REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C503/2013

In the matter between:

THE SOUTH AFRICAN CATERING COMMERCIAL AND ALLIED WORKERS UNION OBO MZAZI, L Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

Second Respondent

COMMISSIONER S GOLDSCHMIDT, N.O.

PICK 'n PAY RETAILERS (PTY) LTD Third Respondent

Date heard: 13 May 2014

Delivered: 31 July 2014

Summary: Review of an arbitration award iro substantive fairness of a dismissal.

JUDGMENT

Rabkin-Naicker J

[1] This is an opposed application to review and set aside an arbitration award under case number WECT 2454 – 13 dated 13 May 2013. The second respondent (the Commissioner) found that Luyanda Mzazi's (Mzazi) dismissal was substantively fair, but procedurally unfair. The applicant challenged the finding on substantively fairness in these proceedings.

[2] Mzazi started working for the company in June 2004. He earned a salary of R4800 per month. He was transferred to the new Middestad store from another outlet with his fellow employees as a storeman in 2012. He was dismissed after being charged and found guilty of absconding from work. Mzazi claimed that he had authorised leave.

[3] The applicant union relies on the grounds as set out in section 145 of the LRA and argues that the award was not rationally justifiable in terms of the reasons given for it. It submits that the analysis of evidence contained in the award ignored crucial evidence presented during the arbitration regarding the minutes of a meeting which took place on 1 February 2012. This evidence according to Mzazi, established that he did consult with his fellow employees after a meeting that was held on 1 February 2012, and proceeded to report the outcome to his manager in the Groceries Department, Mr Jantjies, and submit a leave form. His case was that he was scheduled to take leave on the 27 December.

[4] The Commissioner recorded the evidence by the assistant manager of the store, Mr Yusuf Oyekynie (Oyekynie) who had joined the company five months before the events in question as follows:

> "…. He explained the process that is followed when an employee applies for leave. Once the employee indicates their intention to take leave, the needs of the business is looked at to see if the person can be granted leave. He added that it depends on the time of year and the notice period for the leave request. He emphasised that there must be mutual agreement between management and the employee.
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> Oyekynie continued to explain that a leave form must be completed, signed by the employee and manager, and this is captured on the relevant system. Part of the procedure is to give a copy to the

employee. He confirmed that there was a formal leave policy. He read the relevant clause into the record and that confirms that there needs to be mutual agreement concerning the leave…

Oyekynie stated that the applicant approached him on 21 December 2012 June to inform him that he wanted to take leave. His initial response was that he had not approached him before, despite having been at the store for the past five months, adding that it was the busiest time of the year. The applicant insisted that he had to take leave. Oyekynie said that the store manager, who was in the office at the time, commented that he was not aware that he had been granted leave. He told the applicant that he would give him leave in the first week of January, but had to ensure that there was someone in his place.

Oyekynie said that the applicant told him that he always takes leave in January and that there was a crisis in the family. He responded that they should treat the leave as occasional leave, pending approval. (Occasional leave is granted in cases of death or illness of a family member). Oyekynie stated that after the discussion he did not see the applicant again, although he was waiting for him to complete the necessary paperwork. He was adamant that he had not authorised leave for the applicant, nor had there been any misunderstanding between the two of them.

Oyekynie noted that the applicant held a very important position and that it was essential the proper arrangements were made before he proceeded on leave. He said the applicant returned to work in February 2013. Telegrams were sent to the applicant, but there was no is no response from him. Oyekynie stated that the applicant's disciplinary hearing was held in his absence. Proper permission was obtained for it to proceed without his presence.…"

[5] It was common cause that the telegrams sent to Mzazi were not sent to the Eastern Cape where he had gone to. The Commissioner found that since the company denied that leave for Mzazi was granted: "…the onus to prove that

he did indeed fill in the leave form lay with the applicant. He has failed to produce the leave form, and I thus have to accept that no leave form was completed." (my emphasis) He went on to find that: "From the applicant's witnesses it is clear that while the policy is to give employees copy of their leave forms, this does not happen in practice. While I understand that the respondent used this to support their case, and the union successfully undermined the point, it was still the responsibility of the applicant to produce the original form and submit as evidence to prove that in fact his leave was granted. Furthermore, if indeed the leave form was captured on the system, the applicant would have been paid for the leave he took." He then proceeded to find that the applicant did indeed take unauthorised leave.

[6] The Commissioner found that an important issue in determining that the dismissal was substantively fair was that the unauthorised leave was for a lengthy period. The Award records that: "If he had taken just a few days, then it could have been a mitigating factor in favour of the applicant. Not only did the applicant take extended leave, he also took leave during the busiest time in retail. He held the key position which aggravated his conduct, especially during that particular time of the year".

[7] It was Mzazi's evidence at the arbitration that the family matter that he had to attend was the unveiling of his parents' tombstones. Although this was only mentioned under cross-examination, the evidence of the assistant manager Oyekynie was to the effect that Mzazi told him there was a family crisis and Oyekynie had told him that they could treat the leave as occasional leave, pending approval.

[8] It was common cause at arbitration that the days taken as leave were leave days owing to Mzazi, the issue in dispute being the authorisation thereof. Mzazi returned to the workplace at the end of his leave period. On that question, and the charge of absconding from the workplace, the Commissioner in considering the question of procedural fairness found as follows:

> "The respondent has explained their motivation in dismissing the applicant in abstentia. Under the circumstances at the time, this made

sense. However, they should have dealt with the situation differently when the applicant eventually returned to work. They should have had another disciplinary hearing in order to give the applicant a proper opportunity to explain his conduct, and in order for him to properly defend himself.

The fact that the applicant did return to work, and reported for duty, meant that there was no intention to abscond. This placed his conduct in a different light. While the absence of the applicant was lengthy, the applicant also had a long service history with the respondent. The respondent is a large employer with a sophisticated and well-resourced HR department. The applicant was entitled to the very basic principle of fairness and that is the right to state your side of the matter, and to defend himself against allegations of misconduct accordingly I find that the applicant's dismissal was procedurally unfair." (my emphasis)

[9] The Commissioner's considerations above relating to the procedural fairness of the dismissal include issues generally reserved for the question of whether a dismissal was substantively fair or not i.e. the long service history of an employee and in this case, the finding by the Commissioner that in fact there was no intention to abscond by the employee, absconding being the charge for which he was dismissed. One presumes that the Commissioner had the case of **Khulani Fidelity Services Group v CCMA & others [2009] 7 BLLR 664 (LC)** in mind in which Molahlehi J had this to say:

"'Desertion consists of absence without authorization by the employee, and with the intent to remain permanently away from his or her employment. The intent can generally be inferred from the circumstances of the absence of the employee. The period of absence and the surrounding circumstances can serve as an indication of the intention not to continue with the contract of employment."[1]

[10] It was submitted on behalf of the respondent company that the grounds for review in this matter, amounted to examples of evidence not properly considered or not considered at all by the Commissioner. These grounds did

[1] at para 15

not amount to a basis to review the award. The questions that a reviewing court should ask were set out in the matter of **Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine)**[2] in which the Labour Appeal Court stated as follows:

> "the questions to ask are these (i) in terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties full opportunity to have their say in respect of the dispute?(ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have given their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? And (v) Is the arbitrator's decision is one that another decision maker could reasonably have arrived at based on the evidence?"[3]

[11] The Supreme Court of Appeal in the **Herholdt** matter[4]summarized the position regarding the review of CCMA awards as follows:

> "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 enquiry or arrived at an unreasonable result. A result will only 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 issue that this court has to decide is whether the decision that Mzazi's dismissal was substantively fair was one that a reasonable decision maker could not make, taking into account the evidence before the Commissioner.

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[2] JA 2/2012 delivered 4 November 2013
[3] At paragraph 21
[4] Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at para 25

The way that a Commissioner should approach this enquiry was set out by the Constitutional Court in **Sidumo**[5] as follows:

> "[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal.
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> There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.
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> [79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

Evaluation

[13] The Commissioner did not find that Mzazi was guilty of the offence he was charged with, in that Mzazi had no intent to abscond from his work, finding that his return to work after the leave period placed his conduct "in a different light", and he should have been given a proper opportunity to explain his conduct on his return – one can only presume because this may have prevented his dismissal.

[14] The issue of Mzazi's clean disciplinary record, the reason for his need to return to the Eastern Cape to unveil the tombstones of his parents and Mazizi's relatively long employment with the company were all considerations that should have been addressed by the Commissioner in the process of

[5] (2007) 28 ILJ 2405 (CC)

coming to a decision regarding the substantive fairness of the dismissal. They were not. Further, the reasoning that a disciplinary hearing may have put Mzazi's absence in a different light, highlights the flaw in his approach. The Commissioner's function is to make a decision about the fairness of a dismissal based on an objective conspectus of all the relevant facts and circumstances having heard the evidence in a *de novo* hearing. It is not to consider whether an employer's decision made sense at the time of the dismissal. There are other facts and circumstances arising from the record that impact on the reasonableness of the Commissioner's decision.

[15] The record of the proceedings reveals that the Middestad store had opened up in the middle of the year in question. A lot of leave allocations were planned at previous stores which was why the February 1 meeting was called according to the employer's witness, Mr Jantijies, who stated that: "that was the importance to tell the people about it and bring forward the dates to plan the leaves because all their leaves….were in the December, November period." It also is apparent from the record that the management had not filled in any names of employees on the leave planner for the period July to December 2012. Mr Janties left the store around June of 2012 and according to the evidence of Oyekyne when he looked at the leave planner in June, "there was nobody's name indicated." Poor administration of the leave allocations was evident on the company's own evidence.

[16] In addition, Mazizi's evidence was that when he came to see the managers on the 21 December, it was to remind them that his leave was due:

> "I was there to tell them that I'm going to leave, I was just said that the date was coming closer and there was nobody in fact (indistinct – interpreter not speaking clearly) to come and work on my place whilst I am on leave, so I was saying that the date is coming nearer, nobody is going to come and replace the storeman, then that is why in fact I went to tell them to say look, I'm going to leave on that specific date."

[17] I should also make mention of the Commissioner's error of law when he found that Mazizi had an 'onus' to discover his leave form. This error was further compounded by the fact the Commissioner had acknowledged that

employees were not given copies of their leave forms despite this being a policy of the company.

[18] Taking all of the above into account, I find that the decision that the dismissal was substantively fair is one that a reasonable decision-maker could not make. Mr Maziza was represented in these proceedings by his union and a costs order is not apposite. The award stands to be reviewed and substituted as set out in my order below:

Order

(1) The award under case number WDC T2454 – 13 is hereby reviewed and set aside and substituted as follows:

"(a) The dismissal of Mr L .Mzazi was procedurally and substantively unfair;

(b) The third respondent is ordered to retrospectively reinstate Mr Mazizi within 14 days of this order."

(2) There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicant: SACCAWU

First Respondent: Bowman Gifillan Attorneys