REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

CASE NO C 22/ 11

In the matter between:

CAPE OIL AND MARGARINE (PTY) LTD **APPLICANT**

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION **1ST RESPONDENT**

COMMISSIONER B GOLDMAN **2ND RESPONDENT**

D WHITE **3RD RESPONDENT**

Application heard: 23 October 2013

Judgment delivered: 25 November 2013

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent (the commissioner) on 16 December 2010. In her award, the commissioner held that the third respondent's dismissal on 12 March 2010 was substantively unfair, and awarded him compensation in an amount equivalent to 12 months' remuneration.

Material facts

[2] The material facts appear from the commissioner's award. I do not intend to burden this judgment with a recitation of the facts; it is sufficient for present purposes to record that the third respondent was dismissed consequent on an audit of the applicant's premises conducted by a potential client, Heinz Foods, in February 2010. The audit was the second conducted by Heinz. After the first audit, the respondent was subjected to a disciplinary hearing in November 2009 and issued with a final written warning. The warning was challenged by the third respondent, but not disputed in the sense that it became the subject of any referral to the statutory dispute resolution bodies. The third respondent was engaged as the area leader or production manager (there was a dispute about his title) in charge of the oil bottling plant, which comprised an old and a new plant. Most of the findings of the second audit related to a bottling machine (referred to as 'the 20 litre machine') which was moved to the new bottling plant during the third respondent's absence on leave.

[3] The scope of the audit extended to the margarine plant on the applicant's premises, which did not fall within the third respondent's responsibility. However, it is common cause that while shortcomings were identified in the margarine plant, the third respondent was the only person disciplined after the first audit.

[4] The following facts are particularly relevant to the arbitrator's finding and the challenge to that finding. The third respondent was 61 years old at the time of his

dismissal and had 37 years' service, with only a short interruption of service during 1998. At the time of his dismissal, the third respondent was four years away from retirement. Prior to the first disciplinary hearing, the third respondent had a clean disciplinary record. The bulk of the applicant's staff were employed through a labour broker and the third respondent could not discipline them. The third respondent had taken family responsibility leave on 18 and 19 February 2010, returning to work on the Monday before the second audit conducted on Wednesday 24 February 2010. It is not disputed that the third respondent was the only employee disciplined subsequent to both the first and second Heinz audits. In regard to the second audit, it is not disputed that the 20 litre machine was moved during the third respondent's absence on leave, prior to the second Heinz audit, into the new bottling plant without being cleaned, painted or refurbished. It is common cause that the backing plate of the 20 litre machine was pop-riveted, leaving it difficult to clean. The 20 litre machine was refurbished by the third respondent after the audit in a refurbishment operation that took approximately a week to complete. It was also common cause at the hearing that Rafiek Amien, the quality assurance manager, and the quality assurance staff were responsible ultimately for external audits and their outcome.

[5] On 10 March 2010 the third respondent was called to a disciplinary hearing, conducted on 11 March 2010. The third respondent was charged with negligence in the performance of his duties, charges that emanated directly from the second audit conducted on 24 February 2010. The third respondent was found guilty and dismissed.

The award

[6] In her award, the commissioner summarised the evidence at some length. She noted that despite an opening address that foreshadowed a case of procedural unfairness, no evidence had been led in regard to any procedural unfairness, and on that basis, she found that the third respondent's dismissal was procedurally fair. This conclusion is not disputed in these proceedings.

[7] In relation to substantive fairness, the commissioner concluded that the third respondent's dismissal was "extremely unfair". In essence, the she found that the third respondent could not be held solely responsible for the failed audit, that the third respondent had never been sent on any management training course, that Amien had not conducted a proper inspection prior to the audit and that Ewing, the general manager of the plant until September 2010, had clearly been guilty of similar misconduct but charged only much later, in July 2010. The essence of the commissioner's findings is captured in paragraph [77] of the arbitration award:

> 'Even if the applicant was in any way responsible for the failing of either audit, his dismissal was manifestly unfair as the persons who were responsible for the audits and appeared on the evidence before me to have acted extremely negligently and nonchalantly were not disciplined.'

[8] The commissioner went on to find that even if the applicant had been guilty of the misconduct that he was alleged to have committed, she considered that the sanction of dismissal was unfair and not justified in all the circumstances. In this regard, she recorded (correctly) that fairness required a balancing of the interests of the employer and employee parties and that in determining the fairness of dismissal as a sanction; she was obliged to consider the totality of the circumstances. In particular, the commissioner took into account the fact that the applicant had 37 years of loyal service, the fact that he worked extremely long hours, his lack of training, the humiliating manner in which he was dismissed and "the way he appeared to be the scapegoat for the failed audits whilst those who were responsible for the failure of the audit at the time of dismissal were not disciplined". On this basis (i.e. that the third respondent was not responsible for the failing of the audit and was therefore not guilty of misconduct, and that even if he was, dismissal was too harsh a penalty), the commissioner concluded that the applicant's dismissal was substantively unfair.

[9] After considering all of the relevant factors in relation to the quantum of compensation (including the third respondent's length of service, and extent of any loss suffered by the employer as a consequence of his actions, any

patrimonial loss suffered by the third respondent and extent of any benefits afforded the third respondent on dismissal), the commissioner awarded the maximum amount, i.e. the equivalent of 12 months remuneration. In assessing the appropriate amount of compensation the commissioner had regard particularly to the third respondent's age, the slim chances of him finding alternative comparative employment and the fact that he had been prejudiced by been dismissed so close to his retirement age. The commissioner also had regard to the fact that the applicant and Ewing had concluded a settlement agreement in terms of which Ewing's employment had been terminated by means of a settlement agreement in terms of which he had been retrenched and no doubt paid severance package. (There was no evidence on the detail of any settlement with Ewing since these were confidential). The commissioner further ordered that the applicant pay the costs of the arbitration proceedings.

The grounds for review

[10] In essence, the applicant raises four grounds for review. These are the commissioner's consideration of the final written warning issued to the third respondent; the settlement concluded with Ewing and incorrect conclusions drawn from the fact of that settlement; reliance on what are referred to as 'emotive defences' and the finding that the third respondent's dismissal was humiliating; and more broadly, the substantive fairness of the third respondent's dismissal.

The applicable legal principles

[11] 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.'

[12] 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.

[13] 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.

Analysis

[14] I deal first with the challenge to the commissioner's finding of substantive fairness, and in particular the finding that even if the third respondent had been guilty of the misconduct that formed the basis of the charge against him, dismissal was too harsh a sanction. It is clear from the legal principles set out above that the scope of a reviewing court to intervene in a commissioner's finding on sanction is extremely limited. The commissioner is required to assess the fairness of dismissal as a sanction without any deference to the employer and having regard to all of the relevant circumstances. Provided that the commissioner's decision falls within a band of decisions to which reasonable people could come, this court is not entitled to interfere, even if it would have come to a different decision on the same facts.

[15] The applicant suggests that dismissal was appropriate, amongst other things, because the third respondent failed to delegate. This submission fails to take into account the evidence and the findings made by the commissioner that the charges against the third respondent did not relate to his ability or inability to manage, that he had not received any management training, that he had previously complained about staff issues and that he was not entitled to discipline the staff under him who were employed by labour brokers. In so far as the applicant contends that after the first audit and the final written warning issued to him the third respondent was under a greater obligation to ensure that the next audit was passed, the facts are quite simply that the applicant was aware that the third respondent was having issues with staff, that he had encountered difficulty delegating responsibilities in the past, that he had prioritised critical areas prior

to the audit, that Amien had inspected the section prior to the audit but did not pick up the issues raised by the auditor, and that the 20 litre machine had been moved in the third respondent's absence and should have been reconditioned prior to being placed in the new bottling plant. In so far as the applicant alleges that the arbitrator unreasonably diminished the third respondent's responsibility by blaming Ewing and Amien for the failed audit, this is a reasonable conclusion to draw from the evidence, especially the testimony of the director Mr S Moosa who stated that his fancy quality assurance people should have ensured that the audit was passed, Amien's evidence was that he was directly responsible for the passing of external audits and that no one else had picked up the issues raised by the auditor relating to the 20 litre machine when doing a walkaround of the plant.

[16] More narrowly, in relation to the appropriateness of dismissal as a penalty, it is clear from the record and the arbitrator's award that all of the relevant factors to be considered were taken into account by the commissioner in determining that dismissal was inappropriate even the third respondent had been negligent in the execution of his duties, and that the applicant's long service (37 years), his lack of managerial training and the circumstances surrounding his dismissal were considered particularly militated against a sanction of dismissal.

[17] I am unable to find in the circumstances that the commissioner's decision that dismissal was an inappropriate sanction is a decision that is one that a reasonable decision-maker could not reach on all of the available material. For this reason alone, the application to review and set aside the Commissioner's award stands to be dismissed.

[18] The applicant's case relies on the drawing of incorrect conclusions by the commissioner in relation to Ewing, again, the correctness or otherwise of her conclusions is not an issue. The question to be answered is whether having regard to material facts before the commissioner, the inference drawn by her relating to the settlement agreement concluded with Ewing and the disciplinary action taken against the third respondent was unreasonable in the sense referred

to above. On the available evidence, the commissioner was concerned that while initially only the third respondent had been dismissed on account of the failed audit, charges against Ewing were later brought arising from the same circumstances but not pursued. While the evidence may not disclose that Ewing was 'rewarded' (the term used by the commissioner), the real issue addressed by the commissioner is one of consistency, and least in the sense that the third respondent was dismissed while other responsible employees were not subjected to disciplinary action. This disparity in treatment and calling into question of the fairness of the third respondent's dismissal is evident from the record, and supportive of the conclusion to which the commissioner came.

[19] In so far as the applicant relies on the conclusions drawn by the commissioner based on what are termed 'emotive defences' and 'incorrect conclusions' to the effect that the third respondent's dismissal was humiliating, the undisputed evidence was that after the outcome of the disciplinary hearing was announced, the chairperson left the room and the third respondent was asked by Ewing to hand over his keys. It is also not disputed that on leaving the plant, the third respondent noticed a security guard the vicinity and that by Ewing asking third respondent to hand in his keys, he (the third respondent) was under the impression that he was not permitted to remove his personal possessions from his office or greet his colleagues. On the available evidence, and having regard particularly to the evidence of the third respondent in regard to the impact of his dismissal and his subjective response, it cannot be said that the commissioner's conclusion is one that no reasonable decision-maker could reach.

[20] In short, none of the applicants grounds for review meet the threshold for interference by this court with the commissioner's award. The basis for the review is one that calls for a piecemeal evaluation of the award and an assessment of the commissioner's treatment of a host of individual factors on an isolated basis. The LAC has made clear that a fragmented analysis of the arbitrator's reasoning has no place in an application for review and that the reviewing court must engage in a broad-based evaluation of the totality of the

evidence. In my view, it cannot be said on the basis of the evidence that a reasonable decision-maker could not reach the decisions that are reflected in the commissioner's award. The application therefore stands to be dismissed.

[21] In so far as costs are concerned, this court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of law and fairness. In the present instance, there is no reason either in law having regard to considerations of equity to deprive the third respondent of his costs.

For the above reasons, I make the following order:

1. The application is dismissed, with costs

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances

For the applicant: Mr M Titus, Macgrecor Erasmus Attorneys

For the respondent: Adv J M Bernstein instructed by Heyns and Partners Inc.