IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1430/16

In the matter between

SA METAL GROUP (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

COMMISIONER: A MAKGOBA **Second Respondent**

LEWUSA obo MEMBERS **Third Respondent**

Heard: 19 July 2017

Delivered: 25 October 2017

Summary: The Review application: The individual Third Respondents dismissed, among others, for theft of diesel and use of company property without authorisation. The Second Respondent committed an irregularity as he failed to deal with all issues before him. Neither did he apply circumstantial evidence principles to the facts before him. He found in favour of the individual Third Respondents whose evidence was not properly before him. The award set aside and remitted to the First Respondent.

JUDGMENT

MOLEBALOA AJ.

Introduction

[1] This is a review application launched in terms of Section 145 of the Labour Relations Act[1] (the LRA) to have the arbitration award issued under case: GAEK 2640-15 dated 10 August 2015 reviewed and set aside. The award was issued by the Second Respondent, A Makgoba (the commissioner), who acted under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA). The union, LEWUSA, acted on behalf of its members, Dlamini and others, who for purposes of this application will be referred to as "individual Third Respondents".

[2] This matter originates from Cape Town but parties agreed that it be heard in the Johannesburg seat of this Court as there was a pending application already filed here for the enforcement of the same award. The clear logic in this respect was that should the review application succeed, the enforcement application would naturally fall off. As the papers stood, I am required to make an order enforcing the award in the event the review application is dismissed.

Background facts

[1] Act 66 of 1995

[3] The individual Third Respondents were all employed as truck drivers by the Applicant.~~.~~ The Applicant experienced high volumes of diesel consumption in its trucks. It then launched an investigation through which it discovered that its drivers were routinely deviating from their scheduled routes and stopping at a truck stopping point located in Putfontein.

[4] The Applicant further discovered that the anti-siphoning devices fitted into the trucks' diesel tanks were tampered with and some even broken. The investigations revealed that the stolen diesel was sold at Putfontein and such was confirmed in the video footage captured during investigation. Though none of the individual Third Respondents were captured selling diesel, the footage however confirmed the illicit diesel transactions taking place at Putfontein.

[5] Having discovered that the individual Third Respondents made several unauthorised stops at Putfontein and also that their trucks used high volume of diesel, the Applicant then put the following charges to the individual Third Respondents:

> "Dishonesty in that on several occasions from June 2014 to January 2015 you deviated from your scheduled route. On the days you deviated from scheduled route, diesel consumption on your vehicle was above average. Thus the probability exist that you were involved in defrauding the company diesel.
>
> Breach of company policy and procedure in that on several occasions between June 2014 and January 215 you deviated from scheduled route.
>
> Fraud and theft in that from June 2014 to January 2015 on numerous occasions you led the company to believe that you were drawing diesel from the company's tanks for the purposes of conducting the company's business. The company was induced to allow you to draw such diesel as a result of your misrepresentations. In fact you intended to sell part of the diesel drawn

and keep proceeds. In fact you did sell part of the diesel belonging to the company and kept the proceeds.

Serious misconduct in that you used a company vehicle for personal use without authorisation."

[6] The individual Third Respondents were found guilty and subsequently dismissed. Unhappy with their dismissal, they referred a dispute of unfair dismissal with the First Respondent.

The arbitration award

[7] The commissioner however found that the individual Third Respondents did not contravene any rule or standard regulating conduct of siphoning diesel from the truck as no evidence was led in the arbitration proceedings. He further found that the individual Respondents did not tamper or break the anti-siphoning devices. He also found that there was no rule in the workplace stating that the drivers should use specific routes when travelling to a particular destination. He accepted the explanation that the individual Respondents drove to Putfontein to buy food. He ultimately ordered the Applicant to reinstate the individual Third Respondents with back pay.

The review application

[8] Unhappy with the award, the Applicant launched a review application citing numerous grounds. According to the Applicant, the commissioner committed the following mistakes:

(i) Made a mistake of fact and law in finding that the no anti-siphoning rule exists in the Applicant's workplace.

(ii) Made a mistake of fact and law in finding that no "specific route" rule exists in the Applicant's workplace.

(iii) Made mistakes of fact as he attributed some of the evidence as the evidence adduced by the Applicant's witnesses when such was not the case.

(iv) Made mistakes of fact and law in evaluating the circumstantial evidence that was properly before him.

(v) Made mistakes by failing to determine whether or not the individual Respondents were guilty of using company vehicles for personal use without authorisation.

The law

[9] The test for review is settled. It is whether or not the decision reached by the commissioner is one that a reasonable decision maker could not reach.~~12~~.*In Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[2] the Constitutional Court held that the review grounds set out in section 145 of the LRA have been suffused by the standard of reasonableness, and that an arbitration award of the CCMA or a bargaining council is reviewable if the decision reached by the commissioner was one that a reasonable decision–maker could not reach.

[10] In *Andre Herholdt v Nedbank Limited, (Congress of South African Trade Unions as amicus curiae)*[3] the Supreme Court of Appeal (the SCA) had an occasion to interpret the grounds of review set out in section 145 of the LRA as developed in the *Sidumo* Case. The SCA described the standard of review as follows:

> " In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one grounds in section 145 (2)(a) of the LRA.

[2] 2008 (2) SA 24 (CC)

[3] [2013] 11 BLLR 1074 (SCA)

> For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145 (2) (a) (ii), the arbitrator 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 arbitrator could not reach on all 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."

[11] Accordingly, the SCA, in effect, held that in order to establish the existence of a gross irregularity as a basis for succeeding with a review application, it is necessary to demonstrate that either of the following circumstances exist:

11.1. The Commissioner misconceived the nature of the enquiry; or

11.2. The result ultimately arrived at by the Commissioner was unreasonable.

[12] In *Gold Fields Mining South Africa (PTY) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and other*[4] the court introduced a two stage test for review. First there must be an irregularity and second that irregularity must be material to the outcome. The Court went further and the following was said at paragraphs 15:

> "What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by *Sidumo*. The gross irregularity is not a self standing ground insulated from or standing independent of the *Sidumo* test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process review.

[4] [2014] 1 BLLR 20 (LAC)

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

[13] In *Head of the Department of Education v Mofokeng and others*[5] [2015]) (*Mofokeng*), the Court stated the following at paragraph 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 enquiry. 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 determine 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 issue to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesis 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 competing interest 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 the grounds alone. The arbitrator however must be shown to have diverted from correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[5] [2015] 1 BLLR 50 (LAC)

[14] In interpreting this case, the court in *Shoprite Checkers v Commission for Conciliation, Mediation and Arbitration and others*[6] stated the following at paragraphs 9 and 10:

> "[9] This dictum in Mofokeng says many important things about the review test. But for present purposes, consideration need only be given to the guidance that it provides for determining when the failure by a Commissioner to consider facts will be reviewable. The dictum provides for the following mode of analysis:
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> (a) The first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on 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;
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> (c) a second enquiry must then be embarked upon-it being whether there exist a basis in the evidence overall to displace the prima facie case of unreasonableness, and
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> (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).
>
> [10] The shorthand for all of this is the following: where a Commissioner misdirects him or herself by ignoring materials facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable."

[15] Having considered the above cases, it is axiomatic that it is the reasonableness of the award that becomes a focal point of the enquiry. There must be an error or irregularity as envisaged in section 145 of the LRA. It is however not any error that vitiates the award. The error must be material

[6] [2015) 10 BLLR 1052 (LC)

enough to influence the result and must therefore not be displaced even if the overall evidence is taken into account.

Evaluation

[16] The Applicant argued that the decision reached by the commissioner is one that a reasonable decision maker could not reach. In its argument it relied on several grounds of review as enumerated above. I hereunder deal *ad seriatim* with those grounds.

Made a mistake of fact and law in finding that the no anti-siphoning rule exists in the Applicant's workplace.

[17] I find this ground of review misplaced. The commissioner never indicated in his award that there was no anti-siphoning rule. He however found that the individual third respondent did not contravene any rule or standard regulating conduct in siphoning diesel from the trucks[7]. I must admit that the commissioner did not articulate his thoughts in a succinct manner. However, reading the award in conspectus, it is apparent that he accepted the existence of a rule against siphoning diesel but continued to find that such rule was not breached or contravened. It is on this basis that I find the attack of the award on this ground unsustainable.

Made a mistake of fact and law in finding that no "specific route" rule exists in the Applicant's workplace.

[18] The commissioner in his award[8] under survey of Venter's evidence indicated that Venter referred to page 405 of bundle B which states that "*all trucks will be on route to customers / mills or at the loading or offloading area*". Regard

[7] Para 54 of the award.
[8] Para 30 of the award.

should be had that charges are not always drafted in an impeccable language. So are the policies put in place to regulate the employee's behaviour at workplaces. That being the case, it is however axiomatic in the matter at hand that a rule is in place directing drivers to observe the road to determined destinations. This is what is meant when the employer said all trucks will be on route to customers, etc. To expect the employer to identify the routes by names is grotesquely unreasonable. A driver would therefore know that he is prohibited from driving from North to East and then to South when there is a road connecting North directly to South.

[19] The commissioner completely misconstrued this rule as according to him there was no rule identifying specific routes to be used when travelling to a particular destination. The rule exists. Drivers must drive from loading to offloading points. Drivers must be treated with a degree of respect as they are (fairly) complicated employees. They are able to read road signs and interpret them. They will know if they use a roundabout. The reasons for such will be either valid or invalid. This however does not mean that there is no rule regulating the specific routes to be used by drivers. As Venter indicated, they are expected to use the fastest and safe routes. The commissioner's finding is thus not supported by the evidence properly before him.

[20] In this case, as I understand the Applicant's case, there were instances where a driver will totally detour from the route to his destination and go to Putfontein as if it was a sanctification ritual. The commissioner in those instances was then called to determine whether a rule as identified by Venter was breached. He failed to do so. He treated Putfontein, much against the evidence led, as an exit point which drivers must go through. By invoking such an approach, he denied himself an opportunity to deal properly with why drivers and in particular the individual Third Respondents had to be baptized at Putfontein before proceeding to their identified destinations. Reference to the buying of food as demonstrated hereunder provides no assistance.

[21] The commissioner refers in his award, with a subtle approval, that all drivers went to buy food at Putfontein. Such an approval does not come without difficulties. Venter indicated that the drivers are not allowed to stop when the truck was loaded[9] unless they contact the control room. He further indicated that drivers are allowed to buy food on route[10]. The commissioner appeared to have accepted the individual third respondents' explanation that they went to Putfontein to buy food. The question is: was the explanation reasonable in light of the facts of this case? Did the commissioner interrogate the reasonableness or otherwise of the explanation? He did not. Failure to apply his mind on these material issues constitute material irregularity.

[22] A further difficulty with the commissioner's approval of drivers going to Putfontein is that not all drivers alleged to have gone to Putfontein to buy food. He however appeared to have imputed this reason in an overarching manner to all drivers. He did not consider individual reasons for individual drivers. I understand why he could not look into those individual reasons. It is only Dlamini who testified. Notwithstanding the fact that such drivers did not testify he however invoked the "one size fits all" approach and applied it to the rest of the individual Third Respondents. Even though some of the drivers' reasons were alluded to, the probative value of those reasons depended on the credibility of the drivers who did not testify.

[23] It is clear that the rule exist to use a direct route from loading to offloading and such did not have to be spelt out by providing route names. Deviation from the route must be accompanied by valid reasons not "one size fit all" kind of a reason. The commissioner's finding that such rule does not exist is thus not supported by the material evidence that was properly before him.

<u>Made mistakes of fact as he attributed some of the evidence as the evidence adduced by the Applicant's witnesses when such was not case.</u>

[9] Page 208. Llines 7-9
[10] Page 208 lines 3-5

[24] The Applicant contended that the commissioner committed an irregularity by attributing evidence that the employees went to Putfontetin to buy food as there is a variety of food with reasonable prices to Venter when it was Dlamini who mentioned that during his testimony. This ground of review is also misplaced. The commissioner did not find such to originate from Venter. He recorded what Venter testified to. Venter said that that was what the drivers told him. Venter therefore did not own up those reasons and such was also not the commissioner's finding. This ground of review is dismissed.

Made mistakes of fact and law in evaluating the circumstantial evidence that was properly before him.

[25] In the case of *R v Blom*[11] the court held as follows about circumstantial evidence: "*In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such they that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."*

[26] Evidence led showed that Putfontein was not on route to all customers or destinations the individual third Respondents drove to. Actually according to the Applicant, in some instances, there was actually no reason to via Putfontein. It was also in those trips that the diesel consumption was unreasonably high. Evidence was also led to the fact that anti-siphoning devices were tampered with and that diesel was sold at Putfontein. The commissioner was therefore obliged to invoke the above principles relating to circumstantial evidence in determining whether the charge was proven. He however appears to have come to the conclusion that the charge was not

[11] 1939 AD 188 at 202-203

proven without having applied the above test. According to him no evidence was led to proof theft. He was looking for direct evidence. Such constitutes an irregularity as he mishandled the rules relating to the evaluation of circumstantial evidence and thereby denying himself an opportunity to properly evaluate evidence before him.

Made mistakes by failing to determine whether or not the individual Respondents were guilty of using company vehicles for personal use without authorisation.

[27] It appears that the commissioner fixed his eyes on some of the charges he was called to make a determination on and completely ignored this charge. The commissioner is enjoined to determine all material disputes that are properly before him. Reliance is placed on the matter of *Dairy Bell (Pty) Ltd vs CCMA*[12] in which the court held that "*where there are several charges of misconduct, each ought to be separately dealt with and the arbitrator's analysis and conclusion in relation to each count ought to be clearly set out to meet the required standard of justifiability*". Failure to do so constitutes a material irregularity. In respect to this charge, the commissioner was called to make a determination whether or not the individual Third Respondents used company vehicles for personal use without authorisation. He did not make a determination whatsoever. Even when one reads his award in conspectus with the hope that such a determination might be found hidden in the litany of words used, none is found.

[28] As indicted above, I find that the commissioner had offended more than one of the established rules relating to the review of awards. The irregularities are material as they affect the outcome. The award thus cannot stand.

Whether or not to remit the matter

[12] (J3020/98) (1999) ZALC 85 (1 June 1999)

[29] Mr. Goldberg invited me to decide this matter without remitting it to the CCMA in the event I find that the commissioner committed material irregularities. Though I may be tempted to accept the invitation, it is not advisable to do so. There is only one individual Third Respondent, Dlamini, who testified on his reasons for going to Putfontein. The rest did not testify. It however appears that the commissioner imputed Dlamini's reason of stopping at Putfontein which was to buy food, to the rest of the individual Third Respondents. That was courageous. This on its own constitutes a reviewable act. This together with other findings made above make it difficult for me to accept the said invitation.

[30] I accept that the Applicant did not pray for the remission of the matter to the CCMA. It prayed for further and/or alternative relief. It is within the realm of further and alternative relief that I find the appropriate relief to be remitting the matter to the CCMA to be dealt afresh before another commissioner.

Costs

[31] Spoils were shared. As indicated above, some of the grounds of review were dismissed whereas others were sustained though my finding is that, in the whole, the errors were so material to warrant the reviewing and the setting aside of the award. It is on this basis that I decide not to make an order of costs.

[32] Accordingly, I make the following order:

Order

1. The arbitration award issued under case number GAEK 2640-15 dated 10 August 2015 is hereby reviewed and set aside.

2. The matter is remitted to the First Respondent for arbitration *de novo* before any other commissioner than the Second Respondent.

3. There is no order as to costs.

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Molebaloa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Craig Bosch

Instructed by: Thabang Ngobeni Attorneys.

For the Third Respondent: A Goldberg of Goldberg Attorneys.