THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 315/08

SHOPRITE CHECKERS (PTY) LTD	Appellant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER B MBHA NO	Second Respondent
RETAIL AND ALLIED WORKERS UNION	Third Respondent
J MAAKE	Fourth Respondent

Neutral citation: *Shoprite v CCMA and others* (315/08) [2008] ZASCA 24 (27 March 2009)

CORAM: Navsa, Jafta, Ponnan, Mlambo JJA and Leach AJA

HEARD: **6 March 2009**

DELIVERED: **27 March 2009**

CORRECTED:

SUMMARY: **Review of CCMA award – standard – reasonableness – power of reviewing court – application of s 145 of the Labour Relations Act 66 of 1995 – unacceptable delay in finalising labour matters.**

ORDER

On appeal from: Labour Court, Johannesburg (Zondo JP sitting as court of first instance).

1. The appeal is upheld and there is no order as to costs.

2. The order of the LAC is substituted as follows:

'(a) Both the appeal and the cross-appeal are dismissed and each party is to pay its own costs.

(b) The order of the Labour Court is set aside and replaced with the following:

"Both the review and counter review applications are dismissed and there is to be no order as to costs." '

JUDGMENT

NAVSA *et* PONNAN JJA (Jafta, Mlambo JJA and Leach AJA concurring):

[1] This is an appeal, with the leave of this court, against a judgment of the Labour Appeal Court (the LAC). Leave was granted on the limited issue of the correctness of the remedy afforded to Mr Jan Maake, the fourth respondent, which was reinstatement with retrospective effect to the time of dismissal.

[2] Regrettably, as will become evident, this case has had a long and gruelling journey. Counsel for the appellant urged us to give due consideration to what he described as systemic failures. We should all be concerned about the long delays in finalising especially labour matters. This is an aspect to which we will revert later in this judgment.

[3] Mr Maake was employed by Shoprite Checkers (Pty) Ltd (Shoprite), a national supermarket chain, in 1972. At the material time, he worked for Shoprite as a controller in its delicatessen at its Silverton shop. Mr Maake's problems leading to the litigation which culminated in the present appeal, started during the last quarter of 2000 when, without authority, he consumed

food belonging to Shoprite. The consumption of the food in the delicatessen was captured on a surveillance camera and led to disciplinary proceedings against him during November 2000.

[4] At the disciplinary enquiry Mr Maake was charged with three instances of misconduct, namely, of eating (on three separate occasions) Shoprite's food without authorisation, in areas where doing so was prohibited. It is common cause that Shoprite's rules prohibited eating in most of the areas in the store, including the delicatessen. He was found guilty on all counts and his services were terminated by Shoprite on 2 December 2000. By this time he had been employed by Shoprite for nearly 30 years.

[5] It is unchallenged that, at the time of the commission of the offences by Mr Maake, shrinkage at Shoprite's Silverton store was becoming an increasing problem. The precise nature of the shrinkage is not known.[1] We do know that shrinkage at the store had increased from 1.5 per cent to 4 per cent ─ the norm for such stores is 1.5 per cent. This led to the installation of cameras within the store, in an attempt to identify those responsible for the shrinkage.

[6] It is undisputed that, during the period 14 September 2000 – 21 October 2000, the camera captured Mr Maake in the delicatessen eating items of food. On at least two occasions Mr Maake was consuming food that clearly belonged to Shoprite. The video clips show Mr Maake, on each occasion, taking an item, first from a table and then off a plate, before consuming it. Neither the nature of the food, nor its value, was established.

[7] Mr Maake did not appeal his dismissal internally.

[8] The Retail and Allied Workers Union (RAWU), of which Mr Maake was a member, referred the matter, on his behalf, to the Commission for

[1] During arbitration proceedings Mr Jurie Kemp, who was the store manager at the relevant time, testified that theft by customers, incorrect pricing of goods and pilferage by staff could all be contributing factors. We do not know in which departments the problem was most prevalent.

Conciliation, Mediation and Arbitration (the CCMA) in terms of the Labour Relations Act 66 of 1995 (the LRA), initially for conciliation and later for arbitration.

[9] On 3 April 2001, Commissioner Mathee found that Shoprite had not acted substantively or procedurally fairly and ordered Mr Maake's retrospective reinstatement to the date of his dismissal.

[10] On 10 May 2001, Shoprite, dissatisfied that it had to reinstate Mr Maake, launched a review application in the Labour Court in terms of s 145 of the Act. The Labour Court (Waglay J) handed down its judgment and made the following order on 10 May 2002:

'In the result I am satisfied that [Ms Mathee] did in fact commit gross misconduct in relation to her duties as arbitrator and the award is therefore liable to be reviewed and set aside.'

It took almost a year for this review process to run its course.

[11] The matter was referred back to the CCMA for arbitration afresh. The Commissioner involved in the new arbitration was the second respondent, Commissioner Mbha. Arbitration commenced on 13 September 2002 and was finalised on 7 August 2003 ─ a period of almost 11 months. The Commissioner found that Mr Maake had breached the rule referred to above. He held, however, that dismissal was not peremptory. He considered, in relation to the offence in question, that discipline in the workplace had to be progressively imposed. He took into account Mr Maake's clean long service record and in the totality of the circumstances held that dismissal was too harsh a sanction.

[12] Commissioner Mbha held that Mr Maake should be given a 'severe' final written warning, valid for six months. Shoprite was ordered to reinstate Mr Maake. The reinstatement would take effect from the date of the award and not from the time of dismissal.

[13] That award was once again taken on review by Shoprite in terms of s 145 of the Act. Shoprite, it appears, was intent on securing Mr Maake's

dismissal. It complained that the Commissioner had failed to take into account that reinstatement would set a precedent amongst its other employees who would, as a consequence, be left with the impression that unauthorised consumption attracted only the sanction of a written warning. Shoprite contended that this would lead to inconsistency in applying discipline ─ several people had already been dismissed for the same offence. It was also submitted that reinstatement would mean that Shoprite would be required to continue employing dishonest people.

[14] Mr Maake, in turn, launched a counter application, challenging the finding that he was guilty of misconduct and, in addition, complained about the terms of his reinstatement and the sanction imposed. During the disciplinary proceedings Mr Maake had denied that he was the person on the video clips. During the arbitration proceedings however, Mr Maake ultimately admitted that he was that person. His case then was that he had authority to taste food prepared in the delicatessen and was therefore only doing his job rather than being guilty of misconduct. In his counter application he reverted to his earlier denial that he was the person who featured in the video clips consuming food. It is safe to say that Mr Maake was not contrite.

[15] The second review application, once again, came before Waglay J who encountered problems with the record of the second arbitration. His judgment reflects that there was no transcript available. During the hearing before Waglay J, a transcript of Commissioner Mbha's handwritten notes was provided and the parties were agreed that they were a fair reflection of the arbitration proceedings and were prepared to have the matter decided on that basis.

[16] On 13 August 2004, Waglay J, probably to the distress of both parties, stated the following in his judgment:

'In this matter having regard to the summary of evidence I am satisfied that the decision of [Commissioner Mbha] was not one open to be reviewed. However, I am mindful of the fact that there is discontent on the part of both parties. Because of the unhappiness compounded

by the absence of a proper record I believe that the best course to follow is to refer the matter back…for [it] to be arbitrated afresh before a [different] Commisioner.'

Yet again, Waglay J ordered that the matter be referred back to the CCMA for arbitration before a different Commissioner. Like the first, the second review had also taken almost one year to be finalised.

[17] Shoprite, with the leave of the Labour Court granted on 18 July 2005,[2] appealed that order to the LAC, contending, inter alia, that Waglay J should have decided the matter on the transcript presented to him. Mr Maake and his union, both noted a cross-appeal, maintaining that a reinstatement order retrospective to the time of dismissal was justified.

[18] The matter was heard by the LAC on 15 September 2006, more than a year after leave was granted. Judgment was handed down on 21 December 2007, more than 15 months later. Zondo JP, writing for a unanimous court, said the following about the Labour Court's approach to the matter (set out in para 16 above):

'If that order…was given effect to, the new commissioner…would have been the third commissioner and the parties and the witnesses who had already testified in the previous two arbitrations…would be called to testify and those [who] had given evidence in the disciplinary hearing would have [been] subjected to cross-examination for the fourth time on the same events.'

[19] The learned Judge-President went on to record the following:

'The order of the Labour Court in the second review application was issued on 13th August 2004. That would have been over three and a half years since the fourth respondent's dismissal. What would happen if some important witnesses who had given evidence in the earlier two arbitrations were, for some or other reason, no longer available to give evidence? What would happen if the unavailability of some or other important witness who had testified in the earlier arbitrations led to a result which could not have ensued if he had been available and had given evidence? Of course, the result could well be a miscarriage of justice.'

[2] The application for leave to appeal was disposed of 11 months after judgment.

[20] The LAC decided the appeal by Shoprite and the cross-appeal by Mr Maake. It held that the finding by Commissioner Mbha that dismissal was not warranted was unassailable. In respect of Mr Maake's submission that a final warning as a sanction was unjustified, Zondo JP rightly disagreed.

[21] The LAC held that Commissioner Mbha erred in not ordering retrospective reinstatement. It found that denying Mr Maake the benefit of reinstatement up to the time of dismissal would, in the light of the sanction of a final warning, be too punitive. The LAC took into consideration the period of more than two and a half years that had passed from the time of Mr Maake's dismissal up to the time of Commissioner Mbha's award and that he had been without remuneration for that period. The LAC found that Commissioner Mbha's failure to order retrospective reinstatement was not justifiable, nor reasonable nor rational. In arriving at this decision the court took into account Mr Maake's length of service, his clean disciplinary record and the 'indignity' of the preceding two and a half years without income. Zondo JP accepted that shrinkage was a problem for Shoprite but concluded that, in the totality of the circumstances, it was unreasonable to deny Mr Maake the benefit of his salary for the period between his dismissal and Commissioner Mbha's award.

[22] In the result, on 21 December 2007 the LAC made the following order:

'1. The appeal is dismissed and the cross-appeal is upheld in part.

2. Each party is to pay its own costs in regard to the appeal and cross-appeal.

3. The order of the Labour Court is set aside and replaced with the following order:

"(a) The review application is dismissed.

(b) There is to be no order as to costs.

(c) The counter-review application is granted in part.

(d) The commissioner's decision not to make the operation of the order of reinstatement retrospective to the date of dismissal is hereby reviewed and set aside.

(e) There is to be no order as to costs.

(f) The commissioner's arbitration award is amended by the addition of the following order thereto:

"(i) The order reinstating the applicant is to operate with retrospective effect to the date of the applicant's dismissal." '

[23] It is against that order that Shoprite sought leave to appeal from this court. In granting leave this court stated:

'The appeal is limited to the correctness or otherwise of the remedy that was allowed to [Mr Maake].'

Put differently, the question is whether the LAC ought to have substituted the award by Commissioner Mbha in the terms set out in the preceding paragraph.

[24] As was stated in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 55, the starting point in an enquiry such as the present is the Constitution. Everyone – employees and employers alike – has a right to fair labour practices (s 23(1)). The primary purpose of the Labour Relations Act ('LRA') is to give effect to the fundamental rights conferred by s 23.

[25] In deciding how commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the Constitution which has been given effect to by the LRA.[3] Thus whilst the decision to dismiss belongs to the employer, the determination of its fairness does not.[4] The statutory scheme requires a commissioner to determine whether a disputed dismissal was fair.

[26] No appeal lies against a decision of a commissioner. The only remedy available to a party in a matter such as the present one is to institute review proceedings in the Labour Court. Section 158(1)(*g*) confers on the Labour Court the power to review the performance or purported performance of any function provided for in the LRA on any grounds that are permissible in law. That power, whilst fairly wide, is subject to s 145, which to the extent here relevant, provides:

'(1) Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) within six weeks of the date that the award was *served* on the applicant, ...

. . .

[3] *Sidumo* para 72.
[4] *Sidumo* para 75.

(2) A defect referred to in subsection (1), means –

(*a*) that the commissioner–

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(*b*) that an award has been improperly obtained.'

The general powers of review of the Labour Court under s 158(1)(*g*) are therefore circumscribed by the provisions of s 145(2) which prescribe the grounds upon which arbitral awards of CCMA commissioners may be reviewed. It follows that a party who wishes to challenge an arbitral award under s 145(2) can only do so on one or more of the grounds envisaged in that section.

[27] Section 145 is now suffused by the constitutional standard of reasonableness, the question to be asked being: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[5] Applying that standard will give effect not only to the constitutional right to fair labour practices, but also the right to administrative action which is lawful, reasonable and procedurally fair.[6]

[28] There may well be a fine line between a review and an appeal, particularly where ─ as here ─ the standard of review almost inevitably involves a consideration of the merits. However, whilst at times it may be difficult to draw the line, the distinction must not be blurred.[7] The drafters of the LRA were clearly alive to the distinction. They accordingly sought to introduce a cheap, accessible, quick and informal alternative dispute resolution process. In doing so, appeals were specifically excluded. They said:

'In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies. The absence of an appeal from the arbitrator's award speeds

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[5] *Sidumo* para 110.
[6] *Sidumo* para 110.
[7] *Sidumo* paras 109 & 244.

up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business. Without reinstatement as a primary remedy, the draft Bill's prohibition of strikes in support of dismissal disputes loses its legitimacy.
Prior to the establishment of the present LAC, it was argued that an appeal structure would provide the consistency required to develop coherent guidelines on what constitutes acceptable industrial relations practice. This has not been the case. The LAC's judgments lack consistency and have had little impact in ensuring consistency in judgments of the industrial court. The draft Bill now regulates unfair dismissal in express and detailed terms and provides a Code of Good Practice to be taken into account by adjudicators. This will go a long way towards generating a consistent jurisprudence concerning unfair dismissal despite the absence of appeals.'[8]

[29] Returning to the facts of this case. In our view, the LAC appears in this particular instance to have misconceived the nature of its function. The LAC concluded that Waglay J ought to have finalised the review application instead of setting aside the arbitral award and remitting the matter to the CCMA for a hearing *de novo.* Ordinarily, in those circumstances the LAC ought itself to have remitted the matter to the Labour Court for finalisation. It chose instead to finalise the matter itself. Given the inordinate length of time that had passed since the dismissal, one would hesitate to criticise the approach of the LAC.

[30] In following this approach however, it effectively stepped into the shoes of the Labour Court and was thus exercising, not its traditional appeal powers, but rather the fairly circumscribed s 145(2) review powers of the Labour Court. Its warrant for interference with the award of the arbitrator was narrowly confined. Tellingly, Waglay J stated in his judgment that [w]hen consideration is given to the limited record, the findings of the [arbitrator] cannot be faulted'. This 'limited record' was ultimately the record on which the matter was decided by the LAC. Given the decision-making powers conferred upon the arbitrator and having regard to the reasoning of the commissioner, it cannot

[8] Explanatory Memorandum (1995) 16 *ILJ* 278 at 318, as cited in *Sidumo* para 244.

be said that his conclusion was one that a reasonable decision-maker could not reach.

[31] Since the decision in *Sidumo* during the first half of 2008 numerous cases have been decided in labour courts based on the reasonableness test formulated therein.[9] A multitude of arbitrations would no doubt have occurred from that time, with commissioners discharging their duties and obligations in terms of the Labour Relations Act in the manner carefully and comprehensively spelt out by the Constitutional Court in that decision. Courts should strive to ensure a cohesive and consistent jurisprudence which promotes the rule of law. Workers and employers alike are entitled to certainty in the law as they strive to regulate their relationship in an environment that is often prone to disquiet and tension.

[32] There was, in any event, a further limitation on the powers of interference by the LAC. Section 193(1)(*a*) provides that if the arbitrator finds that the dismissal is unfair, he or she may order the employer to reinstate the employee from any date not earlier than the date of dismissal. Those words clearly confer a discretion upon the arbitrator to order reinstatement which is not retrospective to the date of dismissal. The LAC in *NUMSA v Fibre Flair CC t/a Kango Canopies*[10] held that the test for interference in a discretion exercised in terms of s 193(1)(a) is that formulated in *Ex Parte Neethling.*[11] It has not been shown in this matter that the arbitrator exercised his discretion capriciously or upon a wrong principle or upon any other ground justifying interference.

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[9] In the *Industrial Law Journal* Vol 29 July 2008 Nicola Smit sets out the following list of cases decided in 2008 which applied the test of the reasonable decision maker:
Edcon Ltd v Pillemer NO (2008) 29 *ILJ* 614 (LAC), *Ster Kinekor Films (Pty) Ltd v Maseko NO* [2008] JOL 21393 (LC), *Mkhwanazi v Moodley NO* (2008) 29 *ILJ* 1535 (LC), *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* (2008) 29 *ILJ* 1180 (LC), [2008] 3 BLLR 241 (LC), *Coca-Cola Fortune (Pty) Ltd v CCMA (Sibiya)* [2008] JOL 21186 (LC), *Consol Speciality Glass v NBC Cleaning Industry* [2008] JOL 21073 (LC), *MEC for Health (Gauteng) v Mathamini* (2008) 29 *ILJ* 366 (LC) and *Astore Africa (Pty) Ltd v CCMA* [2008] 1 BLLR 14 (LC). No doubt this list has grown considerably since then.
[10] [2006] 6 BLLR 631 (LAC).
[11] 1951 (4) SA 331 (A) at 335E.

[33] It is true that the systemic failures referred to by Shoprite's counsel made life difficult for both parties. The delays in no way serve to detract from the correctness of Commissioner Mbha's reasoning. Nor do they bring the matter within the terms of s 145(2) of the LRA. It remains eminently reasonable. It should also be borne in mind that, by the time the matter came before the LAC, further systemic delays had impacted on both employer and employee. The answer is to eliminate systemic failure rather than punish either employers or employees unjustifiably. By interfering with the decision of the arbitrator, the LAC was therefore in effect substituting its discretion for that of the arbitrator. That it was not permitted to do.

[34] It follows that the appeal should succeed. Before concluding it is, however, necessary to deal with one remaining aspect. It is the question of the delays in finalising this matter. It is necessary to record that neither Mr Maake nor the union were represented at the hearing of this appeal. Both filed notices to abide the decision of this court. A period of more than eight years has passed since Mr Maake was dismissed. The entire scheme of the LRA and its motivating philosophy are directed at cheap and easy access to dispute resolution procedures and courts. Speed of result was its clear intention. Labour matters invariably have serious implications for both employers and employees. Dismissals affect the very survival of workers. It is untenable that employees, whatever the rights or wrongs of their conduct, be put through the rigours, hardships and uncertainties that accompany delays of the kind here encountered. It is equally unfair that employers bear the brunt of systemic failure. The Registrar has been directed to serve this judgment on the Director of the CCMA. No doubt the LAC and the Labour Court will address the issues referred to above.

[35] For all the reasons set out above, the following order is made:

1. The appeal is upheld and there is no order as to costs.
2. The order of the LAC is substituted as follows:

'(a) Both the appeal and the cross-appeal are dismissed and each party is to pay its own costs.

(b) The order of the Labour Court is set aside and replaced with the following:

“Both the review and counter review applications are dismissed and there is to be no order as to costs.” ‘

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M S NAVSA
JUDGE OF APPEAL

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

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For Respondent:	-