IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER C382/2015

DATE 17 NOVEMBER 2016

In the matter between

ENGINEERED LININGS (PTY) LTD Applicant

and

D I K WILSON First Respondent

CCMA Second Respondent

ANGELIQUE HENN Third Respondent

JUDGMENT

STEENKAMP, J:

This is an application to have an arbitration award by Commissioner D I K Wilson dated 1 April 2015 reviewed and set aside. It arises from the dismissal of the employee, Angelique Henn, by the employer -- who is the applicant in this review application – namely Engineered Linings (Pty) Ltd.

At the beginning of the hearing I granted condonation for the late filing of the applicant's heads of argument.

It is common cause that Ms Henn was a senior employee. She was employed in 2003 and at the time of her dismissal she was the company's Financial Manager, earning a gross salary of R38 000,00 per month. She was dismissed on 5 June 2014 after a disciplinary hearing at which she was charged with gross negligence and dishonesty.[1] The charges mainly arise from a period at the end of 2013 when the company changed its financial software system from a system called SYSPRO to a new one, namely Pastel.

The arbitrator found that, even though a number of allegations of misconduct had been levelled at the employee, he could deal with all of them simultaneously at the hand of the evidence before him, as they mainly arose from the same circumstances. He came to the conclusion that, apart from one specific incident dealing with pay-outs to retrenched workers, the employer had not discharged the onus of showing that the employee had committed misconduct. He noted that as far as the other charges are concerned:

> "...the inability of the [employee] to perform in the manner expected of her by PSV Holdings was entirely, or

[1] The disciplinary hearing was chaired by Mr Dirk Voschenk – the attorney who appeared for the employer in this hearing – in his guise asa an IR Consultant for Labournet.

at least very largely, caused by the failed implementation of the new software package and that the employee cannot be held responsible for her failure to meet expectations."

As far as the other charge is concerned, called Charge N, the employee conceded that she had made an error in overpaying some of the retrenchees. The arbitrator noted that, in mitigation, she stated that she was not involved in calculating the packages and was under the impression that the package was payable over and above their normal salaries and leave pay.

The arbitrator concluded that she was negligent in checking to ensure that her understanding was correct. However, he took into account that two senior people had checked her figures and accepted them as correct. He found that it warranted nothing more serious than a written warning. In those circumstances he found the dismissal of the employee to be substantively unfair.

He took into account that she had 11 years of service, all except the last six months without any complaint, as well as the stress and trauma to which she had been subjected and the finding of a degree of negligence on Charge N. He ordered the employer to pay her compensation equivalent to 10 months' remuneration.

In response the employer has raised some eight grounds of review. Those grounds are all predicated on the overarching ground that the Commissioner committed a gross irregularity. At the risk of restating trite law this Court, as well as the Labour Appeal Court and the higher courts, have been at pains to emphasise that in determining reasonableness, which is the test on review, the test is not whether the Commissioner was correct but whether the decision falls within a range of reasonable findings that the arbitrator can arrive at after taking into consideration all the material factors presented to him, as set out for example in Ethekwini Municipality: Durban Metropolitan Police Services v Khanya [2014] ZALAC 48.

I will not restate the well-known test and the factors enumerated in Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA [2014] 1 BLLR 20 (LAC), other than referring to that test and to the one in Herholdt v Nedbank [2013] 11 BLLR 1074 (SCA). It is against that background that I will consider each ground of review.

The first one and one on which Mr *Volschenk* says much of the rest of the award is predicated, is that the arbitrator took a subjective decision on the fairness of the dismissal. He does not go so far as to allege bias, but he points to an example that the arbitrator took into account his own experience in the changeover of a software system where he says:

> "Ms Duberly testified that in her 20 years' experience she had been involved in six such system changes and in all such cases the two systems were running parallel initially while the problems in the new system were ironed out. Indeed, that has also been my experience and I find it inexplicable why PSV should have proceeded with the change with such limited preparation and training (at least as far as the employee and Ms Duberly were concerned) and no option of the old system running in parallel."

Firstly it must be noted that the arbitrator refers specifically to the evidence of Ms Duberly and he then says, entirely by the by:

> "Indeed, that has also been my experience."

Had it been a court of law, that could have been no more than an *obiter* statement. It is certainly not the *ratio* for the eventual award. What he stresses is the evidence of Ms

Duberly. It is so that Ms Duberly did not give evidence as an expert witness, but the arbitrator was quite entitled to take her experience into account.

It must also be noted that the employee, Ms Henn, herself testified that she specifically requested that the two systems run in parallel, but that request was refused. She went on to say:

> "I can't, I really can't understand why it was denied because in most companies when you move from one accounting to another accounting package, and we even had the same scenario when we moved originally from Pastel to SYSPRO, we did run Pastel Partner and SYSPRO. For a month we had the two systems overflowing and majority of your companies out there don't just switch off one accounting package and start working in another accounting package."

It was entirely reasonable for the arbitrator to take that evidence into account. That is not a reviewable ground.

The second ground raised is that of the arbitrator considering the lack of training given to the employee. Mr *Volschenk* submitted that on the contrary, there was adequate training.

However, the conclusion reached by the arbitrator is borne out by the evidence before him. Although there were some attempts by a Mr and Mrs Peacock as well as Ms Barkhuizen and Ms Slabbert to help the employee, the only proper training on the system itself appears to have been a two-day lecture on Pastel generally. The arbitrator also pointed out that, apart from the general training, this company had special needs that were not adequately addressed in the training. As far as Ms Barkhuizen and Ms Slabbert are concerned, the evidence bears out the submission made by Mr *Bosch* that it was more hindrance than help. They made additional demands and put more pressure on the employee, whereas what she needed was technical support.

The third ground of review is that of the employee's seniority. I took Mr *Volschenk*'s argument to mean that he referred both to her extensive years of service, i.e. more than 10 years, as well as her seniority in the company as a financial director. That experience and years of service are not entirely relevant to the misconduct complained of.

The misconduct flows directly from the implementation of the new software system. As I have noted with regard to the arbitrator's views on the training provided, her years of experience could not have prepared her for the problems arising out of the implementation of the new software package towards the end of 2013. The arbitrator's failure to take that into account in that context is again not a reviewable irregularity.

I then turn to the fourth ground of review, which is that the arbitrator came to contradictory conclusions with regard to evidence of misconduct on the one hand or poor performance on the other hand. It must be noted though that the arbitrator, although he made a passing remark that it may have been better to consider the conduct of the employee as poor performance, did not make any such finding, i.e. that she was guilty of poor performance. Instead he considered the dispute before him, which was that of misconduct based on gross negligence. Having found that the employer had not proven that misconduct, other than the one on Charge N, he applied his mind to that evidence with regard to the dispute before him. That is what he needed to do and it is not reviewable. As required by *Goldfields*, he asked the right question and he determined the dispute before him.

The employer then dealt with a broad ground of review, namely the failure to properly evaluate and make findings on the evidence. It is so that the arbitrator did not deal with each allegation of misconduct separately when he analyses the evidence before him, which he had described in some detail in a wide-ranging award spanning 20 pages and 123 paragraphs. What he does do is to say:

> "I do not intend to canvass all the charges individually, save for one, being Charge N. As far as the other charges are concerned I am satisfied that the inability of the applicant to perform in the manner expected of her by PSV Holdings, was entirely or at least very largely caused by the failed implementation of the new software package and that the applicant cannot be held responsible for her failure to meet the expectations."

He then goes into further detail about the implementation of that system.

In that regard it is quite correct, as Mr *Bosch* argued, that the allegations of misconduct against the employee all contained an element of fault, mostly in the form of negligence. That is what the arbitrator considered and, having considered the evidence before him carefully with regard to all of those charges, he came to a reasonable conclusion.

Both M*r Bosch* and Mr *Volschenk* referred to Simani v Mossel Bay Municipality (2014) 35 *ILJ* 2295 (LC) at paragraphs 43 to

44 where this Court had the following to say when dealing with the conduct of the arbitrator, and that is that the arbitrator must:

> "...grapple with the merits of the dispute before arriving at a conclusion. An award is not to reflect a perfunctory approach to the disputes of fact, with the commissioner merely recording the evidence of both parties and then, without further ado, selecting one or the other version."

That is not what the arbitrator did in this case. He carefully considered the evidence before him and gave proper, albeit short, reasons for his decision to come to the conclusion that he did. That is what an arbitrator must do and it is not reviewable.

Turning then to the one specific charge on which the arbitrator found that the employee had committed misconduct, namely that she was negligent in paying retrenchees over and above their salaries and leave. He again considered the evidence carefully. He noted that she conceded the misconduct and expressed remorse. He considered that it did not warrant dismissal and he imposed a final warning. In that regard he specifically took into account that two senior people had checked her figures and they had no problem with it. Also, he took into account that the overpaid amounts were recoverable by the employer. He did not mistakenly say that they had already been recovered, merely that it was recoverable. Taking into account those factors and the warning that he did impose, that falls within a range of reasonable options and is not reviewable. As the LAC held in *Marthinussen v MEIBC* (2016) 37 *ILJ* 2292 (LAC) par 11:

"It is trite that decision-makers acting reasonably may reach different conclusions on the issue of sanction. Provided the sanction falls within a reasonable range of options the court should be loath to interfere where the arbitrator has considered all relevant factors and not been influenced by capricious or irrelevant considerations distorting the outcome."

With regard to the evidence of Mr Anthony Dreisenstock, the arbitrator did consider it. He did not, admittedly, take a warning that Dreisenstock had previously imposed on the employee into account. However, that warning appears to have related to incidents of late coming and was not relevant to the dispute before him.

Lastly, Mr *Volschenk* submitted that, even if the arbitrator's conclusion on the merits were not assailable, then his award of compensation was. Compensation, however, is a discretionary remedy, as the Constitutional Court pointed out as recently as last week in <u>SARS v CCMA</u> [2016] ZACC 38 at para 50:

> "To compensate or not to compensate, and, if compensation is to be awarded, for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA."

That merely confirms what the Act itself says and it is also the approach that the Labour Appeal Court adopted in Kemp t/a Centralmed v Rawlins (2009) 30 *ILJ* 2677 (LAC) at para 55 when it held that:

> "...the test that the Court, called upon to interfere with the discretion, will apply is to evaluate whether the decision-maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision-maker adopted an incorrect approach."

None of those factors apply in this case. The decision-maker, namely the arbitrator, did not act capriciously or upon the wrong principle or with bias. He merely exercised a discretion and properly took into account the factors that he outlined. The fact that the employer or indeed the Court may disagree with the amount of compensation ordered is neither here nor there. It does not make the award reviewable.

In conclusion:

The award is not open to review. Both parties asked for costs to follow the result. I see no reason to disagree.

THE APPLICATION FOR REVIEW IS DISMISSED WITH COSTS.

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STEENKAMP, J

APPEARANCES

APPLICANT: Dirk Volschenk of Snyman attorneys.

THIRD RESPONDENT: Craig Bosch
Instructed by Malcom Lyons & Brivik.