

**ASA Metals (Pty) Ltd (Dilokong Chrome) v Commission for Conciliation, Mediation & Arbitration & others (2013) 34 ILJ 350 (LC) JR93/2011 Judgment**  
July 13, 2012

**Judgment**

Zondo AJ:

*Introduction*

[1] This is an application to review and set aside an arbitration award (the award) made by the second respondent (the commissioner) on 19 December 2010 wherein the commissioner found, amongst other things, that the sanction of dismissal against the fourth respondent (Ponyane) was too harsh and thereby finding that Ponyane's dismissal was substantively unfair. The applicant contends that the award is a decision which a reasonable decision maker could not have reached. Quite expectedly, the third and fourth respondents contend otherwise. I turn now to set out the facts which are largely common cause.

*Factual background*

[2] Ponyane was employed by the applicant, a company which carries on business in the mining industry, since 1 January 2003 and he had, during the course of his employment with the applicant, become a supervisor, a position he held at the time of his dismissal. The disciplinary charges which were levelled against Ponyane arose out of an incident which took place on 14 April 2010, wherein Ponyane along with one Abednego Shongwe (Shongwe), both employees of the applicant at the time, were alleged to have assaulted another employee by the name of Samuel Madutlela (Madutlela) who had attended at the applicant's ticket office in order to collect his ticket and go underground.

[3] It is common cause that on that day, being 14 April 2010, Madutlela arrived at the lamp room late and noticed that the tickets had been moved to the shift overseer's office as was the practice at the time. He then proceeded to the shift overseer's office to collect his ticket and on his arrival he found Ponyane, Shongwe and two ladies by the names of Nelly Magabe (Magabe) and Hellen Makola (Makola). Madutlela then proceeded to retrieve his ticket from a pile of tickets that were on a table in front of Magabe and Makola.

[4] As soon as Madutlela found his ticket, Ponyane stood up and grabbed the ticket from Madutlela's hand after which a scuffle ensued wherein Ponyane and Shongwe forcefully pushed Madutlela out of the office which resulted in the latter sustaining injuries on his chest and he was subsequently booked off for the day of 15 April 2010. Subsequent to this incident, the charges of misconduct were levelled against Ponyane namely:

'Charge 1—assaulting another employee: It is alleged that on 14 April 2010 at about 08h40 in the 5 level office you mishandled another employee, one Ishmael Madutlela (649) and in the process his crash card got torn up.

Charge 2—use of insulting language and provocation: It is alleged that on 14 April 2010 at about 08h40 during an argument with one Ishmael Madutlela (649) in the level 5 office, and while addressing him you were using abusive and provoking words.'

[5] At the conclusion of the disciplinary hearing, Ponyane was only found guilty on the first charge, ie assault, and thereafter dismissed on 28 June 2010. Following his dismissal, Ponyane referred a dispute to the first respondent alleging unfair dismissal. The matter came before the commissioner on 8 December 2010 who, despite finding that Ponyane did assault Madutlela, found the dismissal to have been too harsh. In the light of that finding, the commissioner then found Ponyane's dismissal to have been substantively unfair and ordered reinstatement with no retrospective effect.

*The award*

[6] From the award, it is apparent that the basis of the commissioner's finding that dismissal was too harsh a sanction is that Ponyane's actions were somehow justified because Madutlela had been aggressive towards Magabe and Makola. In particular the

commissioner, as part of his reasoning process leading to the conclusion he reached, stated that Madutlela's conduct was provocative and that Ponyane's actions were aimed at protecting the two lady clerks from Madutlela's threatening behaviour.

[7] It is perhaps instructive to quote from the award those paragraphs which seem to have been the pillars of the commissioner's decision thus:

'I have carefully considered Mr Madutlela's conduct prior to being assaulted. He came late to work, found his ticket removed from where it is normally kept, he went to the clerks to take it from them against their will and against the policies and procedures of the company. The correct procedure as the applicant stated was that he was supposed to first of all explain his lateness to his supervisor, Mr Emmanuel Khoza, and if the explanation was accepted, Mr Khoza would have gone to the clerks to request his ticket. It appears from the evidence that Mr Madutlela was rude, disrespectful and aggressive when demanding his ticket, and his conduct was clearly unacceptable to his superiors (the applicant and Mr Shongwe). This appears to me to be the reason why he was forcefully removed from the office. It is clear that Mr Madutlela did not want to respect the authority of the two lady clerks, Nolly and Hellen Makola, who were entrusted with the crucial task of time management. It also seems that these two ladies were powerless and could not stop him from opening their files and taking his ticket without their permission. This was the reason he was manhandled by the applicant and Mr Shongwe. These are the circumstances against which the applicant committed the offence he was charged with and dismissed for. Having carefully considered the above circumstances, I find that the dismissal of the applicant was inappropriate taking into account the fact that the conduct of the victim (Mr Madutlela) *was provocative, aggressive and clearly unacceptable. The applicant as a supervisor was trying to protect the two lady clerks from Mr Madutlela's threatening behaviour.* It is clear that the applicant's conduct was not wilful or aimed at deliberately undermining the respondent's rules. It is therefore my view that a warning could have sufficed to correct his behaviour, more so that it seems that he was a first time offender and that no evidence was produced to show he had a bad disciplinary record. Dismissing him under the above circumstances was clearly harsh and inappropriate. The dismissal is therefore substantively unfair.' (Emphasis added.)

#### *The review and its legal framework*

[8] I have chosen to emphasize part of the commissioner's reasoning above because that seems to be what the applicant perceives to be the main flaw in the award. Indeed para 11 of the applicant's heads of argument states as much thus: 'It is apparent that the commissioner's findings that Ponyane was provoked and acted in private defence are the cornerstones of the commissioner's ultimate finding that dismissal was not an appropriate sanction.' At the hearing of this application Mr *Snider*, counsel for the applicant, steadfastly pursued this line in trying to show that there was no connection between such reasoning and the material which was before the commissioner and that, therefore, the award is a decision which a reasonable decision maker could not have reached.

[9] In particular, Mr *Snider* submitted that in relation to the issue of provocation and private defence, the commissioner's finding was not based on any evidence which was before him and that that in itself renders the award reviewable. In his heads of argument, Mr *Snider* further states that Makola did not lead any evidence that she felt threatened by Madutlela to such an extent that she required protection against him. The gravamen of Mr *Snider's* argument is that since the commissioner's reasoning process is flawed the conclusion which he reached cannot stand. <sup>1</sup>

[10] Mr *Motaung* who appeared for the third and fourth respondents fairly conceded that it was never Ponyane's evidence that he was provoked nor was he protecting the two lady clerks who were 'powerless'. It was therefore common cause that the commissioner erred in his award in finding that Ponyane had been provoked and acted in defence of the two lady clerks. I fully agree.

[11] There is nothing in the record to suggest that Ponyane was provoked by Madutlela or that he was protecting the two lady clerks from Madutlela's aggressive behaviour. Had that been so, surely Ponyane would have led evidence to the effect that he was provoked and that he was acting in defence of the ladies. The record does not reveal such. There is therefore no doubt that this part of the commissioner's reasoning was flawed and completely disconnected from the material that was properly before him.

[12] This then raises the question whether the award is a decision which a reasonable decision maker could have reached. Mr *Motaung* on behalf of the respondents submitted that even though part of the reasons articulated by the commissioner as a justification for his decision that dismissal was too harsh a sanction were not supported by the evidence before him, this does not render the award a bad one and therefore reviewable.

[13] For this contention Mr *Motaung* relied on what was said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others*<sup>2</sup> where Zondo JP, as he then was, observed as follows:

'It seems to me that, even if there may have been a debate under *Carephone* and prior to *Sidumo* on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend—at least not solely—upon the reasons that the commissioner gives for the decision.'

[14] The learned Judge President then continued:

'In my view the same can be said of the determination of the reasonableness or otherwise of a decision or finding or arbitration award made by a CCMA commissioner under the compulsory arbitration provisions of the Act. Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'<sup>3</sup>

[15] My understanding of the *Fidelity Cash Management Service* case as quoted above, is that a reviewing court, in determining whether an award is a decision which a reasonable decision maker could have reached, ought not simply to confine itself to the reasons which were given by the commissioner for that would be to place form above substance. *Fidelity Cash* in my view invites the reviewing court to look further than the articulated reasons with a view to establishing whether, looking at all the material before the commissioner, there were other reasons, albeit not articulated, but which can render the award reasonable.

[16] In other words, one does not need to look only at the articulated reasons in order to find that the award conforms to the *Sidumo* test, but even those reasons which were not articulated but which can sustain the award, could still render the award a reasonable one and therefore in consonance with the *Sidumo* test. I agree with this approach because I do not see why a court in review should focus rather slavishly on the articulated reasons for the award and ignore everything else which could render the award reasonable.

[17] When all is said and done, a decision as to whether an award is reasonable must be taken after a careful and thorough consideration of all the material that was before the commissioner and not just the reasons he or she gave for it. Only when the award is wholly unsupported by the material before the commissioner should this court step in to ensure injustice does not prevail. This court ought therefore to be slow in interfering with an otherwise reasonable award save for the bad reasons given for it.

[18] In the words of Zondo JP:<sup>4</sup>

'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decisions of a CCMA commissioner, the court feels that it would have arrived at a different conclusion or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently. Obviously this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.'

[19] If one adopts the approach in the *Fidelity* decision, which I have no doubt is a correct approach to CCMA awards, then it means that when one looks at the award in

casu, one ought to look further than the reasons which the commissioner has given for his award. In my view, before one looks at the reasons which were not articulated, it is instructive first to look at other articulated reasons, apart from the bad ones, which have the effect of rendering the award reasonable.

[20] In casu, the commissioner, over and above provocation and private defence, went on to give other reasons for concluding that dismissal was too harsh a sanction. In this regard the commissioner made mention of the well conceded fact that, when Madutlela came to take his ticket in the room where Ponyane and others were seated, he was aggressive.

[21] This fact was indeed conceded, fairly in my view, by Mr *Snider* who said that Madutlela may have been aggressive in his approach but that did not warrant Ponyane's reaction. This did not make Madutlela's conduct entirely blameless even though there is no doubt that Ponyane's reaction was unwarranted. The commissioner further took into account that Madutlela was rude and disrespectful towards the two lady clerks. Once again Madutlela's conduct is not entirely blameless and the commissioner was correct in taking such conduct into account in finding that dismissal was too harsh when regard is had to the circumstances under which the assault took place.

[22] The commissioner then took into account the undisputed fact that Ponyane was a first time offender and that no evidence was produced to show he had a bad disciplinary record. This coupled with the undisputed fact that Madutlela was rude, disrespectful and aggressive seems to me to be a cogent reason on the commissioner's part in finding that dismissal was too harsh. This alone ought to render the award reasonable and for these reasons alone I would be very slow to interfere with the award.

[23] Apart from the reasons which were clearly articulated by the commissioner and which have the effect of rendering the award reasonable, there are those which, albeit not articulated, do have the effect of sustaining the award. One of the reasons which the commissioner could have taken into account which is apparent from the record is Ponyane's unblemished service. Ponyane was employed in January 2003, had no disciplinary record up until the incident in question. That is a period of roughly seven years and that is a relatively long period of service. Indeed long service is one of the mitigating factors that a commissioner is required to take into account when determining appropriate sanction. <sup>5</sup>

[24] What is also apparent from the record and indeed contended by Mr *Motaung*, which could have influenced the commissioner in his conclusion, is the absence of any evidence to the effect that Ponyane's conduct had rendered continued employment intolerable. Indeed if the applicant felt that the trust relationship had broken down as a result of Ponyane's conduct, the applicant was duty bound to lead evidence to that effect. <sup>6</sup> In the absence of such evidence, the commissioner may very well have been within his right to find that a sanction of dismissal was too harsh.

[25] Another factor which the commissioner could have taken into account is the circumstances under which the assault took place. In my view the incident of assault against Madutlela must be understood in the context within which such assault took place. It is not contended that Ponyane stood up and simply pushed Madutlela but this happened in the context of a scuffle as a result of which Madutlela was pushed causing him to sustain injuries to his chest.

[26] Whilst it is true that Ponyane's conduct was unwarranted, I have some serious doubts that if surrounding circumstances were taken into account it could be said that dismissal was an appropriate sanction.

[27] In my view, a clear distinction must be drawn between a deliberate act of assault where one employee sets about assaulting another and an assault which is brought about by a scuffle between two or more employees. Surrounding circumstances must never be ignored. For me the circumstances surrounding the assault on Madutlela may very well dictate that progressive discipline in the form of a severe reprimand be invoked instead of dismissal where, as in this case, the employee had a clean record.

[28] Lest I am misunderstood, this is not to say that employees are at liberty to take the law into their own hands, for such conduct has no place in the workplace and indeed society in general, however it is only fair that punishment be proportionate to the

offence taking into account all the circumstances. This may very well be one of those unarticulated or unidentified reasons but which have the effect of rendering the award reasonable. Am I to say simply because the commissioner failed to identify this reason his award is therefore unreasonable? I doubt very much.

[29] Perhaps this court needs to remind itself time and again that what is expected of commissioners is not awards that are impeccable but rather awards which fall within the band of reasonableness. In *Shoprite Checkers v Ramdaw NO & others*<sup>7</sup> Zondo JP had occasion to reflect on the standards of awards:

'In my view, it is within the contemplation of the dispute-resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review. Without such contemplation, the Act's objective of expeditious resolution of disputes would have no hope of being achieved. In my view the commissioner's award cannot be said to be unjustifiable when regard is had to all the circumstances in this case and the material that was before him.'

[30] In conclusion, it is my view that, despite the unsatisfactory nature of the award, it cannot be said that it is a decision which a reasonable decision maker could not have reached. Whilst it is true that the commissioner sought to rely on provocation and private defence as justification for his conclusion that the sanction of dismissal was too harsh, these are however not the only reasons which the commissioner articulated for his conclusion.

[31] Factors such as clean record prior to the incident and the circumstances under which the incident of assault took place were also taken into account as a justification for the conclusion that dismissal was too harsh. The commissioner further took into account the well conceded fact that Madutlela was aggressive. For me even if one were to remove provocation and private defence, the remaining factors in the commissioner's reasoning still render his award reasonable.

[32] Over and above the foregoing, as stated elsewhere in this judgment, there are factors which, albeit not articulated, are apparent from the record and which have the effect of rendering the award a reasonable one in keeping with what was said in *Fidelity Cash Management Service*.<sup>8</sup> I am therefore of the view that the award, viewed objectively as a whole, is a decision which a reasonable decision maker could have reached.

[33] There is no reason why this award which, viewed objectively, is reasonable, should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the award. In the premises, I therefore make the following order:

1 The review application is dismissed.

2 There is no order as to costs.

1 See applicant's heads of argument at 6 para 12.10–12.11: 'The commissioner's conclusions in this regard were accordingly not supported by evidence with the result that his decision is not a decision which a reasonable decision maker could have made. The process he utilized in coming to his conclusion was fatally flawed by his lack of appreciation of the facts actually in evidence. The commissioner's finding that Ponyane was provoked by Madutlela and was acting in private defence also reflects a failure to apply his mind to the legal requirements of provocation and private defence and an erroneous understanding of the law relating to both defences.'

2 (2008) 29 ILJ 964 (LAC) at 997A–E.

3 See at 997E–I para 103.

4 See *Fidelity Cash Management Service* at 995H–I para 98.

5 *Sidumo* at 1123D–E para 78.

6 See *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA); [2010] 1 BLLR 1 (SCA) at 12 para 23.

7 (2001) 22 ILJ 1603 (LAC) at 1636H–I.

8 See fn 3 above.