IN THE LABOUR COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: C943/2012

DATE: 9 OCTOBER 2013

In the matter between:

VOERMOL FEEDS (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION 1st Respondent

COMMISSIONER M LOYSON NO 2nd Respondent

DR JASPER COETZEE 3rd Respondent

J U D G M E N T

STEENKAMP, J:

This is an application to have the arbitration award by the second respondent, Commissioner Madeleine Loyson, reviewed and set aside. The award was handed down just short of a year ago on the 29th of October 2012. The arbitration award arises from the dismissal of the third respondent, Dr J Coetzee, by the applicant, Voermol Feeds (Pty) Ltd.

The dismissal stems from an allegation that the employee had committed fraud by submitting, firstly, duplicate expenditure claims for reimbursement; and secondly, having purchased items in quick succession. That was referred to by all the parties as "quick succession claims." These claims were for purchases made by the employee while he was on the road. Dr Coetzee was employed as a sales representative for Voermol. This necessitated him spending many hours travelling around the country. He would then buy items such as snack bars and energy drinks at points along the way and claim these back from Voermol. The "quick succession purchases" were purchases made within minutes of each other at the same sales points, often for similar items.

A number of relevant factors are common cause. Those are, firstly that the quick succession purchases were not in breach of any rule of the company, although it may have been, as the arbitrator found, "bizarre". Secondly, it is relevant that the employee resigned, but that the company chose to continue with a disciplinary hearing. The initial hearing was postponed for various reasons. It was then set down on a day by which the resignation would already have taken effect, and in short, it is common cause that the employee did not attend the disciplinary hearing and that it was held in his absence.

However, he filed an unfair dismissal claim and obviously the arbitration was held as a hearing *de novo* where all of the parties could give evidence. The employee gave extensive evidence, as did the witnesses for the company, including its managing director, Mr Strydom, and a forensic investigator, Mr Moulton.

The arbitrator found that the dismissal was procedurally fair but substantively unfair. She ordered Voermol to pay the employee, who had worked for the company for 15 years, compensation equivalent to 12 months' remuneration, as well as the costs of the arbitration in terms of the applicable Magistrates' Court tariff. Voermol seeks to have the award reviewed and set aside.

The application for review as well as the applicant's heads of argument were delivered after the judgment of the Constitutional Court in Sidumo v Rustenburg Platinum Mines Limited [2007] BLLR 1097 (CC), but before the subsequent judgment of the Supreme Court of Appeal in Herold v Nedbank Limited [2013] ZASCA 97. A number of the authorities referred to in the applicant's heads of argument have been overruled by the latest judgment of the SCA, *inter alia* that of the LAC in the Nedbank case itself.

However, Ms *Pillay*, who argued the matter today and who did not draft the heads of argument, made it clear that her argument is based primarily on the test of reasonableness as set out in Sidumo and reiterated in Nedbank.

The applicant's attack on the award was aimed at three elements. Firstly, the question whether dismissal was for a fair reason, or in shorthand, substantive unfairness; secondly, the award of compensation; and thirdly, the issue of costs in the arbitration.

The arbitration award is an extensive and closely reasoned one that spans no fewer than 30 pages. Apart from the arbitrator's finding that dismissal was not for a fair reason i.e. substantively unfair, the two contentious parts of the award that Ms *Pillay* took issue with are, firstly, that the arbitrator ordered the company to pay the employee the full amount that is allowed by Section 194(1) of the Labour Relations Act, i.e. 12 months' compensation. Secondly, the arbitrator -- and this is unusual for the CCMA -- ordered the company to pay the employee's costs.

I will deal firstly with the arbitrator's findings on substance.

As I have noted, the employee was accused of having committed fraud. This was on the basis of a report compiled

by the forensic investigator, Mr Moulton. As Mr *Ackermann* pointed out in his argument, Mr Moulton could find no evidence of dishonesty or fraud. I take into account that, as Ms *Pillay* pointed out and as Moulton testified, that was not his decision to make. It was the decision of the employer. Nevertheless, the decision of the employer was based on the report before it and Mr Moulton, who is a former prosecutor, conceded that he would not have proceeded with a fraud claim, albeit in court and not in a disciplinary hearing.

It is further significant that Mr Moulton conceded that the duplicate invoices were submitted in error. On a question from the Commissioner, he conceded that "the only legitimate expectation" could be that they were submitted in error. He went further and said "there can be no other explanation than error because the documents indicate clearly that it is a duplication."

He also conceded that the employee in his view did not have any intention to defraud the employer. This must be seen in the context of the actions of the employee of submitting a limited number of duplicate claims that were or should have been checked by the MD, Mr Strydom, and in the context of the quick succession claims which, as the arbitrator pointed out correctly, was not a contravention of any rule.

The arbitrator also took into account that Dr Coetzee was a senior employee who had a clean record of over 15 years service and that many of the company's customers bought its products because of the employee's relationship with them. The employee admitted that he had made a mistake. His explanation was that he was on the road for lengthy periods of time and that he would buy small items to eat and drink, firstly then and there, and secondly later on when he was on the road.

Strange as this behaviour may seem, the finding of the arbitrator that that does not constitute fraud, is not in my view an unreasonable one.

I must further take into account the findings on credibility by the arbitrator. A court, as Mr *Ackermann* pointed out, will be slow to overturn the findings of a lower forum on credibility. That is so even on appeal, and this court is sitting on review. The arbitrator found that Strydom "was not impressive". She further found that the forensic investigator, Moulton, was "possibly the weakest link" and was also not an impressive witness. On the other hand she found Dr Coetzee as having been an "extremely compelling witness". Having considered the transcript of the record, those conclusions do not appear to

me to be unreasonable.

I further have to consider the findings of the arbitrator against the standard set out by the Constitutional Court in Sidumo and lately by the SCA in Herold. In this regard, as Mr *Ackermann* pointed out in his supplementary note, the SCA noted that it is the majority judgment in Sidumo that this court has to follow, and not the minority judgment of Ngcobo J. The Supreme Court of Appeal in Herholdt also stressed that the test in Sidumo is couched in the negative, i.e. whether the decision reached by the arbitrator is one that could *not* reasonably be reached; it is a stricter test than simply asking whether the decision is one that the arbitrator could reasonably reach. It is concerned primarily with the result rather than the process of reasoning of the arbitrator.

This court, therefore, if it were to uphold the review, would have to satisfy itself that the decision reached by the arbitrator is one that could not reasonably be reached. The applicant has not discharged that onus. The arbitrator carefully considered all of the evidence before her. She noted that the actions of the employee may have been strange, but she accepted that it did not amount to fraudulent behaviour. That must be considered also in the light of her credibility findings which this court is not in a position to overturn on review.

That brings me to the question of compensation. Bound up with that is the finding by the arbitrator that the employer had been vindictive.

Ms *Pillay* pointed out, quite correctly, that that had not been put to the company's witnesses in arbitration. However, the conclusion reached by the arbitrator in this regard is based on a consideration of the facts and the evidence before her. Arbitration is meant to be an informal process which the arbitrator may conduct in a manner that she considers appropriate in order to determine the dispute fairly and quickly. It is not akin to a criminal trial. In this arbitration, she dealt with the substantial merits of the dispute with the minimum of legal formalities, as she is enjoined to do by s 138 of the LRA. Once again, this court may not have couched an award in the same strong terms relating to the actions of the employer that the arbitrator did. However, I cannot find that the findings of the arbitrator in coming to that conclusion are so unreasonable that no other arbitrator could have come to the same conclusion. She took into account that the MD, Mr Strydom, initially took no action; that he then took 10 months before he took further action; that he refused to accept the employee's explanation and contrition; and that Strydom himself must also have been negligent.

Section 194(1) gives an arbitrator a wide discretion. It provides simply that the compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason, must be just and equitable, but may not be more than the equivalent of 12 months' remuneration. It was up to the arbitrator to consider what is just and equitable. This court will not readily interfere with that discretion on review.

The arbitrator considers and explains in her reward why she is driven to award the maximum amount of compensation allowed by section 194(1). Once again, had this court been sitting in arbitration, I rather doubt that the court would have awarded the maximum compensation. However, this court is sitting in review and not on appeal and the award made by the arbitrator is not outside of a range of possible reasonable awards.

That leaves the issue of costs. The arbitrator was of the opinion that the company had acted frivolously or vexatiously. Here again, this court sitting in arbitration, would not have gone that far; but even on appeal a higher court does not easily interfere with an award of costs, which is the subject of a wide discretion, imposed by a lower court. Much less so on review.

Mr *Ackermann* referred to Du Toit and others, *Labour Law through the Cases* at LRA 7-53 which in turns refers to the case of Alluvial Creek Limited 1929 CPD 532 at 535, where it was pointed out that the requirement of vexatiousness does not require intent. Proceedings may be regarded as vexatious "when they put the other side to unnecessary trouble and expense which the other side ought not to bear."

That dictum, I think, is not affected by the case that Ms *Pillay* referred to, which is that of the old Industrial Court, which was of course not a court but a tribunal, that of Du Plessis v Sasol Oil 1995 (16) *ILJ* 1617 (IC). There the court dealt with the test of unreasonableness and held that:

> "This standard of 'unreasonableness' suggests that the court should tolerate even ill-advised litigation if there is some genuine issue in dispute which if decided in favour of an applicant might result in success for the applicant even if the probabilities of success are slight."

In considering whether the arbitrator exceeded her discretion to the extent that her conclusion on costs is so unreasonable that no other arbitrator could have come to the same conclusion, I am constrained to find that that is not the case,

whatever this court may have found on appeal.

In summary, therefore, on the strict test as set out in Sidumo and reiterated in Nedbank, the award is not open to review. Both parties have asked that costs of these proceedings follow the result. I see no reason to disagree.

THE APPLICATION IS DISMISSED WITH COSTS.

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STEENKAMP, J

APPEARANCES

APPLICANT: Ms L Pillay
Instructed by Edward Nathan Sonnenbergs.

RESPONDENT: Mr LW Ackermann
Instructed by André Olivier.