IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

CASE NO: JR 3125/09

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Applicant**
ERIC NHLANHLA KHEWU	**Second Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATIONN & ARBITRATION	**First Respondent**
TERRANCE SERERO N.O.	**Second Respondent**
PROTECH KHUTHELE (PTY) LTD	**Third Respondent**

LABOUR COURT

JUDGMENT

LALLIE AJ

Introduction

[1] The Applicants applied in terms of Section 145 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside an arbitration award issued by the

second respondent under the auspices of the first respondent on 22 November 2009. The application was opposed by the third respondent.

[2] The second applicant was employed by the third respondent as a labourer from June 2006 until his dismissal for misconduct on 2 October 2008. He challenged the fairness of his dismissal at the first respondent. The second respondent found his dismissal substantively and procedurally fair. It is the decision of the second respondent which the applicants seek this court to review and set aside. The applicants' main grounds for review are that the second respondent did not apply his mind by rejecting the applicant's version. The applicants also attacked the arbitration award on the basis that the commissioner committed misconduct by finding that the third respondent did not have to clarify the charges it had preferred against the second applicant and further denied him of the right to be represented at the disciplinary enquiry.

The arbitration award

[3] The second respondent was presented with different versions of the events which led to the second applicant's dismissal. The third respondent's version was that on the day in question the site foreman Mr Leopeng (Leopeng) and site manager Mr De Wet (De Wet) observed movement inside a water pipe where the second applicant was performing his duties. They shouted instructions for the person inside the pipe to come out. The second applicant ran out. De Wet tried to grab him. He was unsuccessful but hurt his hand in the process. When Leopeng and De Wet went to look in the pipe they found pieces of copper cable. In a statement the second applicant was required to write on the incident. He stated that he was smoking a cigarette in the pipe. He later said that he was smoking dagga. The third respondent then preferred the following charges against the second applicant.

> *"Under the influence of intoxicating drugs at work on 26/09/2008.*

- *Breach of employee's duty of good faith to the company on 26/09/2008*

LABOUR COURT

- *Gross insubordination whereby you were called by the Site Agent and you did not respond*
- *Unlawful possession of Johannesburg Water property on 26/09/2008*
- *As a result of you running away the Site Agent's hand was injured as you pulled away on 26/09/2008"*

[4] The applicant's version was that while smoking a cigarette next to a steel pipe he was called by De Wet. He did not hear him. Leopeng called him and Brigado (Brigado), a foreman, assaulted him. He decided to knock off and left.

[5] The commissioner's basis for finding the second applicant's dismissal substantively fair was that the only reasonable inference to be drawn from the second applicant's conduct was that he ran away after being caught committing misconduct. He found that it was probable that the second applicant was smoking dagga and was responsible for the pieces of copper cable found inside the steel pipe.

[6] Concluding that the third respondent cannot be faulted for dismissing the applicant for his dishonest conduct, the commissioner relied on the decisions in *Sappi Novaboard (Pty) Ltd v Bolleurs* 19 ILJ 784 (LAC*)* and *Central News Agency v CCMA and Another* (1991) 12 ILJ 340 (LAC) where the Labour Appeal Court found that in employment law a premium is placed on honesty because any conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded.

The test for review

[7] In *Bestel v Astral Operations* Ltd [2011] 2 BLLR 129 (LAC) the Labour Appeal Court emphasised the need for this court to maintain the distinction between an appeal and a review as follows:

"It is important to emphasise, as is exemplified from Carephone, and in Schwartz, supra, that the ultimate principle upon which a review is based is

LABOUR COURT

justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected."

[8] In *Sidumo and another v Rustenberg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC) the Constitutional Court found that a CCMA arbitration award will be unreasonable and reviewable if it is a decision *"that a reasonable decision-maker could not reach"*

[9] Having referred to the *Sidumo* decision, the Court in *Edcon Ltd v Pillemer NO and others* [2010] 1 BLLR 1 (SCA) held as follows in paragraphs 15 and 16:

"Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him.

It is therefore the reasonableness of the award that becomes the focal point of the enquiry and in determining this one focuses not only on the conclusion arrived at but also on the material that was before the commissioner when making the award. It is remarkable that the constitutional standard of "reasonableness" propounded by the Constitutional Court in Sidumo is conceptually no different to what the LAC said in Carephone. The only difference is the semantics – the LAC had preferred "justifiability" whilst the Constitutional Court has preferred the term "reasonableness".

Evaluation

[10] In reaching the decision that the applicant's dismissal was substantively fair the commissioner considered the evidence before him. He did not analyse the charges which had been preferred against the applicant individually. He instead dealt with them collectively. He cannot be faulted for adopting that approach because all the charges are based on a single incident.

LABOUR COURT

The commissioner's power to make decisions was acknowledge in the *Sidumo* case *supra* when the court found as follows in paragraph 119:

"To my mind, having regard to the reasoning of the commissioner, based on the material before him, it cannot be said that his conclusion was one that a reasonable decision-maker could not reach. This is one of those cases where the decision-makers acting reasonably may reach different conclusions. The LRA has given that decision-making power to a commissioner "

[11] The applicant's argument that the commissioner failed to apply his mind to the evidence before him has no basis because the commissioner gave reasons for rejecting the applicant's version. He therefore demonstrated that he took his decision after considering the evidence before him. In rejecting the applicant's version the commissioner noted that the applicants failed to dispute the third respondent's evidence that the second applicant was found inside the steel pipe, the applicants instead tried to argue that the second applicant's superior injured himself by trying to grab him as he ran out of the pipe. He further found that the second applicant provided a contradictory account as to why he was found inside the steel pipe.

[12] The commissioner's decision on the substantive fairness of the second applicant's dismissal is rationally connect to his reasons considering the material before him. His decision on the substantive fairness of the applicant's dismissal is not one that a reasonable decision-maker could not reach. There are no grounds to interfere with it.

[13] I now turn to the commissioner's decision on the procedural fairness of the second applicant's dismissal. In his award the commissioner noted that one of the grounds cited by the applicants for alleging that the second applicant's dismissal was unfair was that he was not even allowed to have a representative at the disciplinary enquiry. He made a negative comment on the second applicant's candour at the arbitration which he found to be the cause of his inability to provide an explanation for the respondent's failure to

LABOUR COURT

allow him representation at the disciplinary enquiry. He found it improbable that the second applicant was denied representation because he signed the notice outlining his rights.

[14] Section 188 of the LRA provides that a dismissal which is not automatically unfair is unfair, if the employer fails to prove that the reason for the dismissal is fair and that the dismissal was effected in a fair manner. It further requires anyone considering the fairness of a dismissal to take into account the Code of Good Practice: Dismissal (the Code of Good Practice) in schedule 8 of the LRA. Further, section 192 of the LRA places the onus of proving the fairness of a dismissal on the employer.

[15] The commissioner adopted an approach of requiring the applicant to prove the procedural unfairness of his dismissal. That approach is contrary to the provisions of section 188 and 192 of the LRA. No evidence was led before the commissioner to prove the procedural fairness of the second applicant's dismissal. His decision that the applicant's dismissal was procedurally fair is not supported by the evidence before him. It constitutes a decision that a reasonable decision-maker could not reach and stands to be reviewed and set aside.

[16] Having reviewed and set side the commissioner's finding that the second applicant's dismissal was procedurally unfair, I have to decide whether to remit the matter to the CCMA or to take the decision that the commissioner should have taken. The Court in *Shoprite Checkers (Pty) Ltd* v *CCMA and others* [2007] 10 BLLR 917 (LAC) applied the decision in *Traub* v *Administrator of Transvaal and others (*1998) 10 ILJ 9 (T) and held that it had the power in cases such as the one before it to make the decision which the tribunal whose decision is on review should have made.

[17] Both the letter and spirit of the LRA require expeditious resolution of disputes arising from the relationship of employment. The second applicant was dismissed on 2 October 2008. The commissioner correctly found his dismissal substantively fair. All the information that has to be considered in

LABOUR COURT

determining the appropriate relief for the procedural unfairness of the second applicant's dismissal is before me and I am therefore in a position to take the decision the commissioner should have taken.

[18] As the second applicant's dismissal was only procedurally unfair the appropriate relief to grant him is compensation. In determining compensation which is just and equitable in all the circumstances I have considered his length of service and the fact that he made himself guilty of dismissible misconduct. I find that compensation equivalent to remuneration the second applicant would have earned over a period of 2 months calculated at the rate of his remuneration on the date of dismissal will be fair and equitable.

[19] In the premises, I make the following order:

1. The arbitration award issued by the second respondent on 22 November 2009 under case number JB31634/2008 is reviewed and set aside and replaced with the following order:

   (a) The second applicant's dismissal was substantively fair but procedurally unfair.

   (b) The third respondent is ordered to pay the second applicant compensation equal to 2 months' remuneration.

   (c) No order is made as to costs.

LABOUR COURT

____

LALLIE

Date of hearing: 11 March 2011

Date of judgement: 13 January 2012

Appearances:

For Applicant:	Adv I M Maunatlala
Instructed by:	Makinta Attorneys
For Third Respondent:	Mr Donald Graham of Donald Grahamn Attorneys

LABOUR COURT