

**IN THE LABOUR COURT OF SOUTH AFRICA**  
***HELD IN JOHANNESBURG***

**CASE NO.: JR 712/08**

In the matter between:

**LEWIS STORES**

Applicant

and

**CCMA**

First Respondent

**COMMISSIONER M RAMOTSHELA**

Second Respondent

**MATOME SAMUEL RAMOLIFO**

Third Respondent

Date of application: 11 August 2011

Date of reasons: 13 September 2011

---

**REASONS FOR JUDGMENT**

---

**VAN NIEKERK J**

**Introduction**

[1] On 11 August 2011, I granted an order reviewing and setting aside the an arbitration award made by the second respondent (the commissioner) on 6 March 2008. In his award, the commissioner found that the dismissal of the third respondent ("Ramolifo") was substantively unfair and ordered the applicant to reinstate him with full retrospective effect.

[2] The applicant has subsequently drawn to my attention the fact that in the notice of motion, the applicant sought the substitution of the award, and requested variation of the order to reflect that substitution. These are my brief reasons for the order made on 11 August and its variation.

### **The arbitration award**

[3] Ramolifo had been dismissed for in February 2007 after being found guilty of dishonesty by failing to issue receipts for money received, failing to deposit monies received, creating fictitious transactions and diverting goods from one customer to another. In his award, the commissioner first dealt with the issue of Ramolifo's diverting of the goods to Nkanyani's address. He found that the applicant had failed to prove that Ramolifo had committed any misconduct in this regard. With regard to Ramolifo's failure to comply with its policies and procedures relating to sales, the commissioner found that there was no fictitious deal created by Ramolifo and that therefore the applicant had failed to prove that Ramolifo was guilty of gross misconduct. For these reasons, the commissioner found that the applicant had failed to prove that there existed any valid reason for Ramolifo's dismissal and that therefore Ramolifo's dismissal was substantively unfair. He therefore ordered the applicant to reinstate him with full retrospective effect.

### **The test on review**

[4] It is now well-established that this court is entitled to set aside an arbitration award if and only if the commissioner's decision falls outside of a band of decisions to which no reasonable person could come on the available evidence (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC)). At paragraph 110 of the judgment, the test is set out thus:

*“To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is*

*now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."*

[5] At paragraph 268 of the judgment, Ngcobo J (as he then was) goes on to state:

*"It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner's conduct prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA and the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."*

[6] It follows from this authority that the *Sidumo* test, read in conjunction with section 145 of the Act, makes provision for the setting aside on review of arbitration awards for both result-based defects, as well as for process-related irregularities. This much has been confirmed by the Labour Appeal Court in some of its post-*Sidumo* judgments. Examples in this regard include *Ellerine Holdings Ltd v CCMA & others* (2008) 29 ILJ 2899 (LAC) and *Maepe v CCMA & others* [2008] 8 BLLR 723 (LAC). In *Ellerine Holdings*, Davis JA had occasion to expand on the *Sidumo* test in the following terms at 2903F:

*"...When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected or where there was not a full opportunity for*

*an examination of all aspects of the case, then there is no gross irregularity..."*

- [7] In *Maepe*, Zondo JP, also expanding on the *Sidumo* test, confirmed that a reviewable irregularity is committed where a commissioner fails to have regard to materially relevant factors. At paragraph 11 of his judgment, the Judge President states:

*"The answer to this argument is that where the law is that a commissioner must take into account a certain factor in deciding a certain question, he is obliged to take that factor into account even if none of the parties asks him to take it into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account. If the factor was a critical one and he did not take it into account, he may well have committed a gross irregularity justifying the reviewing and setting aside of his award."*

**See also: Adv A Myburgh SC "Reviewing the Review Test: Recent Judgments & Developments" paper delivered to SASLAW Western Cape 24 May 2011, referring to *Sasol Mining (Pty) Ltd v Ngeleni & others* [2011] 4 BLLR 404 (LC) and *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC).**

### **Grounds for review**

- [8] The applicant contends that the commissioner's award is reviewable in because, on the one hand, his decision is a one which a reasonable decision-maker could not have reached, having regard to the evidence before him and on the other hand, the commissioner committed numerous gross irregularities in the conduct of the arbitration proceedings. In particular, the applicant submits that the commissioner committed a reviewable irregularity in finding that, as Ramolifo had no authority to instruct Monyela to deliver the goods at Nkanyani's house in Joppie Village instead of to Modika in Marirong Village,

the applicant failed to prove that he had committed any misconduct in relation to this charge. The applicant contends that the commissioner's finding clearly demonstrates that he failed entirely to objectively determine what the issue before him was, in that the issue was whether or not Ramolifo had issued an instruction to Monyela to deliver the goods to Joppie Village instead of Marirong Village. Whether Ramolifo had authority to do so, the applicant submits, was completely irrelevant. Ramolifo was charged with issuing the instruction to Monyela, irrespective of whether or not he was authorised to do so, and the commissioner was required to make a finding on that question. Once he made a finding on that question, he was required to make a finding on whether that instruction was in breach of the applicant's policies. The commissioner failed entirely to make a finding on either of these questions.

## **Analysis**

[9] A perusal of the record indicates that the commissioner failed entirely to consider the following:

1. Leshabane's credible and uncontested evidence that during his investigation, Monyela had advised him that Ramolifo had approached him and given him the note with the amended delivery address for the two items;
2. Monyelo's credible and consistent evidence that Ramolifo had approached him and given him written directions to Nkanyani's address and advised him that he had bought the items as a present and that they must therefore be delivered to Nkanyani's address and not to Modika's address;
3. Grobler's uncontested and undisputed evidence that it was Ramolifo's handwriting.;
4. The fact that at no stage during his evidence on chief or his cross-examination of Grobler did Ramolifo dispute Grobler's evidence that it was his handwriting in the note;
5. When asked under cross-examination why he had not disputed Grobler's evidence regarding the fact that it was his handwriting in the amended delivery note the fact that Ramolifo could not explain, except

to state that the question had not been directed to him, and that the Applicant's policy was that deliveries be made on the basis of printed documents and not handwritten ones;

6. The fact that Ramolifo had admitted at the disciplinary enquiry that he had written the amended delivery note for Monyela and then changed his version at arbitration by denying any knowledge of the handwritten note.
7. The commissioner himself found that the goods had been delivered by Monyela to Joppie Village. The only plausible explanation for this fact is that Ramolifo did indeed persuade Monyela to divert the goods from Modika's address in Marirong Village to Nkanyani's address in Joppie Village.
8. Ramolifo's version that Monyela had lied about the fact that Ramolifo had given him the amended delivery details as he wanted to "*p/ot*" against him was entirely improbable as Ramolifo had led no evidence to substantiate this claim.
9. Monyela had nothing to gain by attending at a stranger's home to have them (Nkanyani) sign a delivery note and a hand written note with their address on it and then approaching Grobler and saying that Ramolifo had given him an amended address.
10. Monyela had approached van der Heever and Grobler to advise them that he was worried about the fact that the goods had been delivered to a different address to that on the printed delivery note.
11. Nkanyani's explanation that she had simply signed the delivery documents for no apparent reason and then did not receive the goods in return is simply implausible, as is her version that she had signed a blank page when she had signed.
12. Grobler's undisputed evidence that it was against the Applicant's policy to allow goods to be bought by one person and delivered to another.

[10] Bearing this evidence and these factors in mind, the only reasonable conclusion that the commissioner could have come to was that Ramolifo did instruct Monyela to deliver the goods to Nkanyani in Joppie Village instead of

to Modika in Marirong Village. In failing to take into account and in ignoring the material evidence and factors that he was required to take into account, in my view, the commissioner committing a gross irregularity in the arbitration proceedings and reached a conclusion that a reasonable decision-maker could not have reached. His award therefore falls to be reviewed and set aside.

[11] In any event, the award is reviewable on the basis that the commissioner committed a reviewable irregularity in concluding that, as Grobler and Leshabane gave contradicting evidence, that clearly indicated that the second deal was not fictitious and that the only valid complaint regarding the deal was that the sale transaction was not effected in accordance with the applicant's policies and procedures. It was not enough for the commissioner to find that their evidence was contradictory. He had to assess their evidence and make a finding on their credibility. He failed to do so. Furthermore, he also failed to provide reasons as to why he concluded that Grobler and Leshabane gave contradictory evidence which showed that there was no fictitious deal, and how their allegedly contradictory evidence showed that there was no fictitious deal. The inescapable inference is that he did not apply his mind to what was a key issue i.e. that the Applicant's policies and procedures required that the person buying stock from the Applicant must be present during the creation of a deal on the Applicant's system, and that the goods must be delivered to the person who buys them. Leshabane led uncontested and clear evidence regarding the requirements of the Applicant when a deal is created and Grobler confirmed that the Applicant's policy did not allow one customer to buy goods for another.

[12] Furthermore, the commissioner ignored and/or failed to take into account the fact that both Modika's and Ramolifo's evidence relating to why there were two separate deals on the same day were implausible and improbable. He ought also to have treated Modika's evidence with caution as she was Ramolifo's sister and would have had an interest in lying on his behalf in an attempt to prevent him from losing his job. Under cross-examination, Ramolifo stated that he had created two different deals for the

sale of the sewing machine, and for the sales of the computer desk and the dining room suite on the instruction of the customer (Modika) and the Branch Manager (Grobler), as Modika had stated that she did not "*want the two things together and one thing she want a separate thing so that she can force to pay because the other thing she want the.. the um... it before the time*".

Modika testified that before she had been taken to the cashiers, she had told the salesperson (Gladys) that she must not combine the two items in one account (that is, the sewing machine, and the computer desk and dining room suite).

[13] The balance of probabilities favours the Applicant's version that the reason which Ramolifo had created two separate deals was that Modika had left the store before the first deal for the sewing machine was completed and Ramolifo had created a second deal on her account for the computer desk and dining room suite for Nkanyani without her knowledge and consent. This version is borne out by Grobler's and Mahasha's consistent and credible testimony that when asked to sign the contract relating to the purchase of the computer desk and dining room suite, Modika had refused to do so on the basis that she had not bought the items. In addition, Ramolifo himself admitted under cross-examination that he did not have a signed order form when he created the second deal, and that such a form is required in terms of the Applicant's policy in order for a deal to be proper. Ramolifo's conduct directly contravened the terms of the Applicant's sales policy and in finding that the Applicant failed to establish clearly what the rule or standard was that Ramolifo contravened, the Commissioner failed entirely to consider this material evidence before him. This constitutes a reviewable irregularity.

[14] For the above reasons, I was satisfied that the commissioner committed a gross irregularity in the conduct of the proceedings and that, in the circumstances, his award falls to be reviewed and set aside. For these reasons, I made the order that I did on 12 August 2011.



[15] Turning to the request for a variation of the order, the substitution of the commissioner's award is specifically contemplated by the notice of motion. Substitution is a discretionary remedy, and in terms of s 165 it extends to the variation of an order to the extent of any ambiguity, obvious error or omission. In the present circumstances, I take the following into account. The applicant was dismissed in February 2007, more than 4 years ago. The record of the arbitration hearing runs into some 200 pages, and nothing more, it would appear, needs to be said concerning the applicant's dismissal or the circumstances surrounding the dismissal. The court is therefore in a position to substitute the commissioner's finding and to fail to do so would not serve the imperatives of expeditious dispute resolution established by the LRA.

In terms of s 165 of the LRA accordingly vary the order granted on 11 August 2011 to read as follows:

1. The arbitration award issued by the first respondent under case no LP 1184-07 on 21 February 2008 is reviewed and set aside
2. The commissioner's award is substituted by the following:  
"The dismissal of the applicant was substantively and procedurally unfair."
3. The third respondent is to pay the costs of these proceedings.

**ANDRÉ VAN NIEKERK**  
**JUDGE OF THE LABOUR COURT**

Appearances

For the applicant: Ms M Edwards: PVWM Attorneys

For the respondent: No appearance