REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 790/2013

In the matter between:

COLPAK, a division of	**Applicant**
COLUMBIT (PTY) LTD	
and	
NEVILLE ADAMS	**First Respondent**
COMMISSIONER BELLA GOLDMAN	**Second Respondent**
THE STATUTORY COUNCIL FOR THE PRINTING, NEWSPAPER, AND PACKAGING INDUSTRIES	**Third Respondent**

Heard: **12 March 2015**

Delivered: **18 March 2015**

Summary: Review – gross irregularity – misconceiving the nature of the inquiry.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant (Colpak) dismissed the first respondent (Adams) after he had been found sleeping on duty and he had failed to record that fact on his timesheet. He was given a written warning for sleeping on duty and dismissed for "fraud – falsifying company documents".

[2] Adams referred an unfair dismissal dispute to the Bargaining Council (the third respondent). Commissioner Bella Goldman (the second respondent) found that the dismissal was substantively unfair and ordered Colpak to reinstate Adams retrospectively. Colpak seeks to have the award reviewed and set aside.

[3] Adams delivered his answering affidavit more than three months late. He applied for condonation. Colpak opposes it. I shall deal with that aspect after having set out the background facts.

Background facts

[4] Adams was a mounting operator. He was on nightshift on 8 March 2013. During his "lunch break" at 01:00 he went to sleep on some foam in the back area of the mounting department. He was woken up by the machine minder and stand-in foreman, Mr Nicky Muller, at 02:30. That meant that he had slept for an hour longer than his allocated break. He did not reflect that fact on his timesheet. He was paid for the full shift.

Condonation

[5] I will consider the late filing of the employee's answering affidavit with reference to the well-known principles set out in *Melane v Santam Insurance Co Ltd.*[1]

Extent of delay

[6] The answering affidavit was delivered more than three months outside of the ten day period set out in rule 7A. It is a substantial delay.

[1] 1962 (3) SA 531 (A).

Explanation

[7] Adams says that he instructed his erstwhile attorneys, Simons Van Staden, when he received the applicant's supplementary affidavit in terms of rule 7A(8) on 5 February 2014. They delivered a "notice of opposition" – but no answering affidavit, as required by rule 7A(9) – on 13 February. He was advised – presumably by those attorneys – that he was required to deliver his answering affidavit by 19 February. He did not.

[8] He then says that he contacted Simons Van Staden "numerous times" to inquire "if they had opposed the review application" – a surprising averment in itself, as they could not have done so without him deposing to an answering affidavit. But what is more, he provides no details or corroborating evidence of these alleged attempts. Be that as it may, only two months later, in April 2014, did Adams consult other attorneys at Edward Nathan Sonnenbergs (ens). He could not afford their fees and they would not assist him *pro bono*. And another month later, on 27 May 2014, he consulted with his current attorneys of record. Only then did he terminate the mandate of Simons Van Staden. His current attorneys delivered the answering affidavit on 6 June 2014.

[9] While the court is reluctant to penalise litigants for the dilatoriness of their representatives, there is a limit beyond which they cannot hide behind their attorneys' negligence or gross ineptitude.[2] This is such a case. There is simply no proper explanation for the inaction of Simon Van Staden from February to May 2014, nor of the alleged steps that Adams took to spur them into action.

Prospects of success

[10] The lengthy delay and the poor explanation therefor need to be considered together with the prospects of success. I do so hereunder. Given my conclusion on the merits, the employee's prospects of success were poor.

[2] Cf *Silplat (Pty) Ltd v CCMA* (2011) 32 *ILJ* 1739 (LC) 1753 and cases there cited.

Conclusion: condonation

[11] The application for condonation for the late filing of the first respondent's answering affidavit is dismissed.

The arbitration award: grounds of review

[12] Mr *Bosch*, for the applicant, abandoned the argument that the commissioner had exceeded her powers. He argued that the commissioner committed misconduct and a gross irregularity in the proceedings, as envisaged by s 145(2)(a)(i) and (ii) of the LRA.[3]

Evaluation

[13] I shall consider each of the two grounds of review.

Gross irregularity

[14] Mr *Bosch* submitted that the commissioner committed a gross irregularity in that she misconceived the nature of the inquiry or undertook the inquiry for the wrong reasons.

[15] Before I deal with the substance of that argument, it is useful to revisit the origin of that formulation. It was used by the SCA in *Herholdt*[4] and the test for a gross irregularity was recently restated by the Labour Appeal Court in *Mofokeng*[5]:

> "[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.
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> [31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and

[3] Labour Relations Act 66 of 1995.

[4] *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA) 2801F-2803D; 2806 A-D.

[5] *Head of the Dept of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) paras 30 ff.

circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling

> indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[16] In the case that served before the arbitrator – and now before this Court – the reason why Colpak dismissed the employee was because he was alleged to have falsified documents. The reason was not because he was sleeping on duty. For that misdemeanour he was issued with a written warning. The misconduct that led to his dismissal was viewed in a more serious light by his employer because it contained an element of dishonesty.

[17] Despite this, and despite the fact that the commissioner initially correctly recorded these facts, the commissioner embarked on a separate inquiry whether the employee had in fact been sleeping on duty; and then she embarked on an inquiry whether there was a rule requiring employees to record their lunch and tea breaks. Simply put, she asked the wrong question and embarked on the wrong inquiry.

[18] It is common cause that the employee slept on duty. For that he received a written warning. The alleged misconduct of falsifying documents arises from his failure to record that fact in his timesheets. It was not the company's case that employees had to record their lunch and tea breaks. Although the employee started sleeping during his "lunch break", he continued sleeping for another hour during working time until he was discovered. He conceded that this was an "abnormal event" and that abnormal events had to be recorded in their timesheets; yet the commissioner chose to focus on the red herring of recording lunch and tea breaks. In doing so, she committed a reviewable irregularity.

Misconduct

[19] The commissioner went further and concluded that the company was in breach of the Basic Conditions of Employment Act[6]. She did so after making inquiries after the arbitration and without giving the company an opportunity to lead evidence or to make submissions. That deprived the company of a fair hearing on that aspect.

Conclusion: substitute or remit?

[20] The award is reviewable. But this is not, in my view, one where this Court should substitute its decision for that of the arbitrator. The irregularities complained of are procedural in nature. Another arbitrator should address the dispute afresh and give the parties a fair trial, and if necessary, give them the opportunity to address these issues:

20.1 The real reason for dismissal;

20.2 Whether there was a rule to record abnormal events and whether the employee breached that rule;

20.3 If necessary and relevant, whether there was a breach of the Basic Conditions of Employment Act.

[6] Act 75 of 1997.

Costs

[21] The effect of this order will be that the dispute has not been brought to finality. The Court cannot foreshadow the decision of another arbitrator. The employee was armed with an arbitration award in his favour that he needed to defend. In law and fairness, I do not consider a costs award to be appropriate.

Order

[22] In the light of the above, I make the following order:

22.1 The application for condonation for the late filing of the first respondent's answering affidavit is dismissed.

22.2 The arbitration award under case number WECT 7814-13 dated 2 September 2013 is reviewed and set aside.

22.3 The dispute is remitted to the third respondent (the Bargaining Council) for a fresh arbitration before a panellist other than the second respondent.

22.4 There is no order as to costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Craig Bosch Instructed by Bob von Witt.
FIRST RESPONDENT:	Hermione Cronjé Instructed by Malcolm Lyons Brivik.