



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA105/2021

In the matter between:

BIDVEST PROTEA COIN (PTY) LTD

Appellant

and

SATAWU

First Respondent

PHAKATHI MOLAHLEHI ISAAC

Second Respondent

GERHARD JANSEN VAN VUUREN N.O.

Third Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Fourth Respondent

Heard: 17 November 2022

Delivered: [29] November 2022

Coram: Sutherland JA, Coppin JA and Savage AJA

JUDGMENT

SAVAGE AJA

- [1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (Makapane AJ), delivered on 15 January 2021, in which the application to review and set aside the arbitration award of the third respondent (commissioner), issued under the auspices of the fourth respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), was dismissed.
- [2] The relevant material facts are, in the main, common cause. The second respondent, Mr Molahlehi Isaac Phakathi (employee) was employed by the appellant, Bidvest Protea Coin (Pty) Ltd, as a security guard on 16 October 2003. At the time of his dismissal, he held the position of duty manager based at the Carnival City Casino premises of Sun International, the appellant's client.
- [3] On 20 November 2016, Mr Cornelius Johannes Kriek, against whom a warrant of arrest had been issued on 23 May 2016, was identified at the Carnival City Casino. The employee, having been instructed to do so, escorted Mr Kriek to an interview room. Mr Brian Kgobe, the client's surveillance shift manager, arrived at the interview room and explained to Mr Kriek that an arrest warrant had been issued against him at the instance of the South African Revenue Services (SARS) in relation to a charge of fraud involving more than R32 million. Mr Kriek was informed that he was therefore to remain in the interview room until the police had arrived. However, after waiting some time, Mr Kriek spoke to his attorney and decided to leave the interview room. The employee followed Mr Kriek to the car park but did not call for backup to prevent Mr Kriek from leaving the premises. The police arrived at the premises shortly after Mr Kriek had left.
- [4] On 20 November 2016, Mr Kgobe compiled a report about the incident and circulated it later the same day via email. Mr Shaun Rennie, the client's surveillance manager, sent an email the same day *inter alia* to Mr Kgobe and Mr Frederick Masilo, the appellant's contracts security manager, asking why Mr Kriek had been allowed to leave the premises. Disciplinary action was subsequently taken against the employee.

[5] On 22 December 2016, the employee was dismissed for refusing to carry out a lawful and reasonable instruction to keep Mr Kriek inside the interview room and allowing him instead to leave the client's premises; bringing the appellant's name into dispute; and insubordination in failing to adhere to Mr Kgobe's instruction to prevent Mr Kriek from leaving the premises. Prior to his dismissal, the employee had been employed by the appellant for more than 13 years with a clean disciplinary record.

Arbitration award

[6] The employee referred a dispute to the CCMA challenging the substantive fairness of his dismissal. At arbitration, Mr Masilo's version was first that the employee had powers of arrest and should have arrested Mr Kriek because Mr Kgobe had informed him that Mr Kriek had committed fraud; then that the employee was instructed to detain Mr Kriek and not arrest Mr Kriek, although detention and arrest were "one thing"; and then that "the instruction was to hold [Mr Kriek] in the interview room". Mr Masilo stated that the employee had the right to hold Mr Kriek since he had committed a crime, although neither the employee nor any other security officer had seen such crime being committed. It was Mr Masilo's view that when Mr Kriek left the interview room, the employee should have called for backup.

[7] The employee's evidence was that he was asked by Mr Vinas Ntshangase, a surveillance officer, to escort Mr Kriek to an interview room. The employee approached Mr Kriek and informed him that someone wanted to speak to him. Once in the interview room, Mr Kriek asked the employee why he was there but the employee did not know the answer. The employee called the surveillance room a number of times because, although he had been told that Mr Kgobe would arrive, he had not done so and Mr Kriek wanted to leave. When Mr Kgobe arrived, he showed Mr Kriek the warrant of arrest and explained its contents to him. Mr Kgobe did not arrest Mr Kriek and allowed him to be accompanied by Mr Mduduzi Zondo, a supervisor, to collect his cellphone.

[8] By the time that Mr Kriek returned to the interview room with his cellphone, Mr Kgobe had left. Mr Kriek then called his lawyer on speakerphone. His lawyer

told him that the client had no right to apprehend him. Mr Kriek became aggressive and asked to see the General Manager who, he was told, was not available. The employee called Mr Kgobe and explained the situation to him. While he was on the call, Mr Kriek left the interview room saying that he had no more time and that the Hawks could contact his lawyers. The employee testified that he followed Mr Kriek, trying to persuade him to wait, but that he and his wife got into their vehicle and drove away. Once Mr Kriek had left, the employee met Mr Kgobe and explained what had occurred. The police arrived approximately 10 to 15 minutes thereafter. The employee stated that he did not call for backup as the SARS incident had not taken place on the client's premises and that, having never arrested a person at the client's premises before, he did not think that he was entitled to arrest Mr Kriek.

[9] The commissioner found that the first and third charges concerned the employee's refusal to adhere to what the appellant considered was a "*lawful and reasonable instruction*" to keep Mr Kriek in the interview room and prevent him from leaving the premises. The commissioner noted that Mr Kgobe, who had apparently given the instruction that Mr Kriek should be detained, did not testify at the arbitration hearing. Since no contract or document existed which obliged the employee to adhere to an instruction of the client's manager, it was found that the appellant had not proved that a lawful instruction had been issued to the employee. In addition, it was found that the employee was not entitled to detain Mr Kriek against his will in that he was not a peace officer who could execute a warrant of arrest; and that no crime had been committed or attempted in his presence which would have allowed the employee to arrest Mr Kriek without a warrant.

[10] The commissioner therefore found that the employee had not refused to carry out a lawful and reasonable instruction to keep Mr Kriek inside the interview room, nor had he been insubordinate in failing to adhere to Mr Kgobe's instruction to prevent Mr Kriek from leaving the premises when no purpose would have been served by calling for backup. Furthermore, in the absence of any direct evidence, it was found not to have been proved that the employee had brought the appellant's name into disrepute. The dismissal of the employee

was therefore found to be substantively unfair and, having sought reinstatement, retrospective reinstatement was found to be appropriate and was awarded.

Judgment of the Labour Court

[11] The appellant sought the review of the arbitration award by the Labour Court on a number of grounds. These included that the commissioner had committed various gross irregularities in the manner in which he had conducted the arbitration; had ignored relevant evidence presented by the appellant's witnesses; erroneously found that it was not proved that the employee had the power to detain or arrest Mr Kriek, despite his having been presented with a copy of the arrest warrant by Mr Kgobe; and in reinstating the employee when this was not an appropriate remedy given that the relationship between the parties "had completely broken down" since the employee could not be relied upon to perform his duties diligently.

[12] The Labour Court found that the appellant had failed to set out clear grounds for review. Although the commissioner had conducted an inquisitorial enquiry which may have been "undesirable", the Court found that this did not lead to the award being reviewable. Instead, the award was found to be reasonable on the basis that the appellant's client could not issue an instruction to the employee; that the instruction itself was not lawful; and that, since no misconduct had been shown to exist, the reinstatement of the employee was appropriate. Consequently, the review application was dismissed.

Submissions on appeal

[13] The appellant appeals against the judgment and order of the Labour Court, taking issue with most of the findings of the Labour Court and contending that the Court erred in dismissing the review application. In argument, it was submitted for the appellant that the commissioner had intervened in the course of the arbitration proceedings in an unwarranted manner and to such an extent that he had created a version for the employee and that, as a result of this conduct, the appellant elected not to call Mr Kgobe as a witness. It was stated that the evidence presented clearly indicated that the employee had failed to

adhere to the lawful and reasonable instruction given to him and that in doing so he had committed misconduct, was insubordinate and had impaired the appellant's reputation. As a result, the appellant sought that the appeal be upheld, with the arbitration award set aside and the matter remitted back to the CCMA for a hearing *de novo* before a different commissioner, alternatively substituted with a finding that the dismissal was fair.

[14] The appeal was opposed by the employee for whom it was contended that the matter concerned the bruised ego of the appellant and its client; that the commissioner had assessed the evidence in the manner required of him; and that the arbitration award fell within the ambit of reasonableness required. As a result, it was submitted that the decision of the arbitrator was unimpeachable and that the appeal should be dismissed with costs.

Evaluation

[15] The Constitutional Court in *CUSA v Tao King Metal Industries and Others*¹ made it clear that the task of the commissioner at arbitration is to "reach for the real dispute between the parties"². In doing so, a commissioner may conduct arbitration proceedings, in terms of section 138(1) of the Labour Relations Act³ (LRA), "in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities". Nothing bars the commissioner from adopting an inquisitorial approach to the proceedings to reach the merits of the real dispute between the parties.

[16] The approach adopted by the commissioner to the arbitration in this matter was neither inappropriate nor unfair. Although robust, both parties were given a fair hearing and not curtailed in the opportunity to present their respective cases. There is no support to be found in the record, as was suggested for the appellant, that the commissioner had created a version for the employee or predetermined the merits of the matter before the appellant had completed its evidence. The record does not show that he intimidated, interrupted or bullied

¹ 2009 (2) SA 204 (CC) at para 62.
² Ibid at para 65.
³ Act 66 of 1995 (as amended).

the appellant's witnesses to point that they could not testify about facts; or that the appellant was prevented from putting up its case. The commissioner was at pains to determine the real nature of the dispute between the parties. He engaged in repeated efforts, directed at both parties, to understand in clear terms the nature of the dispute, the precise source and nature of the instruction given to the employee, and whether such instruction had been breached. His robust questioning of the appellant's first witness was equally evident in his approach to the employee in his evidence. In doing so, the commissioner undertook the task required of him.

[17] The appellant's representative indicated at the outset of proceedings that two witnesses would testify at the arbitration hearing. Two witnesses proceeded to testify for the appellant. The suggestion made for the appellant in this appeal that the decision not to call Mr Kgobe as a witness was motivated by the hostile conduct of the commissioner is simply not borne out by the record. There was no bar on the appellant calling Mr Kgobe to testify had it wished to rely on his evidence. The appellant elected of its own accord not to do so, a decision which appears to have been motivated by the fact that the employee did not dispute the material facts to which that witness may have testified.

[18] The employee, as a security officer, was employed to safeguard the interests and assets of the appellant's client and in doing so, the client was entitled to provide reasonable and lawful instructions to him. When the employee asked Mr Kriek to accompany him to the interview room, on his uncontested version, he was not aware of the reason for doing so. It was in the interview room that Mr Kgobe informed both the employee and Mr Kriek of the existence of the arrest warrant for the first time and the employee was told that Mr Kriek was to remain in the room until the arrival of the police. After he had left the room, the employee contacted Mr Kgobe when Mr Kriek indicated that, acting on the advice of his attorney, he intended to leave the premises. It is material that Mr Kgobe at this point did not instruct the employee to arrest Mr Kriek or to call for backup to prevent Mr Kriek from leaving the interview room.

[19] The appellant's case was not that the employee had been instructed to place Mr Kriek under arrest in the interview room. Rather, the instruction on which the

appellant relied and which it claimed the employee had breached, was that the employee was to keep Mr Kriek in the interview room until the police arrived. From this it is apparent that it was contemplated that the police, and not the employee, would arrest Mr Kriek on their arrival. What the appellant did not appreciate in its approach to the matter was that, not having been arrested, Mr Kriek was legally entitled to leave the client's premises; and the appellant's contention that the employee committed misconduct in failing to prevent Mr Kriek from doing so fails to appreciate as much. The suggestion that, in failing to call for backup to prevent Mr Kriek's departure, the employee breached the instruction given to him and was insubordinate, equally fails to appreciate that Mr Kriek was entitled to leave the premises. It follows that since the instruction did not concern the arrest of Mr Kriek, the employee did not commit misconduct when he failed to call for backup or prevent Mr Kriek from leaving the premises.

[20] In *Herholdt v Nedsbank Ltd (Congress of South African Trade Unions as Amicus Curiae)*⁴ it was held that a review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA:

'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(iii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'⁵

[21] The result reached by the commissioner, albeit for different reasons to that of this Court, that the employee had not committed misconduct, fell within the ambit of reasonableness required having regard to the material before him. The appellant failed to prove that the employee had committed the misconduct alleged by not calling for backup or preventing Mr Kriek leaving the client's

⁴ (2013) 34 ILJ 2795 (SCA).

⁵ At para 25.

premises. There was no evidence that the employee was insubordinate in his conduct or that the appellant's reputation had been harmed as a result of it; and the commissioner cannot be faulted for awarding the primary remedy of reinstatement, as sought by the employee, when this was patently appropriate. The Labour Court did not err in finding that the review application was without merit, despite the fact that the Court arrived at such decision for different reasons.

[22] It follows for these reasons that the appeal is without merit and fails to be dismissed. There is no reason in law or fairness why an order of costs should not be made in the matter having regard to the merits of the appeal and the fact that the employee is no longer represented by a trade union in this appeal.

Order

[23] The following order is therefore made:

1. The appeal is dismissed with costs.

SAVAGE AJA

Sutherland JA and Crippin JA agree.

APPEARANCES:

FOR THE APPELLANT:

S Lancaster

Instructed by Lancaster Kungoane Attorneys

FOR THE SECOND RESPONDENT:

J Vilakazi

Instructed by Creighton Attorneys Gauteng

Inc.

LABOUR APPRENTICE COURT