IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER: C47/2009

DATE: 19 MAY 2010

In the matter between:

INSURANCE AND BANKING STAFF ASSOCIATION Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

PIET VAN STADEN N O Second Respondent

OLD MUTUAL LIFE ASSURANCE COMPANY LIMITED Third Respondent

OLD MUTUAL HEALTCARE (PTY) LTD Fourth Respondent

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J U D G M E N T

DE SWARDT, AJ:

The applicant in this matter approached the CCMA in a dispute which was alleged to concern the interpretation and application of a collective agreement. The dispute between the applicant and the third and fourth respondents arose from the manner in which the third and fourth respondents applied a performance management system. What had occurred is that the performance management system had been applied in a certain manner. More particularly, it had been the custom for the employer to sit down and to discuss an employee's performance with him or her and they would mutually agree on a performance rating.

What then occurred, is that the employer changed its practice and subsequently, i.e. after a certain assessment or standard had been agreed with the affected employee, moderated the result that had been obtained. The applicant was aggrieved by this and alleged that it had acquired the right, pursuant to a collective agreement that had been entered into between itself and the third and fourth respondents, to be consulted when its members' rights were affected.

When the matter came before the CCMA, the second respondent, who had been appointed as the Commissioner to deal with the matter, as a point of departure had regard to the

terms of the written collective agreement, which was referred as 'the Omdaba agreement'.

In a very well reasoned award, the Commissioner carefully considered the applicable law, more particularly the parol evidence rule, which provides that when parties have reduced their contract to writing, the written instrument stands as the memorial of their agreement and that in principle, no extrinsic evidence is allowed as to its meaning.

The award which has been provided by the second respondent in this case is indeed as Mr Steenkamp, who appeared for the third and fourth respondents, submitted, a model award. It is quite clear that the Commissioner applied his mind to the issues that were before him, that he applied his mind to the prevailing law and that he then applied the law to the facts that were before him as he saw these, and to the agreement that he was called upon to construe and interpret.

The Commissioner found that the performance management system, which was applied by the third and fourth respondents, was not governed by the Omdaba collection agreement. The applicant was aggrieved by this finding and approached this Court in terms of section 145 of the Labour Relations Act 66 of 1995 for a review of the arbitration award.

The manner in which this Court is called upon to deal with an arbitration award on review, was the subject of a great many different judgments in this court and in the Labour Appeal Court. It has, however, now finally been settled that when this Court is called upon to review an award in terms of section 145 aforesaid, it must assess whether or not the award that was made by the Commissioner, was one which a reasonable Commissioner, could or could not have reached on the facts and the evidence which served before him or her. In this regard I refer to the well known decision of *Sidumo v Rustenberg Platinum Mines Limited and Others 2008 (2) SA 24 (CC)*.

There is a difference between an appeal and a review. Where one has a right of appeal, it is sufficient to establish a case that the decision appealed against was wrong in one way or another. That is not the test in a review. It might be so that from time to time an arbitration award or a judgment that is taken on review, is wrong in some respect, but as long as the decision is one that could have been reached by a reasonable decision-maker, there is no room for interference with such award or judgment on review. A review is aimed not at correcting something which is patently incorrect, but at an irregularity in the proceedings; something which occurred that

had the result that the decision was not fair and was not properly arrived at.

On a conspectus of this case, it does not appear to me that the Commissioner was in any way at fault. The parties advanced lengthy arguments to him and he, quite rightly, approached the matter on the basis that he had to look at the agreement itself in order to determine what the parties had intended when they concluded it and that is what he proceeded to do.

Mr Jacobs, who appeared for the applicant, argued that it was implicit in the agreement itself that the parties had not intended it to be the sole memorial or sole source of contractual rights which the applicant had acquired on behalf of its members. In this regard, Mr Jacobs relied on a clause in the agreement, which is at page 35 of the indexed bundle of documents. The clause appears under the main heading 'employee rights'. Immediately below that clause 1, under the subheading 'general' reads as follows:

> *'Employee rights are those rights which the employee can enforce in law. The source of these rights is either statutory or contractual or through practice.'*

Under the subheading 'contractual rights' at the foot of page 35, the following appears:

'*These are the terms and conditions of employment and include:*

(a) Contractual rights which are agreed upon, either written or verbal, or established by custom and practice and which are binding in law.'

On the strength of that clause, Mr Jacobs argued that the Commissioner was not only wrong, but that he had acted unfairly, in disallowing the applicant the opportunity of providing evidence as to the practice which had been adopted in the past with regard to the performance management system and its application.

If one goes back to the agreement itself, one sees that it regulates a variety of rights which the applicant has and which it exercises on behalf of its members in dealings with the third and fourth respondents. It is, however, well established that it is very much management's prerogative to conduct performance assessments and to choose how such performance assessments are conducted. As Mr Steenkamp has submitted, it would indeed be totally extraordinary if one could construe a collective agreement in such a manner that an employee or an employees' trade union or organisation could acquire the right to prescribe to an employer how it

ought to do a performance management assessment or how it had to apply such an assessment.

It would appear to me that the decision which the arbitrator reached in this regard, is one which a reasonable arbitrator could have reached and that there is no reason to interfere with the arbitration award.

I might add that it appears to me that the applicant misconceived the nature of the relief to which it might have been entitled. If the manner in which management had applied the performance assessment results had the result that the applicant's members, or any of them, were unfairly affected in regard to their future promotion, or were unfairly demoted, it would appear to me that the union would have been able to rely on the unfair labour practice jurisdiction of the CCMA in terms of section 186(2) of the Labour Relations Act. Section 186(2)(a) provides in terms that an unfair labour practice means, inter alia, any unfair act or omission that arises between an employer and an employee, involving '*unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee, or relating to the provision of benefits to an employee*.'

As the agreement stands, there is nothing to indicate that the

applicant would not have the right to take up the cudgels in terms of section 186(2), and there is also nothing in the agreement to indicate that the applicant would be precluded from adopting a different route to obtain the result that it seeks. That route has been alluded to by Mr Steenkamp in his argument when he said, quite rightly so, that if the applicant were to demand that it be consulted in regard to the manner in which performance assessments are conducted or implemented, it could ask management to do so. If management refused, it could declare a dispute and if that dispute remained unresolved and the particular provisions of the act were complied with, it could eventually embark on a strike.

There is nothing in the Omdaba agreement to indicate that the employers' rights to conduct performance management assessments, has been curtailed or circumscribed. There is similarly nothing in the Omdaba agreement to indicate that any change in the manner in which such an assessment is performed, has to be consulted with the applicant. The applicant founded its relief on an incorrect cause of action and that is why it has come short at the end of the day.

In these circumstances, the applicant's application for the review of the arbitration award made by the second respondent

on 22 December 2008 under case number WE5212-08 is dismissed and the arbitration award is confirmed. The applicants are ordered to pay the costs of the third and fourth respondents.

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DE SWARDT, A J

For Applicant:	Mr Willem Jacobs of Willem Jacobs & Associates Attorneys
For Respondent:	Mr A J Steenkamp of Bowman Gilfillan
Date of Hearing:	19 May 2010
Date of Judgment	19 May 2010