REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1087/12

In the matter between:

COCA-COLA SHANDUKA BEVERAGES SA (PTY) LTD **APPLICANT**

AND

VINCENT MGIBA **FIRST RESPONDENT**

NOMUSA MBHELE N.O **SECOND RESPONDENT**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **THIRD RESPONDENT**

Heard: **17 December 2013**

Delivered: **19 June 2014**

JUDGMENT

Nkutha AJ

Introduction

[1] Coca-Cola Shanduka Beverages (Pty) Ltd ["applicant"] seeks an order reviewing and setting aside the arbitration award issued by Ms N Mbhele ["commissioner"] on 4 April 2012 under case number GAJB 6217-12. In terms of that arbitration award, the commissioner found the dismissal of Mr Vincent Mgiba ["first respondent"] to be substantively unfair. She then ordered the applicant to reinstate the first respondent with effect from 30 April 2012 and pay him R20 291.32 compensation.

[2] This application was opposed only by the first respondent.

Background facts

[3] The first respondent had been in the employ of the applicant since 28 July 2008 as acting team leader earning basic salary of R10 145.66 per month. He was charged and subsequently dismissed for the following acts of misconduct:

> *"(ii) Putting the company into disrepute by failure to honour your duties as an employee in being loyal to the Company in all dealings whatsoever relating to company business and interest thus resulting in conflict of interest in your employ as an employee of CCSB;*
>
> *(iii) Failure to follow company procedure as a means to redress dissatisfaction, thus exposing interest to the litigation that could harm CCSB; and*
>
> *(iv) Breaking the trust relationship in that, your role as an Acting Team Leader is entrusted with management of company assets and affairs which is currently contradicted by lack of goodwill, onerous duty and reasonableness that should promote CCSB's interest."*

[4] Most of the background facts are common cause between parties. During April 2009 the applicant, as part of employee empowerment programme, issued a tender for provision of cleaning services and accordingly invited all its employees, including the first respondent.

[5] The first respondent partnered with a third party, E- Chemie, a private company which had no relations with the applicant at that time. The first respondent's partnership was approved by the applicant. Their tender documents were submitted to the Group Procurement Manager, Mr Juan Dercksen ["Dercksen"] and Mr Robert Davies, Group Logistics Manager, negotiated the deal with the first respondent and E-Chemie until they reached an agreement. On 20 August 2009 the applicant verbally informed the first respondent that they were successful bidders and were given an unsigned copy of the agreement with the terms for the rendering of cleaning services.

[6] Despite a promise that the said agreement would come to effect on 1 September 2009, it was never enforced due to reasons that are not relevant for the determination of the issues before this Court. However, I must mention that the first respondent would have resigned from the applicant's employ had the applicant signed and enforced the cleaning service contract.

[7] In 2010, almost a year later, the first respondent wrote emails to Dercksen, copying the Human Resource Director and the Managing Director, wherein he requested the implementation of the agreement. When there was no response from the procurement unit he had been dealing with throughout the process, he escalated the matter to the Managing Director. The Managing Director gave bare assurances which did not remedy the alleged repudiation.

[8] The first respondent and E-Chemie decided to institute legal proceedings. On 15 September 2011 their attorneys of record in the civil matter served the applicant with a letter wherein it was put *in mora* and thereby demanded specific performance. The said letter led to the suspension and subsequent disciplinary hearing which, as alluded to above, resulted in the first respondent's dismissal on 27 February 2012.

Grounds for Review

[9] The applicant contended that the arbitration award was reviewable based on the grounds summarised as follows, in that the commissioner:

(i) failed to apply the appropriate test in evaluating the evidence before her and by improperly drawing inferences which were not supported by facts;

(ii) misdirected herself by failing to apply her mind to the issues which she was called upon to decide;

(iii) misdirected herself by failing to give due weight and/or ignoring relevant evidence relating to the conduct of the first respondent which broke the employer/employee relationship;

(iv) misdirected herself as to the nature of the dispute and has issued an award that failed to take into account the direct evidence that was adduced before her corroborated by document proof;

(v) committed a gross irregularity in the conduct of the arbitration hearing; and/or

(vi) the commissioner's award should be reviewed in terms of the broader grounds envisaged in section 158(1)(g) of the Labour Relations Act 66 of 1995 as amended ["the Act"].

Legal Principles and Analysis

[10] It is incumbent upon the Court to establish whether or not there is a *prima facie* case to interfere with the arbitration award on review. Section 145 of the Act provides limited grounds for review and is suffused by the constitutional standard of reasonableness.[1] In essence, the applicant must show that the decision reached by the CCMA commissioner is one which a reasonable decision maker could not reach.[2]

[1] *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para108

[2] Above n 2 at para 107 to 109.

[11] The reasonableness standard was dealt with in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [3] as discussed further in *Sidumo.*[4] The Labour Appeal Court further contextualised this approach in *Ellerine Holdings Ltd v CCMA and Other*[5] and subsequently avowed in *CUSA v Tao Ying Metal Industries and Others*[6] where the court held that:

> *"It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:*
>
> *"It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues."*[7]

Application of Legal Principles

[12] The crux of the applicant's case is that the first respondent, by supporting his business partner, E-Chemie, in litigating against it, committed a gross misconduct because of conflict of interest and the detrimental effect to its reputation. However, the commissioner found that the subject matter of that litigation fell outside of the purview of employment relationships and that in the absence of a clear procedure to deal with it internally; the first respondent was entitled to deal with that matter externally as he did.

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[3] 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).
[4] Above n 2.
[5] (2008) 29 ILJ 2899 (LAC) at 2905G-I.
[6] [2009] 1 BLLR 1 (CC) at para 76.
[7] Above n 2 at para 267.

[13] The applicant's counsel persisted with the above argument and submitted that the launch of civil proceedings by the first respondent was for mere 'personal pecuniary gains' to the applicant's detriment because of the serious nature of the allegations canvassed in the particulars of claim. He, however, correctly conceded that, like any litigant, the applicant is entitled to robustly vindicate his rights in a court of law without fear of being victimised or dismissed.

[14] It is common course between the parties that the applicant entered into an agreement with the first respondent and its partner consequent to a tender that was specifically initiated to benefit employees. It is, therefore, mind boggling as to how the first respondent could have vindicated his rights without approaching Court when Dercksen and the MD obviously failed to attend to the tender dispute internally and, moreover, in the absence of any other internal procedure at his disposal as a party to a business contract and not an employee.

[15] I am convinced that the commissioner succinctly dealt with evidence before her and made a rational decision. It is also clear from her analysis of evidence that the applicant did not challenge the first respondent's evidence that he had been a diligent performer since 2009; that the dispute about the cleaning services tender and the subsequent litigation did not affect the trust relationship. Therefore, the conduct of the commissioner is beyond reproach.

[16] Seemingly, the applicant's main bone of contention is that the commissioner came to a wrong decision, which presupposes an appeal as opposed to a review. In *Bestel v Astral Operations Ltd & Others*[8] the Labour Appeal Court, accentuating the distinction between appeal and review, held that:

> *"… the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected."*

[8] [2012] 4 BLLR 334 (LAC) at para 18.

[17] Accordingly, the commissioner's arbitration award constitutes a reasonable finding and I find no reason to set it aside.

Order

[18] In the premises, the application is dismissed with costs.

Nkutha AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: PL Mokoena SC

Instructed by: Mchunu Attorneys

For the First Respondents: Mabaso Attorneys