IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2507/15

In the matter between:

AMERICAN PRODUCTS SERVICES (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER KT MSOMI **Second Respondent**

JULY EZEKIEL MOKOENA **Third Respondent**

Heard: **09 January 2020**

Delivered: **15 July 2020**

JUDGMENT

LEPPAN, AJ

Introduction

On 15 November 2015, the Second Respondent issued an arbitration award under case reference number RFBC37031 ("the Award") against the Applicant in which it was found that the suspension of the Third Respondent was substantively and procedurally unfair. The Applicant was accordingly ordered to pay the Third Respondent an amount equivalent to six months' compensation, less any tax deductible. The Applicant has applied to this Court to have the award reviewed and set aside in terms of section 145 of the Labour Relations Act[1] (the LRA).

The Applicant is a registered close corporation based in Boksburg, Ekurhuleni, Gauteng and indicates that its operations include the supply and repair of imported heavy duty equipment. The Applicant employed the Third Respondent as a truck driver. It is common cause that the Third Respondent was involved in a motor vehicle accident on 13 July 2015. He had been employed for approximately three years prior to the aforesaid accident. The Applicant subsequently suspended the Third Respondent on 14 July 2015. The suspension was without pay.

In a letter addressed to the Third Respondent on 15 July 2015, the Applicant instructed him to produce the result of an eye examination by 21 July 2015 as "*required by the Insurance Company and the Applicant*". This condition was based on an allegation that the Applicant had "*confirmed with witnesses that the accident was caused by poor eye site and negligence on your driving*". Failure to produce this report would result in "*instant dismissal*".

On 4 November 2015 and following his failure to present the report of his ophthalmic examination, a short text message was sent to the Third Respondent notifying him to attend a disciplinary hearing on 6 November 2015. He failed to attend same and was subsequently dismissed.

[1] No. 66 of 1995, as amended.

The narrow issue before this Court is whether the Applicant's decision to suspend the Third Respondent without pay constituted an unfair labour practice in terms of section 186(2)(b) of the LRA.

The Facts

It is common cause that on 13 July 2015, the Third Respondent was involved in a vehicle accident that resulted in damage to the Applicant's property. The next day, the Applicant suspended the Third Respondent pending an investigation into the accident. The suspension was without pay.

In a letter dated 15 July 2015, the Applicant instructed the Third Respondent to produce an eye test report by 21 July 2015. In its founding affidavit, the Applicant alleged that it had grounds to do so as the Third Respondent had previously mentioned that he had suffered from Tuberculosis. The Applicant alleges that "*TB can cause disease in many organs, including the eyes, causing eyesight defects*". The Applicant further attempted to justify this instruction by referencing the National Road Traffic Act[2], which provides for instances whereby an individual can be disqualified from obtaining or holding a driving license. Defective vision, so it was alleged, is one such disqualifying factor.

The Third Respondent reported to the Applicant's premises on 15 July 2015 where a security guard, Mr Masoetsa, handed him the two letters outlining the reasons for his suspension. He was denied access to the workplace. Mr Masoetsa provided a confirmatory affidavit in the application before this Court however it is important to note that this was not evidence that was put before the Second Respondent in the arbitration hearing. It is therefore of no weight in this review application.

The Third Respondent had failed to produce an eye test report by the stipulated date. The Applicant alleges that he had attempted on numerous occasions to

[2] No. 93 of 1996.

contact the Third Respondents to no avail. They had also sent another driver to contact the Third Respondent at his registered place of residence, however this too was unsuccessful.

On 30 July 2015, the Third Respondent referred the dispute to the First Respondent. The matter was not resolved through conciliation and was subsequently set down for arbitration before the Second Respondent. On 15 November 2015, the Second Respondent found that the suspension was substantively and procedurally unfair and ordered the Applicant to pay an amount equivalent to six months' compensation, less any tax deductible.

The Third Respondent had been dismissed by the Applicant in the time between the hearing and this finding.

The Award

The Second Respondent found that the suspension of the Third Respondent was both substantively and procedurally unfair in terms of section 186(2)(b) of the LRA.

Referencing the decision of this Court in *Koka v Director-General: Provincial Administration North West Government*,[3] the Second Respondent distinguished between two types of suspension. The first type of suspension, so the Second Respondent reasoned, was a "holding operation" where the suspension is not designed to impose discipline but is rather for reasons of good administration. The second type of suspension serves as a form of disciplinary action.

The Second Respondent held that "*the first form of suspension applies to the Applicant because the Respondent suspended him pending an investigation into the circumstances of the accident involving the Respondent's truck in which the Applicant was driving"*.[4]

[3] [1997] 7 BLLR 874 (LC).
[4] Arbitration Award at p. 6.

Further to this, the Second Respondent noted that precedent exists in *Sappi Forests (Pty) Ltd v CCMA and Others*[5] that "*it is normally unlawful and unfair to suspend an employee without pay pending a disciplinary enquiry*".[6] It was common cause that the Third Respondent had been suspended without pay, and that he had not agreed to this form of suspension. For this reason, the suspension was found to be substantively unfair.

Regarding procedural fairness, the Second Respondent referred to the three requirements for procedural fairness outlined by the Labour Court in *POPCRU obo Masemola and Others v Minister of Correctional Services*[7] being:

(a) first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct;
(b) secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and
(c) thirdly, that the employee is given an opportunity to state a case before the employer makes a final decision to suspend the employee.[8]

The Second Respondent found that there was evidence that the Third Respondent was involved in alleged serious misconduct which required investigation. With that said, however, the Second Respondent was of the view that no evidence had been led by the Applicant that "*objectively justified denying him access to the workplace. His continued attendance at work would not have jeopardised the investigation nor would it have jeopardised the interests of any parties involved*".[9] The Second Respondent held that the Third Respondent's presence at the workplace would have assisted in the investigation.

The suspension, so held by the Second Respondent, was illogical and defeated the purpose of the investigation. Furthermore, there was no evidence led to

[5] [2009] 3 BLLR 254 (LC)
[6] Abitration Award at page 7.
[7] (2010) 31 ILJ 412 (LC).
[8] Award at page 7.
[9] Ibid.

demonstrate that the Third Respondent had been given the opportunity to make representations before he was suspended. The letters of suspension merely suspended the Third Respondent with immediate effect pending an investigation into the accident.

The suspension of the Third Respondent by the Applicant was therefore held to be both substantively and procedurally unfair. The Second Respondent awarded compensation based on the extent of the unfairness of the suspension and the Applicant was ordered to pay compensation equivalent to six months remuneration, less any tax deductible.

Grounds for review

Section 145 of the Labour Relations Act[19] (LRA) provides as follows -

> "Review of arbitration awards:
>
> (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award:
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> …..
>
> (2) A defect referred to in subsection (1), means:
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> (a) that the Commissioner;
>
> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
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> (ii) committed a gross irregularity in the conduct the arbitration proceedings; or
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> (iii) exceeded the commissioner's powers."

The Constitutional Court in *Sidumo v Rustenburg Platinum and Others*[10] laid out the test that has set the standard for a successful review of an award of the First Respondent. To succeed in a review of such an award, the applicant must establish that the commissioner's decision fell outside the bounds of reasonableness. The test is therefore not one of correctness but one of

[10] [2007] 12 BLLR 1097 (CC).

reasonableness.[11] This Court is therefore mandated to ask whether the decision of the Second Respondent is one "*that a reasonable decision-maker could not reach*".[12] This test strikes a delicate balance between potential overeager and flippant interferences with the decisions of the Commission for Conciliation, Mediation and Arbitration (CCMA) and the potential tendency to avoid interfering too much with a CCMA Commissioner's awards and decisions.[13]

Flowing from this, the general principle is that a gross irregularity should concern the conduct of the proceedings rather than the merits of the decision.[14] In *Myeni v CCMA and Others*[15], this Court has previously also held that:

> "When a commissioner fails to have regard to material facts, this may constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner may have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved party from having his/her case fully and fairly determined.[16] A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity, as contemplated in section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. The result will only be unreasonable if it is one that a

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[11] Anton Myburgh "Reviews in the Labour Court Part B: Meaning and scope of grounds of review" in *Labour Law* (2016).
[12] Id fn 10 at para 106.
[13] *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC) at para 99 where Zondo JP stated that " In my view *Sidumo* attempts to strike a balance between two extremes, namely, between, on the one hand, interfering too much or too easily with decisions or arbitration awards of the CCMA and, on the other, refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike. Indeed, A articulating it may be difficult in itself but applying it in a particular case may tend to be even more difficult. In support of the statement that *Sidumo* seeks to strike the aforesaid balance, it may be said that, while on the one hand, *Sidumo* does not allow that a CCMA arbitration award or decision be set aside simply because the court would B have arrived at a different decision to that of the commissioner, it also does not require that a CCMA commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review - it only requires it to be unreasonable. This demonstrates C the balance that is sought to be made. The court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision maker could not reach in all of the circumstances.
[14] *Herholdt v Nedbank Limited (COSATU as Amicus Curiae)* 2013 (6) SA 224 (SCA) at para 10.
[15] Unreported decision. Case number JR1506/13. Delivered 15 July 2015.
[16] *Herholdt* ibid at para 16.

reasonable arbitrator could not reach on all the material that was before the arbitrator. Material areas of fact, as well the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, and are only of any consequence if their effect is to render the outcome unreasonable".

The applicant's grounds for review

The Applicant has averred that the Second Respondent had committed a gross irregularity in reaching the conclusion that the suspension was substantively and procedurally unfair. The Applicant argued that the Second Respondent's award is reviewable on the following grounds:

23.1 the Second Respondent had failed to apply his mind to the facts in so far as the Third Respondent was suspended to investigate an accident that occurred and not misconduct. It was submitted that the Second Respondent failed to have regard to material facts and took into account irrelevant considerations. According to the Applicant, the suspension was first to establish whether the Third Respondent had problems with his eyesight. Accordingly, the Applicant avers that had the Third Respondent submitted an eye test report, there would have been no disciplinary action taken;

23.2 the Second Respondent's assumption that the lifting of the suspension to allow the Third Respondent to access the premises for the purpose of obtaining the eye test disregarded the evidence presented on behalf of the Applicant. Accordingly, it was submitted, there was no reason provided for the rejection of the evidence presented by the Applicant. Further to this, it was submitted that the Second Respondent came to an unfounded conclusion that the suspension was to investigate misconduct whereas it was intended to investigate the Third Respondent's fitness to continue in his position;

23.3 that the Second Respondent did not regard the second letter giving instruction to undergo an eye test. This letter allegedly qualified the suspension. The Applicant submitted that the Second Respondent's

award is not rationally justifiable in terms of the reasons which are given for the outcome and his findings "*amount to a gross irregularity and are improper*";

23.4 that the Second Respondent's finding that the Third Respondent was not given an opportunity to make representations before the suspension "*is also an indication that he did not take all the evidence before him into consideration*". It was submitted here that it was not necessary for the Third Respondent to make representations beyond the presentation of an eye test report; and

23.5 that the Second Respondent also failed to indicate why he decided on a six-month compensation award other than "*to indicate that the extent of the unfairness was both substantively and procedurally unfair and that the suspension was unfair*". This conclusion, it was submitted, did not consider the Third Respondent's version that he was suspended without pay from 14 July 2015, with the arbitration award being handed down 9 November 2015. It was thus submitted that there was no rational basis for the quantum of the award.

The legal framework

The question before the Court is whether the Second Respondent, in making the award, came to a decision that no reasonable decision-maker could reach.[17] The award found that the suspension of the Third Respondent was both substantively and procedurally unfair.

Section 186(2)(b) of the LRA provides that that "unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving:

> "the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee".

[17] Id fn 10.

As noted by Grogan in *Workplace Law*, while the wording of section 145 of the LRA appears to refer to suspensions only when imposed as a disciplinary sanction, it is now settled that both precautionary and punitive suspensions fall within the terms of section 186(2)(b) of the LRA.[18] The dicta of Murphy AJA in *Member of the Executive Council for Education, North West Provincial Government v Gradwell*[19] is an appropriate starting point, where the learned judge stated that:

> "Ultimately, procedural fairness depends in each case upon the weighing and balancing of a range of factors including the nature of the decision, the rights, interests and expectations affected by it, the circumstances in which it is made, and the consequences resulting from it. When dealing with a holding operation suspension, as opposed to a suspension as a disciplinary sanction, the right to a hearing, or more accurately the standard of procedural fairness, may legitimately be attenuated, for three principal reasons. Firstly, as in the present case, precautionary suspensions tend to be on full pay with the consequence that the prejudice flowing from the action is significantly contained and minimized. Secondly, the period of suspension often will be (or at least should be) for a limited duration ... And, thirdly, the purpose of the suspension - the protection of the integrity of the investigation into the alleged misconduct - risks being undermined by a requirement of an in-depth preliminary investigation".

Further to this, the principles for a fair 'preventive' suspension were outlined in *Mogothle v Premier of the Northwest Province*[20] as follows:

> "[T]he application of the contractual principle of fair dealing between employer and employee . . . requires first that the employer has a justifiable reason to believe, prima facie at least, that the employee has engaged in serious misconduct; secondly, that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy;

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[18] John Grogan *Chapter 5: Unfair Labour Practices* in Workplace Law (2017) 12th Edition at page 72.
[19] (2012) 33 ILJ 2033 (LAC) at para 44.
[20] (2009) 30 ILJ 605 (LC) at para 39.

> and thirdly, that the employee is given the opportunity to state a case before the employer makes any final decision to suspend the employee".

This notion was embellished by the Court in *Harley v Bacarac Trading 39 (Pty) Ltd*[21] where the unlawfulness of a "holding operation" suspension was linked to a breach of material terms of a contract of employment:

> "Suspension without pay and the fairness thereof, are self-evidently linked to the payment of remuneration, especially where, as is the case here, an employee is suspended without pay. Where suspension is effected as a measure pending a disciplinary hearing, as is the case here, suspension without pay is a material breach of contract. In the absence of any apparent apprehension that the applicant's continued B presence in the workplace prejudiced a legitimate business interest and in view of the demonstrated psychological and financial prejudice to the applicant, the applicant's suspension was also unfair".

It is within this regulatory framework that this Court is mandated to assess the reasonableness of the Second Respondent's award, taking into consideration the various allegations of the Applicant.

Analysis

Returning to the Labour Appeal Court decision in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*[22] Zondo JP outlined the delicate balance that this Court must strike when asked to review awards of the First Respondent:

> "The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective

[21] (2009) 30 ILJ 2085 (LC) at para 31.
[22] (2008) 29 ILJ 964 (LAC) at para 100.

> resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached".

The Court must return to the Applicant's submissions in motivation for this review application.

The second respondent's failure to apply his mind to the facts

The Applicant's assertion that the Second Respondent failed to apply his mind to the facts in so far as he failed to have regard to material facts and took into account irrelevant considerations fails to appreciate the true nature of the dispute that was before the Second Respondent. While it may be the case that no disciplinary action would commence had the Third Respondent submitted the eye test report, this is irrelevant to the finding that the suspension without pay was unlawful. The Second Respondent correctly found that this suspension was a "holding operation" and not a disciplinary sanction in and of itself.[23] The Applicant admits as much by confirming that had the eye test report been submitted, there would have been no subsequent disciplinary action taken against the third respondent.

The Second respondent failed to take into account reasons for denying the Third Respondent access to the Applicant's business premises

The Applicant further submits that the Second Respondent's finding, in so far as it pertains to the denying the Third Respondent access to its premises, failed to take into account the evidence presented by Mr Rui Guimaraes on behalf of the Applicant. On a review of the award and the record of the proceedings, I find no evidence that Mr Rui Guimaraes, who acted as a witness for the

[23] Id fn 3.

Applicant at the CCMA, produced any reasonable justification for denying the Third Respondent access to the Applicant's business premises. There was accordingly no need for the Second Respondent to address this, as no *prima facie* case was made out that would satisfy the requirements "*that there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy".*[24] The Applicant has failed to provide sufficient evidence to warrant merit in this regard.

The Second Respondent failed to take regard of the "second letter" which qualified the suspension of the Third Respondent

The merits of this assertion are of little to no significance. The second letter, as indicated above, instructs the Third Respondent to produce an eye test report by a stipulated date. This offers no justification for suspending the Third Respondent without pay and is therefore of no relevance to the finding of the Second Respondent.

That the Second Respondent's finding that the Third Respondent was not given an opportunity to make representations before his suspension failed to take into account the submission that no representations, other than an eye test report, were required

As held by the Constitutional Court in *Long v South African Breweries (Pty) Ltd,*[25] it is settled that "*where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations".*[26] With this said, I am not of the opinion that this creates a blanket exemption from affording employees with an opportunity to make representations. The Court in *Long* however went on to assess that based on the facts before it:

[24] Id fn 21.
[25] (2019) 40 ILJ 965 (CC) at para 24.

> "The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally, where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound".[27]

The facts before this Court are distinguishable. The prejudice caused to the Third Respondent by Applicant have rather been exacerbated by the Applicant's decision to suspend him without pay. There is nothing to motivate the failure to provide the Third Respondent with an opportunity to make representations regarding his suspension. I am of the firm view that given the punitive nature of the suspension, a hearing ought to have been conducted prior to the action being taken. This would not have been the case were the suspension to have been with pay.

The Second Respondent failed to provide reasons for the quantum of the compensation ordered

Section 138(9) provides that:

> "The commissioner may make any appropriate arbitration award in terms of this Act, but not limited to, an award –
> (a) …
> (b) that gives effect to the provisions and primary objects of this Act;
> (c) …

This section of the LRA was the subject of close scrutiny by the Labour Appeal Court in *Engen Petroleum Ltd v CCMA and Others*[28] where the Court explored the powers granted to commissioners, such as the Second Respondent, by the LRA in the following terms:

[27] Ibid at para 25.
[28] [2007] 8 BLLR 707 (LAC).

> "That section 138(9) gives a CCMA commissioner extremely wide powers in making an arbitration award was not a mistake. It is in line with the rationale behind the establishment of the CCMA and one of the primary objects of the Act. As has been stated elsewhere in this judgment, part of the rationale for the creation of the CCMA was that, as far as possible, dismissal disputes and other disputes should be resolved finally by the CCMA and should not go beyond that institution. That would be achieved by giving the CCMA wide powers to resolve such disputes in the way it sees fit with as little interference as possible by the courts with its decisions and arbitration awards. The provision in section 138(9) that a CCMA commissioner may make "any appropriate" arbitration award is also in line with the promotion of "the effective resolution of labour disputes" (section 1(d)(iv) of the Act)".[29]

In the context of review applications, such as the one the subject of which is the topic of this decision, the LAC in *Engen Petroleum* went on to state that:

> "Section 138(9), when read with section 145, reveals that the CCMA was intended to have wide powers to resolve disputes, and that the Labour Court was intended to have limited powers to interfere with CCMA awards because, if the position was the other way around, this would undermine the promotion of the effective resolution of labour disputes, which is one of the primary objects of the Act".[30]

The Second Respondent, in issuing his award which ordered the Applicant to pay six months compensation to the Third Respondent, reasoned this was because of the "*extent of the unfairness of the suspension in that it was both substantively and procedurally unfair*". It therefore does not appear that the quantum of the award was linked to actual compensation that the Third Respondent would have been entitled to had he not been suspended without pay.

[29] Ibid at para 134.
[30] Id fn 29 at para 136.

The Applicant has therefore provided insufficient reasoning for why the decision of the Second Respondent, insofar as it relates to quantum, was one that a reasonable decision-maker would not have reached.

Conclusion

This matter finds its genesis in late 2015. It is a matter of great importance for the Third Respondent and is one that requires an outcome.

On an analysis of the pleadings and record before me, the decision of the Second Respondent was one that no reasonable decision-maker could reach. The Applicant has failed to satisfy the standard of review and has furthermore failed to address the central point of application, namely that the Third Respondent's suspension without pay was both substantively and procedurally unfair, and therefore the review application falls to be dismissed.

In the premises the following order is made:

Order

1. The review application is dismissed with costs.

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F. Leppan

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv. FW Moyses
Instructed by: Harry Goss Attorneys

For the respondent: Mr T Xhango
Instructed by: UCIMESHAWU