REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA; JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 706/2012

In the matter between:

PILLAY, MOGASEELAN (RAMA) First Applicant

LETSOALO, MAITE MELIDA Second Applicant

and

BROADBAND INFRACO (PTY) LTD First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION Second Respondent

RAFFEE, MOHAMMED NO Third Respondent

Heard: **17 December 2013**

Delivered: **25 April 2014**

Summary: Review Application – Test for Review restated – Court of Review empowered to interfere with award only where outcome not reasonable on the available material and where it fails to meet the overriding requirement of fairness. Sanction – may not be interfered with unless Court of Review finds that decision on sanction is one that could not have been reached by a reasonable decision-maker, even where Court has misgivings about such sanction.

JUDGMENT

BANK; AJ

Introduction

[1] The first applicant in this matter, Mogaseelan Pillay ("Pillay"), was an executive heading the Capital Projects Department of the first respondent in this matter, Broadband Infraco (Pty) Ltd ("the Employer"), until his dismissal on 6 July 2011. The second applicant, Maite Melida Letsoalo ("Letsoalo"), was likewise employed by the first respondent in the capacity of business executive until her dismissal on 22 July 2011. The employer is a state-owned entity under the administration of the Department of Public Enterprise.

[2] Since inception of the disciplinary proceedings upon which this matter is based a vast amount of documentation has been accumulated, comprising the record of the disciplinary hearings of both applicants[1] together with bundles of documents, a transcript of the arbitration proceedings before the

[1] Record Vol B1, B2 and C.

third respondent[2] (hereinafter referred to as "the Commissioner") and a full set of affidavits in this review application, alone comprising some 250 pages.

[3] Owing to the complexity of the matter, the parties agreed to file formal pleadings prior to the commencement of arbitration. This was achieved by the filing of the applicants' statement of case,[3] the respondents' statement of response,[4] followed by a comprehensive pre-arbitration minute. Both parties filed detailed heads of argument in both the initial disciplinary proceedings as well as in the arbitration.

[4] The applicants each faced numerous charges of misconduct and gross negligence which essentially amounted to an allegation that both applicants were responsible for allowing their employer to incur unauthorised expenditure in the amount of R115,630,993.00 as a result of their failure to comply with a direct instruction of the Employer's Executive Committee (“EXCO”) that had been tabled on 22 January 2010. The expenditure was incurred in relation to a project for the installation of fibre optic cable following a tender procurement process. Both applicants faced separate disciplinary enquiries, the transcripts of which were, by agreement between the parties, admitted as evidence during the arbitration proceedings under review.

[5] Prior to the commencement of the disciplinary process the Employer had instructed Pillay to appoint Deloitte and Touche ("Deloitte") to conduct an evaluation of the adequacy and effectiveness of the employer's controls with respect to its procurement and contract management process. This resulted in a detailed written report, referred to throughout the proceedings as "the Deloitte report". Based upon the results of the Deloitte report, several of the employer's employees were subject to disciplinary enquiries, including the present applicants.

[2] Record Vol A, pp 1 - 157.
[3] Record Vol A, pp 713 – 739.
[4] Record Vol A, pp 717 – 739.

[6] The Employer argued that the applicants were guilty of serious misconduct by virtue of their failure to comply with a direct instruction of the Exco resolution which led the employer to incur unauthorised expenditure in the abovementioned amount. It also argued that neither of the applicants exhibited any degree of remorse, that the misconduct was of such a serious and grave nature that a continued employment relationship was no longer tolerable and that dismissal was the only appropriate sanction. Both applicants were found guilty and subsequently dismissed. Both applicants appealed their dismissals but were unsuccessful, the findings of guilty and sanction of dismissal confirmed upon appeal in each case. The matters were then referred to arbitration and consolidated. Two pre-arbitration minutes were concluded after two pre-arbitration conferences held between the parties on 21 October 2011[5] and on 16 January 2012.[6]

The Arbitration Award

[7] In his award, the Commissioner saw it fit to reproduce the better part of the second pre-arbitration minute setting out those facts which are common cause and those which are in dispute between the parties. In view of the factual complexity of this matter, there can certainly be nothing untoward in the fact that this took up a large portion of the arbitration award. For clarity's sake, it does, however, bear mentioning that the Commissioner's quotation from the pre-arbitration minute comprises the entirety of paragraph 3 of the arbitration award[7] and that his analysis continues with a discussion of procedural fairness in paragraph 4,[8] a listing of the detailed charges against the applicants in paragraphs 5 and 6[9] and a description of the supplementary documents to the statement of case.[10] Paragraphs 8 to 20 of the award comprise the Commissioner's summary of the evidence presented,[11] commencing with a description of the Employer as a publicly-owned entity,

[5] Record Vol A pp 740 - 754
[6] Record Vol A, pp 755 - 776
[7] From pp 46 - 53 of the paginated pleadings
[8] Pleadings, p 54
[9] Pleadings, pp 54 - 56
[10] Pleadings, p 57
[11] Pleadings, pp 57 - 61

"governed by a myriad of legislation",[12] most notably the Public Finance Management Act No 1 of 1999 ("PFMA"). The Commissioner then summarised the conclusion of the Deloitte report which was, simply put:

7.1 that there had been unauthorised procurement expenditure of almost R116 million;

7.2 that this unauthorised expenditure was not approved as per the Employer's set delegation of authority, and also contravened the PFMA;

7.3 that the controls set in place by the employer intended to address the risks associated with inadequate or non-compliance with the set corporate governance principles and processes "are both inadequate and ineffective" and that there was a "failure to implement processes" to ensure due approval of work or tasks before the employer was fully committed to expenditure.[13]

[8] The Commissioner then analysed what he termed "the applicants' version" through a summary of the evidence of the expert witness called on behalf of the applicants, Ms Rooshanee Naicker (“Ms Naicker”), a chartered accountant and the forensic report that she had produced. Although the Commissioner states that "the applicants' version was presented not by the applicants but [by] their expert witness",[14] it cannot be argued that the Commissioner gave no cognisance to the transcribed evidence led at the disciplinary enquiry as the pre-arbitration minute records the parties’ agreement that the record of the evidence submitted in the disciplinary enquiries was to serve as evidence at the arbitration proceedings.[15] Indeed, in the Commissioner's analysis of the evidence and argument, he refers to the closing argument advanced on behalf of their employer which has

[12] Pleadings, p 58, para 8.4.
[13] See arbitration award para 10, p 58 and Deloitte report, conclusion vol A p 327.
[14] At para16 of his award, p 60.
[15] See pre-arbitration minute para 3.5, vol A, p 742.

numerous references to Pillay's evidence and cross-examination.[16] The Commissioner was clearly aware of this evidence.

Test for Review on the grounds of gross irregularity

[9] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd and Another*[17] confirmed that the test for the review of a CCMA award on the grounds of a gross irregularity as contemplated by section 145(2)(a)(ii) of the Labour Relations Act, 1995 ("LRA") is that:

> '… the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[18]

[10] The Supreme Court of Appeal recently reaffirmed this principle in *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others*[19] in which it was stated that a CCMA commissioner performs his or her function inquisitorially, with little formality, but subject to

> '… the overriding requirement of fairness. Ultimately the commissioner must determine the true facts and reach a fair and equitable decision. And if the commissioner determines the dispute in accordance with a fair procedure, a review court will not interfere with the decision unless it is one that could not have been reasonably made on the available material.'[20]

Procedural Fairness

[16] Award, at para 2, p 61.
[17] (2013) 34 *ILJ* 2795 (SCA).
[18] Ibid at para 25.
[19] 2014 (1) SA 585 (SCA).
[20] Ibid at para 20.

[11] It is argued on behalf of the employer (correctly, in my view) that although the record of evidence and pleadings relating to the earlier disciplinary proceedings was to be taken into account during the arbitration, that did not preclude the applicants from adducing further evidence, especially on those aspects which were not canvassed during their respective disciplinary enquiries. One such issue is the question of procedural unfairness.

[12] Paragraph 4 of the award[21] comprises an almost verbatim transcription of paragraphs 21 and 22 of the written closing submissions advanced on behalf of the employer at the arbitration proceedings.[22] The Commissioner found that he was '… unable to make a finding on procedure on the basis that there was no testimony led concerning in which respect was the chairperson biased'. Finding that what was contained in the pre-arbitration minute, the statement of claim and closing arguments failed to constitute evidence (which is undoubtedly correct); he then stated that in the absence of such evidence he would be '…unable to make such a finding on procedure' and, therefore, dismissed the applicants' 'attack on procedure'.[23] This is one of the findings challenged in the review.

[13] However, not only did the applicants never challenge the alleged bias of the respective chairpersons of their disciplinary enquiries during such enquiries nor did they ever request that such chairpersons recuse themselves, but the arbitration proceedings before the present Commissioner constituted a *de novo* hearing at which both parties were fully entitled to adduce further evidence to the extent that was relevant and which had not already been led at the earlier disciplinary enquiries. No such evidence was, however, led and the challenges to procedural fairness raised in the pleadings, such as they were, did not make out any such case which called for the employer to adduce any evidence. I say this fully bearing in mind that it is the employer which bears the onus to show that the dismissal of both applicants was procedurally fair. In any event, I can find no fault in both the reasoning and

[21] Record at p 54.
[22] Record Vol A, at pp 930 – 931.
[23] Award para [27] p 62.

the outcome that appear in the Commissioner's conclusion regarding procedural fairness and it certainly cannot be said that his finding in this regard is not a reasonable outcome. In addition, it meets the overriding requirement of fairness.

Substantive fairness

[14] With regard to the substantive fairness of the dismissal imposed by the employer and confirmed by the Commissioner, it is argued on behalf of the applicants that the Commissioner disregarded the evidence of the applicants led at their disciplinary enquiries as well as that of their expert, Ms Naicker. In fact, it is argued on behalf of the applicants that the Commissioner '…completely ignored the compelling evidence of the forensic expert and other evidence presented to him'. In this regard, one of the key findings of the Commissioner attacked by the applicants is his finding that Ms Naicker '… was unable to withstand the rigours of cross-examination and in an attempt not to make concessions made her version more and more improbable'.[24]

[15] I have carefully analysed the transcript of Ms Naicker's evidence as well as her forensic report and I am of the view that, although I cannot agree with the Commissioner that her 'version' (whatever that may mean) was "more and more improbable", it is certainly clear, from a proper reading of the transcript, that the broad conclusions reached by Ms Naicker in her evidence could not be sustained at the conclusion of her cross-examination and that the Commissioner's criticism of her evidence is not altogether unfounded. In my view, the Commissioner's analysis of her evidence[25] must be viewed as an assessment that a reasonable arbitrator occupying the position of the Commissioner could have come to and that his rejection of her expert findings in contrast to the Deloitte report certainly falls within the bounds of reasonableness.

[24] Award at para 24 p 62.
[25] In paras 24 and 25 of the award, p 62.

[16] Regarding the facts of the matter, during argument before me, Mr Beaton very properly conceded that the two resolutions had not been complied with by both applicants although there had, however, been "substantial compliance" with a portion of the second resolution. He argued further that the Commissioner's failure to consider the applicants' substantial defences to the charges against them rendered his award reviewable. He also referred me to the relatively recent case of *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*[26] in which Waglay JP succinctly restated the juridical basis for a review of an arbitration award:

> 'In short: A review 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 which was reasonable to justify the decisions he or she arrived at.'[27]

[17] Later on in his judgment, Waglay JP sets out the questions to be asked when considering whether an arbitrator has discharged the statutory duty placed upon him by section 138 of the Labour Relations Act, 1995 ("the LRA") which requires an arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and to do so expeditiously and fairly:

> '(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that 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 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?

[26] [2014] 1 BLLR 20 (LAC).
[27] Ibid at para 16.

(iv) Did he or she deal with the substantial merits of the dispute? and

(v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence (the so-called *Sidumo* test)?'

[18] Although I was urged by Mr Beaton to conclude otherwise, it is my view that the Commissioner and the award that he handed down meet all the requirements of the above five-part test. In particular I find that the Commissioner did in fact deal with the substantial merits of the dispute and that his decision was one that another decision-maker could reasonably have arrived at based on the evidence before him.

[19] Mr Beaton submitted further that although it could be found that, technically, both applicants had committed an offence in failing to comply with the Exco resolution and its conditions, dismissal was a quite inappropriate sanction to have imposed. Nevertheless, the applicants, if successful, seek reinstatement on the basis that a continued relationship between the parties is still possible and reject the employer's notion that the employment relationship has broken down intolerably.

[20] In reply, Mr Boda, who appeared on behalf of the employer, pointed out to me that, based upon these concessions, the review before me was essentially a sanction-based review. In light of this, the question that this court is required to ask itself is whether the Commissioner's finding that dismissal was an appropriate sanction was so unreasonable that it falls outside the band of reason within which two reasonable people might reasonably disagree.[28]

[21] Mr Boda also referred me to *Palaborwa Mining Co Ltd v Cheetham and Others*[29] in which the Labour Appeal Court reaffirmed the principle expressed by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum*

[28] *Ikwezi Municipality v SA Local Government Bargaining Council and Others* (2012) 33 *ILJ* 1447 (LC) at para 13.

Mines Ltd and Others[30] that confirms that the decision-making power regarding sanction is that of the Commissioner unless it is concluded that a reasonable decision-maker could not reach such a decision. The *Palaborwa Mining* decision clarified that the effect of the *Sidumo* judgment was that the courts, and in particular, the Labour Court, must defer (but not in an absolute sense) to the decision of the Commissioner regarding sanction.[31] In the words of Willis JA, who delivered the judgment on behalf of the LAC, one of the effects of the *Sidumo* decision is that it reduces the potential for the Labour Courts as well as the Supreme Court of Appeal to exercise scrutiny over the decisions of commissioners who are appointed to arbitrate disputes in terms of the LRA.[32]

[22] Applying these principles to the present matter, even if I were to be of the view that the sanction of dismissal imposed on the applicants falls unnecessarily harshly upon them, I am not empowered to interfere with this sanction which was effectively confirmed by the Commissioner without him having explicitly discussed in his award whether dismissal, as opposed to a lesser sanction, was appropriate in the circumstances. In this regard, Mr Boda pointed out that there had been no attack on the sanction of dismissal in neither the review application itself nor in the heads of argument filed on behalf of the applicants prior to oral argument in this matter. He nevertheless argued that, in light of the fact that the applicants had shown no contrition at any stage despite the abovementioned concessions regarding their guilt, the fact remained that the unauthorised expenditure of approximately R115 million vastly exceeded the authorised amount of some R35 million and the fact that this unauthorised expenditure took place within a public framework governed by the provisions of the PFMA meant that the provisions relating to disciplinary proceedings contained in the PFMA must be adhered to.[33]

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[29] (2008) 29 *ILJ* 306 (LAC).
[30] (2007) 28 *ILJ* 2405 (CC).
[31] *Palaborwa Mining supra* at para 4.
[32] Ibid at para 6.
[33] See ss 81-85 of the PFMA as read with the Treasury Regulations (especially Reg 4).

[23] After considering the arguments of both parties and the relevant case law, I am unable to find fault with the present Commissioner's analysis of the facts and the method by which he reached his conclusion and the reasons given therefore, apart from my misgivings expressed above as to his failure to consider whether the sanction of dismissal imposed by the employer was appropriate in the circumstances. As mentioned above, I do bear in mind that this aspect was not argued before the Commissioner and he cannot be faulted in this respect. I reiterate, however, for the sake of clarity, that his decision in finding the dismissal of both applicants to be both procedurally and substantively fair does indeed meet the threshold of reasonableness as expounded and refined in the most recent case law and I, therefore, find no reason to interfere with the arbitration award.

[24] For these reasons, the application for review falls to be dismissed. Although the respondent seeks costs against the applicants and costs would, in a matter of this magnitude, ordinarily follow the result, I am disinclined to make such an order in the particular circumstances of this case. I do so by virtue of the fact that the Deloitte report, which was the subject matter of much of the evidence in the disciplinary enquiry, made several significant findings that all related to serious issues of corporate governance as well as a "failure to implement processes"[34] and that internal processes had not been followed.[35] Therefore, although the applicants must of course bear ultimate responsibility for the breaches of policy, procedure and insubordination, I do not believe that it is appropriate that they also be ordered to bear the costs of this protracted and somewhat voluminous review application.

[25] In the result, I make the following orders:

1. The application for review is dismissed.

2. There is no order as to costs.

[34] Deloitte report, vol A p 329.
[35] At p 330.

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BANK; AJ

Acting Judge of the Labour Court

Appearances

For the Applicants:	Advocate RG Beaton SC
Instructed by:	Naidoo and Associates Inc
For the First Respondent:	Advocate F Boda
Instructed by:	Cliffe Dekker Hofmeyr Inc