REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not reportable

Case no: D 628/2011

In the matter between:

SIFISO RAYMOND NDLELA **Applicant**

and

METRORAIL **First Respondent**

NARINI HIRALALL N.O **Second Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Third Respondent**

Heard: 12 November 2013

Delivered: 8 December 2014

Summary: Review of an arbitration award –Commissioner made reasonable findings – application for review is dismissed.

JUDGMENT

PRINSLOO, AJ

Introduction

[1] The Applicant is seeking to review and set aside an arbitration award issued on 22 May 2011 and to substitute it with an order that the Applicant's dismissal was procedurally and substantively unfair.

[2] The documents placed before Court were voluminous, comprising of a transcribed record of 391 pages and a total of 621 pages.

Condonation

[3] At the outset, the Applicant sought condonation for the late filing of the application for review that was filed 8 days late.

[4] In the application for condonation the Applicant explained the reasons why this application was filed late. I considered the reasons for the delay and in my view the delay is not excessive, the explanation tendered is plausible and the Third Respondent ('Metrorail') is not opposing the application for condonation. For these reasons condonation is granted.

Brief exposition of the facts

[5] The Applicant was employed as a section manager. On 14 September 2010 and at around 20:00 he drove Metrorail's vehicle with registration number ND55502 when he was hijacked. The Applicant has knocked off at 12:30 on 14 September 2010 and the hijacking sparked an investigation in respect of the tracker reports on the company vehicles used by section managers. The investigation on the vehicle used by the Applicant was prioritised.

[6] The investigation was concluded and a report prepared by 1 October 2010. Subsequently two main charges of misconduct were levelled against the Applicant namely that he misused the company vehicle by using it for private purposes on specified dates and misrepresentation in that he claimed undue payment for work not done on specified dates. A disciplinary enquiry was scheduled for 25 October 2010 and concluded on 6 December 2010. The Applicant was found guilty and Metrorail subsequently dismissed him for misuse of Metrorail's vehicle and for claiming that he was executing his duties when he was in fact busy with private trips.

[7] The Applicant referred an unfair dismissal dispute to the Third Respondent (CCMA).

The arbitration proceedings and award

[8] The dispute was set down for arbitration and at the onset of the arbitration proceedings the Applicant raised points *in limine.*

[9] The points *in limine* were that Metrorail contravened clause 4.4 of the Disciplinary Code and Procedure (the Code) and that there was an issue of victimization in that the Applicant was the only employee who was charged and disciplined for misuse of vehicles whilst others were doing the same. The Second Respondent (arbitrator) made findings on the points *in limine* so raised.

[10] Clause 4.4 of the Code reads as follows:

> "Disciplinary hearing shall be conducted and finalised within a period of thirty (30) calendar days after the incident is brought to management's attention. Should extension of this period be sought, permission shall be sought from the Regional Manager's / Executive Manager's Office upon furnishing substantive and legitimate grounds for the delay. If not obtained, the case will be withdrawn."

[11] During the arbitration the Applicant's representative submitted that clause 4.4 of the Code prescribes that a disciplinary hearing shall be concluded within 30 days after the incident was brought to management's attention. The incident occurred on 14 September 2010 and therefore that was the date management was aware. The disciplinary hearing was only scheduled for 25 October 2010, thus 11 days outside the prescribed period. The 30 day period as envisaged in clause 4.4 started to run from the date of the hijacking incident and therefore the disciplinary hearing commenced outside the 30 day period and the case should have been withdrawn.

[12] The Applicant was hijacked on 14 September 2010 and subsequent to that, an investigation was launched. Metrorail's case was that it was aware of the hijacking incident of 14 September 2010, but it was still required that the matter be investigated since the Applicant was innocent until proven guilty. An investigation was conducted and on 1 October 2010 the investigation report

was brought to Metrorail's attention. The disciplinary hearing should have been concluded within 30 days after the investigation report was issued and since the report was issued on 1 October 2010 and the disciplinary hearing was scheduled for 25 October 2010, there was compliance with clause 4.4 of the Code.

[13] The arbitrator found that there was no need for Metrorail to apply for an extension for the disciplinary hearing to be held outside the 30-day period and that there was compliance with Clause 4.4 of the Code.

[14] On the issue of victimization the arbitrator found that she has taken into consideration that the Applicant's contention is that there was a bad relationship between the Applicant and Mr Bhengu. She accepted that there might have been rivalry over the post of safety manager and that the relationship might have soured as a result of that, but it was highly improbable that Mr Bhengu harboured a grudge as he was appointed in the post and it was the Applicant that displayed an attitude tainted with animosity.

[15] The arbitrator found that the probabilities are overwhelmingly in favour of Metrorail's version. She found that there was a policy and rule against misuse of company vehicles, the Applicant was allocated the vehicle with registration number ND55502 for standby duty and that it was misused during the period it was allocated to him. The Applicant's dismissal was found to be procedurally and substantively fair.

The test on review

[16] The test to be applied on review is well-established. A review application is not an appeal. The review court is required to determine whether the decision to which the arbitrator came falls within the bands of decisions to which a reasonable decision-maker could come on the available material. Any process-related conduct on the part of an arbitrator for example a failure to have regard to particular evidence, or the manner of the assessment of that evidence, is of no consequence unless it had the result of an outcome that is unreasonable.

[17] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[1] the Supreme Court of Appeal held that:

> '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 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.'

[18] The test to be applied is a stringent one, concerned only with the question whether the decision of the arbitrator is reasonable.

Grounds for review

[19] The Applicant raised four main grounds for review.

[20] Two of the grounds for review relate to the two points *in limine* raised during the arbitration.

[21] The first ground for review is directly related to the first point *in limine* raised. The Applicant's case is that the arbitrator exceeded her powers and / or committed a gross irregularity by delving into the interpretation of Clause 4.4 of the Code. It should have been clear to the arbitrator that the Applicant's challenge to the application of Clause 4.4 amounted to a dispute regarding the interpretation or application of the said clause and that she had no jurisdiction as Clause 17.1 of the Code confers jurisdiction in respect of the interpretation of the Code to the Transnet Bargaining Council.

[22] Metrorail's case is that an investigation was conducted after the hijacking incident of 14 September 2010 and that the report with findings was made available on 1 October 2010 and the Applicant was charged within 30 days after the incident was brought to management's attention. A perusal of the

[1] (2013) 34 ILJ 2795 (SCA).

charge sheet shows that there were two main charges levelled against the Applicant. Charge one was the misuse of a company vehicle with three sub counts, all relating to different dates the vehicle was misused namely 6 – 10 September 2010, 11 September 2010 and 14 September 2010. Charge two was misrepresentation in that the Applicant claimed payment for work that was not done and this charge also has three sub counts relating to different dates.

[23] There was no evidence to suggest that Metrorail was aware of the misuse of its vehicle on 6 – 10 and 11 September 2010 or of the misrepresentations as set out in charge 2.

[24] The arbitrator found that there were reasons to call for an investigation as the case was about more than the single incident of 14 September 2010 and as the investigation report was only received on 1 October 2010, that was when management became aware and as the enquiry was scheduled for 25 October 2010, there was compliance with the provisions of Clause 4.4 of the Code.

[25] The arbitrator found that the case was about more than just the misuse of the vehicle that occurred on 14 September 2010.

[26] The Applicant seeks to review this finding on the basis that the arbitrator exceeded her powers, as she never had jurisdiction to interpret Clause 4.4.

[27] The Applicant raised the fact that Clause 4.4 was not complied with as a point *in limine* at the onset of the arbitration proceedings. The arbitrator made a finding on compliance based on the facts placed before her and she found that the charges relate to more than the hijacking and the misuse of the vehicle on 14 September 2010. Metrorail only became aware of all the facts on 1 October 2010.

[28] The arbitrator made a finding regarding the compliance with Clause 4.4 and in my view she determined the point she was required to decide. The issue to be determined was a factual one that related to the date Metrorail became aware of the misconduct and it was not an issue about the interpretation of a collective agreement.

[29] Be that as it may, at no point did the Applicant raise a jurisdictional point nor did he indicate to the arbitrator that the issue was about the interpretation of

an agreement and she had no jurisdiction to determine that. The jurisdictional point is raised for the first time in the Applicant's review papers.

[30] The arbitrator cannot be faulted in the finding she made, more so since no jurisdictional issue was raised during the arbitration. It is not open for the Applicant to seek to review the findings of the arbitrator on the ground that she exceeded her powers when she determined an issue raised by the Applicant.

[31] This ground for review is without merit.

[32] The second ground for review relates to the second point *in limine*. It is the Applicant's case that his persecution was an extension of victimization directed at him by his line manager. He stated that this was a classic case of victimization and the arbitrator completely missed it and for that reason her award is reviewable.

[33] The arbitrator recorded that she has taken the contention that there was a bad relationship between the Applicant and Bhengu into account and found that it was possible that the relationship soured. The version about victimization was not properly canvassed with Metrorail's witnesses. Based on her observations of the parties and the evidence adduced, the arbitrator found it highly improbable that Bhengu still harboured a grudge.

[34] It is common cause that Metrorail dismissed other employees for the same or similar misconduct as the Applicant and they also referred an unfair dismissal dispute to the CCMA. The review application in respect of that dispute was filed under case number D 869/2011 and was enrolled on the same day as this application.

[35] I cannot find that the Applicant presented a 'classic case of victimization' that was missed by the arbitrator. The evidence that was adduced does not support this ground for review.

[36] The third ground for review is that the arbitrator accepted the evidence presented by Metrorail, despite his uncontested evidence regarding the possession and use of the company vehicle.

[37] A perusal of the transcribed record shows that the Applicant's evidence regarding the use and possession of the company vehicle was not uncontested, as he alleges and there is no merits in this ground of review.

[38] The last ground for review is that the arbitrator held that the issue of claiming for scheduled *vis-à-vis* actual work was not relevant to the issue to be decided and in doing so she failed to realise that the second charge was premised on whether section managers claimed for actual or scheduled work. The arbitrator could not find him guilty of dishonesty without addressing the issue of claiming for scheduled *vis-à-vis* actual work. It is further the Applicant's case that charges 1 and 2 were indivisible and that it was in fact one act of transgression and the dishonesty in charge 2 was the same transgression as charge 1.

[39] The arbitrator found that it was reasonable to conclude that the Applicant was not at work performing his functions as per the time indicated on his weekly report.

[40] The issue she was not inclined to address at length, as it was not relevant to the issues to be decided, was the Applicant's claim for scheduled and actual work. Holistically the arbitrator found that the Applicant was correctly charged and found guilty of the misconduct he was charged with.

[41] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*[2] affirmed the test to be applied in review proceedings and held that a piecemeal approach should not be followed. It held that:

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.
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> …… In a review conducted under s 145(2)*(a)*(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the

[2] (2014) 35 *ILJ* 943 (LAC).

> evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.
>
> To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly.'

[42] In my view the arbitrator dealt with charge 2. She found that the Applicant was not at work performing his functions as per the time indicated on his weekly report and that he was correctly charged and found guilty of the misconduct he was charged with.

[43] A review Court should not take a piecemeal approach and the Applicant's last ground for review is requiring of this Court to do just that.

[44] In reviewing the arbitration award I must consider the totality of the evidence adduced and decide whether the decision made by the arbitrator is one a reasonable decision maker could make. This Court is not to consider every factor individually or independently, but is to consider the evidence and the award in its totality and holistically.

Conclusion

[45] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed. This Court can only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[46] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I cannot find that the arbitrator's decisions do not fall within the band of decisions to which a reasonable decision maker could come.

[47] The arbitrator's decisions are reasonable and the award is not to be interfered with on review.

[48] The Applicant argued that costs should be awarded in his favour and Metrorail submitted that the costs should follow the result. I can see no reason why the costs should not follow the result.

[49] In the premises I make the following order:

Order

[50] Condonation is granted for the late filing of the review application;

[51] The application for review is dismissed;

[52] The Applicant is ordered to pay the costs.

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Prinsloo, AJ

Acting Judge of the Labour Court

Appearances:

Applicant:	Advocate H K Gunase
Instructed by:	Mhlanga Attorneys
First Respondent:	Attorney A P Shangase