REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2540/12

In the matter between:

MAIA, LIONEL **Applicant**

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

MACGREGOR, ROB, N.O. **Second Respondent**

MATRIX COMPUTER WAREHOUSE (EDENVALE) **Third Respondent**

Heard: **15 January 2014**

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Delivered: 17 April 2014

Summary:

JUDGMENT

RAWAT AJ

[1] This an Application in terms of Section 145 of the Labour Relations Act 66 of 1995 ("*the Act*"). The Applicant sought an order that the award of the Second Respondent ("the Commissioner") be reviewed and set aside and be replaced by a finding that the dismissal of the Applicant was both procedurally and substantively unfair.

[2] The Applicant was employed as a salesperson at Matrix Computer Warehouse (Edenvale) from July 2011 until the date of his dismissal on the 14th of May 2012 earning R5 000.00 per month.

[3] The Applicant had three disciplinary charges against him which were described as follows in a disciplinary charge sheet:

> **'Charge 1: Category (7) (A). Offence: Late for work:** In that you have presented yourself late for work on the following days 16.042012, 18.04.2012, 19.04.2012, 20.04.2012 and 25.04.2012 which is totally unacceptable and portrays a negative attitude towards your work and affects your ability to be fully productive this after you have received a final written warning in December last year.
>
> **Charge 2: Category (1) (E) Offence: Gross Incompetence:** In that you failed to reach your targets of R250 000 per month for December 2011, January, March and April 2012 you only reached the following target in February, this deterioration for the months mentioned justified that you prorating a don't care attitude which proves that you are gross incompetent in the performance of your duties and that you have become a liability to the company.
>
> **Charge 3: Category (1) (F). Breach of employee of good faith to the company: (Derelict of duties):** in that you were on duty on Saturday the 28

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> of April 2012 you were busy surfing the internet **(9gag.com)** for your personal use without enquiring if there was any work that needed to be done which left Bradley to attend to the customers once again justifying your lack of ability to perform your duties as well as respect your job and by this you have tarnished the work relationship.'

[4] A disciplinary hearing was held on the 14th of May 2012 chaired by Mr. G. Green. The outcome was that Mr. Green found the Applicant guilty on all three charges and recommended his dismissal, which recommendation the company upheld. Of importance, is the fact that the Applicant pleaded guilty to all three charges.

[5] The matter was referred to Arbitration at the CCMA on the 16th of August 2012 before the Second Respondent, Commissioner Rob MacGregor ("the Commissioner") who made the following award:

> 'The Applicant is to be paid R5 000.00 (five thousand rand) being the equivalent of one month's salary as compensation for the procedural unfairness of the dismissal. I consider this amount to be fair and equitable given the Applicant's uncooperativeness in finalising the complaint and the context of the matter as sketched by the parties. The payment is to be made within two weeks of receipt of this award.
>
> There is no order for costs.'

[6] The Applicant's grounds for review are that the Commissioner:

1. did not apply his mind to the relevant issues with the behest of the Act;
2. failed to appreciate and/or give effect to his powers and duties in terms of the Act;
3. adopted an approach unjustified on the facts and inconsistent with his statutory duty;
4. based his factual conclusions on grounds which do not accurately or correctly reflect the evidence given before him;

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5. did not exercise the power conferred upon him properly in accordance with the behest of the Act or at all;

6. failed to establish a reasonable correspondence between the evidential material placed before him and the award;

7. failed to establish a proper connection between the evidential material reasonably assessed and the relevant legal principles reasonably applied on the one hand and terms of the arbitration award on the other hand;

8. misconstrued oral and documentary evidence and ignored or misapplied relevant legal principles, to the extent that it was unreasonable and inappropriate; and

9. reached conclusions which are not capable of reasonable justification when regard is had to the factual premises upon which they are based.

[7] At the outset, a point *in limine* was raised and argued by Mr Mer for the Applicant that the Commissioner should have arranged for another Commissioner to conduct the Arbitration as he had reverted to mediation.

[8] This is not correct. Section 138 of the Act in the General provisions for Arbitration proceedings reads:

> '(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.
>
> (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.
>
> (3) if all the parties consent, the commissioner may suspend the arbitration proceedings and attempt to resolve the dispute through conciliation.'

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[9] Further, all exchanges in terms of Section 138(3) are made without prejudice. The fact that the entire mediation endeavour is part of the record however leads to the inevitable fact that it is open to be read. It therefore seems appropriate at this point to state that even though the Court is aware that that segment pertaining to the mediation is not officially part of the record, the Applicant has, as a ground for review, levelled the accusation against the Commissioner that he had a predisposed mind-set as to the compensation that was eventually awarded. Nothing in what has been recorded verifies such an allegation.

[10] Insofar as the actual decision is concerned, the Court agrees with the finding of the Commissioner at page 9 of the record that:

> 'The charges were manipulated to ensure a sanction of dismissal". The Third Respondent, at page 13 of the record writes to his IR Officer and Chairperson of the hearing before the hearing the following:
>
> I have a staff member who is constantly late and has failed to reach his sales target over the last couple of months. I want to look at dismissing him. Attached are the final warnings he has received. They are all over three months old (just).
>
> This would suggest that the company was influencing the chairman of the hearing to comply with their expectation that the Applicant should be dismissed. I must therefore conclude that the hearing was procedurally flawed as the independence of the chairperson is in question.'

[11] The same applies to the finding regarding the Applicant's failure to reach his targets. The Commissioner found that the:

> 'Applicant's performance was adequate and this was supported by the absence of any prior counselling or disciplinary action.'

[12] Having embarked along this path of reasoning, the Commissioner on the first charge of late coming, found the Applicant guilty. In this regard, the Commissioner at page 9 of the record stated:

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> 'This aspect of the Applicant's testimony was particularly worrying as it was clear that the Applicant was late and his challenge to the branch manager in this regard was not constructive or honest.'

[13] In the record on page 250 – 254 relating to Charge 1 is an exchange which is indicative of a very laboured exchange between the Applicant and the Commissioner and a literal reading and interpretation thereof clearly lends itself to the finding that the Commissioner arrived at.

[14] Whilst there is scope for the Applicant's argument that the disciplinary guidelines recommended that for the offence of arriving late at work or leaving work early without permission would warrant in the first instance a written warning, in the second instance a written warning, in the third instance a final written warning and in the fourth instance, dismissal.

[15] However in this instance, the four days of late coming are within the space of five days and the fifth five days later. To deal with the five days of late coming as a whole asking for the maximum penalty, given the closeness of the timeframe of the five days of late coming, the Court considers this one way of dealing with such offences.

[16] However, such an interpretation and application deprives the employee of the benefit of being made aware of his/her infringement of the company rule and to guard against incurring a stronger sanction being imposed by the repetition of the offence. This would be the preferred option. In this case, the Applicant was not even spoken to about his late coming, let alone correctively disciplined. Had the Third Respondent carried out the disciplinary guideline with the corrective approach, then by the 20th of April 2012, the fourth day of late coming, the Third Respondent could have considered the proper course of action being the dismissal of the Applicant on this ground alone.

[17] As regards the third charge being:

> 'Charge 3: Category (1) (F). Breach of employee of good faith to the company: (Derelict of duties): in that you were on duty on Saturday the 28 of April 2012 you were busy surfing the internet (9gag.com) for your personal use without enquiring if there was any work that needed to be done which left

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> Bradley to attend to the customers once again justifying your lack of ability to perform your duties as well as respect your job and by this you have tarnished the work relationship.'

[18] This charge is very specifically formulated in terms of what the Applicant purportedly was doing on Saturday 28 April 2012, and in terms of what the Applicant purportedly did not do and as a result of which, the person mentioned "Bradley" had to compensate for this action of the Applicant. The charge further makes specific reference to the Applicant's lack of ability to perform his duties as well as respect his job with the accumulative consequence of having tarnished the work relationship.

[19] A reading of the record of the arbitration reveals that the Third Respondent did not lead any evidence to substantiate all these aspects of this charge. The only evidence led at the arbitration hearing was that of Mr. Green.

[20] Further it would have been essential to produce evidence to substantiate the fact that the Applicant was busy "surfing the net" or otherwise engaged in the utilisation for personal purposes of the Third Respondent's facilities whilst there were customers in the store on 28 April 2012. The Applicant admitted that he did, from time to time, engage in this particular practice but not at any time when there were customers on the store or to the detriment of the Third Respondent's operations.

[21] Mr, Green testified as the Chairperson of the disciplinary hearing that:

> 'Certainly the fact that… In charge three the fact that Lionel sat there knowing very well there is work to be done and there were clients in the store and he did not offer to assist at all and if I look at the evidence that was presented in terms of that on page 15 onwards, fourteen at least, it justifies he was sitting there entirely doing no work. So he was being paid for not doing any work. And obviously sitting doing something personal or what do you call it surfing the net and not doing your work, obviously you not going to meet your targets. So you are more of the liability to the company than an asset (inaudible). And the fact that he pleaded guilty in the hearing.'

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[22] This aspect of the arbitration is problematic; it is trite law which emanates from Natural Law that any person against whom an accusation is levied must be presented with at the very least an evidential basis for such accusation. This concept is captured in Schedule 8 of The Act:

> 'The Employer should notify the Employee of the allegations using a formal language that the Employee can reasonably understand. The Employee should be allowed the opportunity to state a case in response to the allegations.'

[23] In this instance, charge three is very specifically formulated and no evidence beyond that of Mr Green was presented at the arbitration hearing. In addition, a reading of evidence quoted hereinabove does not reveal any relevance to charge three. "Bradley" did not testify at either the arbitration or disciplinary hearing and there is no explanation for his absence. Only Brandon the Store Manager testified at the disciplinary hearing, only on the issue of late coming.

[24] This evidence does not exonerate the Third Respondent from the duty to prove Charge 3. The Commissioner bore the *onus* of proving his case, whilst the Applicant, after this duty has been discharged, would have borne the *onus* of rebutting the evidence. This is trite law and even if Section 138 of the Act empowers a commissioner to deal with a dispute quickly, fairly and with the minimum legal formalities, there exists a framework be it of rules and procedures which emanate from the *Audi Alteram Partem* principle.

[25] This consequence of natural law is that a party needs only to respond to the case against him / her. The Commissioner made the point in his award that an Arbitration is a *de novo* process. A party cannot rely on evidence adduced at the disciplinary hearing as having the weight of evidence at an Arbitration hearing. To allow a relaxation of the legal formalities to this extent would have disastrous consequences and eventually erode the Arbitration process, which is a specific one, to the extent that principles of fairness and justice, would be severely corroded.

[26] Further, the Commissioner perpetuated this conduct at page 9 of the record, which is clause 12 of his award:

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> 'With regard to the last charge being dereliction of duty the Applicant once again tried to deflect the blame on the Temp Worker and his colleague and co-worker. The Respondent showed the record of the Applicant's presence on the internet playing 9Gag for lengthy periods of time and the Applicant considers as much during the cross-examination. The Applicant's lack of remorse and his defiant refusal to accept responsibility for his actions is difficult to comprehend and even more difficult to excuse. Such dereliction of duties could cause difficulties for the company as service plays second fiddle to internet games.'

[27] Firstly, the Court accepts that what the Commissioner actually meant was that playing internet games plays second fiddle to service in the company and not what the Commissioner penned.

[28] There is no evidence on record to substantiate this finding. At page 262-264 is the closing address of the Third Respondent and alludes to claims which bear a resemblance to the above deduction, but this was not part of the evidence properly tendered which would have afforded the Applicant the right of rebuttal. The record also shows that the Applicant was questioned in his cross-examination on the allegations in charge three by, it would appear, the Commissioner.

[29] The question still remains: 'Was this award a reasonable one a decision-maker could reach?'

[30] As already alluded to, the Commissioner in finding that the referral to the chairperson of the disciplinary hearing and which reads: "I have a staff member who is constantly late and has failed to reach his sales targets over the last couple of months, I want to look at dismissing him. Attached are the final warnings he has received. They all over 3 months old (just)" was suggestive of the company influencing the chairperson and in finding that this did constitute a procedural flaw and in dismissing charge two relating to the targets set, did embark on an award which was clearly reasonable and in keeping with the evidence before him.

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[31] The Supreme Court of Appeal in: **Sidumo vs Rustenburg Platinum Mines and Others (2007) 28 ILJ 2405 (CC)** stated the following:

> *[5] It is trite that an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere. Section 145 of the Labour Relations Act 66 of 1995 permits the Labour Court to set aside an award for one or other defect stated in s 145(2) – none of which are now applicable. But it was recognised in Sidumo v Rustenburg Platinum Mines Ltd,[1] adopting what was held in Carephone (Pty) Ltd v Marcus NO,[2] that an award may also be set aside if it is one that 'a reasonable decision-maker could not reach',[3] and it was on that basis that Samancor sought to have the award set aside. Thus the question that was before the Labour Court – and subsequently before the Labour Appeal Court – was whether the award in this case was so defective as to fall within that category.*

[32] The admission of inadmissible evidence is, to the extent that this was the case in this matter, one that seriously impacts on the Applicant's fundamental right to a fair hearing. The issue of the influencing of the Chairperson, prior to the hearing is a serious one, again, impacting on the same right that any accused employee has.

[33] The Court has difficulty reconciling the Commissioner's finding that the influencing of the Chairperson was a procedural defect and yet in dismissing the Applicant's claim that he had ***"been wooed"*** into changing his plea to guilty with the expectation that he would be treated more leniently and ***"in finding that no evidence of this expectation was produced."*** Yet at page 141 of the Record, line 8 -13, Mr Green, the Chairperson says:

> 'If you plead guilty, it means, you are showing; there's already a plea of leniency in terms of that and it is showing remorse, it is now up to your pleading leniency in these matters, do you understand my point? That will be taken into consideration, which will be depending or taking into consideration. That is the only two ways the matter can go.'

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[34] To which the Applicant changes his plea and responds:

> 'Yeh, yeh both of them 1 and 3 with reason because I do have …… I can state as to why I'm not guilty'

[35] The record at page 142 onwards, shows the Applicant making several attempts to explain himself in relation to the charges to which the Chairperson notes a plea of guilty with reason. He also allows the Third Respondent at the disciplinary hearing the right to "ask questions" to the Applicant, despite the plea of guilty.

[36] Mr Green, the Chairperson of the disciplinary hearing says:

> 'When it came to mitigating circumstances I even asked him and on page 12 I wrote there: "Mitigating – what do you have to say for yourself in yourself in your defence? You have pleaded guilty." He said he is not married, no children. Two kids which is his fiancé's. And nothing to say….. he showed no remorse in the hearing for his actions. He was not even sympathetic that look I messed up: Please give me an opportunity. I have realised now that what I have done. Nothing. He just sat there. I have nothing to say. It leaves it me with very little to accept that the Applicant was remorseful in his actions. It was like his right to do that and he just did not care as much.
>
> Hence based on that it was only obvious and clear that this relationship has broken down and on that basis I recommended a summary dismissal.'

[37] This must be read against what Mr Green said to the Applicant earlier, which induced him to change his plea and is at odds with what Mr Green found as quoted hereinabove.

[38] The reasonable course that the award commenced on and which then diverted, is what this Court has to, with the greatest caution, reconnect.

[39] The approach of lumping all the days of late coming into one charge instead of dealing with it progressively must be read against the background of the Commissioner's finding that there was an intention by the Third Respondent to dismiss the Applicant. The Applicant constantly alluded to this throughout the disciplinary hearing and the arbitration. The Commissioner came to the

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conclusion that the Applicant's dismissal was procedurally unfair and proceeded to award him one month's compensation due to "the Applicant's uncooperativeness in finalising the complaint and the context of the matter as sketched by the parties."

[40] The award at page 9 of the record also notes, "the Applicant's lack of remorse and his defiant refusal to accept responsibility for his actions is difficult to comprehend and even more difficult to excuse such dereliction of duties would cause difficulties for the company as service plays second fiddle to internet games".

[41] These deductions are partly based on the inadmissible evidence and also is lacking in a strong factual, evidential deduction and the proper course of procedure.

[42] The award of the Commissioner is defective in that inadmissible evidence was admitted, which in itself, is reviewable irregularity. The award is not one a reasonable decision-maker would have reached. On the premises of where the course of reasonableness diverted, the reasonable decision-maker would have made a finding of substantive unfairness and procedural unfairness. This Court finds that there was substantive and procedural unfairness.

[43] The order this Court makes is:

1. The Award dated the 20th of August 2012, by Commissioner, Rob MacGregor (the Second Respondent) is set aside;

2. The award is replaced with: the Applicant is to be paid the equivalent of six month's salary being the sum of R30 000.00 (thirty thousand rands)

3. This is to be paid within 30 days of receipt of this order;

4. The third Respondent is to pay the costs of the Application;

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Rawat AJ

APPEARANCES:

FOR THE APPLICANT:

FOR THE THIRD RESPONDENT:

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