THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J331/16

In the matter between:

EDCON LIMITED	**Applicant**
and	
KESHIA MOHAMMED-PADAYACHEE	**First Respondent**
COMMISSIONER MQINGWANA *N. O*	**Second Respondent**
COMMISSION FOR CONCILIATION	
MEDIATION & ARBITRATION	**Third Respondent**

Heard: **13 September 2018**

Delivered: **20 September 2018**

Summary: An opposed review application. The applicant contends that the award of the respondent is not one that a reasonable commissioner may issue. Dismissal is justifiable on reasons that led to it. Where incompatibility is the reason for dismissal, the employer ought to prove on a preponderance of probabilities that the employee was incompatible. Held (1) The review application is dismissed. (2) The applicant is to pay the costs of the application.

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JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed application to review and set aside an arbitration award issued by the second respondent on 15 February 2016 in terms of which it was found that the dismissal of the first respondent is both substantively and procedurally unfair. The second respondent ordered the applicant to reinstate the first respondent with a ten months' salary backpay.

Background facts

[2] The first respondent was employed by the applicant as its Group Remuneration and Benefits Manager. A senior position within the applicant. During the course of 2014, the applicant received several complaints from various members of staff. The complaints were around work ethic and the first respondent's ability to collaboratively work within a team. In a meeting, around October 2014, the applicant brought the complaints to the first respondent's attention. According to the applicant, the first respondent did little to address the complaints and an action plan submitted by her addressed only one of the several complaints. The first respondent disputes all of that.

[3] An attempt was made to arrive at a mutual termination of employment. This attempt failed to yield the desired results. Following that a formal investigation was conducted. Upon conclusion of the investigation, a view was held that the first respondent is to be summoned to an incapacity hearing to deal with the alleged incompatibility. An incapacity enquiry was conducted and concluded on 03 March 2015. The conclusion was that the first respondent was incompatible. She was thus dismissed on one month's notice.

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[4] Aggrieved by her dismissal, she referred a dispute of alleged unfair dismissal to the first respondent. The second respondent was appointed to resolve the dispute through arbitration. On 15 February 2016, the second respondent issued an award. The applicant before me was aggrieved thereby and launched the present application.

Grounds of Review

[5] The grounds of review have not been succinctly set out in the founding affidavit. This, parties, are encouraged to do without being discursive. Trawling through the founding and supplementary affidavits, the following emerge as the grounds upon which the applicant seeks to have the award reviewed and set aside:

- The outcome is not one that a reasonable commissioner can arrive at;
- He ignored and or failed to apply his mind to the material facts placed before him (examples of the evidence allegedly ignored were given);
- Failed to appreciate the evidence;
- Failed to consider that poor work performance was sufficient to justify dismissal;
- He ignored evidence of four witnesses and concluded that two other witnesses were relevant to prove incompatibility;
- Failed to consider that insubordination was sufficient reason to justify dismissal;
- He misconceived the enquiry;
- He assessed the evidence wrongly by not taking into account conflicting versions and or credibility and probabilities;
- Ignored or failed to apply the Poor Work Performance Policy;

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- Failed to take into account the first respondent's seniority and
- Wrongly concluded that there was procedural unfairness.

Evaluation

[6] What matters in review applications is the outcome arrived at. If the outcome is one that a decision maker can reasonably arrive at, a court of review cannot interfere. If the outcome falls within the bands of reasonableness, the award is unassailable. The task to determine whether a dismissal is fair or not is that of a commissioner. In performing that task, a commissioner is not allowed to defer to the employer. It is not the task of the Labour Court to determine whether dismissal for incapacity is fair or not. The task of the Labour Court is to determine whether the decision involving the fairness of a dismissal is one that a reasonable decision maker may arrive at.

[7] Whenever a judge considers the merits of the case, he or she does so solely to determine whether the outcome is justifiable in relation to the material properly placed before a commissioner. The merits are not traversed with a purpose to substitute the findings of the commissioner. The difference between an appeal and a review ought to be maintained at all times. What guides the reviewing court is the decision (award) and the material properly placed before the commissioner (the evidence). Further, the task of the reviewing court is to consider the grounds of review and not the views expressed by the parties in their affidavits. Therefore, it is unhelpful to the court for parties to attempt to summarize the record and or evidence tendered in their respective affidavits.

[8] In a recent judgment of *Duncanmec (Pty) Ltd v Gaylard N.O and others*[1], the Court reaffirmed the position thus:

> "[41] *Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves

[1] CCT 284/17 [2018] ZACC 29 13 September 2018

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consideration of the merits. So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker.

[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons."

[9] In considering the applicant's grounds of review, it is important to note that if the commissioner has determined the principal issue and gave the parties a fair opportunity to put up their respective cases, a judge cannot substitute an outcome simply because he or she would have arrived at a different outcome. It is by now trite that an employer can only justify a dismissal by proving the reasons that led to a dismissal. In *casu*, it is common cause that poor work performance and insubordination were not the reasons that led to the dismissal of the first respondent[2]. Accordingly, the dismissal of the first respondent cannot be justified with reference to poor work performance and insubordination.[3]

[10] It must follow axiomatically that the ground that the second respondent failed to find justification of the dismissal with reference to poor work performance and insubordination should fail. He was not obliged to. The reason why the first respondent was dismissed is that she was found to

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[2] Paragraph 101 of the findings of Dolo reads: Given the aforementioned facts, it is fair to confirm that Mrs. Mohammed-Padayachee is incapacitated due to incompatibility and can no longer be trusted in her role. Keisha is dismissed with immediate effect with 1-month notice pay.

[3] *ABSA Brokers (Pty) Ltd v Moshoana NO and others* [2005] 10 BLLR 939 (LAC).

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be incompatible. If the applicant failed on a preponderance of probabilities to show that the first respondent was incompatible, then the dismissal was not for a fair reason.

[11] Failure to apply one's mind entails taking into account irrelevant considerations and ignoring the relevant ones. The focal point for the second respondent was whether the first respondent was incompatible or not. Incompatibility arises in a situation where there has been a breakdown in the employment relationship because inter-personal relationships are tense, conflictual or lacking in harmony. The golden rule is that prior to reaching a decision to dismiss, an employer must make some sensible, practical and genuine efforts to effect an improvement in interpersonal relations when dealing with a manager whose work is otherwise perfectly satisfactory.[4]

[12] The offending employee has to be advised what conduct allegedly causes disharmony, who is upset by the conduct, and what remedial action is suggested to remove the cause of the disharmony. A reasonable period must be allowed for the employee to make amends. Dismissal may be appropriate only where the employee's eccentric behaviour is of such a gross nature that it causes consternation and disruption in the workplace. The employee must have been properly warned or counselled. The incompatibility must be one that is irremediable[5].

[13] Almost 24 years ago, the Labour Appeal Court (LAC), as it then was constituted, in *SA Quilt Manufactures (Pty) Ltd v Radebe*[6] had the following to say:

> "We are of the view that the court below was correct in finding that the procedure adopted by the appellant in dismissing the respondent was inadequate and unfair. However, the facts would seem to indicate that the appellant may well have had grounds to terminate the employment of the respondent on account of the unrest that developed in its

[4] Lubke v Protective Packaging (Pty) Ltd (1994) 15 ILJ 422 (IC).
[5] Wright v St Mary's Hospital [1992] 13 ILJ 987 (IC).
[6] [1994] 15 ILJ 115 (LAC).

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> workforce as a result of the animosity towards the respondent. However, it adopted the wrong procedure and thereby treated the respondent unfairly.

[14] The leading judgment emanating from this court[7] on the subject seem to be that of *Jabari v Telkom SA (Pty) Ltd*[8] where this court said the following:

> "In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct <u>was primarily the cause</u> of the disharmony…

[15] Might I add, where necessary, an employer must invoke and or insist on the internal grievance policy. There are many instances where lethargic employees may label a results driven manager as being incompatible. The cause of disharmony in such instances would be the insistence on results and lack of shoddiness. The conduct of insisting on diligence cannot be an intolerable conduct. The conduct must be one departing from a recognized, conventional, or established norm or pattern. There must be a clear causal link between the disharmony and the departing conduct. Where there is no evidence that the conduct is the cause of the disharmony, then an employer must fail. The evidence of Samodien was nothing else but a litany of acts of misconduct and poor performance. She did not show that there was disharmony caused by the first respondent. The same goes with the evidence of Holding. Lotter's evidence was no different.

[16] It is also clear that what Ramothwala was investigating was not necessarily the cause of the disharmony but the litany of acts of misconduct and poor performance as presented to her by Samodien. That was a wrong procedure adopted. Similarly, Dolo was effectively conducting a poor performance hearing as opposed to determining whether the conduct of the first respondent was the cause for the disharmony. In *SA Quilt supra*, the LAC said:

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[7] Quoted with approval in Samancor Tubatse Ferrechrome v MEIBC & others [2010] 8 BLLR 824 (LAC).
[8] [2006] JOL 17475 (LC).

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> "It was correctly pointed out in the judgment *a qou* that if a worker behaves in such a manner that he or she is incompatible with the other staff, that worker can be dismissed. There must be, however, <u>a proper inquiry to establish that the fault lies with the worker</u>. Mere incompatibility caused by other workers does not justify the unfair treatment of the worker who cannot get on with the others…"

[17] The investigation by Ramothwala and the enquiry by Dolo was not focused on whether the fault of disharmony lies with the first respondent but on whether the first respondent is a performer or not. Such is a wrong enquiry. For the reasons set out above, there is no basis for me to conclude that the decision by the second respondent that the dismissal of the first respondent is unfair is one that a reasonable decision maker may not arrive at.

[18] Turning to the remedy. I am unable to fault the remedy of reinstatement with backpay. Having found that the dismissal is substantively unfair, unless the exceptions exist, the remedy of reinstatement cannot be denied. The only possible exception applicable to this matter is one in section 193 (2) (d) – the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable. Intolerability is not based on views of other employees but based on sufficient evidence that the trust relationship is broken and is irreparable. In *casu*, the Human Resources Business Practitioners merely expressed their frustrations, which is not sufficient to deprive the first respondent of her primary remedy[9].

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

<u>Order</u>

1. The application for review is dismissed.

2. The applicant is to pay the first respondent's costs.

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[9] See SARS v CCMA (CCT19/16) [2016] ZACC 38 (8 N0vember 2016); Amalgamated Pharmaceuticals Ltd v Grobler NO & others (2004) 25 ILJ 523 (LC) para 13 and New Clicks SA (Pty) Ltd v CCMA & others (2008) 28 ILJ 402 (LC) paras 11 and 17.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances

For the Applicant:	M G Maeso of Shepstone & Wylie, Sandton.
For the first Respondent:	X Njokweni of Knowles Husain Lindsay Inc, Sandton.

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