REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 939/2009

In the matter between:

4 SEAS WORLDWIDE (PTY) LTD	**Applicant**
and	
CCMA	**First respondent**
STEPHEN BHANA N.O.	**Second respondent**
LIESEL VAN DER BURGH	**Third respondent**

Heard: **25 May 2011**
Delivered: **23 June 2011**
Summary: **Review** – award not unreasonable – application dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application to review and set aside an award by the second respondent (the arbitrator) in which he found the dismissal of the third respondent, Liesel van der Burgh (the employee) to be procedurally and

substantively unfair. He ordered the applicant, 4 Seas Worldwide (Pty) Ltd, to pay her compensation equivalent to 5 months' remuneration, as well as one month's is a notice pay. He also ordered the applicant to pay the employee's costs on a scale A of the magistrate's court tariffs. Both parties were legally represented at arbitration.

Condonation

[2] The arbitration award was delivered to the parties by telefax on 8 October 2009. The applicant delivered its review application on 25 November 2009. The application is four days out of time. The applicant only applied for condonation on 22 December 2009.

[3] The parties agreed that I should deal with the merits of the review application fully, as I would have to consider the prospects of success in the context of condonation in any event.[1]

[4] The applicant was represented at arbitration by Mr Richard Brown of Herold Gie attorneys. The applicant's business manager, Leon Bubenicek, informed Mr Brown by email on 16 October 2009 that the applicant had received the award the previous day, ie on 15 October 2009.

[5] Subsequently, the applicant appointed Werksmans Inc to pursue the review application. Werksmans' Grant Marinus received the file from Herold Gie on 17 November and delivered the review application on 25 November 2009. On 10. December 2009, and during the course of urgent interdict proceedings to stay the enforcement of the arbitration award, the employee's attorneys informed Mr Marinus that the award had been delivered to both parties on 8 October 2009. The applicant then to apply for condonation with the assistance of Mr Marinus.

[6] The extent of the delay is not significant. It has not led to any prejudice to the employee. The explanation for the delay is sufficient for condonation to be granted. Despite the view I have taken of the prospects of success, which I will address in considering the merits of the review application, I decided to grant the application for condonation.

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[1] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532 B-F.

The review application: the merits

[7] The parties are in agreement that the test I must apply in order to decide whether the award is open to review, is that set out in *Sidumo and another v Rustenburg Platinum mines Ltd and others*[2], i.e. whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach.

[8] The issue in dispute before the Commissioner was whether the employee was dismissed for incapacity (poor work performance) or operational requirements; and in any event, whether the dismissal was procedurally and substantively fair.

[9] The applicant had employed the employee as a general manager from 1 August 2008 and dismissed her on 5 May 2009, ostensibly for operational requirements.

[10] It is common cause that the applicant initially embarked on a performance management processes with the employee. It is also common cause that it made no adverse finding on the employee's performance during this process. The applicant then set a retrenchment procedure in process on the basis that the position of general manager was redundant.

[11] The arbitrator came to the conclusion that the applicant had taken a decision on the redundancy of the position prior to commencing the consultation process. He concluded that the decision to dismiss her was a *fait accompli*; and that the decision to dismiss her for operational requirements was a way to avoid the responsibility of managing her. He concluded that the real reason for dismissal was the employee's alleged poor performance and not an economic rationale. This was neither a fair more a genuine reason. The dismissal was therefore procedurally and substantively unfair.

[12] In coming to this conclusion, the arbitrator took into account the decision of the Labour Appeal Court in *SACTWU & others v Discreto (a division of Trump & Springbok Holdings)*[3] that the function of a court in scrutinising the consultation process [in terms of section 189] is not to second-guess the commercial or business efficacy of the employer's ultimate decision, but to pass

[2] (2007) 28 *ILJ* 2405 (CC) para [110].

[3] [1998] 12 BLLR 1228 (LAC) at 1230

judgement on whether the ultimate decision arrived at was union and not merely a sham. He also considered the following statement of Prof Darcy du Toit[4] :

"The starting point, therefore, is that an enquiry into the substantive fairness of an operational requirements dismissal is twofold: first, whether it was in fact based on 'the economic, technological, structural or similar needs of an employer' and, second, whether that the reason was 'fair' in the sense of being adequate, he when weighed up against the employee's basic right to fair labour practices, to justify dismissal."

[13] It is against that background that the arbitrator came to the conclusion that the evidence showed that the applicant's decision on the redundancy of the employee's position was a fait accompli; that the real reason for the dismissal was not an economic rationale; that the reason for dismissal was neither fair nor genuine; and that it was therefore substantively unfair. He also came to the conclusion that the consultation process was no more than a sham and that the dismissal was procedurally unfair as well.

[14] One hardly needs authority for the proposition that the use of an improper motive for dismissing an employee makes the process a sham. For example, in *Pedzinski v Andisa Securities (Pty) Ltd (formerly SCMB Securities (Pty) Ltd))*[5] this court noted:

"I have found… further that the respondent's reason for dismissal based on operational requirements was spurious and a sham. The respondent used the applicant's health condition as an admission in order to rid itself of an employee who proved herself to be diligent and committed in the execution of her duties."

[15] The arbitrator in this case was faced with a similar situation and, like the court in *Pedzinski*, he found the dismissal to be unfair. He properly considered the evidence before him and made an award that a reasonable decision maker could make. The award is not reviewable.

[16] Mr *Aggenbach*, for the applicant, submitted that there was a bona fide commercial rationale for the dismissal. He submitted that there was no need for a general manager; that the position had become redundant; and that this was the reason for dismissal.

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[4] Darcy du Toit, "Business restructuring and operational requirements dismissals: Algorax and beyond" (2005) 26 *ILJ* 595 at pp 601 1nd 602.

[5] [2006] 2 BLLR 184 (LC) para [97].

[17] The problem with this argument is that the employee was indeed presented with a *fait accompli*, as the arbitrator pointed out. On 8 April 2009 the applicant's Mark Llewellyn told the employee that her job "will be made redundant"; she was only invited to consult a week later.

[18] It is also apparent from the evidence and the contemporaneous correspondence that the applicant attempted to convert a failed performance management process to be a retrenchment process that was, as the arbitrator found, a sham.

[19] The employee testified that there were clear attempts to "manage her out". For example, she was pressurised to sign performance review forms that had not previously applied to her; her targets were changed; and her reporting lines were changed. On 3 April 2009 the applicant's Leon Bubenicek presented her with a counselling form, to which she responded in full on 7 April 2009. On 8 April 2009 the applicant's labour consultant, one Stephen Beukes, entered the fray and changed tack by setting in motion an operational requirements dismissal. On the same day – 8 April 2009 – the applicant's Mark Llewellyn told the employee that Bubenicek wanted to sideline her and that she would be "bought out of the business". Significantly, it appears that Beukes was under the impression that the applicant had reached an agreement with the employee, when this was not the case. Beukes removed the employee from the workplace on 15 April 2009; and only thereafter did he attempt to set up a consultation process. At that stage, he was under the impression that she had to be "relieved of her duties" and not suspended. What's more, a letter dated 24 April 2009 inviting the employee to a consultation process was sent under Llewellyn's name while he was in Hawaii and unaware of such a letter.

[20] Mr *Aggenbach* argued that the applicant had corrected a flawed process and that any shortcomings in the process were. As a result of miscommunication between the applicant's directors and its consultant, Beukes.[6] But it is clear from the evidence that the belated attempt at consultation was a sham. The arbitrator's conclusion in this regard is not so

[6] He referred in this regard to a trio of cases decided by the old Industrial Court under the 1956 LRA's unfair labour practice jurisdiction, viz *Metal & Allied Workers Union of SA v Henred Freuehauf Trailers (Pty) Ltd* (1988) 9 *ILJ* 488 (IC); *SARHWU v Bop Air (Pty) Ltd* 1994 (3) LCD 74 (IC); and *Nhlapo v Liquor Inn* [1995] 7 BLLR 101 (LC).

unreasonable that no other decision-maker could have reached the same conclusion.

Conclusion

[21] The arbitration award is a reasonable one and is consistent with the evidence given at the arbitration. In coming to his decision the arbitrator properly considered his role as required by *Sidumo* and he evaluated the applicant's actions in the light of the relevant case law. He came to a conclusion that a reasonable arbitrator could reach.

[22] Both parties asked for costs to follow the result. There is no relationship left between the parties. In law and fairness, I agree that costs should follow the result.

Order

[23] The application is dismissed with costs.

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Anton Steenkamp
Judge of the Labour Court

APPEARANCES

APPLICANT:	Adv M Aggenbach Instructed by Werksmans
THIRD RESPONDENT:	Adv P Kantor Instructed by Craig Schneider