IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR164/06

In the matter between:

RALPH DENNIS DELL	**Applicant**
And	
SETON (PTY) LTD	**1ST Respondent**
CCMA	**2nd Respondent**
SHEEN N.O	**3RD Respondent**

JUDGMENT

MOLAHLEHI J
Introduction

1] This is an application to review and set aside the arbitration award issued by the third respondent (the commissioner) under case number GJAB 16727/05 and dated 7th December 2005.

2] The first respondent contended that the review application was two days late and that the matter stand to be dismissed for that reason, more particularly because the applicant did not apply for condonation for the late filing of the review. In terms of s145 of

the Labour Relations Act 66 of 1995(the Act), a review application has to be brought within 6 (six) weeks of the date of becoming aware of the arbitration award. An applicant who brings an application outside the 6 (six) weeks period has to apply for condonation for such late application.

3] The appellant states in his founding papers that he received the award on the 7th December 2005. The review application was delivered on the 20th January 2006. The 6 (six) weeks period expired on the 18th January 2006. This means that the applicant was 2 (two) days late and therefore the applicant should have made an application seeking an indulgence of the court to have the 6 (six) week's period extended by 2 days but the applicant has failed to do so. The application stands to be dismissed on this ground alone. However, 2 (two) days being such a short period I will indulge the applicant even in the absence of an application for such indulgence. The late filing of the application for review is condoned.

Background facts

4] The applicant is a former managing director of the first respondent a private company registered in terms of the laws of Republic of South Africa. The other 3 (three) directors of the first respondent are based in the United States of America and Germany.

5] The applicant was, arising from a number of allegations against him charged and dismissed for misconduct relating mainly to acts of dishonesty and failing to act in the best interest of the third respondent as a director. The disciplinary hearing was chaired by an independent chairperson.

6] After his dismissal the applicant referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (the CCMA) for arbitration. At the arbitration hearing the first respondent abandoned some of the charges it had proffered against the applicant at the disciplinary hearing.

The first charge

7] The first charge against the applicant was that he, during December 2001, the applicant granted himself an increase without the

necessary authorisation of the first respondent and in particularly without knowledge of the other directors.

8] The version of the first respondent in this regard was that the applicant was at the end of November 2001, earning a salary of R68 500.00. This amount was increase in December of the same year to R97 600.00.

9] The background to the increase according to the applicant is that it was set out in dollar denomination by Mr Hermann Winkler (Winkler), the then vice president of the first respondent. The increase was set out in a memorandum which was given to Mr John Henry the human resource manager by Winkler. This memorandum was received by the human resource manager in the presence of the applicant. The human resource manager was told to keep the contents of the memorandum confidential.

10]Winkler in setting out the increase as stated earlier used the dollar denomination which set out the increase as being from $8 245.00 to US $10 000.00. It was testified on behalf of the first respondent that the applicant approached the human resource manager and

provided him with a website which could assist him in determining the correct exchange rate. It was through this calculation that the salary of the applicant was increase to R97 600.00.

11]The testimony of the first respondent was that the rate used to get from a rand value of R68 500 to a US dollar value of R8 245.00 was R8.31 to the dollar. This exchange rate was according to the first respondent provided by the applicant to Winkler when he provided him with a list of management personnel in South Africa and their respective salaries for the purposes of calculating their increases.

12]The applicant caused his salary to increase to R121 500.00 in January 2002 by informing the human resource manager that his remuneration was to be based on US dollar denomination and to avoid him being prejudiced by the rate fluctuation; the exchange rate should be set at a particular rate.

13]The arrangement to have the rate set out at a particular rate and to be adjusted once per year on the 1st of January was set out by the

applicant in a letter dated 14 January 2002, to the human resources manager in the following terms:

> "*With reference to the fact that my monthly `basic salary which is US $ denominated. I agree that the conversion to South African Rand is only done once a year on the 1 January with the rate ruling at that stage. The rate of exchange that will be used is the rate as per the currency conversion rate on the OANDA website. This will mean that the monthly fluctuations do not effect (sic) my basis remuneration during a financial year.*"

14] Winkler testified that it was never his intention or that of the first respondent to pay the applicant's salary in dollar denomination. He testified further that to this extent the applicant knew that whenever he was considering increases he would request the applicant to convert the current salary into dollars. This according to him did not mean that a person's salary would be dollar denominated. The applicant knew that the respondent's practise was to pay in the currency of the country in which employees worked.

15]The first respondent contended that as a result of the manipulation the applicant received a 100% increase from R68 500.00 to R121 500.00. This was not the intended consequences of Winkler's memorandum which provided for an increase of not more that R21.3% increase from US$8.245 to US $10 000. This action was in breach of the fiduciary duty to act in the best interest of the first respondent according to Winkler.

16]It was further testified that the applicant increased his salary again in January 2004, to R140 000.00 without authorisation but had informed human resource manager that he would repay the over payment if he did not finally receive authorisation. In relation to this accusation the applicant wrote a memorandum to the human resources manager dated 1 March 2005 wherein he stated that:

"*Re My salary*

As you are aware there is a lot of controversy about my salary which does not seem to get resolved. Given this the following is my suggestion to correct all relevant records.

1. *The increase I received subject to confirmation from Mr Winkler in 2004 was paid back to the company as you are aware of. This was due to no confirmation received despite promises up to as late as*

August 2004.

2. *As this issue is still under dispute/investigation I suggest that my salary is reduced to the level as last agreed which is R121900 per month. As I have received the higher level for January and February I propose that it is reduced in March but effective 1 January 2005. In other words a reduction negative salary of R18100X3 = R54300 is applied in March and from there set to the agreed level as above.*

Please implement the above until such time as my salary has been resolved. I attach an email from Bob D to this effect."

17]Another accusation against the applicant is that between January and June he caused himself to receive over R83 000.00 in over payment. In arranging to have the repayment of this amount the applicant devised a scheme which was detrimental to the interest of the respondent. The first respondent alleged that the applicant manipulated the bonus scheme in such a manner that he did not repay the over payment but caused himself to be over paid in his bonus and used the same amount being R217 200.00 as the repayment.

Second charge.

18]The second charge against the applicant relates to failure by him to

disclose to DeMajistre in 1999 his bonus arrangements when he approached him for a 25% bonus for the employees of the first respondent who are based in South Africa. Apparently at that stage the applicant was already receiving 25% bonus. Because of this when DeMajstre approved the 25% incentive bonus to all employees of the first respondent based in South Africa the applicant received 2 (two) bonuses each of which was 25%.

The third charge

19]In terms of the third charge the applicant was accused of "*selling"* his annual leave to the first respondent when he realised that he was receiving an additional amount of R83 870.00. This amount the applicant received from January to June 2004 totalling to sum R503 200 20.

20]In addressing this abnormality of receiving an additional of R83 870.00 for which no explanation was given, the applicant sold his 55(fifty five) days leave to the first respondent.

The case of the applicant

21]The applicant denied having granted himself an increase and

testified that there was no rule that all directors should have had knowledge of his remuneration. He further contended that he had in terms of the resolution of the board of director's full authority on all staff matters of Seton SA.

22]The increase in December 2001 to US dollars R10 000 and the implementation of the US dollar denominated salary was according to the applicant authorised by Winkler. He contended that the first respondent and its management were fully aware of all the increases which he received and their claim that they were not aware amounted to negligence in the manner in which they managed Seton SA.

23]In as far as charges 5 (five) and 6 (six) were concerned the applicant contended that the issue of leave was not a contravention of policy but:

> "It was a clerical error corrected. *Negative leave are not uncommon as it is created when short time is worked and the annual shut down forces leave."*

24]In this regard the applicant went further to state as follows in his

answering affidavit:

> "As the finding on these charge was guilty of breaching company policy and acting without the knowledge or authority of the company or directors, I only referred to it in the context of no authority of the company or its directors as the company was aware of it. This is based on the fact that the correction was processed. How can it be known if it is processed. It was simply a correction of an error and as such cannot be breach of company policies."

Grounds for review

25] The applicant contended that contrary to the provisions of the first respondent's own disciplinary code, he was denied the right to appeal against the decision of the disciplinary hearing.

26]The approach to be adopted when dealing with a situation where an employer has failed to follow its own internal disciplinary code was considered in the case of ***Highveld District Council v CCMA and Other*** **(2002) 12 BLLR 1158 (LAC)**, where the Labour Appeal Court held:

"Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in Section 188 (1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair... . When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair."

27] In dealing with the same issue in ***Leonard Dingler (PTY) Ltd v Ngwenya*** **(1999) 5 BLLR 431 (LAC)**, Kroon JA stated:

"In my judgement, and having regard to all circumstances, the time when and the manner in which the apparent hearing was held, while not strictly in accordance with the appellants disciplinary code, were substantially fair, reasonable and equitable."

28] The Supreme Court of Appeal (SCA) in ***Denel (PTY) Ltd v D.P.G Vaster 2004 (4) SA 481 (SCA)***, adopted a different but a distinguishable approach to the above mentioned cases. The SCA held that the employer was bound to follow a disciplinary code which it had incorporated into the employment contracts with its employees.

29] In my opinion the ***Denel*** decision is distinguishable from the ***Leonard Dingler's*** case in that in the ***Denel*** *case* the Supreme Court of Appeal, was dealing with a situation where the disciplinary code was incorporated into the contract of employment of each of the employees. In this regard the Court held in dismissing the contention of the appellant that it was not correct that the only thing required of the parties was that they act fairly towards one another, despite the contractual obligation requiring something more.

30]It is also important to note that the matter in the ***Denel's case*** came before the SCA on appeal from the Pretoria High Court where the Court was faced with having to decide on damages for breach of

contract of employment and damages for ***injuria***. The claim for ***injuria*** was dismissed and the court confined itself to damages for breach of contract.

31] In the light of the above I am of the opinion that the applicable law is that as stated in both the **Highveld District Council and Leonard's** cases. See also, **Khula Enterprise Finance Limited v Madinane and others (2004) 4 BLLR 366 (LC) and SA Tourism Board v CCMA and Others (2004) 3 BLLR 272 (LC).**

32]In the present instance the commissioner in applying his mind to this issues before him, accepted as common cause that the applicant was denied an appeal hearing. In his evaluation and assessment of the circumstances of this case the commissioner, correctly it is submitted, came to the conclusion that the fact that the appeal was not held did not make the procedure defective.

33]In circumstances of this case what needs to be considered, in my view, is firstly whether or not there are valid reasons for deviation

from the internal disciplinary procedure, secondly and more importantly is whether or not such deviation deprived the employee a fair hearing. The explanation for the deviation given by the first respondent is in my view reasonable and acceptable. The applicant was a senior employee in South Africa and one of the directors of the first respondent. Another factor to be taken into account in assessing the fairness or otherwise of the failure to follow the disciplinary procedure is the fact that the disciplinary enquiry was chaired by an independent chairperson. In my view the circumstances of this case do not support the contention that the failure to provide the applicant an appeal was unfair.

34]The other complaint by the applicant is that DeMajistre was present through both the disciplinary and arbitration hearings. This in my view does not take the case of the applicant any further. At that time DeMajistre was both the president and chief operating officer of the first respondent. There is no evidence that shows in what way or manner the presence of DeMajistre during both the disciplinary and arbitration proceedings prejudiced the applicant.

35]A further criticism against the commissioner by the applicant is

that he allowed the legal representative of the first respondent *"to argue certain issues."*

36]The transcript of the arbitration proceedings reveals the applicant having objected to legal representation. It is apparent that the respondent abandoned the use of legal representative and appointed Mr Evans as its representative. The applicant also objected to Mr Evans representing the respondent. After considering the submissions as to the objection the commissioner ruled that Mr Evans had ***locus standi*** to represent the respondent.

37]As concerning consideration of the charges which were proffered against the applicant, the evaluation and assessment of the evidence to sustain such charges, I am of the view that the commissioner's award is in line with the standard required by **Sedumo v Rustenburg Platinum Mines Limited (2007) 28 ILJ 2405 (CC),** and can therefore no be faulted for being unreasonable.

38] In terms of the **Sedumo** decision it is only an award which is unreasonable that will attract interference by the Court on review. An award would not be sustainable if the decision reached therein

is one which a reasonable decision- maker could not reach. The scope of this test is confined to determining the reasonableness of the decision and not its correctness. The test for determining the correctness of a decision lies in the appeal proceedings.

39]In the ***Fidelity Cash Management Services***, the Labour Appeal Court, per Zondo JP (at paragraph [97]) held that:

> "If it is an award or decision that a reasonable decision-maker could not reach, then the decision or the award of the CCMA is unreasonable and, therefore reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or award is reasonable and must stand. It is important to bear in mind that the question is not whether the arbitration or decision of the commissioner is one that a reasonable decision maker *would not reach but one that a reasonable decision maker could not reach."*

40]The Court further held that the test enunciated in ***Sidumo*** for determining whether a decision or an award is reasonable:

> "... is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objective of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that the decision of the arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all circumstances, have reached."

41]I have already indicated that the decision of the commissioner cannot be faulted for unreasonableness. The finding by the commissioner that the applicant wilfully and knowingly attempted to manipulate the increase he received at the end of 2001, may well be incorrect but it is not unreasonable and therefore there is no bases for this Court to interfere with the award.

42] The applicant being the director of the first respondent in South Africa owed the first respondent a duty to act in good faith. He had a duty to ensure that his interests do not override those of the first respondent. He was under an obligation not to place himself in a situation where his interests undermine those of the first

respondent. It is in this regard that I agree with the commissioner's finding that the applicant abused the position of trust that was placed on him by the first respondent.

43]It is also for the above reasons that I agree with the commissioner that the dismissal was the appropriate sanction taking into account the evidence and the circumstances of this case. And more importantly the record shows that the applicant has not shown any remorse before and during the proceedings.

44] In conclusion, it is my view, regard being had to the evidence which was presented before the commissioner and the circumstances of this case, that it cannot be said that the award of the commissioner is one which a reasonable decision-maker could not have reached. In fact it would seem to me that the attack of the commissioner's award by the applicant is based more on its correctness rather than its reasonableness. In ***Fidelity Cash Management (supra)*** the Court at para 99 held:

> *"Sidumo does not allow that a CCMA arbitration award or decision be set aside simply because the Court would not have arrived at a different decision to that of the commissioner..."*

45]It would not in my view, be fair in the circumstances of this case to allow cost to follow the result.

46]In the premises I make the following order:

1. The application to review and set aside the arbitration award under case number GJAB 16727/05 and dated 7th December 2005, is dismissed.
2. There is no order as to costs.

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MOLAHLEHI J

DATE OF HEARING : 31 JANUARY 2008

DATE OF JUDGMENT : 23 JULY 2008

APPEARANCES

For the Applicant : RALPH DENIS DELL (in person)

For the Respondent: Ludwig Frahm-Arp (Attorney)

Instructed by : Bell Dewaar & Hall