REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case number JA 2/2012

GOLD FIELDS MINING SOUTH AFRICA

(PTY) LIMITED (KLOOF GOLD MINE) **Appellant**

and

COMMISSION FOR CONCILIATION`

MEDIATION AND ARBITRATION **First Respondent**

MORAJANE C NO **Second Respondent**

MOREKI E M **Third Respondent**

Delivered: 4 November 2013

Edited: 15 November 2013

Summary: Review of the arbitration award- arbitrator miscategorising the dispute as that of poor work performance instead of misconduct. Labour Court dismissing the review on a result-related basis.

Appeal- review of arbitration awards not divided into process-related and result based reviews. Test for review of arbitration awards set out in *Sidumo*- gross irregularity not a self-standing ground to set aside an arbitration award without being assessed against the *Sidumo* test. Reviewing court should consider the alleged misconduct committed by the arbitrator then apply the test in *Sidumo.* *Sidumo* test restated. Appeal upheld. Arbitration award set aside - dismissal of third respondent substantively fair.

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court (Fourie AJ) dismissing the appellant's claim that the arbitrator committed a process-related irregularity by miscategorising the third respondent's conduct as that of poor performance instead of misconduct, thereby failing to apply his mind to the material facts. The Labour Court rejected the appellant's submissions with no order as to costs, holding that the error committed by the arbitrator was immaterial to the outcome of the review. Leave to appeal was granted by the Labour Court.

Background facts

[2] Moreki, the third respondent, was employed by the appellant as a senior sampler. He held the highest qualification that exists in mine sampling: an Advanced Mine Valuation Certificate. His functions entailed taking ore samples from measured and plotted rock faces in the appellant's underground mining operations according to the Stope and Development Sampling Standard (sampling standard).

[3] The duty of a sampler such as Moreki is to take measurements underground so as to indicate the exact location of the stope face position from which he extracted ore samples. In terms of the sampling standard, measurements must be taken from at least two numbered survey pegs and entered into a field book which is then co-signed by a miner. The field book is then handed to a senior dedicated sampler who takes the measurements from the field book and plots it onto a sampling plan.

[4] The ore sample collected by the sampler is then sent to a laboratory for analysis in order to determine the valuation of the whole area. The decision to mine a particular area depends on the result of the laboratory test. Mining a

particular area carries significant costs. It is therefore crucial that the measurements be carried out according to the sampling standard. An incorrect measurement could result in the mine incurring significant loss. A sampler therefore plays an extremely important role with respect to choosing areas to be mined, in that decisions on the areas to mine are based on the preliminary work done by the samplers such as the third respondent.

[5] On 20 June 2009, the third respondent provided measurements of an area from which he collected ore samples and recorded the measurements of the area from which he extracted the ore in his field book. The field book in which the measurements were recorded was not co-signed by a miner; doubt was thus cast on the measurements provided by the third respondent.

[6] On 1 July 2009, a scheduled monthly measurement of various panels, which included the panels which the third respondent had measured, was undertaken. A discrepancy was discovered by the surveyors Msimang and Nyawo between their measurements and those provided by the third respondent.

[7] Msimang and Nyawo confronted the third respondent with the discrepancy in the measurements. The third respondent disputed that his measurements were incorrect and indicated that someone must be sent underground to re-measure the panels. On 3 July 2009, Ms Mmapitsi, a sampler, was sent to re-measure the panels initially measured by the third respondent.

[8] Mmapitsi's report revealed that the position of the stope face reported on by the third respondent was 11 metres further than was actually the case. This wrong measurement affected the valuation of the panels. The financial loss according to the appellant would have been R1.2 million as the panel measured by Moreki was valued at R700 000 whereas its true value was R 1.9 million.

[9] Subsequent to the confirmation of the wrong measurements, the third respondent was charged with serious neglect of duty based on the incorrect report on the stope face position and a failure to work according to the

applicable standards. He was dismissed on 19 September 2009 after being found guilty as charged at the disciplinary hearing.

[10] Dissatisfied with his dismissal, the third respondent referred a dispute of unfair dismissal to the CCMA for conciliation and thereafter for arbitration. The arbitrator found the third respondent guilty of poor work performance but found the sanction of dismissal too harsh on the basis that the third respondent's conduct could be *corrected and improved*. The arbitrator ordered that the third respondent be reinstated without backpay.

Labour Court

[11] The appellant took the matter on review to the Labour Court. The Labour Court dismissed the review application and did so on *inter alia* the following bases:

(i) that although the arbitrator had miscategorised Moreki's [third respondent] conduct as poor performance instead of misconduct, this was immaterial and not unreasonable;

(ii) that while the sanction of dismissal was actually fair, the arbitrator's decision that it was unfair passed the test set in *Sidumo;*[1] and

(iii) that the appellant brought predominantly a result-based review.

The appeal

[12] The appellant raised a number of grounds of appeal. These can be summarised as follows:

(i) that the Labour Court miscategorised the review as a result-based and not a process-related review, and thus arrived at an incorrect decision; and

(ii) that since the fairness of the sanction was based on the miscategorisation of the third respondent's conduct as poor work

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

performance instead of misconduct, this led to a failure to consider what sanction was appropriate in the circumstances.

[13] The right to review an arbitration award on process-related grounds has been a topic of recent discussion and debate.[2] It has been regarded as a different species of review to that postulated in *Sidumo. Sidumo* requires the reviewing court to ask the question: is the decision made by the arbitrator one that a reasonable decision-maker could not reach on the available material? [3] This has been interpreted by some to suggest that the *Sidumo* test deals only with the result or outcome of the arbitration proceedings, and that it remains open to review an award on process-related grounds.

[14] *Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act[4] (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct,[5] gross irregularity in the conduct of the arbitration proceedings,[6] and/or excess of powers [7] will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the

[2] The debate came about as a result of the comments made in the judgment of *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC) where the Labour Appeal Court (differently constituted) was of the view that there were different tests to be applied to process-related reviews and result-based reviews, adding that the whole idea of reviews needed to be abandoned in favour of appeals of the arbitration awards. When I was interviewed by the Judicial Service Commission for the position of the Judge President of the Labour Court I was asked for my view on the judgment and I indicated that I did not share the opinions expressed in that judgment. As the matter was on appeal to the SCA I thought it appropriate to await the decision of the SCA before handing down this judgment. The judgment of the SCA was handed down on 5 September 2013 under the following citation: *Andre Herholdt v Nedbank Ltd and Another* (701/2012[2013] ZASCA 97 and disagrees with the comments expressed in the LAC judgment.

[3] The test as expressed by the court appears at paragraph 110 as follows: 'Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?'

[4] 66 of 1995.

[5] S145(2)(a)(i) of the LRA.

[6] S145(2)(a)(ii) of the LRA.

[7] S145(2)(a)(iii) of the LRA.

enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.

[15] A 'process-related review' suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into account facts that are irrelevant, and the like. The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2),[8] it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the *Sidumo* test. I disagree. 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-related review.

[16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable. [17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision

[8] S142(2) reads that: (2) A defect referred to in subsection (1), means -
(a) that the commissioner -
(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or
(b) that an award has been improperly obtained.

reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.[9]

[20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that

[9] 2009 (2) SA 204 (CC) at paragraphs 64 and 65 where the court held that: '…commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do. An arbitrator must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.'

the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[10]

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.

[22] Based on the above, what is clear in this matter is that the arbitrator properly allowed each of the parties to state their case and lead their evidence but he misconceived the nature of the enquiry, which was to determine the fairness of a dismissal for misconduct. He concluded that the third respondent's dismissal was premised on poor performance and not misconduct. Poor work performance and misconduct are by definition two distinct and diverse concepts.

[10] The *Sidumo* test.

[23] In drawing a distinction between poor work performance and misconduct, Professor B. Jordaan in his article "Poor Work Performance (Incapacity) vs Misconduct"[11] stated the following:

> 'Incapacity relating to poor performance is prevalent where an employee has persistently failed to meet certain performance standards despite the employer offering training, guidance, assistance and evaluation. In such a case the employee would potentially lack the skills, knowledge or competencies to meet the employer's standards. In this case the problem lies with the employee's 'aptitude': although willing to do what is required, s/he is *unable* to because of some factor linked to the employee that s/he has little or no control over.
>
> A dismissal for misconduct is based on the employees fault i.e. intentional or negligent noncompliance to company rules or standards. A degree of blameworthiness is therefore ascribed to the employee. In respect of misconduct, the employer must prove that the employee contravened a rule, was aware of or could reasonably be aware of the rule, that the rule was valid and there was consistency in the application of the rule (substantive fairness). The employer is required to give the employee an opportunity respond to the allegations (procedural fairness). This may take the form of a disciplinary hearing or an interview for lesser transgressions.'

[24] The requirements to show that the dismissal for misconduct was fair are different to what has to be shown in the case of dismissal for incapacity.[12]

[25] In order to find that an employee is guilty of poor performance and consider dismissal as an appropriate sanction for such conduct, the employer is required to prove that the employee did not meet existing and known performance standards; that the failure to meet the expected standard of performance is serious; and that the employee was given sufficient training, guidance, support, time or counselling to improve his or her performance but could not perform in terms of the expected standards. Furthermore the employer should be able to demonstrate that the failure to meet the standard

[11] Maserumule Consulting, September 2009 Issue. http://www.masconsulting.co.za/uploads/news/Poor_work_performance.pdf.
[12] *Landsec and Another v Commission for Conciliation, Mediation and Arbitration and Others* (JR 819/07) [2009] ZALC 12 (29 January 2009) at para 26.

of performance required is due to the employee's inability to do so and not due to factors that are outside the employee's control.

[26] The facts to be taken into account in considering the fairness of a dismissal in a case involving misconduct are set out in item 7 of the Code of Good Practice as follows:

> *'Any person who is determining whether a dismissal for misconduct is unfair should consider-*
>
> *(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace.'*

[27] It is trite that in cases of dismissal for misconduct, the burden to prove that the employee was guilty of misconduct rests with the employer and failure to discharge it renders the dismissal unfair. In discharging its burden the employer has to show that the employee breached an existing rule which he or she knows about or could reasonably be expected to have known of its existence.

[28] In this matter, it is obvious that the arbitrator miscategorised the charges against the third respondent. The arbitrator stated that "*the problem with this charge and finding is that there is a thin line dividing the poor work performance of the [third respondent] and a violation of the rule* and added that *in case the [third respondent] has been performing poorly surely the [appellant] has a duty to follow the correct procedure in dealing with that*." Based on the perception that the third respondent was charged with poor performance, the arbitrator concluded that the sanction of dismissal of the third respondent was extremely harsh and therefore the dismissal was substantively unfair.

[29] The third respondent was charged with gross negligence in the performance of his duties, for falsely reporting on the position of the stope and for failing to work in accordance with the applicable standard. This charge was found, by the arbitrator and confirmed by the Labour Court, not to be clear as to whether it refers to poor performance or misconduct. However, the evidence adduced showed that the third respondent did not perform his duties in compliance with

the standard that he knew was required of him. The evidence was that he had always performed these tasks properly and correctly, that these tasks constituted his duties and on that day he failed to perform his duty. The evidence was not that he did not know or was confused as to what he was required to do.

[30] The evidence at the arbitration demonstrated that the third respondent failed to perform his duties as required and had refused to admit it. He knew what he was required to do, he was able to do what was required but deliberately and intentionally failed to do what was required and compounded this by pretending that he had carried out his duties properly (this he did) by fabricating the information he was required to provide. Also, only when pressed by the arbitrator did he admit that he failed to take the measurements on the second peg as he was required to do.[13] By admitting that no measurements were done on the second peg he admitted that the measurements he provided were fabricated. This cannot be said to be a case of poor performance as the third respondent was a qualified sampler and deliberately and intentionally failed to follow the sampling procedure and failed to carry out his task and fabricated the information he provided to his employer.

[31] It therefore follows that in approaching the dismissal as one effected for poor performance, the arbitrator committed a gross irregularity in the conduct of the proceedings. The conclusion he arrived at was influenced by the wrong categorisation of the case against the third respondent. This however is not sufficient for the award to be reviewed and set aside. The question needs to be asked: had the categorisation of the case against the third respondent been misconduct as opposed to poor work performance, is the arbitrator's award nonetheless one that could be arrived at by a reasonable decision-maker? In my view it is clearly not. The third respondent committed an act of serious misconduct. He deliberately failed to follow the sampling procedure and was recalcitrant about his wrongdoing. In such circumstances, his years of service and seniority serve not only as mitigation but also aggravation

[13] Record vol 4 p 330.

particularly in light of the fact that his work has a serious impact on the decision that the employer would take in relation to which area should be mined and the costs implications attached thereto.

[32] The decision arrived at by the arbitrator is not one which a reasonable decision-maker could reach. In the circumstances, the award is liable to be reviewed, set aside and replaced with an order that the dismissal was fair.

[33] With regard to costs, taking into account the requirements of law and equity, I believe this is a matter in which there should be no order as to costs.

[34] In the result, I make the following order:

(i) The appeal is upheld with no order as to costs;

(ii) The order of the Labour Court is set aside and replaced with the following order:

"The award of the second respondent is reviewed and set aside and replaced with the following order:

'The dismissal of the employee was fair.'"

_____

Waglay JP

I agree

_____

Hlophe AJA

I agree

_____

Zondi AJA

APPEARANCES:

FOR THE APPELLANT:	Anton Myburgh SC with Laura Grai-Coletti
	Instructed by Webber Wentzel Attorneys
FOR THE THIRD RESPONDENT	No appearance