electricity meter. The Applicant's second witness, Mr. Hendrik Lee, was also not prepared to suggest that it was the Third Respondent who tampered with the electricity meter. It was not denied that the Third Respondent was out of town at the time that the replaced meter was tampered with. Mr. Elvis Nhleko suggested that the Third Respondent tampered with his electricity meter and wanted the arbitrator to draw the same inferences that he had.

[21] The Third Respondent denied that he tampered with the electricity meter. He explained that he was not home as he was in Venda at the time of the (second)

tampering and I could find no place in the transcribed record where this version was challenged.

[22] It is clear that the arbitrator did deal with the substantial issues of the matter before him. There is nothing in the record or the founding affidavit that reveals bias. In the result, the first ground of review fails.

[23] His conclusion that the Applicant failed to prove the allegations against the third Respondent is one that a reasonable commissioner could reach on the basis of the material placed before him.

[24] This review must, therefore, fail.

Costs

[25] I have a discretion under section 158 (1)(a) read with section 162 of the LRA to award costs on the basis of the requirements of law and fairness. In my view, it is fair that each party pays its own costs.

Order

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

i. The application is dismissed.

ii. There is no order as to costs.

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Bakker, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Advocate HW Sibuyi
Instructed by:	Phungo Attorneys
For the Respondent:	Ms L Burns-Coetzee
Instructed by:	IMATU