REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: JR 297/2009

In the matter between:

ZIRK BERNARDUS JANSEN **Applicant**

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER T PARKINSON N.O. **Second Respondent**

IMPALA PLATINUM LIMITED **Third Respondent**

COMMISSIONER MATTHEWS RAMOTSHELA *N.O* **Fourth Respondent**

Heard : 06 February 2014

Judgment : 20 March 2014

Summary: No assessment of sanction. Bias. Award reviewed and set aside.

JUDGMENT

AC BASSON, J

[1] This was an application to review and set aside an award in terms of which the Commissioner (the second respondent) held that the applicant (Mr Zirk Jansen) was fairly dismissed. The finding of the Commissioner reads as follows:

> 'As I have found that the applicant, Jansen, had breached his contractual obligations on both counts, the conclusion inevitably follows that I find his dismissal to have been for a fair reason. I have already indicated that a fair procedure was followed in effecting that dismissal'.

Rescission application

[2] In addition to the review application, the Court was also called upon to review and set aside a rescission ruling of a default award issued by the fourth respondent on 31 January 2008. I indicated at the commencement of the argument that there is no merit in this application. The application for rescission is therefore dismissed.

Review of the award

[3] The applicant raised 17 grounds for review in the founding affidavit. Because of my view in dealing with this matter, I do not intend to deal with all of these grounds for review as I am of the view that two of the grounds for review are dispositive of the matter. At the outset I should also point out that although the Labour Court as a rule resists remitting matters back to the CCMA for a hearing *de novo* simply because of the delay it brings about in finalising a dispute, I am of the view that, because of the defects in the award, a remittal of the dispute is the only option in dealing with this dispute. I will now turn to the merits.

Was there a consideration of an appropriate sanction?

[4] It is trite that where a commissioner finds an employee guilty of misconduct he or she must thereafter decide whether to impose a sanction and/or what an appropriate sanction should be. It is furthermore trite that a commissioner must apply his mind to the issue of sanction and must approach the appropriateness of a sanction by taking into account the totality of

circumstances. A commissioner must therefore consider what an appropriate sanction should be and should at the very least provide reasons for his or her decision on sanction. See in this regard: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*:[1]

> '[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal.
>
> There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
>
> [79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances'.

See also in this regard the remarks by Zondo, J (as he then was) in *Maepe v CCMA and Another:*[2]

> '[39] Once the Labour Court or an arbitrator has come to the conclusion that a dismissal is unfair, the Labour Court or the arbitrator must now determine what relief or remedy, if any, should be granted to the employee. The determination of what relief ought to be awarded to an employee is governed by the provisions of section 193 of the LRA…'

[5] The Supreme Court of Appeals in *Edcon Limited v Pillemer N.O. and Others*[3] also specifically laid down the principle that an employer, in order to be able to

[1] (2007) 28 ILJ 2405 (CC).
[2] [2008] 8 BLLR 723 (LAC).
[3] [2010] 1 BLLR 1 (SCA).

show that dismissal was the appropriate sanction, must lead evidence to show that there was a breakdown in the employment relationship.[4] This principle as set out by the LAC has been consistently followed by this Court. See: *Chemical, Energy Paper, Printing Wood and Allied Worker's Union and Others v CTP Limited and Another*[5] where the Court held as follows:

> '[162] A further issue that requires mention is that, **in order for the employer to satisfy the onus of proof that the sanction of dismissal was fair, it is incumbent on it to lead evidence to establish a breakdown in the trust relationship**.[6] As the SCA put it in Edcon Limited v Pillemer N.O. and Others (1) (Edcon): 'In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage, Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair.' [7]

See also *Fidelity Cash Management Service v CCMA and Others*[8] where the Labour Appeal Court clearly set out what the duties of an arbitrator are when deciding an appropriate sanction:

> '[94] In terms of the *Sidumo* judgment, *supra,* the Commissioner must:
>
> (a) "Take into account the totality of circumstances"
>
> (b) "Consider the importance of the rule that had been breached"

[4] "[22] Pillemer was entitled to and in fact expected in the scheme of things, to explore if there was evidence by Edcon and/or on record before her showing that dismissal was the appropriate sanction under the circumstances. This was because Edcon's decision was underpinned by its view that the trust relationship had been destroyed. She could find no evidence suggestive of the alleged breakdown and specifically mention this as one of her reasons for concluding that Reddy's dismissal was inappropriate. A reading of the award further reveals that in addition to this finding Pillemer also found that in the context of that matter Reddy's long and unblemished track record was also an important consideration in determining the appropriateness of her dismissal.
[23] In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. …"
[5] [2013] 4 BLLR 378 (LC).
[6] Court's emphasis.
[7] [2013] 4 BLLR 378 (LC).
[8] [2008] 3 BLLR 197 (LAC).

(c) "Consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal";

(d) "Consider the harm caused by the employee's conduct";

(e) "Consider whether additional training and instruction may result in the employee not repeating the misconduct";

(f) "Consider the effect of dismissal on the employee"; and

(g) "Consider the employee's service record'.

[6] In addition to the aforegoing, commissioners and arbitrators must also consider the provisions of the *Code of Good Practice:*[9] *Dismissal* and the relevant provisions of the Labour Relations Act ("the LRA").[10] In this regard section 188(1) of the LRA provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove the matters stated therein. Section 188(2) enjoins a person considering whether a dismissal is unfair to take into account provisions of the relevant Code of Good Practice. Lastly, in terms of section 192(2) of the LRA it is clear that the onus is on the employer to prove that the dismissal is fair.

[7] From the aforegoing it is apparent that the consideration of an appropriate sanction constitutes an important yet separate component of the arbitration process. This was confirmed by the Labour Court in *Theewaterskloof Municipality v SALGBC (Western Cape Division) and Others*[11] where the Court held as follows:

'8 ….In order to maintain the necessary distinction, some assistance may be drawn from the perspective that **a typical arbitration comprises essentially two phases**. The first is the receipt and evaluation of evidence in order to make factual findings. That phase is governed by the ordinary rules of evidence and procedure and no value judgment is involved. **If the employee's guilt is established, the second phase arises, being the identification and weighing of the factors relevant to the determination**

[9] Schedule 8:Code of Good Practice
[10] Act 66 of 1995
[11] [2010] 11 BLLR 1216 (LC).

> **of sanction.** Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory policy and framework; and adequate regard to the pertinent juris prudence as developed by the courts. **Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair'.**[12]

[8] Furthermore, it is also a trite principle that the mere fact that a commissioner finds an employee guilty of misconduct does not as a matter of course entitle an employer to dismiss.[13] See in this regard *Ikwezi Municipality v South African Local Government and Others* where the Court held as follows:[14]

> '[11] The sole issue on review, as articulated by Mr Grogan, is whether this Court should interfere with the arbitrator's finding that dismissal was an appropriate sanction in the circumstances. Mr Wade submitted that this refers to a pure penalty review for unreasonableness, which is not the basis of its attack. In this vein, Mr Grogan submitted that the gravity of the misconduct is only one of the many factors to be taken into account by the arbitrator as set out by the Constitutional Court in *Sidumo (supra*). Seen in context the publication of the letter did not constitute misconduct of such gravity so as to automatically warrant dismissal. It reflects the kind of criticism that appears in the media daily. **In any event, there is no misconduct, however serious, that automatically licences an employer to dismiss an employee. The LAC confirmed in *Toyota South Africa Motors (Pty) Ltd v Radebe and Others* that mitigating factors must always be considered**. **This would mean that even where an employee is found guilty of serious misconduct, on consideration of all the facts dismissal may not be determined to be an appropriate sanction**. The applicant's submission that there is in essence a contradiction between the finding that the employee is

[12] Court's emphasis.
[13] *Toyota SA Manufacturing (Pty) Ltd v Radebe and others* [1998] 10 BLLR 1082 (LC): ' [18] However, these principles do not dictate that mitigating circumstances such as taken into account by the third respondent, should not influence the result or sanction that should be applied. In other words, dismissal is not knee-jerk response to all cases of dishonesty, without exception. This is exactly what the third respondent illustrated in this matter. He took into account mitigating circumstances, presented on the evidence before him, and he found that a sanction other than dismissal should be applicable in this matter'.
[14] [2012] 4 BLLR 403(LC).

> guilty of misconduct and the remedy of reinstatement cannot therefore be sustained. **The ultimate test is whether the arbitrator applied his mind to determining whether the sanction is appropriate in the circumstances** having regard to, among other factors, the misconduct committed'. [15]

[9] In the present matter is clear from the award that the commissioner had simply accepted that, if the applicant is found guilty of the offences, that there would be a fatal breach in the trust relationship. This much is clear from the following comments:

> 'If and whether he did so or not, he abused his duty of care in that his conduct as a whole was motivated either directly or indirectly to secure a benefit for his wife's company, Vuselela. Either of those actions whether individually or in concert would, if proven on a balance of probabilities, constitutes (sic) a fundamental and fatal breach of the trust relationship between the applicant and the respondent'.

The commissioner in this matter therefore, assumed that there would be a breach in the trust relationship despite the fact that it was common cause that the respondent did not call any witnesses to testify about the gravity of the alleged offences or on the effect of the alleged misconduct on the trust relationship between the parties. Moreover, it is clear that the commissioner did not even consider important factors such as the applicant's considerable length of service (which in this case was 24 years) and the fact that the applicant had an unblemished service record with the respondent for this long period. There is also no reference, nor could the respondent refer me to any evidence to the effect that the trust relationship between the parties had broken down. The commissioner therefore arrived at this conclusion despite no evidence to this effect. It was also never canvassed in cross-examination with the applicant that there is such a breach. It is not for the commissioner to decide whether, in his opinion, the trust relationship has been tarnished or even broken down – it is for the employer to present evidence of such a breakdown in the trust relationship. A commissioner is enjoined by the Labour Relations Act to apply his mind to the issue of what an appropriate sanction

[15] Court's emphasis.

should be and to do so with reference to all relevant circumstances. *Ex facie* it is also clear that the arbitrator had failed to have regard to the Code of Good Practice: Dismissal (contained in Schedule 8 to the LRA) despite the fact that he has such an obligation in terms of section 188(2) of the LRA.

[10] In the premises I am of the view that the award should be reviewed and set aside on this basis. I have decided against remitting the dispute back to the second respondent for a re-evaluation of an appropriate sanction in light of my finding that the commissioner was biased. I will now turn to this issue.

Reasonable perception of bias

[11] The Appeal Court (as it then was) in *BTR Industries SA (Pty) Limited and Others v MAWU and Another*[16] set out the relevant test to apply to a complaint of bias as follows:

> 'The test to be adopted in recusal applications involving the appearance of bias is whether there exists a reasonable suspicion of bias on the part of the decision maker. An apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias. The very objects which the 'reasonable suspicion' test are calculated to achieve would be frustrated by grafting onto it the further requirement that the probability of bias must be foreseen. Provided that the suspicion of partiality is one which might reasonably be entertained by a lay litigant, a reviewing Court cannot be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter'.[17]

[12] The Labour Court in *Raswiswi v CCMA and Others*[18] considered what the functions of a commissioner are in conducting an arbitration hearing:

> '[20] In this instance, having regard to the transcript, I am satisfied that there are enough examples to indicate that the manner in which the arbitrator approached the witnesses would create a justifiable impression that he had a predisposition to assist the employer in putting its case and to challenge the applicant's case. A reasonable person in the position of the applicant would

[16] (1992) 13 ILJ 803 (A).
[17] Quoted from the headnote.
[18] (2011) 32 ILJ 2186 (LC).

have had a strong factual basis to drawing this inference, and therefore for having a reasonable apprehension of bias. The question that remains is whether the degree of license which arbitrators are allowed in conducting proceedings in an inquisitorial manner might nevertheless mean that such an apprehension of bias should not be recognised as legitimate.

[21] It is well established that arbitrators performing statutory arbitration under the LRA are entitled under the provisions of section 138(1), to adopt an inquisitorial approach to the conduct of proceedings and are not confined to the adversarial practices of the Magistrate and High Court. In the words of the learned Stelzner AJ:

> '[7] …The basic standards of proper conduct to an arbitrator are
>
> to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter Administrative Law at 536). These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See Carephone Pty) *Ltd v Marcus N.O. (1998) 19 ILJ 1425 (LAC) at 1431 I –1432 H).* The core requirements of natural justice are the need to hear both sides (audi alteram partem) and the impartiality of the decision maker (nemo iudex in sua causa) (see Baxter at 536).
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> [8] It follows from the above principles that a commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. Therefore, even though a commissioner has the power to conduct arbitration proceedings in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly under the provisions of section 138(1) of the Act, this does not give him the power to depart from the principles of natural justice. Thus, further, although it clearly lies within the commissioner's powers to decide whether to adopt an inquisitorial or adversarial mode of fact finding, once this decision has been made it ought to be consistently applied to both parties.

[9] In Brassey et al Commentary on the Labour Relations Act at

A7:49 the following guidance with regard to the choice between forms of procedure is provided:

'In adversarial proceedings the litigation process is in the control of the parties; the evidence that is adduced is that which the parties choose to present and the arbitrator operates rather like an umpire. In inquisitorial proceedings the arbitrator plays a more active role in the hearing, calling witnesses and interrogating them in order to ascertain the truth.… Where an arbitrator adopts an inquisitorial approach to the arbitration, she cannot abandon the well-established rules of natural justice; on the contrary, she must be especially careful to guard against creating a suspicion of bias in the breasts of litigants who will have little, if any, experience of a process so foreign to our system of adjudication. See *Mutual and Federal Insurance Company Limited v CCMA and Others [1997] 12 BLLR 1610 (LC) at 1619 – 20.'*

[10] Where a commissioner has adopted an adversarial approach, he or she should stand entirely away from inquisitorial style questioning of witnesses, leaving the parties to adduce and test evidence as they see fit, alternatively, if he or she wishes to descend into the arena, this should be done in a consistent manner so as to avoid giving rise to suspicion of bias.'

[22] The emphasised portion of the extract above is particularly pertinent in this matter. Both parties were represented in the hearing and the arbitration was conducted within the broad framework of adversarial proceedings. That is not to say that the arbitrator could not adopt an inquisitorial approach in the interest of expedition or fairness, but when intervening the arbitrator's approach must be consistent.

[23] In this case, the arbitrator's approach was far from even-handed and there is more than an adequate basis for believing the arbitration was not conducted in an impartial manner, giving rise to a reasonable apprehension that he was more disposed to the employer than the

> employee. Consequently, the arbitrator committed misconduct in relation to his duties by depriving the applicant of a fair hearing'.

[13] I am in agreement with my learned brother's exposition of the law. I also have no quarrel with the fact that commissioners may and should in certain circumstances adopt an inquisitorial approach to the conduct of the proceedings. However, the commissioner must not be seen to assist one party to the detriment of the other party. Where the commissioner decides to adopt an inquisitorial approach he or she must be careful not to descend into the arena in such a way as to give rise to a suspicion of bias. The commissioner in this matter has, despite the fact that both parties were legally represented, descended into the arena in a manner that gave rise to a suspicion of bias. I am persuaded in light of the numerous examples pointed out to the Court that the arbitrator, when descending into the arena, elicited evidence from witnesses which he deemed would be beneficial to Impala's case and that he cross-questioned the applicant and the applicant's witness in such a manner that the evidence adduced evidence, likewise which he deemed to be beneficial to Impala's case. I do not intend for purposes of this judgment to refer to the numerous examples where the arbitrator extracted evidence which seemed to be beneficial to the respondent's case nor to the plethora of examples where the arbitrator descend into the arena and effectively cross examined witnesses. Suffice to point out that I am persuaded in light of the numerous examples bought to the Court's attention that the commissioner inquisitorial interferences gave rise to a reasonable apprehension on the part of the applicant (a layperson) that the commissioner was incapable of bringing an objective mind to bear on the matter, therefore having deprived the applicant of a fair hearing in contravention of sections 23 and 34 of the Constitution read with section 188 of the LRA. I am satisfied that the conduct of the commissioner in conducting this case may reasonably have created an impression of bias. Consequently, this conduct on the part of the commissioner rendered the arbitration process fundamentally flawed.

[14] In light of the aforegoing, the award should be reviewed and set aside. I have decided to remit the award back to the CCMA. Although as already pointed out, this Court is as a rule hesitant to remit a dispute back to the CCMA

because of the resultant delays, this is unfortunately one of those cases where a remittal cannot be avoided. The Court is simply, in light of the manner in which the arbitration was conducted not in a position to substitute the award with an order of its own.

[15] In the event the following order is made:

15.1 The rescission application is dismissed.

15.2 The arbitration award of the Second Respondent issued under case number NW6634-07 is reviewed and set aside.

15.3 The matter is remitted back to the CCMA to be arbitrated *de novo* by a Commissioner other than the Second Respondent.

15.4 The Third Respondent to pay the costs of this application.

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AC Basson, J

Judge of the Labour Court of South Africa

APPEARANCES

For the applicant : Advocate M G Hitge

Instructed by : Stefan van Rensburg Attorneys

For the Third Respondent : Advocate Tolmay

Instructed by : Edward Nathan Sonnenbergs Inc.