THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2471/13

SHOPRITE CHECKERS	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER PRAKASH ROOPA, *N.O.*	**Second Respondent**
ANNIE MARIETTE JACOBS	**Third Respondent**

Heard: 30 July 2015

Delivered: 31 July 2015

Summary: Sanction review – distorting effect of failure to consider materially relevant facts and considerations causing an unreasonable award that dismissal for what amounted to gross insubordination not warranted – award set aside and substituted with an order that dismissal fair.

JUDGMENT

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MYBURGH, AJ

Introduction

[1] In his award, the second respondent (the commissioner) found the third respondent (Ms Jacobs) guilty of misconduct, but held that the sanction of dismissal was unfair and awarded her four months' remuneration as compensation.

[2] The applicant (the company) now seeks to review the award in terms of section 145 of the LRA.[1] This is thus what is commonly referred to as a penalty review.

The basis of Ms Jacobs' dismissal and the award

[3] Ms Jacobs, who was employed as the fresh food manager at the company's Jouberton store, was dismissed in June 2013 on two counts of misconduct: (1) "serious misconduct in that you did not follow a legal and reasonable instruction from your branch manager on 04/06/2013 by not locking the store as instructed"; and (2) "[you] did not adhere to your contract of employment with regards to the hours of work as stipulated in point 10".

[4] The commissioner found that Ms Jacobs was guilty of these charges, which arose in the following circumstances.

a. In terms of the contractual regime between the parties (read together with the relevant sectoral determination), Ms Jacobs was required to either work from 06h00 until 17h00 or from 08h00 until closing time – this without the payment of overtime. When scheduled to work until closing time, Ms Jacobs was typically required to attend to locking the store.

b. Having worked these hours for some two years, Ms Jacobs raised a grievance about not being paid overtime. According to her, she had obtained some advice in this regard from the CCMA and the

[1] Labour Relations Act 66 of 1995.

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Department of Labour. (It is, however, now common cause between the parties that any such advice was wrong, and that the contractual regime regulating working hours and the non-payment of overtime was lawful.)

c. On 2 June 2013, when things had not been resolved in her favour, Ms Jacobs gave the company an ultimatum: from 3 June 2013 onwards, she would work 45 hours per week and no overtime unless paid, and she would not work hours outside of 08h00 - 17h00.

d. True to her word, on 3 June 2013, Ms Jacobs, who was scheduled to work from 08h00 until closing time that day, refused to stay on to lock the store, and left early.

e. Following this, Ms Jacobs was instructed by the branch manager (Adri Jacobs) to report to her at 06h00 the following morning, but she refused to do so and only arrived at work at 10h00. This resulted in Ms Jacobs being given a formal warning by the branch manager during the course of the morning of 4 June 2013 (for having refused to report to work at 06h00).

f. Upon receipt of the warning, Ms Jacobs made an annotation on it to the effect that she refused to work overtime without pay. (Seen in context, this was a show of defiance, and more was to come.)

g. Also on 4 June 2013, the branch manager instructed Ms Jacobs to work until closing time, which meant that she would have been responsible for locking the store.

h. The instruction was followed by an exchange of emails on the issue between Ms Jacobs and Mr Meyer (the regional personnel manager). In the process, Ms Jacobs stuck to her guns (she would not work past 17h00 on 4 June 2013 unless she was paid overtime), with Mr Meyer having warned her on two occasions that this would result in disciplinary action being taken against her. In his dealings with Ms Jacobs, Mr Meyer carefully explained the company's position

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regarding Ms Jacobs' hours of work and remuneration, and even went so far as to send her an opinion that it had obtained from its lawyers.

i. Despite all of this, and as she had done the previous day, Ms Jacobs refused to work to closing time (and attend to the locking of the store) on 4 June 2013.

j. Significantly, Ms Jacobs had told Ms Nel (an administration manager) on 4 June 2013 that she wanted the company to dismiss her because she wished to be paid certain monies that it owed her. (Although Ms Jacobs disputed this in her evidence, there was no challenge to this evidence by Ms Nel under cross-examination. I am thus inclined to accept it.)

[5] In finding Ms Jacobs guilty as charged, the commissioner found that the advice that she said she had received from the CCMA and Department of Labour could not be justified on the evidence, and that – the error of her ways having been brought to her attention by the company – she had to bear the consequences of bad advice.[2] In the context of dealing with the issue of guilt (and not sanction), the commissioner described the attitude adopted by Ms Jacobs as being that "she was bent on following her own dictates and immune to any advice to desist from the course she had chosen".

[6] Turning to the issue of sanction, the full text of the commissioner's findings in this regard are as follows:

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[2] This finding and construction accords with a comparable finding made by the LAC in *Coin Security Group (Pty) Ltd v Adams & others* [2000] 4 BLLR 371 (LAC) at para 18: "It was argued by Mr Trengove for the respondents that they *bona fide* but mistakenly believed their strike to be protected. Whilst a *bona fide*, and reasonable, yet mistaken, belief by strikers in the legality of their strike action may have a bearing on the fairness of any subsequent dismissals (especially if the illegality is technical) that is not the case in circumstances where strikers have been warned that their belief is mistaken. In those circumstances the strikers, as the collective entity that they are when they undertake concerted action, must bear the risk that their union is wrong and their employer is right. In the present case, the union and the respondents were warned on a number of occasions that, since they had the right to refer the underlying dispute to arbitration, their strike would be and was unprotected."

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> "I warned the [company] during the matter to deal with the issue of whether [it] was confident that the sanction of dismissal was proper given the nature of the charges. All it presented was the view of Adri [the branch manager], who when I put questions to her in this regard, was most unconvincing. All she could rely upon was the previous warnings given to Jacobs, which was not further pursued by the [company] and did not suggest that at least one of them was a final warning.
>
> I am of the view that the [company] was not justified in dismissing Jacobs given the nature of the misconduct she was charged for, and that a sanction short of dismissal would have been an appropriate one. I therefore find that Jacobs's dismissal to be unfair for that reason alone."

[7] In the result, the commissioner awarded Ms Jacobs four months' remuneration in compensation (this in circumstances where she did not seek reinstatement).

Review and evaluation

[8] Following the SCA's judgment in *Herholdt*[3] and the LAC's judgment in *Gold Fields*,[4] the LAC handed down a very important judgment in *Mofokeng.*[5] In this judgment, Murphy AJA provided the following (with respect, typically insightful) exposition of the review test:

> "[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

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[3] *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae*)* [2013] 11 BLLR 1074 (SCA).

[4] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC).

[5] *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).

> 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." (Emphasis added.)

[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:

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[6] (and *vice versa*).

[10] 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

[6] The test for reasonableness was set as follows in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para 110: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

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distorting effect of this misdirection was to render the result of the award unreasonable.

[11] Essentially, this is the case that the company mounts on review – it contends, in effect, that the commissioner ignored a host of material facts, which had the distorting effect of causing an unreasonable result.

[12] To my mind, there is merit in the review application. As a point of departure, the commissioner clearly went wrong in failing to consider "all relevant circumstances" and the "totality of circumstances", and then weigh and balance them in arriving at a decision on sanction – this as required in terms of the Constitutional Court's judgment in *Sidumo*.[7] Instead of adopting this approach, the commissioner simply made one or two findings in isolation (see para 6 above), before concluding that the sanction of dismissal was inappropriate.

[13] As a consequence of not undertaking a proper enquiry into sanction, the commissioner failed to consider the following relevant facts, which had a direct bearing on sanction:

a. the nature and relative seniority of Ms Jacobs' position;

b. the fact that, properly construed, Ms Jacobs' misconduct amounted to gross insubordination[8] (which typically warrants dismissal for a first offence), with the commissioner thus having misconceived the gravity of Ms Jacobs' misconduct;[9]

c. the equally important fact that, on the unchallenged evidence of Ms Nel, Ms Jacobs had, in effect, contemplated her dismissal (with the

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[7] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at paras 78-79.

[8] To qualify as gross insubordination, the insubordination must be serious, deliberate and persistent.

[9] Arbitration awards dealing with sanction have often been set aside on review on account of the commissioner having misconstrued the gravity of the employee's misconduct. See, for example, *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) at para 23; *National Union of Mineworkers on behalf of Selemela v Northam Platinum Ltd* (2013) 34 *ILJ* 3118 (LAC) at para 39; *Zono v Gruss NO & others* [2011] 9 BLLR 873 (LAC) at para 35.

result that it arguably did not lie within her mouth to complain about that sanction);

d. the fact that Ms Jacobs had worked in accordance with the contractual regime for some two years;

e. the fact that Ms Jacobs' misconduct was not spontaneous, but was instead planned and orchestrated,[10] and involved her deliberately setting herself on a collision course with management;[11]

f. the fact that Ms Jacobs repeatedly engaged in misconduct – first on 3 June 2013 and then again on 4 June 2013;[12]

g. the fact that despite being issued with a formal warning on the morning of 4 June 2013 by the branch manager (for refusing to attend work at 06h00, which amounted to insubordination), Ms Jacobs was again insubordinate (and grossly so) a few hours later;

h. the fact that, on 4 June 2013, Ms Jacobs was warned against again misconducting herself by Mr Meyer – this on two occasions;

i. the fact that, in the process of his interaction with Ms Jacobs, Mr Meyer explained the company's position to her, and even went so far as to provide her with written legal advice that the company had obtained;

j. the fact that Ms Jacobs' misconduct of refusing to work until closing time and lock the store involved an important component of her duties, and meant that another manager had to be deployed to do her work;

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[10] See *National Union of Metalworkers of South Africa (NUMSA) v CBI Electric African Cables* [2014] 1 BLLR 31 (LAC) at para 39.

[11] See *Slagment (Pty) Ltd v BCAWU & others* [1994] 12 BLLR 1 (AD) at 10G-H.

[12] As held in *Modise & others v Steve's Spar Blackheath* [2000] 5 BLLR 496 (LAC) at para 154, "[a]n employee may successfully argue that one instance of insubordination should not have led to dismissal; but he could never argue that he might continue being insubordinate without being dismissed, no matter what his employment record or his personal circumstances are."

k. the fact that Ms Jacobs displayed no remorse whatsoever, either during her disciplinary inquiry or during the arbitration;[13] and

l. the fact that both Mr Meyer and the branch manager (Adri Jacobs) gave cogent evidence to the effect that Ms Jacobs' misconduct served to destroy the trust relationship (with the commissioner's finding that the branch manager's evidence was restricted to her having made mention of undefined warnings, being at odds with the transcription of her evidence and unreasonable).

[14] Having identified the relevant facts ignored by the commissioner, the *Mofokeng* analysis should now be undertaken. To begin with the first enquiry, to my mind, the relevant facts set out above that were ignored by the commissioner constitute material facts, because if they had been considered by the commissioner, he would (on the probabilities) have come to a different conclusion on sanction. In the result, the award is *prima facie* unreasonable. Turning to the second enquiry, the question is whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness. To my mind, no such basis exists in this case, with the result that the award is unreasonable.

[15] Put simply, what occurred in this matter is that the distorting effect of the commissioner's failure to consider a host of material facts was of such a nature as to cause an unreasonable (and thus reviewable) award.

Order

[16] In the result, the following order is made:

1. the arbitration award issued by the second respondent is reviewed and set aside;

2. the arbitration award is substituted with an order that the third respondent's dismissal was fair;

[13] See *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) & others* (2010) 31 *ILJ* 2475 (LC) at paras 27-31.

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3. there is no order as to costs.

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Myburgh, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: J Jones of Norton Rose Fulbright

On behalf of the third respondent: G Kirsten of Theron Jordaan & Smit

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