IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG]

Reportable

Case no: JA138/2017

In the matter between**:**

DEPARTMENT OF HEALTH (NORTH WEST PROVINCE) **Appellant**

(Third Respondent in court *a quo*)

and

THERSIA STRYDOM **First Respondent**

(Applicant in court *a quo*)

L DREYER N.O. **Second Respondent**

(First Respondent in court *a quo*)

THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL **Third Respondent**

(Second Respondent in court *a quo*)

Heard: **14 November 2019**

Delivered: **26 November 2019**

Summary: Review application – Award falling within the band of reasonableness and Labour Court erred to interfere with award – *Sidumo* test considered

Essential controversy on appeal was supposed inconsistency of discipline – on the facts no inconsistency demonstrated – senior employee responsible for coordination of a fraudulent scheme dismissed – others warned and docked a month's wages

Costs order granted by the Labour Court unrelated to the issues before the court – inappropriate - *Zungu* considered and applied.

Coram: Sutherland JA, Murphy and Kathree-Setiloane AJJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] This appeal is against a part of a judgment in which an award was partly upheld and partly set aside. The first respondent had been found guilty in a disciplinary enquiry of serious misconduct, involving dishonesty, and dismissed. In an arbitration, that outcome was repeated. The Labour Court, on review of that award, confirmed the finding of guilt. That aspect of the judgment is not disturbed by the appeal.

[2] The Labour Court went on to set aside the sanction of dismissal and remit the matter to the CCMA to be addressed again on the question of a proper sanction on the premise that the issue of ostensible inconsistency of discipline rendered the sanction of dismissal unfair. The implication was that the issue of inconsistency needed to be probed afresh by the arbitrator. Furthermore, the appellant employer was ordered to pay the costs of the review based on its dilatory conduct of the matter. It is these two orders which are appealed

against. The appellant's contention is that the sanction of dismissal should have been upheld and the costs order was, on the facts, inappropriate.

[3] Accordingly, it is plain that the principal forensic issue before this Court is whether the arbitrator's award was satisfactory in terms of the *Sidumo test*[1], and if it was, then the review court ought not to have disturbed it. The costs order is addressed discretely.

Evaluation

[4] The compass of the controversy is narrow.

[5] The first respondent was a senior food services manager in charge of catering at two provincial hospitals. Several persons reported to her. The first respondent and others, namely C. Lombard, R Smit, A Fourie and M Mtengenyale, were culpably involved in a dishonest scheme. The scheme consisted of the manipulation of the food expenses records and statistics to inflate the supposed value. This was done in conjunction with a catering service provider, Unique Services, which was fully implicated in the fraud. The manipulation scheme yielded, in effect, "surplus funds", either, in the hands of the first respondent or available for disbursement as she saw fit. These funds were used in two ways. First, several items of equipment were purchased for use in the operations of the hospitals. These items were, on the whole, indeed useful to the hospital's operations. Second, and more significantly, perks of various kinds were procured for the crew of manipulators, some of it in direct cash handouts, and, for example, a weekend at Sun City, and food.

[6] When the scheme was uncovered, the appellant took disciplinary action. True enough, the sluggish pace of the appellant's disciplinary process is a legitimate ground for rebuke, but despite some noises being made about that delay, it is irrelevant to the real controversies. The outcome of these disciplinary steps was that everyone implicated, except the first respondent,

[1] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC) at [110]:-
"….s 145 is 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.

was subjected to final warning and a deduction of month's pay. The first respondent was arraigned before a disciplinary enquiry and dismissed. Herein lies the nub of the case.

[7] The arbitrator having heard a considerable body of evidence was apprised of the following critical facts pertinent to the appropriate sanction to impose:

7.1 The first respondent was senior to all the others and they were her direct subordinates taking instructions from her.

7.2 The other culprits testified that the first respondent had instructed them to play their part in the manipulation of the records and the consequent use of the surplus money.

7.3 The first respondent had about 20 years of service, said to be unblemished, in the service of the appellant.

7.4 The first respondent was remorseless, and, in the presentation of her case, sought to justify the scheme. The proposition was put up that as the budget did not provide for all that was required in the operations of the hospital, that the manufacturing of the "surplus" was justifiable. The perspective that through the proper budgetary process equipment could not be procured was not sustained by the evidence, but even if it is accepted that the budget was stretched and necessary items were hard to procure, the flagrant abuse of the system by a person charged with upholding its integrity is inescapably an aggravating feature.

[8] In the award, the following was stated:

'[77] The creative use of budgets is not uncommon in any organisation. An unexpected saving in one area can be used to finance a shortage in another area. However this must be done with circumspection and does not allow employees involved in the process to do it arbitrarily. The applicant testified that due to her long service, she knew every corner of the hospital. Due to her seniority she would also have known every page of procedures.

[78] It is legitimate to question why she was dismissed while certain of her subordinates who also benefited, received a lighter sanction. One must

consider that she was far superior to them in rank and length of service and that they acted under her instructions. They did not, as she did, have ready access to Mr Drotskie and the CEO. They all testified that she assured them that Mr Dotskie had approved. One of them, Charlotte Lombard, had the foresight to keep a discrete record of which statistics she was required to inflate to buy what. The others merely obeyed her instructions. There was evidence that she told a representative of Unique in front of one of them that Unique should give that employee a cellphone. It is inexplicable how she could expect her subordinates to respect procurement procedures and the prudent use of public resources in general if she conducted herself in that fashion in front of them. Their sanction of a month's unpaid suspension is harsh in itself. There was also evidence that other documents were burned which raised questions of prudent governance in her management area.'

[9] It is plain that the arbitrator concluded that an appropriate distinction to make between the first respondent and the other manipulators was based on:

9.1 her superior status,

9.2 her long service and that the proper procedures must have been well known to her,

9.3 the finding of fact made that the first respondent instructed her fellow manipulators to commit the acts of misconduct.

[10] The Labour Court held as follows:

'[10] The evidence, with regards to the service providers, demonstrates that each employee played their part in over-inflating the number of food platters. Whatever the motivation, this conduct did not conform to proper procurement policies and the employer did not benefit, instead it was the service provider and the employees involved in the scheme who had benefited. What the evidence also demonstrates is that the applicant did not act alone. Each of the employees involved in this scheme were a cog in some elaborate mechanism.

[11] Now, this argument was considered by the Commissioner, who used the employee's seniority to distinguish the applicant from other so-called "ordinary

> employees". No evidence was led that the applicant instructed other employees in participating in the over-inflation of food platters. I do not accept that seniority alone is sufficient to justify a different sanction from other employees.
>
> [12] The applicant's heads of argument refers to the judgment in *South African Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd* at (1999) 20 ILJ 2302 (LAC) at paragraph 29, dealing with the consistency of discipline. I agree that employees should be measured by the same standards, this applies equally to the facts of this case, where each employee had their part to play in over-inflating food orders. If any of the employees did not cooperate to over-inflate the orders, then this scheme would fail despite seniority of anyone of these employees. As a result, I have to look at the requirements set out in *Goldfields Mining SA (Pty) Ltd v CCMA & Others*, [2014] 1 BLLR 20 (LAC). In terms of these requirements, the Commissioner did not come to a reasonable conclusion on sanction on the facts presented at arbitration.'

[11] First, the remark that there was no evidence that the first respondent instructed the others is simply incorrect. There was plentiful and repeated evidence which was held by the Arbitrator to be cogent. Moreover, on the inherent probabilities, the first respondent, as the pivot of the scheme, and as the interlocutor between Unique Services and the department and its staff, was the co-ordinator of the scheme.

[12] Second, the remark that "seniority alone" is insufficient to justify a different sanction, if intended as a statement of principle, is misconceived. It might be in a proper case. Relevant context ultimately governs the assessment of any factors deemed pertinent. On the facts of this case, it was an inappropriate criticism to advance because it misrepresents the Arbitrator's findings, which, as cited above, did not rely on seniority *in vacuo*.

[13] Perhaps, more importantly, the remark is misdirected because the Labour Court asked itself the wrong question. It is irrelevant whether a Review Court would have found it unacceptable to give such weight to the factor of seniority or any other factor or combination thereof. The proper question is whether an arbitrator in giving weight to a factor, in doing so, thereby acted in a manner

that no reasonable arbitrator could have acted. It must be shown that the test in *Sidumo* was met in order to interfere. In our view, the test was not satisfied and no interference was warranted.

Conclusion on the sanction issue

[14] Accordingly, in our view, the award is not vitiated by any irregularity.

[15] The appeal must succeed.

The Costs order appealed against

[16] The decision of the Labour Court to order the appellant to pay costs had nothing to do with the merits of the matter.

[17] The Labour Court was critical of the conduct of the appellant in the matter. The rebuke was articulated thus:

> '[14] I cannot ignore the employer's conduct from the inception of the charges. The laidback laissez-faire attitude from the employer in concluding the disciplinary hearings and the manner in which the employer approached this application is even worse. It was accepted in employer's address that the record was complete when the applicant filed its Notice in terms of Rule 7A(8) in July 2014. And there was no need for the employee to file an answer. This matter could have been argued years earlier and concluded within that time period. If there are any special circumstances, it will be special circumstances to justify a costs award against the employer for its approach to this application.'

[18] The approach to ordering costs is that dictated by the Constitutional Court in *Zungu v Premier Kwazulu-Natal* (2018) 39 ILJ 523(CC) at [23] – [26]; in particular, it was held:

> 'The correct approach in labour matters in terms of the LRA is that the losing party is not as a norm ordered to pay the successful party's costs. Section 162 of the LRA governs the manner in which costs may be awarded in the Labour Court. Section 162 provides:

'(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account —

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties —

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.'

[24] The rule of practice that costs follow the result does not apply in Labour Court matters. In *Dorkin*, Zondo JP explained the reason for the departure as follows:

"The rule of practice that costs follow the result does not govern the making of orders of costs in this court. The relevant statutory provision is to the effect that orders of costs in this court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless the requirements are met. In making decisions on costs orders this court should seek to strike a fair balance between on the one hand, not unduly discouraging workers, employers, unions and employers' organizations from approaching the Labour Court and this court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this court frivolous cases that should not be brought to court."'

[19] It seems that the Labour Court sought to rebuke and punish the appellant employer in respect of an issue not before it. It was wholly misdirected in this regard. It must be set aside too.

[20] Having due regard to the review proceedings, axiomatically, the Labour Court's erroneous conclusion to interfere with the award inhibited it from considering whether a costs order should have accompanied the dismissal of

the review. On the approach dictated in *Zungu,* no order should have been made.

Costs of the appeal

[21] As to the costs of the appeal, it is understandable that the first respondent would seek to defend the review judgment, regardless of its lack of merit. In this respect, there shall be no order as to costs for that reason in keeping with the dictum in *Zungu.*

The Order

(1) The appeal is upheld.

(2) The judgment of the Labour Court is set aside in its entirety.

(3) The award of 30 May 2010 is confirmed.

(4) There is no order as to costs in respect of the appeal.

_____

Sutherland JA

I agree

_____

Murphy AJA

I agree

_____

Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv W R Mokhare SC, with him, Adv M Moagi
	Instructed by Leepile Attorneys
FOR THE RESPONDENT:	Attorney S Snyman of Snyman Attorneys