IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

Case No: D505/06

REPORTABLE

In the matter between:

IMATU	First Applicant
SAMWU	Second Applicant
and	
S.A.L.G.B.C	First Respondent
ETHEKWINI MUNICIPALITY	Second Respondent
A J RYCROFT N.O	Third Respondent

JUDGMENT- LEAVE TO APPEAL

MOSHOANA, AJ

INTRODUCTION

[1] This is an application for leave to appeal against the whole judgment of this court on 18 December 2008, in terms of which this court dismissed an application to review and set aside an award by the Arbitrator. Before the application for leave could be heard, I made an order condoning the late filing of the application for leave. Therefore, I say no more with regard to the application to condone. The application was heard on 30 April 2009.

BACKGROUND FACTS

[2] The Applicant and the third Respondent had a dispute about the interpretation and application of a collective agreement. Both parties were concerned about an interpretation and application of the collective agreement in so far as calculation of leave days is concerned. The collective agreement did not make specific provision

for shift workers. In brief the applicant contended that a proper interpretation calls for definition of the phrase: “working day”. According to the applicant working day should be to the exclusion of days on which the shift workers do not work. On the other hand the third Respondent contended that the interpretation leads to absurd and unfair outcome in that the shift workers would be entitled to about 48 days leave. That contention was upheld by the arbitrator. In the applicant’s view the interpretation is wrong. Such therefore suggests that the arbitrator has not interpreted the collective agreement as tasked. This court applying the test developed in *Bato Star* and confirmed to be applicable in arbitration awards in *Sidumo* dismissed the application. The applicant was not satisfied with this court’s judgment hence this application.

GROUNDS FOR LEAVE

[3] The applicant has presented various grounds, which, for the purposes of this judgment are not to be repeated herein. However central to all is that another court may reasonably come to a conclusion that the award is so unreasonable and reviewable. In argument Pillemer SC for the applicant rounded the grounds to effectively this: “*How far off*

the mark should an arbitrator be to render his or her award issued as a result of a task contemplated in Section 24 of the Labour Relations Act unreasonable?" It was argued that there exists a reasonable possibility that another court may find that if an arbitrator is wrong in his or her interpretation then the award is unreasonable to a point of being reviewable as contemplated in the test developed this far.

EVALUATION

[4] The test in matters of this nature will always be that of a reasonable possibility that another court may come to a different conclusion than the one the court below has arrived at. It is not incumbent on an applicant to demonstrate that the court hearing the application that it was indeed wrong. It is sufficient for an applicant to demonstrate a reasonable possibility of another court coming to a different conclusion. It is not unusual for a court above to agree with the court *aquo's* approach but disagree with the outcome. If the court is not shown a reasonable possibility an applicant must fail. In *casu*, I am not convinced that another court may come to a different conclusion in so far as the applicable test. In this court's view the LAC would also

be bound by the test developed in Bato Star. In dealing with the role of the court, the Honourable O'Regan J had the following to say:

"In such circumstances a court should pay due respect to the route selected by the decision maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker"

This, the Honourable judge echoed after having accepted that what constitutes a reasonable decision will depend on the circumstances of each case. **(Administrator*, Transvaal, and Others v Traub and Others 1989(4) SA 731 (A)).***

As factors to be considered, the following have been mentioned: nature of the decision, the identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and

the impact of the decision on the lives and well-being of those affected. In recognising the important distinction between appeal and review, the court had the following to say:

"Its (court) task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

Most importantly, the court having analysed the decision of the Chief Director, said the Chief Director's decision may or may not have been the best decision in the circumstances, but that is not for the court to consider.

[5] However, since interpretation is a question of law, there exists a possibility that another court may conclude that if the interpretation is wrong same is unreasonable. In other words, an arbitrator tasked with an interpretation of a collective agreement, he or she must be right in his or her interpretation. As argued, a court of review must agree with the interpretation as being correct. To steal the words of the Honourable judge: *not rubber-stamp*, even if wrong in this instance. Should a court of review not agree, then it follows axiomatically that

the award is unreasonable. This court still holds a view that as held in *Engen* and confirmed in *Sidumo*, an arbitrator must apply his own sense of fairness when considering an unfair dismissal claim. Such should apply to an arbitrator considering a Section 24 dispute. Similarly a court of review must be slow to interfere with the interpretation of an arbitrator as doing so may amount to usurping the statutory function of an arbitrator. This court, recognising that interpretation is an elastic matter of law, took a view that much as it may not like the arbitrator's interpretation, it is not the issue for it to consider. However this court finds persuasion in an argument that perhaps a slightly different approach may apply in matters of interpretation-since such undeniably involves a question of law. It is on this aspect alone that I am inclined to grant leave to appeal. In my view this is an important question of law to this parties and the entire labour law community. I agree with Van Niekerk SC that the LAC may not uphold an interpretation that yields absurdity and unfairness. However the issue is, if the LAC does not find such an absurdity, can it uphold the applicant's contention if the arbitrator's interpretation is wrong. Simply put, the LAC should decide the issue of bounds-how far off the mark should an arbitrator be? I am also inclined to agree with Van Niekerk that interpretation being an elastic process cannot

be confined to one approach. An arbitrator is allowed to apply any method of interpretation, inclusive of a purposive approach as approved by the Constitutional Court. This may be so; however another court may approve the approach but find the results to be wrong to a point of being unreasonable. It could be so that such threatens the distinction between review and an appeal. Probably in attempt to determine reasonableness that path is worth travelling, despite the inherent and apparent pitfalls. This should arrest the attention of the LAC, particularly for interpretation disputes. Like matters of jurisdiction, which involves a question of law, it matters not that an arbitrator finds jurisdiction where it does not legally exist, a court of review is bound to set aside the outcome, even if the reasoning is beyond reproach. Can it be so that in questions of interpretation the same applies despite it being an elastic exercise? - Maybe not, maybe yes.

CONCLUSION

[6] In the light of the above I come to the conclusion that the applicant has satisfied the test in applications of this nature. Although this court is convinced that it was correct in its judgment, the task of the applicant was not to show that this court was wrong. That is the task of the court of appeal. All the applicant had to show and had shown is a reasonably possibility. In the result I make the following order: **LEAVE TO APPEAL IS HEREBY GRANTED. COSTS TO BE COSTS OF APPEAL.**

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G. N MOSHOANA

Acting Judge of the Labour Court

Date of Judgment: 20 May 2009

APPEARANCES

For the Applicant: Adv. M. Pillemer SC instructed by Shanta Reddy Attorneys

For Third Respondent: Adv. G.O. van Niekerk SC instructed by Shepstone and Wylie Attorneys