Reportable

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D 884/2012

In the matter between:

DERIVCO (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**First Respondent**
HILDA GROBLER NO	**Second Respondent**
THINASAGREE MUDALY	
(Aka SAGREE SINGH)	**Third Respondent**

Heard: **18 February 2014**

Delivered: **17 July 2014**

Summary: **Review**

JUDGMENT

GUSH J

[1] In this matter, the applicant applies to review and set aside the award of the second respondent who concluded that the third respondent's dismissal was both procedurally and substantively unfair and ordered that the third respondent be reinstated retrospectively on the same terms and conditions at as those that prevailed at the time of her dismissal.

[2] Despite the lengthy record and substantial documentation, let alone surprising length of the award, (to which I will return later) the background to the matter is relatively straightforward.

[3] The third respondent had been employed, prior to her dismissal by the applicant as a "Bingo technical architect" earning some R100,000 per month. Simply put the applicant is involved in the development of software for online gaming and the third respondent was responsible for designing and developing such software and in particular for "Bingo" programme.

[4] On 24 August 2010, the third respondent was given notice that she was to be retrenched and consultations followed regarding the proposed retrenchment during September 2010.

[5] The applicant had in place an "information security policy" that provided violation of this policy may lead to "disciplinary action, including termination of employment" and that "... documentation must only be generated in hardcopy to the extent necessary to complete normal business operations."

[6] During this process, the applicant ascertained that the third respondent had printed a document relating to a programme in the process of being designed to replace the existing "Bingo" programme. This document had been e-mailed to the third respondent who whilst not directly involved in the development of the new programme, had developed the "old Bingo" programme and was the "interface person/conduit between the old and new programs".[1]

[7] The applicant was charged with misconduct relating to her copying of the document referred to above.

[1] Applicant's heads of argument.

[8] In response to the accusation of misconduct, the third respondent admitted that she had printed the document but denied that she had done so in contravention of the applicant's information security policy.

[9] The third respondent was found guilty at the disciplinary enquiry and dismissed. Dissatisfied with her dismissal, the third respondent referred a dispute to the first respondent who appointed the second respondent to arbitrate the dispute.

[10] It was common cause that this incident had occurred during the retrenchment process. However, the applicant and the third respondent differ markedly in the understanding of what exactly had transpired during the consultation process.

[11] It was not in dispute that following the section 189(3)[2] letter addressed to the third respondent, she had participated in consultations regarding the proposed retrenchment on 3, 6 and 9 September 2010.

[12] On 13 September 2010 at 17H00 the applicant advised the third respondent of her retrenchment with effect from 30 September 2010. The notification comprised a document headed "notice of retrenchment" but in essence, amounted to no more than a "settlement agreement" signed by the applicant that *inter alia* recorded that the applicant and the third respondent had consulted and wished to record in writing the settlement.

[13] There is no doubt that when presented with this agreement, the third respondent did not regard the consultation process as having been concluded and the third respondent did not sign the agreement.

[14] The applicant however appears at all material times to have regarded the process as having been completed and that the third respondent's employment would terminate on 30 September 2010.

[15] Various meetings took place thereafter during which, it appears, the applicant was only prepared to discuss the quantum of retrenchment payment set out in

[2] Labour Relations Act 66 of 1995.

the "settlement agreement". In a letter addressed to the third respondent's attorneys on 21 September 2010, the applicant's attorney's specifically records in that letter that "the applicant and the third respondent had "reached consensus ... on both a substantive and procedural aspects of [the third respondent's] dismissal" but somewhat surprisingly continues to invite further consultation on at least alternative employment by the applicant.[3] This letter also confirmed the termination of the third respondent's employment with effect from 30 September 2010 as did the so-called "notice of retrenchment".

[16] The issue relating to the alternative position that had been offered to the third respondent was according to the applicant's attorneys resolved on 27 September 2010 and in a letter on the same date, the attorneys confirmed the termination of the third respondent's employment on the 30th September 2010.

[17] In its founding affidavit, the applicant records it had ascertained on 28 September 2010 that the third respondent had "printed a substantial amount of confidential information" and that this had been brought to the applicant's attorneys' attention. The applicant's attorneys demanded the return of all such information and advice the third respondent that her access to applicant's premises had been barred with immediate effect.

[18] The applicant goes on to record that the third respondent denied having printed "substantial amount of confidential information", that she had printed documents in the ordinary course of the employment and would return all the documents in possession, confidential or otherwise, on 30 September 2010. According to the applicant, the third respondent did return a number of documents including the so-called "bingo" document on 30 September 2010 as she had undertaken to do.

[19] The applicant then records that on 1 October 2010, "in circumstances where the company elected not to proceed with her retrenchment",[4] the applicant suspended the third respondent and charged her with misconduct. It remains unexplained what transpired between 28 September 2010 and the date of

[3] Volume 1 of the bundle of documents pages 342 – 343.
[4] Founding affidavit para 36 page 12.

termination of the third respondents employment on 30 September 2010 that the averment, seemingly *ex post facto* her dismissal to "elect not to proceed with her retrenchment", and to proceed with a disciplinary enquiry.

[20] The applicant sets out in its application's grounds of review that:

a. the Commissioner failed to analyse the evidence as a whole;

b. the Commissioner's findings that [the third respondent] intended to review the bingo.net blueprint in preparation for a meeting on 28 September (in argument this was dealt with as an allegation that the second respondent had ascribed to the third respondent a defence she had not raised herself);

c. the Commissioner's rejection of Parbhoo's and Schei's evidence as opinion;

d. the Commissioner misdirected herself on the onus;

e. the Commissioner relied improperly on the transcript of the disciplinary enquiry; and

f. The commissioners finding on procedural unfairness.[5]

[21] These averments, the applicant avers constitutes misdirections on the part of the second respondent that resulted in the applicant being deprived of its right to a fair hearing.

[22] At the commencement of his argument, Mr Myburgh SC who appeared for the applicant, indicated that the applicant's case had been "pleaded and is indeed presented for argument as a classic process related review". He explained that the applicant's application was launched prior to the Supreme Court of Appeals decision in *Herholdt v Nedbank Ltd (Congress of Trade Unions of SA as amicus curiae).*[6]

[5] Pleadings pages 19 – 24.
[6] (2013) 34 ILJ 2795 (SCA).

[23] Before dealing with the merits of the applicant's review application, Mr Myburgh suggested that the Court was not bound by the decision by the SCA in *Herholdt* (and the subsequent decision by the Labour Appeal Court in *Goldfields*[7]) in that it was "bad law".

[24] In essence, the applicant argued that the decision in *Herholdt* was based on an approach set out in the judgment of the honourable Cachalia and Wallis JJA. In the judgment, Cachalia and Wallis JJA rejected the so-called process related approach namely

> The LAC expressed it thus:
>
> `Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined.' [8]

[25] Cachalia and Wallis JJA proceeded to conclude that

> The origin of this approach is a dictum in the minority judgment of Ngcobo J in *Sidumo*, where he said in the context of a discussion of s 145(2) of the LRA that:
>
> `Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.[9]

And

[7] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).
[8] At paragraph 16.
[9] At paragraph 18.

> It is unnecessary to analyse this *dictum* further because it results in an approach to the review of CCMA arbitration awards that is contrary to that endorsed by the majority judgment in *Sidumo.* This is apparent from examining the manner in which the two judgments dealt with the facts of that case. Ngcobo J analysed the award of the arbitrator and held that, although a little terse, it could be construed in a way that did not involve the arbitrator in making a material error in regard to the facts. By contrast the majority held that the arbitrator had erred in certain respects in making his award, in particular in holding that the relationship of trust between employer and employee had not been breached, but held that it was nonetheless an award that a reasonable decision-maker could make in the light of all the facts. In other words the approach of the majority was clearly inconsistent with the approach suggested by Ngcobo J. As we, and all courts, are bound by the majority judgment the development of the notion of latent irregularity, in the sense that it has assumed in the labour courts, cannot be accepted.[10]

[26] This approach, it was contended, ignored the decision of the Constitutional Court in the matter of *Commercial Workers Union of SA v Tao Ying Metal Industries and Other.*[11] The applicant argued that in the *Tao Ying Metals* case, the Constitutional Court had endorsed the honourable Ngcobo J's minority approach in *Sidumo and Another v Rustenburg Platinum mInes and Others* 2008 (2) 24 SA (CC) and as *Tao Ying Metal* was a judgment of the Constitutional Court it was binding on this Court despite the judgment of the Supreme Court of Appeal in *Herholdt* and the judgment of the LAC in *Goldfields*.

[27] It is necessary to take into account the context in which the honourable Ngcobo J dealt with the issue or question in *Tao Ying Metal.* The Constitutional Court was faced with an application for leave to appeal. In dealing with the application, the court had to consider *inter-alia* whether the application raised a constitutional matter.

[28] In determining this issue, the court held that "the question whether the commissioner adjudicated the real dispute between the parties is an issue

[10] At paragraph 20.
[11] 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC).

connected with a decision on a constitutional matter".[12] This, the court held that the enquiry required the Commissioner to firstly determine what the dispute between the parties was and secondly to apply her mind to that dispute.

[29] Dealing with the latter question, the honourable Ngcobo J, having considered what the dispute between the parties was, proceeded to consider whether the arbitrator "applied her mind to this dispute".[13]

[30] Under the heading

> *'Did the commissioner apply her mind to the question whether the exemptions had expired?' [14]*

the honourable Ngcobo J said the following:

> 'It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside.'[15]

and reiterated his observations in his minority judgment in *Sidumo*.[16]

[31] The context in which Ngcobo J to dealt with the is issue in *Tao Ying Metal*: did the commissioner applied her mind to the question of whether "the exemptions existed" was in my view considered in the context of determining whether the commissioner had applied her mind to **the issue in dispute.** It is necessary to distinguish between this and the test expressed by Ngcobo J in Sidumo viz a test that involves determining whether a commissioner ... appl[ied] his or her mind to **the issues that are material to the determination of the dispute."**

[32] In order to disregard the SCA judgment in *Herholdt* and the LAC decision in *Goldfields,* I am required conclude that that portion of the judgment in *Tao*

[12] At page 2481.
[13] At page 2484.
[14] At page 2485.
[15] At page 2486.
[16] See para 25 above.

Ying Metal is not *obiter* but is a binding decision on the test to be applied when reviewing awards of the CCMA or a Bargaining Council.

[33] The court concluded that it was clear that the Commissioner in the *Tao Ying Metal* matter clearly applied her mind to the dispute. That enquiry went no further. I am of the view that Ngcobo J's judgment in does not constitute a binding precedent for what the applicant referred to as the process related test on review[17], neither is it a judgment that entitles this court to disregard the decisions of the Supreme Court of Appeal's decision in *Herholdt,* or the LAC in *Goldfields.*

[34] Accordingly, the test to be applied in determining the applicant's application is as was set out in the SCA decision in *Herholdt* and the LAC decision in *Goldfields*.

[35] By the applicant's own admission, the basis of its review application was the test set aside by the Supreme Court of Appeal. That being so the applicant does not rely on an averment that award is defective within one of the grounds in s 145(2)(a) of the LRA or that the arbitrator misconceived the nature of the inquiry or arrived at an unreasonable result. The applicant's grounds of review as set out in the founding affidavit are that the second respondent committed misdirections which resulted in the applicant being deprived of its right to a fair hearing and that had the second respondent not so misdirected herself, she would have come to a different conclusion.

[36] The award the applicant seeks to set aside comprises some 70 pages. It is inconceivable why the second respondent found it necessary not only to record her award in such length but why he appeared not to find time to edit the award and ensure that it followed a logical progression. To paraphrase Mark Twain it appears that the second respondent "did not have time to write a short [award], so [she] wrote a long one instead".

[37] The test on review as set out by the LAC in the *Goldfields* case is:

[17] *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC).

> 'A review 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 which was reasonable to justify the decisions he or she arrived at.'[18]

[38] It is clear from the pleadings and the second respondent's award that the issue in question was whether the third respondent was fairly dismissed because she was guilty of gross misconduct in that, in breach of the applicant's information security policy she "printed documents containing confidential information which was not necessary to complete normal business operations"; removed confidential documents from the applicant's premises, failed to return confidential documents to the applicant and failed to store confidential documents in locked drawers cabinets or rooms designed for that purpose.[19] Despite the nature of the award, it is neither argued nor can it be said that the second respondent misconceived the nature of the inquiry.

[39] Some 66 pages later after an unnecessarily convoluted analysis of the evidence and argument, the second respondent concluded that on a balance of probabilities the applicant had failed to establish that the third respondent was guilty of the misconduct and that accordingly the dismissal was substantively unfair.

[40] In the founding affidavit the applicant suggests under the heading grounds of review:

a. That the second respondent failed to analyse the evidence as a whole. Despite the nature of the award, it is clear that the second respondent understood the dispute; considered the evidence and concluded that the applicant had not discharged the *onus* of establishing that there was a fair reason for the dismissal;

b. The second respondent rejected the evidence of the applicant's witnesses as being opinion. I am not persuaded that the manner in

[18] Supra para 16.
[19] Award para 13 page 1038.

which the second respondent dealt with this evidence renders the award reviewable. The second respondent given the nature of the alleged misconduct was required to determine whether the applicant had discharged the onus of proving the third respondents guilt. In doing so the second respondent was obliged to assess the evidence. The fact that the second respondent did not regard the applicant's witnesses of having established the third respondents guilt is based on her evaluation of their evidence;

c. The second respondent misdirected herself on the *onus*. It is clear from the award that in the application of the *onus,* the second respondent assess whether the applicant had established on a balance of probabilities the third respondent's guilt. It is difficult to conceive on what basis it can be alleged that this constituted a reviewable irregularity or resulted in an award that a reasonable decision-maker could not come to. The onus was not on the third respondent to establish her "innocence" or that her copying of the documents did not constitute misconduct. The essence of the misconduct required the applicant to establish that the third respondent had copied the documents in circumstances that were not justified. This the second respondent concluded had not been established ;

d. The second respondent relied improperly on the transcript of the disciplinary enquiry. This issue cannot be said to have rendered the second respondent's award reviewable.

[41] What is however apparent from the above grounds of review is that they are perilously close to an approach commensurate with an appeal.

[42] The applicant's application to review the second respondent's award must be considered applying the principle set out by the LAC in the *Goldfields* case viz:

> 'A review 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 which was reasonable to justify the decisions he or she arrived at.[20]

[43] I am satisfied that the second respondent:

a. Considered the principal issue before her;

b. Evaluated the facts and the evidence presented at the hearing; and

c. Concluded that the applicant had failed to discharge the onus of proving that the reason for dismissing the third respondent was fair.

[44] The award, albeit long and confusingly structured, is sufficiently lucid to justify concluding that the conclusion to which the second respondent came is reasonable and that cannot be said to one to which a reasonable arbitrator could not reach.

[45] Specifically taking into account and considering the (substantial) record of the arbitration, I am satisfied that on a consideration of the totality of the evidence that the decision of the second respondent that the applicant failed to discharge the onus of proving that the third respondent's dismissal was fair is not one that can be said to not be a decision to which a reasonable arbitrator could come.

[46] The applicant takes issue with the second respondent's finding on procedural unfairness. It is in the circumstances unnecessary for me to deal with this issue as it has no bearing on the outcome of the applicant's application.

[47] In conclusion and for the reasons set out above, I am not persuaded that the award of the second respondent is reviewable.

[48] At the commencement of the proceedings, Mr Myburgh raised the issue of the applicant's application to amend its notice of motion. The application was for the addition of the following paragraph 2A of the paragraph 2 of the notice of motion:

[20] Goldfields para 16 supra

'2A in the event of the above honourable court refusing the relief sought by the applicant in paragraphs 1 and 2 above, the applicant seeks an order in the following terms:

(i) declaring that the applicant has complied with, alternatively substantially complied with, paragraph 225.2 of the arbitration award under case number KNDB 12813/10 dated 14 August 2012;

(ii) declaring accordingly, that the third respondent by refusing to tender her services to the applicant pursuant to such tender of reinstatement, has waived her rights to the relief granted in paragraph 225.2 of the arbitration award;

(iii) declaring that the applicant has complied with, alternatively substantially complied with, paragraph 225.2 of the arbitration award dated 14 August 2012;

(iv) Accordingly, the applicant is directed to pay to the third respondent retrospective remuneration calculated from the date of her dismissal, being 13 October 2010, to the date of the applicants tender of reinstatement, being 22 October 2012, alternatively, 25 October 2012, further alternatively 20 November 2012, alternatively 27 November 2012;

(v) in the alternative to paragraphs (iii) and (iv) above, the period of delay occasioned by the third respondent in respect of the failure to file her answering affidavit timeously guy collective and 31 January 2013 to date of filing thereof, is to be excluded from the calculation of the period of back pay payable in terms of the arbitration award.'

[49] During the course of the hearing, it was agreed between the parties that as this issue was dependent on the outcome of the applicant's review and related to the possible consequences and implications of the award and because a consideration of the issues raised in the application for amendment may well lead to a dispute of fact that in the event of the applicant's application being dismissed the applicant would be entitled to enroll this issue for consideration by the court.

[50] There is no reason in law or in fairness why costs should not follow the result.

[51] In the circumstances, I make the following order:

a. the applicant's application is dismissed with costs;

b. The applicant is given leave to enrol, for consideration by this Court, the applicant's application for the amendment of the relief consequent upon the dismissal of the applicant's application to review the award of the second respondent. The enrolment of this matter is to be given precedence and the parties are directed to approach the registrar to obtain a date of the hearing of the applicant's application.

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D H Gush

Judge of the labour Court of South Africa

APPEARANCES

FOR THE APPLICANT:	A Myburgh SC
	Instructed by Norton Rose Fulbright
FOR THE THIRD RESPONDENT:	M Pillemer SC
	Assisted by L Naidoo
	Instructed by Jay Reddy Attorneys