REPUBLIC OF SOUTH AFRICA

In the labour court of South Africa, JOHANNESBURG

JUDGMENT

Reportable

Of interest to other judges

Case no: JR3408/09

In the matter between:

MOLAPI BENJAMIN MUDAU	**Applicant**
and	
THE METAL AND ENGENEERING INDUSTRIES BARGAINING COUNCIL	**First Respondent**
GERALDIN DUNN N.O	**Second Respondent**
BOMBELA CIVIL VENTURE (Pty) Ltd	**Third Respondent**
MURRAY & ROBERTS CONSTRUCTION (PTY) LTD	**Fourth Respondent**

Heard: **31 January 2012**

Delivered: **29 July 2012**

Summary: Review section 188A of the LRA, arbitration award- Commissioner committing gross irregularity and exceeding powers– determining issues which were not before her. Award reviewed and set aside.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award of the second respondent under case number CDR/ 9/378 dated 7 December 2009 in terms of which the second respondent found the dismissal of the applicant to have been for a fair reason.

[2] The arbitration proceedings were conducted in terms of section 188A of the Labour relations Act of 1995 (the LRA).[1]

Background facts

[3] The background facts in this matter are fairly common cause. The applicant who prior to his dismissal was employed as shutter hand grade one was dismissed for misconduct concerning the alleged 'unauthorised removal of company property namely steel and selling it to a scrap metal dealer.'

[4] The witness of the third and fourth respondents was Mr Bucha, the site administrator who testified that he found an invoice from a recycling company indicating that the applicant had sold steel to that company. He found the payment slip in one of a car belonging to the fourth respondent. He then went to the company to which the scrap metal was sold to enquire as to the person who sold the scrap metal. His inquiry revealed that the applicant was involved in the sale of the scrap metal in question. He further testified that the scrap metal which was sold weighed 620 kg.

[5] The applicant testified that after cleaning at the workplace there were some off cuts which could no longer be used. He further stated that their foreman

[1] Act 66 of 1995.

indicated that he would speak to the site engineer regarding the possibility of selling them to the scrap metal dealers and whatever comes out of the sale could be used for a braai. According to him, their foreman informed them that Mr Melville, the site engineer, agreed that they could sell the off cuts. The sale yielded over R700,00. The amount was used for a braai at the foreman's home. Apparently the site engineer also attended that braai.

[6] During cross-examination, the applicant indicated that he did not know why the braai was held at the foreman's home and not at the workplace. He stated that the correct person to answer the question was the foreman.

[7] The applicant's witness was Mr Davies who confirmed that the site engineer had said that because they were cleaning the site they could take the scrap metal.

Grounds for review

[8] The applicant in his grounds of review contends that the Commissioner committed misconduct in relation to his duties as an arbitrator and further that she committed gross irregularity in the conduct of the arbitration proceedings. In relation to gross irregularity, the applicant contended that the Commissioner committed irregularity when she found that the applicant had committed an offence which is much more serious than the charge of an authorised removal of the respondent property.

The commissioner's award

[9] The Commissioner in the arbitration award identified the issue she was seized with as follows:

> 'Whether the employee is guilty of an unauthorised removal of company property, namely steel and selling it to scrap metal dealer (Prime Recycling).'

[10] After summarising the evidence of the respective witnesses, the Commissioner in analysing the evidence found that on the basis of the receipt which had been placed before her, the applicant had concluded the

transaction of selling this deal for cash. She further found that this fact was not disputed by the applicant. The Commissioner then stated that the issue for determination was whether the applicant had permission to remove the steel. In this respect, the Commissioner found that

> 'The onus is on the employee to show that he was authorised to remove the steel.'

[11] The Commissioner noted that although the applicant had stated that they were given permission to remove the steel, he conceded during cross-examination that the site engineer Mr Melvin, did not say how they were to remove the steel. It would appear common cause that the steel was removed with the use of the third and fourth respondents' vehicle. The Commissioner said that by implication the applicant and others did not have permission to use the third and fourth respondents' vehicle.

[12] The Commissioner then analysed the evidence of both applicant and his witness and found that there were contradictions between their versions. The contradiction between the versions of the applicant and his witness relates to the amount for which the scrap metal was sold for. According to the applicant's witness, Mr Davies, the scrap metal that he saw could be estimated at a 100 kg whereas the amounts sold was 620 kg. It was on this basis that the Commissioner found that the version of the applicant was improbable and accordingly made the following finding:

> 'I therefore do not accept that the employee had discharged the onus of proving that he had permission to remove the steel.'

[13] The above contradiction in the versions of the applicant and his witness was found by the Commissioner to have been significant and according to her it clears the issue in dispute. She further found that if permission to remove the steel was given, it would then had followed that permission to use the van would have been given.

[14] The Commissioner concluded in the assessment of the substantive fairness of the reason for the dismissal that the applicant was guilty as charged because as she put it:

> 'I find that the employee failed to prove that he was authorised to remove the 620 kilograms of steel from the company premises. On a balance of probabilities I find the employee guilty as charged.'

Evaluation

[15] The Commissioner was appointed in terms of section 188A of the LRA to determine the fairness or otherwise of the dismissal of the applicant. Her mandate was to determine whether the applicant was guilty of unauthorised removal of the third and fourth respondents' property.

[16] It is trite that the employee in dismissal cases has the *onus* to show that he or she was dismissed. Once the employee has shown that he or she was dismissed the o*n*us rests on the employer to show that the dismissal was for a fair reason. In other words, the employer bears the o*n*us of proving the alleged misconduct on a balance of probability.

[17] The present case is slightly different to the cases that generally serve before Commissioners on arbitration. The majority of cases that goes to arbitration in the CCMA and other dispute resolutions determine the validity or the fairness of the reason to dismiss an employee. In other words the task of the arbitrators in those cases is to determine whether there existed a fair reason for dismissing an employee. Whilst the arbitrator has to determine the matter *de novo* in those cases, he or she in relation to the sanction has to do so by having regard to the reasons given by the employer for dismissing the employee.

[18] Section 188A provides for pre-dismissal arbitration which can only be conduct by agreement between the employer and the employee and when the employer intends charging the employee with misconduct.[2]

[2] Section 188A reads as follows:
"**188A. Agreement for pre-dismissal arbitration**

[19] The task of arbitrators in terms of section 188A is slightly different in that in that regard the task is to determine on the balance of probabilities whether an employee has committed an offence for which he or she has been charged with and if so whether there is a basis in fairness to terminate the employment relationship between the parties. In other words, the terms of reference for the arbitrator in terms of section 188A are, unless indicated otherwise, limited to determining whether an employee has committed an offence and if so whether there exists a basis in fairness to terminate the employment relationship. In conducting arbitration proceedings under this section, the arbitrator is required to determine the action to be taken against the employee on the basis of the evidence before him or her and on the criteria of fairness.

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(1) An employer may, with the consent of the *employee*, request a *council*, an accredited agency or the Commission to conduct an arbitration into allegations about the conduct or capacity of that *employee*.
(2) The request must be in the *prescribed* form.
(3) The *council*, accredited agency or the Commission must appoint an arbitrator on receipt of -
(a) payment by the employer of the *prescribed* fee; and
(b) the *employee's* written consent to the inquiry.
(4) (a) An *employee* may only consent to a pre-dismissal arbitration after the *employee* has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.
(b) Despite subparagraph (a), an *employee* earning more than the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*, may consent to the holding of a pre-dismissal arbitration in a contract of employment.
(5) In any arbitration in terms of this section a party to the *dispute* may appear in person or be represented only by -
(a) a co-employee;
(b) a *director* or *employee*, if the party is a juristic person;
(c) any member, office bearer or official of that party's registered *trade union* or registered *employers' organisation*; or
(d) a legal practitioner, on agreement between the parties.
(6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.
(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142(1)(a) to (e), (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the *director* for the purpose of this section, must be read as a reference to -
(a) the secretary of the *council*, if the arbitration is held under the auspices of the *council*;
(b) the *director* of the accredited agency, if the arbitration is held under the auspices of an accredited agency.
(8) The provisions of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.
(9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the *employee*.
(10) (a) A private agency may only conduct an arbitration in terms of this section if it is accredited for this purpose by the Commission.
(b) A council may only conduct an arbitration in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for this purpose by the Commission.'

[20] An arbitration award made in terms of section 188A is reviewable in terms of section 145 of the LRA. This means that an arbitration award under that section may be reviewed for either unreasonableness of its outcome or for a defect in the proceedings. The defects in the proceedings may as provided for in section 145 of the LRA relate to misconduct, gross irregularity or exceeding powers by the arbitrator.

[21] The applicant in the present matter challenges the arbitrator's award on amongst others, gross irregularity and exceeding her powers.

[22] I now turn to deal with the principles governing gross irregularity upon which the applicant relies on in challenging the arbitration award of the Commissioner. In interpreting the meaning and effect of gross irregularity on arbitration awards, the Constitutional Court in *Sidumo and Another v Rustenburg Platinum mines and Others,*[3] held that:

> 'The basic principle was laid down in the oft-quoted passage from *Ellis v Morgan*132 where the court said:
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> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has *prevented the aggrieved party from having his case fully and fairly determined*."
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> In *Goldfields*, the court qualified this general principle. This case concerned a situation where the decision-maker misconceived his or her mandate. The court held that where a decision-maker misconceives the nature of the inquiry, the ensuing hearing cannot in principle be said to be fair because the decision-maker has failed to perform his or her mandate. Schreiner J expressed the principle as follows:
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> "The law, as stated in *Ellis v. Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that

[3] 2008 (2) SA 24 (CC) at para 262-263.

> case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.'" [Footnote omitted]

[23] The Court further held that arbitrators are required to make awards which are consistent with their obligations and functions as set out under the LRA and the Constitution. The arbitration awards that are inconsistent with the powers given to the Commissioner under the LRA are reviewable in terms of section 145(2)(a)(iii) of the LRA. In this respect, *Sidumo* held that:

> '...In effect, if a commissioner fails to determine the dispute fairly, he or she is in breach of the statute that is the source of his or her power to conduct the arbitration and is also in breach of the doctrine of legality, which is a constitutional constraint upon the exercise of his or her powers. This conduct on the part of the commissioner is ultra vires, that is, beyond powers conferred on the commissioners as contemplated in section 145(2)(a)(iii).'[4]

[24] In the present instance, one of the irregularities which render the arbitrator's arbitration award reviewable relates to exceeding her powers by considering issues which were not properly before her. The issue of whether the applicant and the driver had authority to use the vehicle was never before the arbitrator. The applicant was also not charged with the amount of steel which was removed from the work place. The size or weight of the steel removed from the workplace did not form part of the charge against the applicant. The charge for which the applicant was dismissed for is stated by the arbitrator in more than one occasion in the record of the arbitration hearing as follows:

> 'Okay, I can see here that the charge I am given is unauthorised removal of company property without permission, that is scrap and steel and they (say) you sold it to a steel metal dealer.'

[4] At para 276.

The Commissioner later in the record said:

> 'Now what we are here for this morning. My job is to come and hear the evidence that Sipho (the respondent's employee) says he has got against you in this issue of taking steel from the company and selling it to a metal dealer, . . to a scrap metal dealer.'
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> And during the case of the applicant the arbitrator reminded him that the case was about:
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> 'Okay, this matter is about you selling scrap metal at the scrap metal dealership. This is the company's evidence, what do you want to tell me, what happened on 30 November?'

[25] The first witness of the third and fourth respondents, Mr Bucha who at the time was site administrator, testified how he found a purchase slip which indicated that the applicant had sold the property in issue to a metal dealer using third and fourth respondents' van. He further stated that the applicant was not authorised to use the van. As concerning the amount of steel sold, he indicated that the total amount sold weighed 620kg.

[26] In testifying on his own behalf, the applicant stated that on 13 November, there was a discussion about a possible braai for his team. There was also talk about taking the unused scrap metal to a scrap dealer for sale. Their supervisor Mr Davies promised to talk to the site engineer about the sale of the scrap and using the proceeds for a braai. Although he was not present when Mr Davies spoke to the site engineer, he said that Mr Davies told them that there was an approval for them to sell the scrap metal. The scrap metal was sold for over R700,00- R600,00 of which was used for the braai and R100, 00 was given to the driver. The braai according to him was held at the foreman's house and present there was also the site engineer.

[27] Mr Davies in testifying on behalf of the applicant stated in essence that he had a discussion with Mr Melvin, the site engineer about the scrap metal which was made of small pieces of metal off-cuts. He also stated that Mr Melvin told him that if they were going to clean the site they could 'get rid of the scrap.'

He further answered in the affirmative when asked during cross-examination as to whether he gave permission for the scrap metal to be sold.

[28] As concerning the value of the scrap steel which was on the floor, Mr Davies testified that it could have been 100kg and not 620kg. And as concerning the amount which could have been made in the sale of the steel in question he stated that could not have been R600,00 and also that the applicant gave him R60,00 of the proceeds of the sale.

[29] It is clear from the above summary that the case which was before the arbitrator was that the applicant had removed the steel metal without the authority of the respondent. The issue of the removal of the steel and selling thereof to a dealer is not in dispute. The issue which I will revert to later was whether the applicant had authority to remove the steel and sell it.

[30] It needs to be emphasised that the issue which was before the arbitrator which she set out very clear at the beginning of the proceedings and later on was whether the applicant had the authority to remove the steel and sell it. The applicant was never charged with submitting less money than what was made out of the sale of the steel, neither was he charged with taking more steel than he was authorised to remove. The applicant was also not charged with the unauthorised use of the third and fourth respondents' vehicle. These are the issue which the arbitrator decided to determine even though from the record it does not appear that the applicant was ever given the opportunity to answer to. It is for these reasons that I am of the view that the arbitrator committed an irregularity that materially denied the applicant the right to a fair hearing.

[31] It seems to me also that had the arbitrator properly evaluating the evidence which was before her, she would have found that the third and fourth respondents had not discharged their duty of showing that the applicant was guilty of the offence for which he was charged with.

[32] It was the duty of the third and fourth respondents to show that the applicant did not have authority to remove the property in question. It is also clear from the facts which were before the arbitrator that the applicant was given

authority to remove the steel by Mr Davies who in turn received authority to allow the steel to be sold from Mr Mervin. I have already stated that the case before the arbitrator did not concern the amount of steel sold and the monetary value of the steel sold neither was the case about amount of money given to Mr Davies. The conflicting version between Mr Davies and the applicant as concerning the quantity of the steel sold and the amount given to him may have been of some concern but was irrelevant in as far as determining whether the applicant was guilty of the offence of unauthorised removal of the steel from the workplace and selling it to a steel dealer.

[33] In light of the above discussions, I am of the view that the applicant has made out a case for the review of the arbitration award of the arbitrator. On the basis of the material before this Court I do not deem it not deem it necessary to remit the matter back to the first respondent for a determination afresh.

[34] I have also not found any reason why the primary relief of reinstatement in terms of the provisions of section 193 of the LRA should not apply.[5]

[35] I do not see any reason why the third and fourth respondents should not be required to pay the costs of the applicant.

[36] In the premises, the following order is made:

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[5] Section 193 of the LRA reads as follows:

'193. Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator may -

(a) order the employer to reinstate the *employee* from any date not earlier than the date of *dismissal*;

(b) order the employer to re-employ the *employee*, either in the work in which the *employee* was employed before the *dismissal* or in other reasonably suitable work on any terms and from any date not earlier than the date of *dismissal*; or

(c) order the employer to pay compensation to the *employee*.

(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the *employee* unless -

(a) the *employee* does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the *dismissal* are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the *employee*; or

(d) the *dismissal* is unfair only because the employer did not follow a fair procedure.'

36.1 The arbitration award of the second respondent made under case number arbitration CDR/ 9/378 dated 7 December 2009, is reviewed and set aside.

36.2 The arbitration award is substituted with the following order:

‘1 The initiator of the disciplinary hearing has failed to proof on the balance probabilities that the employee was guilty of unauthorised possession of scrap metal.

2. The charges against the employee are dismissed’

36.3 The respondents are ordered to reinstate the applicant into the position he occupied prior to his dismissal without loss of benefits.

36.4 The third and fourth respondents are to pay the costs of the applicant the one paying the other to be absolved.

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Molahlehi J

Judge of the Labour
Court of South Africa

APPEARANCES:

FOR THE APPLICANT:	Mr KF Mphepya of the Legal Aid South Africa
FOR THE RESPONDENT:	Adv Holander instructed by Petersen, Hertog and Associates.