IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR482/18

In the matter between:

MOTOR INDUSTRY STAFF ASSOCIATION **First Applicant**

NATHAN MOODLEY **Second Applicant**

and

McCARTHY LIMITED T/A McCARTHY NISSAN

AND RENAULT **First Respondent**

MOTOR INDUSTRY BARGAINING COUNCIL **Second Respondent**

COMMISSIONER GORDON EDWARDS *N.O.* **Third Respondent**

Heard: 15 January 2019

JUDGMENT

MADDERN. AJ

Introduction

[1] This is an application to review and set aside the third respondent's arbitration award dated 9 February 2018, issued under the auspices of the second respondent under case number MIDBI7572 in terms of which the third respondent determined that the second applicant's claim of the sanction

having been too harsh was not sustainable and in terms of which the applicant's claim as to an unfair dismissal was dismissed.

Background Facts

[2] The first applicant was employed by the second respondent on 22 May 2017, qualified as a technician in January 2014 and was dismissed on 26 June 2017, following a disciplinary hearing in terms of which the applicant was charged for gross negligence in failing to comply with the standards of a major service as stipulated by Nissan SA (first charge) and as such "*bringing the company into disrepute*" (second charge).

[3] On arbitration before the third respondent, the issue to be determined by the third respondent was whether the sanction of dismissal imposed by the chairperson of the disciplinary enquiry was the appropriate sanction. Following the second respondent's engagement with representatives of the applicants and the first respondent, both parties confirmed that it was only the appropriateness of sanction which was to be determined by the third respondent. Further, agreement was reached by the parties and the third respondent that the appropriateness of sanction would be determined having regard to the "papers". It is apparent from the engagement between the third respondent and the representatives of the applicant and the third respondent that it was agreed that Heads of Argument would then be exchanged between the parties. This engagement further extended to the exchange of bundles.

Grounds of Review

[4] The applicants rely on three broad grounds of review, which the second applicant, in his Founding Affidavit, outlines as follows:

> "13.4. It is the applicant's case that the arbitrator committed a reviewable irregularity by:
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> 13.4.1 Adjudicating the issue before him in the absence of a stated case or minutes of a pre-arbitration hearing, in which the parties had agreed to the relevant facts; and/or

13.4.2 Committing a gross errors of Law;

13.4.3 Misdirecting himself both as to the applicant's case as well as how to adjudicate the said case."

[5] In relation to the first ground of review, the applicants contend that in the absence of "*any evidence to the arbitrator in respect of the dispute to be decided by him in the light of the absence of any stated case or any pre-arbitration minute setting out the common cause facts*", the determination by the third respondent of the appropriateness of the sanction in the absence of the aforegoing gives rise to a "*gross misdirection on the part of the arbitrator*", alternatively, evidences the fact that the "*arbitrator did not apply his mind to the issue before him*".

[6] If the applicants are able to establish this ground of review, it would not be necessary for the applicants to assail the reasonableness of the result. The applicants rely, in relation to this first ground of review, on the decision of the Labour Appeal Court (LAC) in *Arends and Others of the SA Local Government Bargaining Council and Others*[1] which provide:

"[15] The appellants are to some extent the authors of their own misfortune. They placed the matter before the arbitrator as if there was a simple, single issue capable of resolution with the barest minimum of factual matter. Their approach was neither prudent nor correct. When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of facts agreed by the parties, akin to a pleading…

[16] … The Parties in this case did not engage in a proper pre-arbitration process with the aim of agreeing a stated case…

[17] Practitioners must follow these rudimentary elements of good practice when intending to proceed on the basis of a stated case. An arbitrator faced with the request to determine a special case where the facts are inadequately stated, should decline to accede to the request…..

[1] (2015) 36 ILJ 1200 (LAC).

[19] … The enquiry was undertaken in the wrong manner with the result that the appellants were denied their right to have their case fully and fairly determined. The principle cause of that denial or failure was the inept manner in which the case was put before the arbitrator. Be that as it may, the undertaking of the enquiry in the wrong or in an unfair manner by an Arbitrator is an irregularity in the conduct of the proceedings, reviewable in terms of s 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair.[2]"

[7] The applicants, in relying on the decision of *Arends* supra, made further reference to the decision of the LAC in *Public Servants Association v Minister of Correctional Services*[3]:

"[17] The factual matrix is important because each agreement must be placed in its proper context ... It has been said that words without context mean nothing and that context is everything …

[18] I have sympathy for the arbitrator because he was called upon to interpret a collective agreement devoid of a factual matrix … It is clear from the approach in relation to the adjudication of a stated case and the interpretation of contracts that an agreement including a collective agreement cannot properly be interpreted without a factual matrix.

[19] The absence of a factual plinth on which to build his interpretation renders his conclusion unreasonable. He could not apply his mind properly to the issue before him without a factual substratum. He should have refused to deal with the matter without an agreed set of facts."

[8] On the basis of the aforegoing authority, the applicant's argument before this Court was, in essence, that even if parties are to blame for the inept manner in which the case was put before the third respondent, this does not absolve an arbitrator from ensuring that the dispute is fully and fairly determined and, an arbitrator must refuse to arbitrate a dispute in the absence of evidence, a stated case, or pre-arbitration minutes setting out the common cause facts.

[2] Ibid at paras 11 to 19.
[3] [2017] 4 BLLR 371 (LAC) at paras 17 to 19.

[9] This Court has also been referred to what, at first glance, appears to be conflicting authority emanating from the LAC in the matter *Interstate Bus Lines (Pty) Ltd v Daniel Phakwe and Others*[4]. In this matter the LAC was also faced with the submission that where an arbitrator did not rely on any form of evidence to decide the dispute, that this fact alone constituted a valid ground of review and along the lines of the argument made in respect of such submission in the *Arends* judgment.

[10] However, it is quite apparent that the material facts before the Court in *Arends* are entirely distinguishable from the material facts before the LAC in *Interstate Bus Lines*. In *Interstate Bus Lines*, unlike *Arends*, the dispute related to the interpretation of a collective agreement in the absence of any factual matrix. In *Interstate Bus Lines*, much like the instant matter, the factual background leading to the dispute was largely common cause or undisputed. Also, in the dispute before the arbitrator in both *Interstate Bus Lines* and the instant matter, the sole issue for determination was the appropriateness of the sanction. Also, in *Interstate Bus Lines*, like the instant matter, the parties' closing arguments made reference to evidence which was not disputed and which was tendered at the disciplinary enquiry. Consequently, the record of the proceedings of the disciplinary enquiry was common cause. In particular, in *Interstate Bus Lines*:

> "[17] … the record of the disciplinary inquiry would be part and parcel of the arbitration and that it would supply the factual basis upon which the fairness of the sanction is to be assessed. It is for this reason that the arbitrator made reference to some factual background, which could only be extrapolated from the record of the disciplinary inquiry that must have been presented to him as part of the bundle. Although the record of the disciplinary inquiry is not a model of a prefect record of the proceedings, it does, however, provide key elements of the evidence tendered as well as the submissions of the parties. Further, most of the evidence is common cause and this appeal is limited to sanction only. What would therefore be more relevant, in addition to the common cause factual background, would be the evidence on

[4] [2016] ZALAC 58.

aggravating and/or mitigating circumstances as well as the reasons of the chairperson of the inquiry on the sanction he imposed. All these factors are found on the record as it stands.[5]"

[11] In *Interstate Bus Lines*, the LAC, specifically distinguished the facts in *Arends* as follows:

"19. The circumstances of this case are by far distinguishable from the circumstances in the cases referred to us by Mr. Snyman. In Arends and Others v Local Government Bargaining Council and Others, the parties had agreed not to lead any evidence and simply presented documents and made oral and written arguments. There was no pre-arbitration minute nor did the parties provide the arbitrator with any agreed set of facts. This Court correctly found that the absence of any evidence, the absence of a stated case; and the manner of its presentation makes it impossible for the court on appeal to determine whether the dispute is indeed one about the implementation of a collective agreement and how it should be resolved. There was absolutely no evidential material for the arbitrator and ultimately the Labour Court to work on in resolving the dispute.[6]"

[12] If regard is had to the facts before the Court in this matter it is materially on all fours with the facts before the LAC in *Interstate Bus Lines*. The applicants contend that it is the evidence relating to whether the trust relationship had broken down irretrievably that is an issue. Put somewhat differently, in the absence of evidence of this, the first respondent did not have all the material facts before him in order to discharge his obligation to take into account all relevant circumstances and facts. In this regard, reliance was then placed on the *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* judgment.[7]

[13] From *Interstate Bus Lines* it is quite evident that it is entirely appropriate that, in the context of the determination of the fairness of the sanction, (particularly where parties have agreed to the submission of closing arguments and

[5] Ibid at para 17.
[6] Id fn 4 at para 19.
[7] (2007) ILJ 2405 (CC) at 2432 H2 2433A.

bundles which comprise the record of a disciplinary enquiry), that facts and inferences may be extrapolated from the record of the disciplinary enquiry as presented to an arbitrator. Specifically, having regard to the facts of the instant matter, the second applicant's years of service, disciplinary record, the circumstances and gravity of the offence (gross negligence), and its effects, the continued employment after the offence was committed prior to dismissal, the reputational damage to the first respondent and the accumulative effect on the employment relationship, are all common cause or facts reasonably capable of being extrapolated from the record of the disciplinary hearing. In the premises, there is no merit in the applicant's first ground of review, on the facts.

[14] In relation to the second ground of review, namely the contention by the applicants that the first respondent committed gross errors of law which relates to the finding by the first respondent that an employer is not required to present evidence that the trust relationship have broken down irretrievably. In this regard, it is the applicant's contention that, as the applicant had not been found guilty of any dishonest conduct, and the conduct in respect of which the applicant was found guilty, did not "*entail or imply that the trust relationship had been damaged irretrievably*", evidence was required as to the breakdown of the trust relationship.

[15] The relevant portions of the first respondent's award in this regard are as follows:

> "26. Edcon Ltd v Pillemer N.O and Others (2009) ILJ 2642 (SCA); that followed the Sidumo case more or less placed or at least, until recently, an additional onus on the Employer to lead evidence showing that the trust relationship had been destroyed.
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> 27. However, in the subsequent case of Impala Platinum Ltd v Zirk Bernadus Jansen and Others (JA100/14), the Labour Appeal Court ("LAC") finally and unequivocally dispelled the myth that it was necessary to lead evidence to show that the trust relationship had been tarnished irretrievably, as per the Supreme Court of Appeal ("SCA") in Edcon v Pillemer N.O. and Others (2010) 1 BLLR 128.

28. In summary, the Impala Platinum case, in essence, states that each case turns on its own facts and that Edcon did not establish an immutable rule that an Employer must always lead evidence to establish a breakdown in a trust relationship in order for the sanction of dismissal to be appropriate and that the fairness of the sanction must be implied from the nature of the misconduct and whether the misconduct itself had clearly rendered the employment relationship intolerable.

29. Put differently, an Employer will be able to justify its decision to impose the sanction of dismissal in circumstances where the Employer is (*sic*) not lead evidence on the breakdown of the trust relationship, where the nature of the Employee's misconduct clearly renders employment inconceivable."

[16] Having regard to the aforegoing, the Court is not convinced that the understanding of the law attributed to the second respondent, accords with his findings as set out in the extract of the award to which reference is made supra. There are, undoubtedly, instances where, in the absence of evidence as to the breakdown of the relationship, it would be entirely justified to conclude, as the Court has done, on the peculiar facts before it in *Edcon Ltd v Pillemer NO and Others*[8] that the dismissal of an employee, on such peculiar facts, and circumstances, is unfair in the absence of such evidence. The LAC, in *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[9] upheld a decision by the commissioner that the sanction of dismissal was appropriate in the absence of any evidence as to the breakdown of the relationship in circumstances where the misconduct involved "deception and dishonesty and there was no remorse". The LAC, in doing so, found that each matter turns on its own facts[10].

[17] On the facts before this Court, the material question is, however, whether the second respondent's award, in upholding the sanction of dismissal, was

[8] [2008] 5 BLLR 391 (LAC).
[9] (2015) 36 ILJ 1453 (LAC).
[10] Ibid at para 19.

unreasonable. This determination arises in the context of the third ground of review.

[18] In relation to this ground of review, the applicants contend that the first respondent committed a number of "*serious misdirections*". These misdirections pertain to a contention that the second respondent misunderstood the applicant's case and made a number of erroneous findings. In so doing the applicant challenges selected aspects of the second respondent's award.

[19] What is, however, required is an examination of the award "in the round"[11]. As is now clearly established in *Head of the Department of Education v Mofokeng and Others*[12]:

> "[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, at least, to 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 in forming 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

[11] Herholdt v Nedbank SA (Congress of South African Trade Unions as Amico Curiae) [2013] 11 BLLR 1074 (SCA).
[12] [2015] 1 BLLR 50 (LAC).

> 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."[13]

[20] Having regard to the third respondent's award, it is quite apparent that the nature of the dispute which the third respondent was to determine, related to the appropriateness of the sanction. The second respondent's award clearly establishes that this was firmly appreciated by him. The award reflects his assessment as follows:

> "It is clear from the aforesaid guidelines and relevant case Law that an applicant can challenge the fairness of his or her dismissal based on the contention that the sanction of dismissal was too harsh and this challenge goes to the substantive fairness of the dismissal."[14]

[21] In determining the appropriateness of the sanction, the third respondent incorrectly recorded the service of the second applicant as 13 years. The applicant only had 10 years service. Further, the reference to the employer's franchise agreement and the impact of the conduct in relation to the repercussions for the employer in relation to this franchise agreement do not appear directly to have been dealt with in any evidence before the third respondent (outside of the Heads of Argument that is, and the context of the Record of the Disciplinary Proceedings). The third respondent also made an inappropriate reference to item 9 of the Code of Good Practice, relating to guidelines in cases of dismissal for poor work performance. Also, there is no indication from the third respondent's award that he took into account the fact that the applicant continued working for the first respondent for a further period of three weeks beyond the date on which the second applicant was charged and the date of his dismissal, as an indication of the state of the trust relationship. Further, the Third respondent expressly attached no significance to the absence of any finding of dishonesty.

[13] Ibid at para. 33
[14] Arbitration Award at para 19.

[22] In considering the "distorting effect" or the materiality of the challenges raised to the third respondent's award as outlined above, the discrepancy in the years of service of the second applicant is overstated. However, the discrepancy is only three years. It is difficult to conceive that this error would, on the facts, have been material at all. On the facts, it is likely that, if the years of service, incorrectly recorded as they were, had any effect to the extent that they were overstated, they were nevertheless taken into account.

[23] In relation to the contention that the third respondent took into account the impact on the franchise agreement, where there is no evidence of this impact specifically lead, there was evidence before the second respondent of the impact of the second applicant's conduct in relation to the applicant's business, specifically, in relation to the customer concerned and charges related specifically to the service standards of "Nissan" and to bringing the company's name into disrepute. On the facts, there was evidence that, at least as far as the customer is concerned, the employer's name was brought into disrepute. Also on the facts, it is quite clear that the Nissan standards had not been complied with. Whilst the second respondent may have drawn an inference regarding the impact on the actual franchise agreement, such inference is, on the facts, not an unreasonable one to draw. Quite apart from this, however, whether there was a dispute arising from failure to comply with the franchise agreement or disrepute arising absent any reference to a franchise agreement and solely in relation to the customer, the impact of the misconduct remains disrepute for the first respondent.

[24] The reference to item 9 of the Code of Good Practice was entirely unnecessary. That said, this authority, before this Court, is replete with the difficulty in drawing the line between gross negligence and poor performance. Apart from this reference, it is quite clear that the third respondent knew that he was dealing with misconduct and that it was in relation to this conduct that he was required to determine the appropriate sanction. There is, consequently, no nexus between the misappropriate reference to the Code of Good Practice and the finding, let alone a basis on which to contend that this

finding had any distorting effect on the ultimate finding of the third respondent at all.

[25] In relation to the contention that the third respondent's award failed to take into account the continued working relationship of three weeks, this is hardly material. Indeed, one would expect of a reasonably prudent, fair employer, not to unnecessarily suspend employees in each and every case of alleged, serious misconduct where facts do not justify such suspension. Fair conduct on the part of the employer dictates that suspension be avoided, unless there are circumstances justifying the suspension. This conduct cannot simultaneously be used to justify the argument as to the absence of a breakdown of the employment relationship in circumstances where, like in the instant matter, the employer has specifically averred that it monitored the employee during the course of the three week period.

[26] The instant matter is not one of those matters where, notwithstanding knowledge of the misconduct, the employer has continued utilizing the employee's services over a protracted period of time, without any explanation as to impact on the relationship.

[27] Finally, in the context of the contention that the third respondent attached no significance to the absence of any finding of dishonesty, whilst this might be so, it is quite clear that the third respondent did attach significance to the finding of gross negligence. It is not only a finding in relation to dishonesty that would, ordinarily, justify dismissal. That said, however, it is quite clear from the facts before the third respondent and his award that, whilst he might have expressly attached no significance to the issue of dishonesty, there was a dishonest element in the misconduct in that the second applicant had reflected that he had changed the pollen filter in circumstances where he had not. In effect, he said that he had done the particular aspect of the service, when in truth and, in fact, he had not.

[28] Whilst intent is critical in the context of the framing of the charge, when it comes to mitigating and aggravating circumstances, however, the facts peculiar to the commission of the offence speak to the sanction. Put

somewhat differently, whilst the evidence mz\ight not have been sufficient to justify the finding of fraudulent intent, there is, nonetheless, an element of dishonesty, specifically related to the ability of the first respondent to trust its employee, given the nature of the misconduct he had committed.

[29] Notwithstanding the aspects outlined above, the third respondent's upholding of the sanction of dismissal in relation to gross negligence and the further charge of bringing the employer into disrepute is not a decision which falls outside of the band of decisions to which a reasonable decision maker could come nor was there a misconception of the true enquiry. Also, whilst the Court accepts that the decision was harsh, it is not unreasonable such that it stands to be reviewed and set aside.

[30] In the premises the following order is made:

Order

1. The application for review is dismissed.

2. There is no order as to costs.

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Maddern AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Gerrie Ebersohn Attorneys

and Ms. Lizel van Deventer

For the Respondent: J.Philps Attorneys