REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

CASE NO C 863/2013

Not reportable

In the matter between:

ANTHEA GRACE ABRAHAM **APPLICANT**

and

THE OCEANA GROUP LTD **1ST RESPONDENT**

DIK WILSON *NO* **2ND RESPONDENT**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **3RD RESPONDENT**

Application heard: 10 September 2014

Judgment delivered: 29 September 2014

JUDGMENT

VAN NIEKERK J

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Introduction

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner). In his award, the commissioner held that the applicant's dismissal by the first respondent (Oceana) was substantively and procedurally fair.

The award

[2] The material facts relevant to this dispute are captured in the commissioner's award, and there is no need to repeat them here. The applicant was employed by Oceana in November 2010 as a communications manager. She was dismissed on 9 April 2013 for incapacity in the form of a failure to meet required performance standards, after a performance review held on 12 March 2013 and an incapacity hearing chaired by an independent third party on 22 March.

[3] The applicant challenged both the substantive and procedural fairness of her dismissal. After an arbitration hearing that took some six days to complete, the commissioner concluded, as I have indicated, that the applicant's dismissal was both substantively and procedurally fair.

[4] The award, some 23 pages long, comprises a commendable summary of the evidence and the applicable legal principles. The commissioner's conclusions and his reasoning in relation to the substantive fairness of the applicant's dismissal appear from paragraphs 122 of the award onward. He says the following:

> 122. With regard to substantive fairness, there were a number of instances of alleged poor performance put forward by the respondent. It was confirmed by almost all of the witnesses that the company has a focus on high performance, and that targets arew challenging and deadlines are tight. The high-performance focus appears to have been applied particularly within the GSS Department, which was a relatively new Department intent on establishing its value to the business. It was also not disputed that the applicant's role was an important one, and that the scope of her job was extensive and demanding. Applicant was a

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> senior employee is evidenced by the remuneration package as well as the fact that she led the communications function and reported directly to a company director…
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> 126. The Respondent in this matter has adduced plentiful evidence of shortcomings in the applicant's performance. Applicant was counselled concerning these shortcomings over a lengthy period of time; she was eventually given an ultimatum to improve within four weeks (which became five weeks), and thereafter she was given an opportunity to state her case. I have already determined that this process was a fair one.
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> 127 Applicant led evidence as to the good work she had done. It was not disputed that she had performed well in 2011, although Respondent noted that she was measured on a lower standard due to her recent appointment in a position which was still being developed. It was also not disputed that she had been complemented from time to time by various managers, including this year, and aspects of work however, this is not the issue; the question is whether the applicant's performance as a whole was sufficiently good warrant the retention in the position.
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> 128. I have no reason to question the standards applied by the Respondent… Essentially the Respondent expected the applicant to do things right and within the allocated time, in line with Respondent's high performance expectation. It is clear that the applicant did not meet these expectations in several respects.

[5] The commissioner goes on to summarise the particular respects in which the applicant did not meet the required performance standards. These include expectations in regard to the co-ordinating role in producing the integrated report, the drafting of the stakeholder engagement plan, which was eventually outsourced. The commissioner referred to the evidence that suggested that the applicant did not enjoy a good relationship with service providers – indeed, the evidence of a particular service provider was that she had never before been required to change account managers so frequently. The commissioner observed further that the applicant appeared to be prone to blaming others for the shortcomings, and to deny any culpability. The applicant's refusal to accept that

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her performance was deficient in any way, observed the commissioner, appears to have made it more difficult for the respondent to encourage her to improve.

[6] The commissioner concluded as follows:

> 133. It must be acknowledged that the Applicant worked hard and appeared to be committed to the job; however it appears that the work expected of her was simply beyond her abilities. This is a hallmark of the true incapacity dismissal, where the employee is not at fault, but is simply incapable of meeting the requirements of the position. It would seem that the position was more demanding than the Applicant realised when she applied, or possibly that she over estimated her ability to do what was expected of her.

On this basis, the commissioner concluded that the applicant's dismissal was fair.

Grounds for review

[7] The applicant has raised numerous, detailed grounds for review, the vast majority of which are more appropriate to an appeal. She has supplemented her grounds for review in her heads of argument. An applicant seeking to review and set aside an arbitration award under s 145 of the LRA must articulate all of the grounds for review in the founding and supplementary affidavits and may not expand the basis of the review application in a replying affidavit or heads of argument.

[8] Be that as it may, the grounds for review on which the applicant relies in her founding papers are, in essence, that the commissioner failed to consider and identify what the applicant is required performance standards were, that he failed to apply his mind to whether the applicant could reasonably have been aware of the required standards and whether those standards were realistic and achievable. In intend to deal with the application on this basis.

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Applicable principles

[9] The test to be applied in an application such as the present 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* (ZASCA 97, 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.'

[10] 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

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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.

[11] In *Goldfields Mining South Africa (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC) 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.

[12] At paragraph [20] of the judgment, the court stated:

> '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 a 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 led 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 one that another decision-maker could reasonably have arrived at based on the evidence?
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> [21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see

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> *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must aactually defeat the constitutional imperative that the award must be rational and reasonable - there is no room for conjecture and guesswork.

[13] More recently, in *Shatterprufe (Pty) Ltd v Sesani NO & others* (unreported, PA 4/13 10 September 2014) the Labour Appeal Court summarised the approach as follows:

> A review of a CCMA award is permissible only if the defect in the proceedings falls within one of the grounds in section 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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.

[14] The applicable test thus clearly maintains the distinction between a review and an appeal. The correctness of the commissioner's decision is not in issue; this court is not entitled to interfere if it would have come to a different conclusion on the same material.

Analysis

[15] The applicant does not call into question that the commissioner identified the dispute that he was required to arbitrate and that he understood the nature of

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that dispute. Nor does the applicant dispute that the commissioner gave the parties an opportunity to state their respective cases, or that he dealt with the substantive merits of the dispute. What is at issue in these proceedings is the reasonableness of the outcome of the arbitration hearing - in essence, the applicant's contention is that the commissioner's award is not one to which a reasonable person could have come on the available evidence.

[16] At the outset, it is worth recording the proper approach to be adopted in the matter concerning the dismissal of an employee engaged at managerial level, with the reason for the dismissal is a failure to meet the required performance standards. While the provisions of item 9 of the Code of Good Practice: Dismissal remains applicable, the courts have consistently recognised that employers are entitled to set performance standards and that an arbitrator ought to be slow to interfere with them, unless of course the standards are shown to be patently irrational or unreasonable. The courts have also recognised that the general requirements reflected in item 9 may not apply to the same degree to an employee who is a manager or senior employee and whose knowledge and experience qualifies her to judge for herself whether she is meeting the required performance standards. The same consideration applies with the degree of professional skill required of the employee is so high and the departure from the standard so serious that a failure to perform in accordance with the standard is sufficient to justify dismissal, even for a single lapse on the part of the employee. These qualifications to the general rule are obviously relevant in the present context; the applicant's position- she was a senior employee engaged in the Paterson D band and required to play a managerial role. The nature of her work and its relevance to the strategic importance of Oceana's business are obviously also relevant.

[17] It should also be recalled that 'softer' qualities such as leadership, resolve, business acumen, judgment and effective administration are legitimate factors that may be brought into account in any assessment of the performance of a senior employee, and that it is largely within the employer's province to assess

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whether these standards have been met unless, of course, the assessment is grossly reasonable. In short: where an employer comes to the conclusion that a senior or managerial employee has failed to meet the required standards or exhibit the qualities necessary for effective performance, the scope for having that conclusion overturned in an arbitration proceeding is narrower than it ordinarily might be.

[18] In his award, and the commissioner recognised that the applicant had knowledge of the applicable standards through the contract of employment, her role profile and individual performance agreement.

[19] No substantive evidence was led before the commissioner to corroborate the applicant's view that the standards expected and required of her were unrealistic and unachievable. The evidence before the commissioner, presented through Oceana's witnesses (which included the CEO, HR manager and the applicant's immediate superior) was that the relevant IPA targets did not broaden the scope and responsibilities of the applicant's role, given that the core competencies in key areas of responsibility remained unchanged. It was not disputed that the department of which the applicant was a member was a 'high performance' department or that the applicant, as a senior employee heading a function could reasonably be expected to be held to demanding standards rationally arrived it. Insofar as the applicant contended that she had been afforded no assistance and support in performing her role, this is not a contention that is corroborated by the evidence. There was sufficient evidence adduced before the arbitrator for him reasonably to draw a conclusion that the applicant had access to resources and service providers to ensure that the relevant standards were met, that she had failed to make a concerted effort to ensure that these resources will effectively utilised and that she had been counselled in an effort to assist her to meet the required standards. What the commissioner was required to do was to have regard to a conspectus of all of the available evidence and to make a value judgment as to the reasonableness of the relevant performance standards. This he did. The test was not, as the applicant appears to suggest, whether she

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subjectively regarded the standards as being too high or unreasonable. In my view, having regard to the evidence before the arbitrator, his conclusion that the required performance standards were reasonable and that the they did not constitute a barrier to the applicant performing at the required standard is a decision to which a reasonable decision-maker could come on the available evidence. In so far as the applicant submits that the award is reviewable because the commissioner derived performance standards from four different documents but failed to articulate them with any clarity, that she was assessed only on stretch targets and that there was no formal evaluation of her performance, this submission ignores the nature of the enquiry in a matter such as the present. The parameters of the enquiry are those referred to above and reflected in the judgment of the Labour Appeal Court cited by the commissioner, *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunston* (2000) 21 *ILJ* 501 (LAC):

> I would think that where an employer unreasonable grounds comes to the conclusion that a senior management employee is unsuited to the position which he holds, the scope for having such a conclusion overturned in court of law small. It is in the highest degree desirable that an employee should, in the interests of efficiency, be entitled to choose because much freedom as is compatible with the most exercise of discretion, who it wants at or near the helm of its enterprise. Qualities like leadership, resolve, business acumen, judgement and effective administration are not readily provable in a court. A deficiency in such qualities is not readily provable however… It is important that the employer's business should not have to suffer, to the detriment of all concerned, through the ineptitude or inefficiency of a particular employee.

In other words, the applicant cannot be heard to complain that the commissioner failed to treat her as one might treat and unskilled or semiskilled employee who is alleged to have failed to meet the required performance standards. The mechanical approach which the applicant appears to suggest that the commissioner ought to have applied is more suited to those instances. In the present case, the commissioner was obliged to take a holistic view of the

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evidence before him and by applying the factors referred to above, decide whether the applicant's performance fell short of what was required of her.

[20] Insofar as the applicant's failure to meet the performance standards is concerned, this is the question that was at the core of the proceedings under review. The record discloses that the overwhelming evidence before the commissioner was that the applicant had failed to meet the performance standards required of her. I do not intend to repeat that evidence here – it is summarised by the commissioner in his summary of the evidence and the paragraphs from the award quoted above. It is sufficient to say in a number of material respects, including communication concerning the Oceana Empowerment Trust, the integrated plan, the stakeholder engagement plan, the applicant's inability to follow through on instructions and delegate tasks effectively, the applicant's lack of initiative and failure to be proactive, and the applicant's failure to meet deadlines and manage resources, the evidence discloses that inability to meet the required performance standards. At the hearing of the present application, the issue of the assessment of the applicant's IPA during May 2012 assumed some significance. It is not disputed that the assessment yielded a score of 33%. Although the commissioner does not deal specifically with this issue in his analysis of the evidence, he correctly records the evidence to the effect that this was a self-assessment, and the applicant's version that she accepted the assessment only to avoid conflict with her immediate superior. Again, nothing terms on this for present purposes – the applicant does not deny accepting the score as valid and to that extent, it was reflective of her performance at the time and is relevant to the issue of whether the applicant had meet the required performance standards.

[21] To the extent that the applicant contends that the evidence before the commissioner does not support the reasonableness of a conclusion that her performance was appraised regularly during her employment, this is simply not the case. I did not understand the applicant to dispute the evidence before the commissioner that from as early as February 2012, she was afforded an

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opportunity to improve her performance and that she understood the potential consequences of a failure to do so. Specifically, prior to the incapacity hearing, the applicant was afforded a period in excess of the month to improve her performance. In these circumstances, there is no reason to call into question the reasonableness of the commissioner's conclusion that the applicant had been afforded an adequate opportunity and a reasonable time within which to improve her performance.

[22] Finally, in relation to the appropriateness of dismissal as a sanction, the approach adopted by the Constitutional Court in *Sidumo* leaves very little scope for this court to interfere with a value judgement made by a commissioner in regard to sanction. The LRA places a responsibility on commissioners to assess all of the relevant facts and circumstances and in particular, those that serve to mitigate or aggravate a disciplinary sanction. Again, it is not for this court to interfere only on the basis that it would have imposed some lesser sanction. It is for the applicant to demonstrate that the sanction of dismissal was, in the circumstances, so unreasonable that no reasonable arbitrator could have come to that decision. In the present instance, the commissioner had before him irrefutable evidence that there were no appropriate alternatives or sanctions short of dismissal. On a totality of the evidence, the reasonableness of his decision cannot be called into question.

[23] For the above reasons, in my view, the applicant has failed to establish that the commissioner's award falls outside of a band of decisions to which reasonable people could come on the available evidence, and the application before stands to be dismissed.

Costs

[24] In relation to costs, this court has a discretion in terms of section 162 to make orders for costs on the basis of the requirements of law and fairness. This court traditionally is reluctant to make orders for costs in cases where individual employees pursue genuinely felt grievances against their employers. As the

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Labour Appeal Court has pointed out, the court should be slow to close its doors are to those who genuinely feel aggrieved and seek to pursue their grievances in this forum. On the other hand, in the present instance, the conduct of this matter borders on an abuse of the process of this court. The papers run into thousands of pages, and no attempt has been made to identify those portions of the record that are relevant for the purposes of the review. Further, as I have indicated, the applicant's heads of argument (some 35 pages) contain much that serves to introduce new material. For these reasons, I had seriously considered ordering the applicant to pay the first respondent's costs in this matter. However, I will give her the benefit of the doubt and take into account particularly that this litigation was conducted, for the most part, by her erstwhile attorneys of record. For that reason, she may not be solely or entirely to blame for a lamentable state of affairs, and I intend therefore to make no order as to costs.

I make the following order:

1. The application is dismissed

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

Representation:

For the applicant: In person

For the first respondent: Mr. S Harrison, ENS Inc

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