**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Reportable

Case no: JA 06/2019

In the matter between:

**SECURITAS SPECIALISED**

**SERVICES (PTY) LTD** **Appellant**

and

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION** **First Respondent**

**KHUMALO, MDUZI N.O** **Second Respondent**

**KUNGIWE AMALGAMATED**

**WORKERS UNION obo**

**PEHEME EDWARD** **Third Respondent**

**Heard:** **06 November 2020**

**Delivered:** **22 January 2021**

**Summary: CCMA arbitration proceedings---Decisions and awards of commissioners---Test for review---Restatement of test set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)----Commissioner misdirection on procedural fairness of dismissal immaterial for the determination of substantive fairness of dismissal----Award standing**

**scrutiny if despite procedural misdirection by commission award falling within ban of reasonableness.**

**CCMA arbitration proceedings---Decisions and awards of commissioners---Test for review--- Review test distincts from that of appeal---Review test focusing on whether outcome reasonable and appeal whether decision right or wrong.**

**Coram: Davis JA, Murphy AJA and Kathree-Setiloane AJA**

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**JUDGMENT**

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KATHREE-SETILOANE AJA

[1] This is an appeal against the judgment and order of the Labour Court (Mahosi J) reviewing and setting aside the arbitration award of the second respondent ("arbitrator") made under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration ("CCMA") in which he found that the employee's dismissal was procedurally and substantively unfair. The appeal lies with leave of this Court.

Background

[2] The appellant is a private security company. Prior to his dismissal, Mr Edward Pheme ("employee") was employed as a Contracts Manager by the appellant for a period of sixteen years. His duties comprised providing security services to the appellant's clients and managing a team of security officers who reported directly to him.

[3] Arising from allegations of misconduct against him that included (a) violence and threats of violence; (b) bringing the appellant's name into disrepute; (c) gross negligence in the performance of his duties; (d) unauthorised absenteeism from the workplace; and (e) failure to follow a lawful and reasonable instruction, the employee was charged and given notice to attend a disciplinary hearing.

[4] The disciplinary hearing took place on 21 July 2011. The employee sought a postponement as he was unrepresented and needed time to prepare. Ms. Fritz, the chairperson of the inquiry postponed the hearing to 26 July 2011. On resumption of the hearing, the employee arrived with his representative, Mr James Hlatswayo (a union official). Since Mr Hltaswayo was neither a shop-steward or co-worker of the employee, he was not permitted to represent him. The employee, therefore, represented himself at the disciplinary inquiry.

[5] The appellant called three witnesses to prove the charges of misconduct against the employee. The employee cross-examined these witnesses but refused to testify. Having considered the evidence before her, the chairperson found the employee guilty of misconduct and recommended his dismissal.

[6] The employee did not appeal the decision and was dismissed by the appellant on 12 August 2011.

The Arbitration Award

[7] The employee referred an unfair dismissal dispute to the CCMA. He challenged both the substantive and procedural fairness of his dismissal.

[8] In relation to the procedural fairness of the dismissal, the arbitrator found that the appellant's refusal to allow Mr Hlatswayo to represent the employee prejudiced him in his ability to present his case. He, accordingly, found the employee's dismissal to be procedurally unfair.

[9] The primary charge concerned the allegation that the employee, at a counselling session with his Manager, Mr Joel Skosana ("Mr Skosana"), informed him that he (the employee) had entered the workplace with his personal firearm. According to the appellant, this remark was directed at his Divisional Manager, Mr Johan Myburgh ("Mr Myburgh) with whom he had a bad relationship and "could result in a life-threatening situation". In relation to this charge, the arbitrator held as follows:

> 'There are two mutually destructive versions on this point. The concern I have with the [appellant's] version is that Mr Skosana did not see the firearm, and relies on the word of the [employee], who denies ever making such utterances.

> This is a serious contention and Mr Skosana as a Senior Manager had the responsibility to investigate the [employee's] word to establish the truthfulness of the statement. It would be unreasonable to draw adverse inferences from the allegation or the manner in which Mr Skosana claimed to have reacted to the information. The claims he makes in his affidavit that the mention of a gun was a threat directed at Myburgh because of their strange relationship is farfetched in my view . The employee made no threat in my reading of the affidavit. If anything he sought to be transferred away from Myburgh and surely that cannot be construed as a threat. The [appellant] has failed to substantiate this claim in my view. '

[10] As concerning the charge which related to the employee "bringing the company's name into disrepute" by rendering poor services to a client which resulted in a negative perception of the standard of services which the appellant delivered, the arbitrator found that the employee was expected to visit the clients that he was in charge of once a month, but there were clients whom he had not visited for a period exceeding six months. The arbitrator found the employee's conduct to be unacceptable because he was aware of the service level agreement which required him to host at least one meeting per month with each client, yet he failed to do for a period exceeding six months.

[11] The employee was also charged with unauthorised absence from the work for failing to: (a) provide the appellant with a sicknote (as per company policy and procedures) for his absence from work on 4, 5, and 11 to 15 July 2011; and (b) follow the instructions of Mr Skosana who directed him to provide a sick note for the days on which he was absent from work. The arbitrator found in relation to the employee's purported failure to produce a sick note for his absence from work on 4 and 5 July 2011, that the appellant had failed to establish this. However, in relation to the employee's alleged failure to provide Mr Skosana with a sick note for his absence from work on 11 to 15 July 2011, the arbitrator found that the employee had transgressed Mr Skosana's instruction to provide him with a sick note. He, nonetheless, found that the reason that the employee advanced for not doing so was reasonable, as he had informed Mr Skosana that he would hand in the sick note on his return to work which he did, but neither Mr Skosana nor Mr Myburgh was prepared to accept it.

[12] In relation to the charge that the employee was grossly negligent for failing to process internal and external company documents handed to him by his subordinates relating to leave, sick notes, pay queries, loan forms etc, the arbitrator found that the appellant failed to prove that these documents were handed to the employee.

[13] In relation to the employee's purported failure to communicate his daily operational and administrative duties to Mr Skosana whilst on sick leave, the arbitrator found that this charge was unsustainable because Mr Skosana was in constant contact with the employee during his sick leave to demand sick notes, and would have discussed the employee's operational and administrative activities with him at the same time.

[14] On the charge of failing to report to the workplace on 20 July 2011 at 0900, as instructed by Mr Skosana, the arbitrator found that the employee's failure to obey the instruction constituted an act of misconduct. Although he found the employee guilty of this charge, he considered it to be not sufficiently serious to warrant dismissal.

[15] The penultimate charge related to the employee's purported failure to carry out standing instructions by failing to: (a) communicate his daily operational and administrative duties to Mr Skosana while absent from work; and (b) entering the company premises with a gun. In relation to the latter, the arbitrator confirmed his earlier finding that there was no evidence to establish that the employee had brought a gun onto the company premises.

[16] In relation to the last charge which concerned the employee's failure to contact Mr Skosana at 08h00 every day while on suspension, the arbitrator found that the appellant had confiscated the employee's starter pack which he had used to communicate with the appellant, thereby leaving him without the means to contact Mr Skosana.

**[17]** On the question of the appropriateness of sanction relating to the finding that the employee failed to visit clients regularly, the arbitrator held that the employee was not the only one to transgress this rule. He held that because the "appellant had adopted progressive discipline in relation to other

transgressors, it should do the same in respect of the employee". The arbitrator, accordingly, concluded that retrospective reinstatement of the employee was the appropriate order and that a written warning for his transgression would suffice.

The Judgment of the Labour Court

[18] The Labour Court dismissed the review application. In doing so it reasoned as follows:

> 'It is apparent that the arbitrator dealt exhaustively with the evidence before him and considered all the factors prior to coming to the conclusion that the employee's dismissal was procedurally and substantively unfair. Taking into consideration the depth of his treatment of the evidence, it cannot be said that he committed misconduct in relation to his duties as an arbitrator, a gross irregularity in the conduct of the arbitration proceedings, or that he exceeded his powers. As such, it is my view that the decision of the arbitrator, in this case, is not a decision that a reasonable decision-maker could not reach. It is a reasonable decision that is justified by the evidence that was placed before him. There is, therefore, no reason for this court to interfere with the award.'

Test for review

[19] The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?"[1] To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[2]

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[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 110.
[2] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] BLLR 1074 (SCA) paras 12 and 13.

[20] This Court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision-maker could make.'[3]

Analysis

[21] The appellant raised numerous grounds of review against the award which included that the arbitrator: (a) improperly interrupted the evidence presented by the appellant's witnesses and in particular that of Ms. Fritz, by rushing their evidence and cutting them short; (b) failed to apply his mind to, and misconstrued, the evidence led at the arbitration hearing; (c) was swayed by evidence unrelated to the matter; (d) failed to appreciate or attach any weight to the inconsistencies, contradictions and wholly improbable versions placed before him by the employee; and (e) in finding that the dismissal was procedurally unfair, ignored certain evidence led at the arbitration hearing.

[22] In relation to the first ground of review, the appellant argues that it is evident from the conduct of the arbitrator towards Ms. Fritz (the chairperson of the disciplinary inquiry) that the arbitrator was biased towards her as well as to other witnesses of the appellant. I set out below the exchange between the arbitrator and Ms. Fritz which the appellant contends illustrates that the arbitrator was biased towards Ms. Fritz (and other witnesses of the appellant) who testified on behalf of the employee:

> 'COMMISSIONER: Ms. Lancaster, … Yes.
>
> I want you to speak to your witness as to answer questions and…(intervenes) --- I am answering questions (indistinct) appropriately. --- I am sorry, but … (intervenes)
>
> and
>
> COMMISSIONER: Let us answer questions that are put to you. If you do not know, say you do not know and … (intervenes) ---

[3] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at paras 17 and 18.

> Which is what I said …(intervenes) ---
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> Ma'am, … (intervenes) --- I have not examined …(intervenes)
>
> I have no intention of entering into a dialogue with you. I am just trying to reprimand you, that please your performance in this hearing is not appropriate. Continue. '

[23] I consider the appellant's complaint to be completely unsustainable. Although the use of the word "reprimand" by the arbitrator is regrettable, it is clear when read, in context, that the arbitrator merely cautioned Ms. Fritz for not answering the questions put to her directly and for talking back at him. There is absolutely no indication in this quoted passage nor in the record as a whole which indicates that the arbitrator was biased toward Ms. Fritz or any other witnesses of the appellant. In fact, the record shows that where the arbitrator believed that the appellant's witnesses (including Ms. Fritz) were being asked unfair questions, he intervened to protect them. Accordingly, the arbitrator was not biased toward Ms. Fritz or any of the other witnesses of the appellant. Nor did his conduct toward them create the perception of bias. The Labour Court, therefore, correctly dismissed the appellant's first ground of review on the basis that there is no indication on the record that there was undue interference by the arbitrator in the arbitration proceedings or in the testimony of Ms. Fritz.

[24] There is also no merit in the appellant's second ground of review. That the arbitrator inaccurately recorded the evidence of Ms. Fritz, in relation to the question of whether there was a policy which did not permit employees to be represented by officials of the union, is not material to the outcome of the arbitrator's award which is a decision that a reasonable decision-maker would have come to on the totality of the evidence before him or her. Nor for that matter is it material to the outcome of the award that the arbitrator may have erroneously recorded, in the award, that Ms. Shirindi made the decision to exclude Mr Hlatshwayo from representing the employee at the disciplinary hearing, when in fact it was Ms. Fritz who made that decision. Absent the appellant demonstrating that these errors in the recordal of the evidence were material to the outcome of the award, in the sense of rendering the decision

unreasonable, the Labour Court was correct in attaching no weight to this ground of review.

[25] Furthermore, and to the extent that this ground of review related to the appellant's contention that the employee's dismissal was not procedurally unfair as found by the arbitrator, a finding to that effect, by the Labour Court, would have had no impact on the overall outcome of the arbitration award that the employee's dismissal is substantively unfair. In other words, even if the arbitrator was wrong on this aspect, it would have made no difference to the outcome of the award which is one that a reasonable arbitrator would have arrived at on the evidence before him or her.

[26] Related to this ground of review, was the further ground raised in the Labour Court, that in arriving at the conclusion that the dismissal of the employee was procedurally unfair, the arbitrator ignored the evidence of the appellant's witnesses, including Ms.Shirindi that:

(a) the appellant allowed one of its employees, namely Prince, outside representation as he had deceived the appellant as to the true identity of his representative;

(b) the charge sheet stated that "in terms of the Group Disciplinary Procedure you (the employee) are entitled to be represented or assisted by a Trade Union Representative (Shop Steward) or by a co-worker of your choice;

(c) The concession by the employee that he had read the charge sheet;

(d) Ms. Shirindi's testimony that she objected to Mr Hlatswayo representing the employee as he was not a shop steward.

[27] I reiterate, that even if the arbitrator, on the evidence, arrived at a completely wrong conclusion on the question of the procedural fairness of the dismissal, this would make no difference to the outcome of the arbitration award which is that the employee's dismissal was substantively unfair.

[28] The third ground of review advanced by the appellant is that the arbitrator was swayed by evidence unrelated to the matter at hand that the employee's former manager (Mr Myburgh) referred to him as a "kaffir". Although the arbitrator summarised the employee's evidence at the arbitration hearing which was that "charge 1 related to his relationship with one Myburgh who had previously called him a kaffir and that the [appellant] had failed to address this issue….", there is no suggestion in the award that the arbitrator placed any weight on this evidence in arriving at the decision that the employee's dismissal is substantively unfair. Even if the arbitrator did so, it has no impact of the outcome of the award. The Labour Court was accordingly correct in dismissing this ground of review out of hand.

[29] There is also no substance in the contention that the Labour Court erred in confirming the finding of the arbitrator that there was no evidence to support the charge that the employee had told Mr Skosana (at a counselling session) that he had brought a firearm to the workplace which he intended to to use on Mr Myburgh. Except for the allegation to this effect which was contained in an affidavit made by Mr Skosana, which the employee had categorically denied, the appellant led no evidence to support it. As held by the arbitrator, this is a serious allegation the truthfulness of which the appellant bore the responsibility to investigate. There was, however, no evidence led of such an investigation having been carried out. Nor, for that matter, did the appellant consider the purported transgression sufficiently serious to provide the employee with a written warning.

[30] A further ground of review related to the arbitrator's finding that the sanction of dismissal was too harsh in light of the fact that the appellant adopted progressive discipline in respect of all other transgressors who failed to attend regular meetings with clients. The Labour Court found as follows on this aspect:

> ' In this regard, the arbitrator found that the employee failed to visit clients as required in terms of his contract. However, the arbitrator assessed the appropriateness of the sanction and found dismissal to be too harsh in light of the fact that the [appellant] adopted progressive discipline in respect to all transgressors. As a result, he concluded that a written warning for the

> employee's transgression would be appropriate. It is evident that the arbitrator considered the evidence led by the appellant's witnesses.'

[31] The appellant contends that the Labour Court erred in finding that the arbitrator considered the evidence led by the appellant's witnesses in concluding that the appellant adopted progressive discipline in respect of other transgressors, as the appellant had already followed progressive discipline in relation to the employee by counselling him. It is correct that the appellant had counselled the employee. On this aspect, the "Work Performance Counselling Report", dated 24 July 2011, records that the employee was counselled on time management, absenteeism, and client service evaluation meetings. The work performance standard required was: plan and manage time effectively, reduce rate of absenteeism, and meet all your customers on a monthly basis (with a few exceptions listed in the report). Under "Action to be taken: By whom: By when", Mr Skosana was required to carry out a review on a monthly basis. Lastly under "possible consequences of continued lack of improvement" the employee was to receive a final written warning. Mr Skosana confirmed this under cross-examination.

[32] This notwithstanding, there is no evidence on the record which indicates that after the employee was counselled on his failure to meet the appellant's clients regularly, that he continued to underperform and, as a consequence, of his "continued lack of improvement", he received a final written warning. When pertinently asked, in cross-examination, whether the employee received a final written warning for his "continued lack of improvement", Mr Joubert's silence was telling. This is not surprising, given the testimony of the employee that he only received one warning. The Labour Court was therefore correct in endorsing the decision of the arbitrator that the sanction of dismissal was too harsh and that a final written warning for the employee's transgression was appropriate, albeit that Mr Gantsho and Mr Joubert (for the appellant) testified that the failure to visit clients for a period exceeding six months constituted serious misconduct.

[33] The appellant's grounds of review against the arbitration award of the arbitrator contradict the very essence of what the Constitutional Court in *Sidumo* and this

Court in *Gold Fields* sought to ensure in a review against an arbitration award. The grounds of review raised by the appellant in the review application seek, in this respect, to blur the lines between an appeal and review. Not a single ground of review raised by the appellant implicates the reasonableness of the arbitrator's award. They seek instead, on a piecemeal basis, to challenge the correctness of the arbitrator's award. This is impermissible. Accordingly, the Labour Court's dismissal of the appellant's review application, on the basis that "the decision of the arbitrator…is not a decision that a reasonable decision-maker could not reach" on the totality of the evidence, was justified.

[34] For all these reasons, the appeal falls to be dismissed.

Costs

[35] I see no reason why costs should not follow the result.

Order

[36] In the result, I make the following order:

1. The appeal is dismissed with costs.

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F Kathree-Setiloane AJA

DM Davis JA and JR Murphy concur.

APPEARANCES

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|---|---|
| FOR THE APPELLANT : | Adv. MA Lennox |
| | Instructed by Evershed's Sutherland |
| FOR THE RESPONDENTS: | Goldberg Attorneys |
| | Instructed by Goldberg Attorneys |