REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no JR 1656/12

In the matter between:

P A MAHLAKE **APPLICANT**

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **1ST RESPONDENT**

AC MAANDE **2ND RESPONDENT**

DEPARTMENT OF SPORTS, ARTS & CULTURE

LIMPOPO PROVINCE **3RD RESPONDENT**

Date heard 28 November 2013

Judgment delivered: 17 January 2014

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent, to whom I shall refer as 'the arbitrator'. In his award, the arbitrator ruled that the applicant's claim of unfair dismissal should be dismissed, with no order as to costs.

Material facts

[2] The applicant was employed by the third respondent as a senior manager. In October 2004, she was appointed as chairperson of a committee to manage the Mapungubwe Arts Festival. The festival took place in December 2004. After the festival, a forensic investigation was conducted. The investigators recommended that the applicant and two other employees, the head of department and the chief financial officer be charged on various counts relating to financial mismanagement. The chief financial officer left the department before he could be charged; the head of department was transferred to the office of the premier where charges against him were withdrawn. The applicant was afforded a disciplinary hearing at which she was found guilty of 14 of the 18 charges brought against her, and dismissed.

[3] The proceedings under review were conducted on various dates between May 2011 and February 2012. The arbitrator found the applicant guilty of charges 1, 2, 4, 5, 6, 8, 10, 11, 13 and 14 and upheld her dismissal. All of these charges relate in one way or another to financial mismanagement and in particular, a failure to comply with applicable regulatory measures, in relation to the festival.

[4] I do not intend for present purposes to repeat the evidence, all of which is on record. The only witness to give evidence for the respondent was a Mr. Knevitt, an accountant who conducted the investigation into the festival. He testified that the budget for the festival was R5.5 million and that the actual expenditure was R 8 271 976.71, a budget overrun of some R2.77 million. In order to achieve this,

Knevitt testified that the applicant had sought authority to shift special-purpose funds granted by the provincial treasury for other purposes within the directorate without the consent of the treasury. He testified that the applicant, as a senior management for her directorate and chairperson of the executive committee charged with managing the festival, was responsible to ensure that the service provider appointed to manage the festival, Ziyaphenduka, acted with the confines of its terms of reference and the contract in terms of which it was appointed. The investigation conducted revealed that the applicant had failed to do so by allowing Ziyaphenduka to render services that were not contemplated by the contract or its terms of reference. Further, the applicant had allowed the appointment of and payment to service providers without following proper procurement procedures. In particular, various amounts were paid to a number of entities, all of which exceeded R 100,000, such payments being made directly to the entities concerned. The service providers that were the beneficiaries of these payments had been paid amounts ranging from R120 000 to R1. 255 million. An exemption from procurement procedures had been granted on 16 November 2004, up to threshold of R 30,000. In respect of amounts beyond this threshold, Knevitt testified that Treasury regulatory requirements applied, and in particular, in respect of exemptions above R 100,000 and R1 million, in respect of which differing tender procedures were applicable.

[5] The applicant's defence, in the main, was not to dispute Knevitt's evidence in relation to the paper trail disclosed by him, rather than to deny any responsibility for any financial mismanagement that may have occurred. In particular, the applicant denied that she was responsible for the appointment of any service providers, and asserted related all material times she acted with the knowledge and consent of the head of Department who was the responsible person. In regard to any contravention of procurement policies, the applicant's defence was that at the time, she was under the bona fide impression that she was acting with the consent an authority of the head of Department. In more general terms, the applicant asserted that she relied upon the chief financial officer, the financial committee, the festival committee, the procurement department, the compliance

officer, and the head of department to bring to her attention that she was committing any act of misconduct. At most, the applicant concedes that she was guilty of negligence and that in any event, given her clean disciplinary record and the delay in instituting disciplinary proceedings against her, that dismissal was not an appropriate penalty in the circumstances.

[6] In broad terms, the arbitrator rejected the applicant's denial of any responsibility for financial mismanagement and in particular, her attempt to shirk responsibility for what occurred under her watch as chairperson of the executive committee managing the festival. The applicant's defence that she was neither responsible nor accountable for the payment proper running of the festival was rejected as baseless, in that the budget and accountability for the festival was found to fall squarely within the applicant's directorate and within her sphere of responsibility as a senior manager and chairperson of the festival committee. In so far as the applicant's defence was based on ignorance of the applicable policies and procedures, this too was dismissed, the arbitrator finding specifically that the applicant's letter dated 16 November 2004 in which she sought exemption from the threshold of R30 000 was indicative of her awareness of the applicable policies.

The grounds for review

[7] The applicant contends that the arbitrator committed a gross irregularity in the conduct of the proceedings by failing properly to take into account relevant evidence, by failing to apply his mind to the material evidence before him and by arriving at factual and legal conclusions that no reasonable decision maker would have reached in the circumstances. For the reasons that follow, in the absence of any averment to the effect that the process-related conduct by the arbitrator resulted in an award that is unreasonable, I need consider only the last of these grounds, and then only to determine whether the outcome of the proceedings under review falls within a band of decisions to which reasonable decision-makers could come on the available evidence..

The applicable legal principles

[8] The test to be applied is that enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*, recently affirmed by the Supreme Court of appeal in *Herholdt v Nedbank* (701/2012, 5 September 2013). In the latter judgment the court summarised the position as follows:

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will 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.'

[9] The *Heroldt* decision clarifies the *Sidumo* test, at least to the following extent:

a. The test to be applied is cast in the negative- the court must ask whether the arbitrator's decision is one that could not reasonably be reached on the available material.

b. The test is concerned primarily with the result of the arbitration proceedings and not the arbitrator's reasoning. The arbitrator's reasons are relevant only in so far as they assist the court to determine how the result was reached, and whether the result can reasonably be reached by that route.

c. A 'latent irregularity' or 'dialectical unreasonableness' on the part of the arbitrator (i.e. a failure by the arbitrator to take into account one or more material facts, or the taking into account of irrelevant facts, or any unreasonableness flowing from the arbitrator's process of reasoning) is not in itself a sufficient basis for review. The arbitrator's conduct in this regard is relevant only in so far as it renders the outcome of the arbitration proceedings unreasonable.

[10] In *Goldfields Mining South Africa (Pty) Ltd v CCMA* (JA 2/2012, 4 November 2013) the Labour Appeal Court confirmed that the applicable test does not admit what has been referred to as a "process-related review", at least in the sense that it is no longer open to a reviewing court to set aside an arbitration award only on account of a process- related irregularity on the part of the arbitrator. This has the consequence that the failure by an arbitrator to mention a material fact in the award, or to deal with any issue that has a bearing on the issue in dispute, or any error in regard to the evaluation of the facts presented at the arbitration hearing, is of no consequence. Provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator's decision is one that could not be reached by a reasonable decision-maker on the available material.

[11] At paragraph [20] of the judgment, the court stated:

> 'The questions to ask are these: (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? (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?
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> [21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator

> assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must aactually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.

[12] The test to be applied clearly maintains the distinction between a review and an appeal. The correctness of the commissioner's decision is not in issue, and the court is not entitled to interfere only because it would have come to a different conclusion on the same material. It also requires the court to overlook any lapses in reasoning on the part of the commissioner and to determine whether the outcome of the proceedings is nonetheless reasonable.

[13] To apply the criteria identified in the *Goldfields* judgment, it cannot seriously be disputed that the arbitrator understood the nature of the dispute before him and that he dealt with its substantive merits. In so far as the applicant contends that the outcome of the proceedings under review represent a decision to which no reasonable decision-maker could come, in my view, it is not unreasonable to conclude on the basis of the available evidence that the applicant was responsible for the budget allocated to the festival, and more specifically, that she was ultimately responsible for the instances of financial mismanagement that formed the subject of the findings against her. In particular, it should be recalled that the merits of the investigation conducted by Knevitt were not seriously called into question during cross examination. It may be that other employees of the third respondent, and in particular the head of department and chief financial officer were also culpable and that by leaving the third respondent's employ, they have escaped the consequences of their actions. But that in itself does not absolve the applicant of accountability for the financial mismanagement which no doubt occurred. The applicant was a senior manager and chairperson of the committee tasked with the production and management of the festival. In that capacity, she was ultimately accountable for the acts of mismanagement that

occurred and it is not unreasonable to require her to bear responsibility for them. For these reasons, in my view, the arbitrator's decision cannot be said to be one that a reasonable decision-maker could not reach on the available evidence. For this reason, the application stands to be dismissed.

[15] In so far as costs are concerned,s 162 of the LRA afford this court a wide discretion to make orders for costs according to the requirements of the law and fairness. In practice, this court is reluctant to make orders for costs against individuals who might otherwise be dissuaded from pursuing their rights on account of the prospects of an adverse order for costs. In the present instance, I accept that the applicant feels genuinely aggrieved about the outcome of the proceedings under review, that she initiated these proceedings in good faith and in circumstances where the application is neither frivolous nor vexatious. For that reason, I intend to make no order as to costs

I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv AL Cook, instructed by Koikanyang Inc.

For the third respondent: ADv N Cassim SC, with him Adv DT Skosana, instructed by the state attorney.