THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

CASE NO: PR 206/2016

Not reportable

In the matter between

GENERAL MOTORS SOUTH AFRICA

(PTY) LTD Applicant

and

NATIONAL UNION OF METALWORKERS OF SA First Respondent

JEROME SAMSON Second Respondent

JAMES MACKRIEL Third respondent

LUBABALO MDYOGOLO Fourth Respondent

BRIAN COETZEE Fifth Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION Sixth Respondent

FREDERICK SAULS *N.O* Seventh Respondent

Application heard: 14 September 2017

Judgment delivered: 30 January 2018

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside an arbitration award issued by the seventh respondent (the arbitrator) on 14 October 2016. In his award, the arbitrator found that the second to fifth respondents (the individual respondents) had been unfairly dismissed by the applicant and ordered their reinstatement, with retrospective effect.

[2] The material facts are not in dispute, and I do not intend to burden this judgment with a detailed record of the events that led to the dismissal of the individual respondents. These are well summarised by the arbitrator in his award. The dispute has its origins in what was referred to as a sick absence control procedure (SACP), agreed between the applicant and the first respondent (the union) in 2003. The agreement was intended, amongst other things, to '*address sick absence in a manner which is both procedurally and substantively fair, within a control procedure that is consistent with the provisions of the code of good*

practice – schedule 8 of the Labour Relations Act with specific reference to clauses 10 and 11.' The agreement provides further for the counselling of employees when they reach the limit of 10, 20 and 30 days' sick leave, and again after having exceeded the 30-day limit. An employee who having been counselled for exceeding the 30-day limit and who is again absent on account of illness within the same three-year cycle, will be called upon to attend an enquiry consistent with the provisions of the Code of Good Practice.

[3] The contracts of employment of each of the individual respondents provides that a good attendance record and punctuality is an essential requirement and that any failure to comply with those requirements, will reflect on the employee's capacity, entitling the applicant to terminate the employee's services.

[4] Each of the individual respondents had exceeded the 30-day limit, and all of them took further sick leave with the result that incapacity enquiries were convened in respect of each of them. The notices issued to the individual respondents state specifically that they would be consulted on their capacity to fulfil their job functions and render services in the manner agreed upon in their contracts of employment. The individual respondents were further invited to submit any additional evidence related to the medical conditions which they considered relevant to the enquiry.

[5] In each case, the respective chairpersons found that the individual respondents did not have the capacity to meet their contractual obligations on account of excessive sick absence and in each case, the respective chairperson decided that the sick absence trend was not likely to improve, and that the applicant could not fairly be expected to continue with the employment relationship. The employment of each of the individual respondents was terminated. The individual respondents disputed the fairness of the dismissals and referred disputes to the CCMA. These disputes were consolidated for the purposes of the arbitration proceedings under review.

[6] In his award, the arbitrator found that the testimony by the parties and the documentary evidence presented during the proceedings illustrated that the enquiries were not conducted as ill-health or injury incapacity enquiries as contemplated by the statutory Code of Good Practice, but rather as enquiries into the failure by the individual respondents to comply with the contractual obligations. On this basis, he went on to find that if the applicant had intended to charge an individual respondents for a breach of the rule in that they were not complying with their contractual obligations to attend work, it should have done so. He expressed the view that the form of incapacity at issue fell directly within the realms of what the Code of Good Practice refers to as ill-health incapacity and should have been treated as such. The arbitrator's reasoning is apparent from the following passage:

> 23. These were thus not the ill health incapacity inquiries, as required to have been held in terms of schedule 8 of the Act. The applicants were not charged for breach of a rule relating to sick leave or sick absence from work. In terms of section 22 of the Basic Conditions of Employment Act (the BCEA), and clause 13 of the applicants' contract of employment, they were entitled to be paid sick leave. Said provisions does not specify that applicants, on having used all their paid sick leave would not be entitled to unpaid sick leave, or where were granted, to an extension of the period of paid sick leave. The learned author Dr John Grogan argues in his publication Workplace Law 11th edition 2015, held the view that "*Although it has been held that circumstances unconnected with an employee's physical or mental health that prevent an employee from working may qualify as 'incapacity', the LRA suggests that such cases should be treated like other forms of dismissal'.* If the respondents had thus intended to charge the applicants for breach of a rule that they were not complying with their contractual obligation to work, it should have charged the applicants accordingly. But this was not done, as the applicants situation does not fall into such other forms of incapacity as referred to by the author. Their situations thus falls directly in the category of ill health incapacity and should have been treated as such… (Sic).

[7] The arbitrator held further that the persons who had conducted the enquiries had speculated, based on their own personal opinions and without any medical or specialist diagnosis, about whether the medical conditions of each of the individual respondents would improve.

[8] In response to a submission by the applicant in these proceedings that the individual respondents' absence from work was indicative of their incapacity to work, the arbitrator held that there was no evidence that the individual respondents 'could not do their work, when they were at work'. It was thus incumbent on the applicant to have dealt with the issues listed in item 10 of schedule 8. Finally, there was an issue of alleged inconsistency that had been raised by the individual respondents. The arbitrator did not consider it necessary to deal with this component of the claim given his findings on the nature of the process followed by the applicant. Issues of alleged inconsistency are thus not relevant to these proceedings.

[9] In summary, the arbitrator's reasoning is the following: the individual respondents each underwent counselling after exceeding 30 days sick absence. The inquiries that the individual respondents all subsequently faced were not incapacity inquiries as envisaged by the Code; they were inquiries into a failure to comply with contractual obligations. Inquiries of this nature were inappropriate; the applicant ought to have conducted ill-health incapacity inquiries. Further, absence from work is not in itself indicative of any incapacity to work; the individual respondents could do their work when they were at work. The applicant had therefore failed to establish incapacity on the part of any of the individual respondents and its failure to follow the prescribed procedure for conducting incapacity hearings rendered their dismissals substantively and procedurally unfair.

[10] The applicable legal principles are well-established. This court is entitled to interfere with an award made by a commissioner if and only if the commissioner

misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)). In other words, the test is two-staged. First, the applicant must establish a misconception of the nature of the enquiry or some misconduct or misdirection on the part of the arbitrator. If that is established, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

[11] In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), The Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process-related irregularity sufficient to set aside the award. The court cautioned against adopting a piecemeal approach since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). Specifically, the questions for a review court to ask or whether the arbitrator gave the parties a full opportunity to have their say in respect of the dispute, whether the arbitrator identified the issue in dispute that he was she was required to arbitrate, whether the arbitrator understood the nature of the dispute, whether he or she dealt with a substantial merits of the dispute and whether the decision is one that another decision-maker could reasonably have arrived at based on the evidence (see paragraph 20). So, when arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as

the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[12] Given the applicants grounds for review, it is also necessary to summarise, brief terms, the legal principles applicable to sick absence. In *AECI Explosives Ltd (Zomerveld) v Mambalu* [1995] 9 BLLR 1 (LAC), the Labour Appeal Court said the following:

> It seems to us that the company, having accepted the authenticity of the medical certificates, was entitled to rely only on incapacity. It was entitled to dismiss the applicant… For his incapacity to perform his job with such incapacity [was] due to persistent absence from work because of genuine ill-health… per Tebbutt J in Hendricks v mercantile and general reinsurance company of SA Ltd (1992) 15ILJ 34 (LAC) at 312 I-J. The test for substantive fairness was stated by Tebbutt J at 313A-D to be the following:
>
> > 'The substantive fairness of the dismissal depends on the question whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include inter alia the nature of the incapacity; the cause of incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on other employees; and the employees work record and length of service.'

[13] Turning to the first ground for review, the applicant contends that the arbitrator misdirected himself to the extent that he declined to recognise the category of incapacity arising from persistent intermittent absences on account of ill health. Instead, he simplistically reasoned that incapacity could not be present as there was no evidence before him that the individual respondents could not do the work, when they were at work. Put another way, the applicant contends that the arbitrator failed to realise that intermittent absence due to ill-health is a

recognised basis for a dismissal on account of incapacity. Once this is accepted, so the applicant contends, the arbitrator committed a misdirection that amounts to an error of law which had a distorting effect on the outcome of the proceedings under review. The second ground for review is that the arbitrator misdirected himself by finding that the proceedings as initiated and conducted by the applicant were not incapacity enquiries. The arbitrator's reasoning in this regard would appear to be that because reference was made (especially in the findings made by the respective chairpersons) to the individual respondents' inability to comply with their contractual obligations, the enquiries unavoidably had to be something other than genuine incapacity enquiries, and that the applicant ought properly to have conducted disciplinary hearings. The third ground for review is that the arbitrator failed to draw reasonable conclusions in relation to the individual respondents' lack of capacity. In particular, the applicant attacks the finding that the chairpersons of the enquiries simply speculated about the individual respondents' medical conditions and prognosis. Fourthly, the applicant contends that the arbitrator misconceived the nature of the enquiry by finding that the applicant ought to have presented evidence to prove that the individual respondents could not do their work, when at work. The applicant submits that this indicates that the arbitrator require the applicant to prove that the individual respondents were suffering from some form of disability or incapacity when at work. Fifthly, and following from the fourth ground of review, the applicant contends that the arbitrator failed to take into account that during the cross-examination of the individual respondents, they effectively conceded that they had not been able to bring their medical problems under control. Sixthly, the applicants referred to the arbitrator's finding that nothing prevented an employee from taking unpaid sick leave either in terms of their contracts or the BCEA and contend that in coming to this finding, the arbitrator disregarded material evidence in the form of the SACP, an agreement concluded specifically for the purpose of addressing sick absence. The seventh ground for review is that the arbitrator, by finding that the applicant had failed to give effect to items 10 and 11 of the Code of Good Practice, failed to give consideration to the material

evidence placed before him. Finally, the applicant contends that the arbitrator's finding that the enquiries had been conducted as disciplinary enquiries rather than incapacity enquiries was not an issue raised by any of the individual respondents; the arbitrator had thus introduced a challenge to procedural fairness for the benefit of the individual respondents which they had not even raised themselves.

[14] In my view, by declining to recognise a category of incapacity arising from persistent intermittent absence from work, the arbitrator committed a material misdirection that amounts to an error of law. The passage from *AECI Explosives (Zommerveld) v Mambalu* referred to above makes clear that the LAC has accepted that persistent absence form work because of genuine ill-health is a legitimate ground on which to terminate employment, and one that relates to the capacity and not the conduct of the employee. The passage from *Hendricks v Mercantile General Reinsurance Company* (quoted with approval in *Mambalu*) is also authority for the proposition that substantive fairness in these circumstances requires an assessment of whether the employer can fairly be excepted to continue the employment relationship given the nature of the incapacity, its cause, the prospect of recovery, improvement or recurrence, the period of absence and its effect on the employer's operations and on other employees, and the employee's work record and length of service. These authorities were binding on the arbitrator (as they are on this court) and it was not open to him to ignore them.

[15] The arbitrator's reference to John Grogan's 'Workplace Law' in paragraph [23] of his award is entirely misplaced. Reading the passage on which the arbitrator relied in context, it suggests no more than that the employee's incapacity must arise from illness or injury and not some form of 'operational incapacity', in the case referred to, occasioned by the employee's detention in custody on suspicion of a crime. Indeed, the author goes on specifically to recognise and confirm that repeated absence for short periods constitutes an exception to the general rule

that dismissal is generally considered inappropriate if the employee's absence is likely to be of a short duration. In the former instance, the author confirms, with reference to the *AECI* judgment, that dismissal is in principle permissible in a case of habitual absenteeism, even if for medical reasons.

[16] In short, the arbitrator's refusal or failure to recognise a category of dismissal that permits an employer to dismiss an employee for persistent or habitual intermittent absence on account of ill-health constitutes an error of law and renders his award reviewable. It warrants mention that the arbitrator's finding effectively ignores the terms of the collective agreement between the parties on the manner in which repeated absence from work was to be regulated. This is particularly apparent from these finding that the periods of paid sick leave established by the BCEA did not preclude the granting of an extension of that leave, even on an unpaid basis. The express purpose of the collective agreement was to regulate the manner in which absence on account of ill-health would be managed. It was incumbent on the arbitrator to give effect to that agreement.

[17] There is also no basis on the evidence to sustain the arbitrator's finding that the hearings conducted by the applicant were, in effect, enquiries into allegations of a failure by the individual respondents to comply with their contractual obligations. The arbitrator's finding appears to have its roots in the wording of the findings in respect of each of the individual respondents. That wording, in one way or another, refers to an incapacity to 'fulfil contractual agreements' or 'fulfil contractual obligations'. These findings must be appreciated in the context of the nature of each enquiry and the findings as a whole. It cannot be deduced from a single sentence making reference to contractual obligations that the real as opposed to the apparent purpose of the inquiry was to determine the existence of any breach of contract by the individual respondents. The fact remains, as recognised by the SACP, that the obligation to attend work regularly is a contractual obligation. To suggest that an assertion that the individual respondents were unable to meet this obligation on account of their incapacity to

attend work regularly amounts to an allegation of a breach of contract and thus a workplace rule, manifestly ignores the context in which the incapacity hearings were conducted and in which the respective findings against the individual respondents were made. The case against the individual respondents was not that they had breached their employment contracts or that they had breached any workplace rule. The fact that they were unable on grounds of incapacity to attend at work with a frequency that their contracts of employment recognised and demanded did not have the effect of migrating the issue from capacity to conduct – the applicant was fully entitled to treat the matter as it did, as a case of incapacity that resulted in a failure to meet acknowledged contractual obligations relating to attendance at work.

[18] On the basis then that it was permissible in law for the applicant to dismiss the individual respondents on account of excessive intermittent absence on account of ill-health, and given that the nature of the inquiry is one that relates to incapacity and not misconduct, the issue is whether the dismissals of any of the individual respondents were unfair on any one or more of the grounds advanced by them. On the evidence, the need to maintain satisfactory levels of attendance was clearly a capacity that an employee was required to demonstrate to remain employed. The fact remains that in each instance, the source of the alleged incapacity or inability to comply with attendance requirements was ill- health.

[19] The arbitrator did not consider it necessary to consider the circumstances of each individual applicant – the sweeping rejection of the approach adopted by the applicant and the dismissal of the grounds for termination of employment in each case as speculative, rendered it and necessary for him to do so. Given that this court is required to determine whether the result of the proceedings under review can stand having regard to the evidence notwithstanding any error or misdirection by the arbitrator, I intend to consider briefly whether the arbitrator's finding of substantive unfairness is capable of being upheld. It warrants mention that contrary to the arbitrator's finding, the findings on the evidence it served

before each person can hardly be dismissed as speculative. On a conspicuous of all the evidence, the findings made were reasonable, given the totality of the information available to the chairperson's concern, including information on the individual respondents past attendance record, the distribution of periods of absence, the reasons for absence, and whether or not any change had occurred suggesting any prospect of improved future work attendance.

[20] The second respondent had exceeded the 30 day limit recognised by the SACP by a considerable degree. By the date of his dismissal, he had accumulated 60% more than the permissible number of days absent on account of illness. Further, there were some five months left in his sick leave cycle. The evidence shows that he presented with eight different diagnoses in the course of the sick leave cycle in question. In the circumstances, it can hardly be said that there was any indication that the situation was likely to improve. The best evidence available to the applicant was that, more likely than not, the second respondent would continue to be absent from work and that he accordingly lacked the capacity to ensure that he attended at work with sufficient regularity to meet his obligations both in terms of his employment contract and the SACP.

[21] The third respondent was absent for 36 days during the relevant sick leave cycle, exceeding the agreed limit by some 20%. Evidence suggested that he presented with seven different diagnoses in the course of the sick leave cycle and that a marked improvement in his ability to attend work on a regular basis was unlikely. On the best evidence available, it was more likely than not that the third respondent would continue to be absent from work on an excessive basis, and that he lacked the capacity to ensure regular attendance at work.

[22] The evidence suggests that the fourth respondent, who had accumulated some 40% more than the permissible number of sick absence days in the relevant leave cycle, had accumulated these days at a rapid rate, given that there were some 17 months remaining in the sick leave cycle. The evidence also suggested

that the fourth respondent presented with nine different diagnoses in the course of the sick leave cycle in question, that these illnesses were persistent and that there was little prospect of any marked improvement in his ability to attend work on a regular basis.

[23] In the case of the fourth respondent, the same reasoning applies. The fourth respondent had exceeded the agreed 30 day limit by a considerable margin – he had been absent for hundred and 30 days during the applicable sick leave cycle. These days were accumulated at a rapid rate. Despite the further counselling session undertaken in May 2015, the situation did not improve. The relevant records disclosed that the fourth respondent presented with seven different diagnoses during the course of the relevant sick leave cycle. Insofar as alternative employment is concerned, in the fourth respondent's case, there was clear evidence, largely undisputed, that it was not viable simply to appoint the fourth respondent into a clerical position since no such vacancy existed at the time and skills were required that the fourth respondent did not possess or could not acquire within a reasonable time. The evidence suggests that the fourth respondent would more than likely continue to be absent from work excessively, and that he lacked the capacity to ensure regular attendance at work.

[24] In short, there is nothing in the record of the proceedings under review to suggest that despite the arbitrator's misdirection in relation to the nature of the enquiries conducted by the applicant, the arbitrator's finding of unfair dismissal can be sustained. The arbitrator's award thus stands to be reviewed and set aside.

[25] Given the above findings, it is not necessary for me to consider the applicant's remaining grounds for review.

[26] In successful review applications, this court ordinarily exercises a discretion to either remit the matter to the CCMA for rehearing, or substitute the commissioner's finding for one that is appropriate. The source of this discretion is

s 145 (4) of the LRA, which provides that this court may either 'determine the dispute in the manner it considers appropriate' or 'make any order it considers appropriate about the procedures to be followed to determine the dispute. The court ordinarily takes into account whether the result is a foregone conclusion, whether any prejudice would be caused to the applicant by any further delay, whether the decision-maker has exhibited bias, and whether the court is in as good a position to make the decision itself. In *Palluci Home Depot (Pty) Ltd Heskowitz and others* [2015] 5 BLLR 484 (LAC) the LAC said the following, at paragraph 58:

> Where all the facts required to make a determination on the disputed issues before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court is in as good a position as the administrative tribunal to make the determination, see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the paths of the Labour Court under s 158 of the LRA, which primarily directed at remedying a wrong, and providing effective and speedy resolution of disputes. The need for bringing a speedy finality to labour dispute is thus an important consideration in the determination, by a court of review, of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner.

[27] The court has before it all of the relevant material and little point would be served by remitting the dispute to the CCMA for rehearing. Further, the interests of expeditious dispute resolution would be best served by an order of substitution.

[28] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view, both interests are best served by there being no order as to costs. This court has conventionally been reluctant to make orders for costs where genuinely aggrieved employees pursue legitimately felt grievances. There is no good reason to make an exception in this instance.

I make the following order:

1. The arbitration award issued by the seventh respondent on 14 October 2016 is reviewed and set aside.
2. The award is substituted by the following:

   'The applicants' dismissals were substantively and procedurally fair.'
3. There is no order as to costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. FE le Roux, instructed by Chris Baker and Associates

For the first to fifth respondents: Adv. L Voultsos, instructed by Gray Moodliar Attorneys