LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG CASE NO: JA22/2005

2008-05-08

In the matter between
ELLERINE HOLDINGS LIMITED Appellant

And

CCMA AND OTHERS Respondent

J U D G M E N T

DAVIS JA:

[1] This is an appeal against the judgment of the Labour Court delivered by Ngcamu AJ ON 21 July 2004.

[2] The issues can be summarised briefly thus:

Appellant is a furniture retailer which owns stores throughout the country. Mr Mcingane ('the employee') who is represented by the third respondent had been employed by the appellant at its Burgersdorp store. On or about 18 June 2001, the employee completed the banking register in respective of a deposit slip, number 10521, in an amount of R3 000. Later on the same morning, he completed a banking register in respect of another slip, number 710522, in an amount of R2 619.

[3] On 18 July 2001, the manager of the Burgersdorp store received a call from his area manager in which it was reported that the records of the appellant showed that the two deposit slips, to which I have made mention, totalling in an amount of R5 619 had not been banked.

Subsequent investigations took place. The bank statement obtained from the Burgersdorp branch of First National Bank revealed that the amounts reflected, the two deposit slips had indeed not been banked. It is also apparent that on 18 June 2001, the employee left the store with

amounts totalling R5 619 and by virtue of his signature confirmed that the monies had been banked.

[4] On 25 July 2001, he was suspended from his employment. Notice of the suspension provided that a disciplinary hearing would be held on 30 July 2001 at 11:00. On that day he was served with a notice to appear at the disciplinary hearing.

The allegations were formulated thus:

It is alleged that you Alfred in your capacity of stock controller made yourself guilty of gross dishonesty, in that on 16/04/01, you accepted money to the value R5 619,00 to be banked. You entered it into the bank register as if banked and signed of the register yourself, receiving that, the said money was not banked thereby, enriching yourself by the amount of R5 619,00.

[5] On 27 July 2001, the employee signed an acknowledgment of debt, which stated that he was "truly and lawfully indebted" to the appellant in the sum of R5 619,00 in respect of the cash shortage. Reference was made in this document to the two deposit slips. In the acknowledgment of debt, he also authorised appellant to make monthly deductions from his salary until the capital amount had been settled.

On 28 July 2001, the appellant resigned from the employer and in his letter of resignation he stated, "I hereby do wish to tender my resignation as a stock controller with immediate effect. I am resigning out of my freewill, I thank you. I hope you find this in good order". This resignation was not accepted. The background to this is not relevant to the present dispute.

On 30 July 2001, appellant convened a disciplinary enquiry as planned. The employee did not attend the hearing. He submitted another resignation letter, stating "I hereby accordingly wish to tender my resignation as a stock controller in your company with immediate effect. Thanking you so much for the opportunity you gave me to demonstrate my skills and experience". On 31 July 2001, the disciplinary hearing was convened. He did not attend the hearing. He was found guilty of the charge against him and dismissed.

It was against this decision that he then referred an unfair dismissal dispute to the first respondent.

The second respondent concluded that the employer, being appellant, had been justified on the grounds of substantive fairness in the decision that it had taken to dismiss the employee. The essence of the finding is captured in the following paragraph:

"I have no hesitation to conclude that the employer discharged the onus on them in terms of section 192(2), proving on a balance of probabilities that the employee enriched himself at the employer's expense. The employee signed an acknowledgement of debt and tendered his resignation even though it was not accepted. I have no doubt if the employee was not guilty of the charges against him, that he would not have tendered his resignation nor would he have signed an

acknowledgement of debt … Despite the employee's personal circumstances, I can come to no other conclusion but to find the sanction of dismissal was an appropriate sanction for the offence committed".

[6] The second respondent did find that there had been a procedural irregularity and that accordingly appellant had not complied with the requirements of procedural fairness. He concluded the dismissal was procedurally unfair because the employee's post had been advertised on 30 July, a day before the disciplinary hearing was concluded. After concluding that the dismissal had been substantially fair but procedurally unfair, second respondent then engaged in an analysis as to whether compensation should be awarded.

[7] It is important to note that the law governing the question of compensation was section 194 of the Labour Relations Act of 66 of 1995 ('the Act') prior to the 2002 amendments having been effected in the Act.

In essence therefore, second respondent was confronted with legislation which had been given content by this court in *Johnson & Johnson (Pty) Ltd v CWIU,* (1998) 12 BLLR 1209 (LAC). Conventionally the approach adopted in *Johnson* is referred to as 'the all or nothing approach': either compensation for a procedural irregularity is granted in terms of a prescribed formula or no such compensation would be awarded.

In his judgment in *Johnson*, Froneman DJP said at para 41, "The compensation for the wrong in failing give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss, it is in the nature of a solatium, for the loss of the right and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss".

In amplification of the *Johnson* doctrine, and in particular in dealing with the question as to whether compensation ought to be refused in a case where a dismissal was substantively fair but procedurally unfair. Landman J said in *Lorentzen v Salachem (Pty) Ltd*, (1999) 20 ILJ 1811 (LC) para 25, "I agree that the test would require one to ask what fairness demands, taking into account the interests of the employee and the employer".

[8] In his award, second respondent concluded thus:

"I have therefore come to the conclusion, taking into account the interests of the employee and employer as well as what fairness demands, not to award any compensation to the employee. The harm done to the employer in the event in applying the statutory formula, would by far outweigh the harm done if compensation was refused".

[9] It was this precise finding that was taken on review before the court *a quo*. It is important to emphasise that, although the entire finding of second respondent, that is the substantive fairness and the procedural fairness were the subject of the review, the court *a quo* confirmed the finding of the second respondent in respect of the substantive fairness of

the dismissal. That left only the question of procedural unfairness which became the centre of the judgment of the court *a quo* and of the dispute which came before this court.

The court *a quo* found, insofar as the procedural irregularity was concerned, that the second respondent had misdirected himself. The basis for this finding can be found in the judgment and can be reduced to the following conclusions:

1. Second respondent had taken into account in his refusal to award compensation for procedural unfairness, that an offer had apparently been made by appellant to the employee in the amount of one month's salary as a form of settlement. Ngcamu AJ found:

   "The discussion during the conciliation are private and privileged. None of the parties is entitled to refer to such discussions. In my view it was improper for the commissioner to take into account that the offer was refused".

2. The court *a quo* referred to the finding of the second respondent, that if compensation was awarded in the constitute, overpayment to the employee. Ngcamu AJ said:

   "The fact of the matter is that the commissioner found the dismissal procedurally unfair for the reason that the position was advertised before the disciplinary hearing which then suggested the employer had in mind that the employee was going to be dismissed. In my view, the employer's actions were grossly unfair: The employer on its own postponed the matter from 30 July to 31 July. If the employer was under the impression that the employee was not going to attend on 31st, I see no reason why there was any

postponement of the hearing. The advertising of the position before the hearing was finalised and was not fair".

3. The court *a quo* referred to the fact that second respondent was not required to determine if any particular loss had been suffered by the employee. Ncgamu AJ concluded:

"In my view, the commissioner misdirected himself in concluding that no particular loss was suffered. There is no justification for the finding that to apply the statutory formula would outweigh the harm to the employer. The employee had not been paid for the period up to the finalisations of arbitration, there was therefore no over compensation as there was no compensation at all".

[10] After finding these misdirections if the court *a quo* set aside the award of second respondent and substituted the following order:

"The dismissal of the employee Mr Mcingane is found to have been substantively fair. The dismissal of the employee is found to be procedurally unfair. The first respondent was ordered to pay five month's compensation in the total amount of R15 250,00 calculated at the rate of R3 050,00 per month. The first respondent is ordered to pay the costs".

[11] It is against this finding that appellant has approached this court on appeal with leave of the court *a quo*. Mr Grobler who appeared on behalf of the third respondent submitted that the essence of the approach which must be adopted by this court in dealing with the judgment of the court *a quo*, was to examine whether there were material irregularities, if

they were found the court *a quo* was justified in intervening in the dispute. Because it would then have exercised its discretion in terms of Section 145 of the Act, it was not for this court to 'second guess' that exercise of discretion. For Mr Grobler, the key test was whether the finding of material irregularity by the court *a quo* was sustainable. The counter conceptual framework offered to this court by Mr Ngcukaitobi who appeared on behalf of the appellant was that in proceedings of this kind, a court should eschew the red light test for review and adopt a more facilitative framework. By that I took him to mean that it would be wrong to formalistically pass through the award of second respondent, find some irregularity had taken place that irregularity would set off the judicial trip wire, the red lights of review would flicker brightly and the result would be to sustain an application for review. A more substantive overall framework for review would examine the nature and role of first respondent with the broad framework of labour relations, the role played by an official such as second respondent, and then take into account the substance of that decided, both in terms of its conclusion and the reasoning which underpinned the conclusion.

There is some confusion as to the law regarding the review of an award by second respondent. After *Sidumo & Others v Rustenburg Platinum Mines Limited & Others*, [2007] 12 BLLR 1097 (CC), the source of review of matters of this kind is to be found in the Act particularly section 145 and section 158 read together. The earlier adherence by

some courts to the Promotion of Administrative of Justice Act as the source for review, has been rejected in *Sidumo*. That leads to the grounds for a review in terms of the Act.

In section 145(2) of the Act the trigger for a review is a 'defect', namely 'a defect' in any arbitration proceedings under the auspices of the Commission" (Section 145(1)). Defect is defined as follows:

a. that the commissioner:

(i) committed misconduct in relation to the duties of the commissioner or a arbitrator;

(ii) committed a gross irregularity in the conduct in the arbitration proceedings; or

iii) exceeded the commissioner's powers. (section 145 (2))

This provision had given the courts considerable trouble because it must be reconciled with section 158(1) (g) of the Act which appeared to give far wider powers of review to the courts than the specific provisions of section 145(2).

This conundrum was resolved in the case of the *Carephone (Pty) Ltd v Marcus NO & Others*, 1999 (3) SA 304 (LAC), in which the court gave broad content to the phrase 'exceeded the commissioner's powers', by reading into that provision, an administrative law test of reasonableness. In short, this Court approached the argument that Section 158(1)(g) of the Act gave broad powers of review to the Labour Court with the narrow provisions of Section 145(1) and (2), by concluding that administrative law concepts such as reasonableness, proportionality could be read into section 145(2) thereby reconciling the two sections.

I have examined this history in some length because it is important to understand what the judgments in *Sidumo* determine. In my view, *Sidumo* decided *inter alia*, that, when a court deals with the question of an arbitrator exceeding her powers, it is obliged to adopt a *Carephone* type test. To recapitulate at para 110, Navsa AJ says: "To summarise: *Carephone* held that section 145 of the LRA, was suffused by the then

constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is, that section 145 are now suffused by the Constitutional standard of reasonableness. That standard is the one explained in Bato Star. Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect, not only to the Constitutional right, to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair." That dictum must be understood thus in terms of the earlier interpretative conundrum resolved by *Carephone* with respect to sections 145 and 158.

The court, in *Sidumo*, was also concerned to ensure that a 'red light' approach to review, should no longer form part of our labour relations procedures with regard to review of first respondent. The court said the following, "In respect of the absence of dishonesty, the Labour Appeal Court find that the commissioner's statement in this regard "baffling". In my view the Commissioner cannot be faulted for considering the absence of dishonesty, a relevant factor in relation to the misconduct. However, the commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the mine's valuable property in which he did not do. However, this is not the end of the enquiry. It will still be necessary to weigh all the relevant factors together in light of the seriousness of the breach". (para 116)

This passage which finds earlier support in a dictum of this court per Zondo JP in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others*, (2001) 22 IAJ 1603 (LAC) 1636H-I, "In my view, it is within the contemplation of the dispute resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects, but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul to the applicable grounds of review. Without such contemplation, the Act's objective of the expeditious resolution disputes would have no hope of being achieved. In my view, the first respondent's award cannot be said to be unjustifiable when regard is had to all the circumstances in this case and the material that was before him".

With this approach, it is important to examine what it second respondent allegedly did, so as to perpetrate a defect in terms of Section 145 of the Act. Mr Grobler insisted in his submission that once there was a ground for review, the court can interfere. There is some confusion as to precisely which of the three defects were committed by second respondent. I shall canvas briefly the two possible basis on which Mr Grobler's arguments were predicated. The first concerns gross irregularity, a concept not canvassed by Navsa AJ in *Sidumo* but subject to a typically learned and perceptive analysis from Ngcobo J in the same case. In essence, Ngcobo J held that a distinction must be made between the process by which a decision is taken and the content of the decision itself. It was clear that he said, that

"Where a commissioner fails to have regard to material facts, the

arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing … the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside, not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings". (at para 268)

Adopting that approach, the question arises to the gross irregularity which was allegedly perpetrated by second respondent? For the answer it is necessary to return to the judgment of Ngcamu AJ and on the 'error' on which he justified his intervention. The first 'error' he took account of was of a month's salary offer of which no reliance should have been placed. This finding of Ngcamu AJ was contended by Mr Ngcukaitobi who pointed out that, whereas the court had found that the offer had been made during conciliation proceedings, it appears that it was made during the arbitration proceedings. I hasten to add that Mr Grobler contended that the offer took place during certain, off the record, settlement talks. I am prepared to assume that Mr Grobler was correct and that second respondent erred.

But is this an irregularity of a gross kind which would disturb the basis of the process, so that an injustice was committed of the kind contemplated by Ngcobo J? Was this the kind of failure to have regard to material facts which, notwithstanding the result, would trigger off a review? I hardly think so for reasons I shall mention.

As for the second reason, that the second respondent did not exercise an adequate degree of proportionality between the competing interests of employer and employee, is hardly a gross irregularity. This is a 'judgment call', which by its very nature is a process of decision making which, absent any evidence to the contrary, can hardly be classified as a gross irregularity. The other 'error' was that second respondent had misdirected himself by concluding that no particular loss was suffered. But again, is this a gross irregularity of a kind which would sustain a review?

The reasons why these questions must be answered in the negative, is in the first place, that a court must be careful to parse an award by second respondent in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. These awards must be read for what they are, awards made by arbitrators who not judges are. When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity as urged upon us by Mr Grobler.

The core finding was "I have come to the conclusion taking

into account the interests of the employer and the employee as well as what fairness demands, not to award any compensation to the employee. The harm done to the employer in the event of applying the statutory formula, would by far out weigh the harm done if compensation is refused". That finding also congruent with the evidence placed before the second respondent. To suggest that the taking into account of the offer of the salary or at some extent, an inelegant phrasing dealing with the issue of patrimonial loss, is to be equated to a gross irregularity and cannot be sustained. Once the issue of gross irregularity cannot pass muster neither can the result of an outcomes based enquiry, namely the reasonableness of the award, be helpful to respondents.

In his judgment Ngcamu AJ appears to conflate gross irregularity with a reasonableness review. For example in the following passage of the judgment the learned judge says: "With regard to the refusal to award compensation, the question is whether the commissioner's award is justified in this regard". The test of justification is sourced in *Carephone* and takes us directly to the reasonableness enquiry. Applying the *Sidumo* test, it cannot be said, that an employee who has been found guilty of theft (the issue as to whether in fact he stole or not is no longer before this court because that finding is not being appealed), can be refused R15 000 of compensation on the *Johnson* formula and that refusal as being unfair. In my view, on the test of Navsa AJ, namely, was this a decision that no reasonable decision maker could reach? The answer must surely be in the negative. It was a justifiable decision once justifiable, that leg of Ngcamu AJ's judgment must fall away.

In summary, there was no basis in law to interfere, on the grounds of section 145 with the decision of the second respondent. Accordingly there is no need to examine whether the decision of the court acting in terms of Section 145 is itself one that should be set aside or being incorrect in law.

For these reasons the appeal is upheld with costs. The order of the Labour Court should be set aside and replaced with the following order:

"The review application is dismissed with costs".

LEEUW JA & NDLOVU AJA: Concurred.

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Appearances

On behalf of the Appellant **Mr T Ngcukaitobi**

Instructed by	**Bowman Gilfillan Inc**
On behalf of the Respondent	**Advocate Grobler**
Instructed by	**Joubert Attorneys**