

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1078/21

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION WORKERS UNION (“AMCU”)
OBO BOSMAN, B.H.**

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

HENDRICK OLIPHANT N.O.

Second Respondent

G4S SECURE SOLUTION

Third Respondent

Heard: 11 January 2024

Delivered: 16 February 2024 (This judgment was handed down electronically by circulation to the parties’ legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 16 February 2024.)

Summary: Review proceedings – Application to review and set aside the arbitration award made by the Second Respondent on 26 April 2021 in which the Second Respondent found that the dismissal of the Applicant, [Mr B.H. Bosman], was fair. Held – that the Second Respondent committed a gross irregularity when he failed to weigh all the relevant evidence and the probabilities to draw inferences and made findings not justified on the evidence. Matter referred back to the CCMA for determination afresh by a commissioner other than the Second Respondent

Held – The Second Respondent misinterpreted the facts placed before him and therefore did not draw the correct inference. The misconduct committed did not suit the punishment. Matter referred back to the CCMA.

JUDGMENT

SWANEPOEL, AJ

Introduction

[1] This is an application to:

1.1 Review and set aside the arbitration award issued by the Second Respondent dated 26 April 2021 under case number NC 2081/20.

1.2 Directing that the matter be referred back to the CCMA for arbitration before a commissioner other than the Second Respondent.

1.3 Directing that such of the Respondents who oppose the relief sought herein be ordered to pay the costs of the application jointly and severally, the one paying the other(s) to be absolved.

1.4 Granting the Applicants further or alternative relief.

[2] The Third Respondent opposed the relief sought and requested that the matter be dismissed.

The facts

Applicant's submissions

[3] The Applicant's member, Mr B.H. Bosman was employed as a security officer by the Third Respondent on 1 November 2019. At the date of his dismissal on 17 August 2020, Bosman earned R 4 500,60 per month.

[4] On 3 July 2020, Bosman felt unwell as a result of a gastrointestinal virus, however, he reported for duty as a result of a shortage in staff. Bosman requested that his supervisor bring him water, which his supervisor failed to do.

[5] Bosman was stationed at the red boom gate – some 2,5 km from the main gate.

[6] He did not have water with him and asked his supervisor to bring him water. The supervisor collected him after some time and took him to the old farmhouse some 4 km away to get water.

[7] When he was dropped off at his post, the supervisor left with the water and his radio.

[8] He contacted his supervisor but was told that he was busy.

[9] He opted to go to the main gate rather than remain on duty at the place where he was posted to perform his duties.

[10] The customer informed the Third Respondent about this. Bosman was charged with desertion and dismissed.

[11] Aggrieved by his dismissal, the Applicants referred an unfair dismissal dispute to the First Respondent. The matter was set down for a conciliation/arbitration (con/arb) process, neither party objected to the process and after conciliation failed, the Second Respondent continued with the arbitration hearing.

[12] The Second Respondent found the dismissal procedurally and substantively fair, despite the procedure not having been placed in dispute.

[13] The Applicant then approached this Court claiming that the Second Respondent had neglected his duty as a reasonable commissioner in that he made serious errors in the assessment and application of the evidence. The Second Respondent should have arrived at a different conclusion in favour of the Applicant.

Grounds for review

[14] The hearsay evidence – since this ground for appeal was abandoned during argument of the matter, I do not intend to deal with that specific ground in this judgement.

[15] The commissioner failed to consider and properly understand the content of the evidence presented at the arbitration.

[16] The commissioner failed to consider consistency in discipline. This ground was amended in the supplementary affidavit to read that the commissioner failed to consider a less punitive sanction to that of dismissal.

[17] The commissioner failed to consider the mitigating factors prior to the imposition of a sanction.

[18] The award was on the whole unreasonable.

[19] Therefore, the Second Respondent committed a serious transgression in considering the law of evidence and no other reasonable decision maker would have come to the same or similar conclusion that the Second Respondent reached.

The Third Respondent's contentions

[20] The Third Respondent filed its answering affidavit, and its main contention was that the application was nothing more than an attempt to argue that the Second Respondent's findings were incorrect given the Applicant's construction of the evidence and thus an attempt at an appeal. It also contended that the Applicant had not demonstrated a reviewable irregularity. The Third Respondent contended that the award was a correct finding of the facts before the Second Respondent and was a reasonable award.

[21] Mr Beckenstrate argued, amongst others, that the Applicant altered the basis of its first challenge as it no longer contended that the Second Respondent erred in taking hearsay evidence into account, and for the first time in its argument introduced the definition of desertion of post as contained in the Code of Conduct of the Third Respondent, and then contended that the Second Respondent would have concluded that the Applicant had a valid reason to leave his post.

[22] He argued that this completely new basis for the Applicant's case was impermissible and should be dismissed. He added that an Applicant in a review application must make its case out in the Founding and Supplementary Affidavit and that the reviewing Court is limited to deciding issues that are raised in the Applicant's affidavits.

The arbitration process and award

[23] The Second Respondent drafted an award containing a scant recital of the evidence presented before him. In his analysis of the facts, he found that:

- '1. Afrika presented clear and concise evidence and that Bosman deserted his post.
2. He added that Africa conceded that it would not be safe to work without a radio, and that;
3. Bosman had told the client that he left because of the weather conditions.'

[24] He stated that it was contrary to Bosman's version that he felt sick, and that Bosman was responsible for his uniform.

[25] He found that Bosman was not consistent and clear in his evidence basing it on the fact that:

- '1. The Applicant's representative did not disprove Africa's version that Bosman did not tell Afrika that he did not feel well,
2. That Bosman changed his defence to [one of] Kula taking the water and the radio,
3. That he left his post because he felt unsafe,

4. That he regarded the above as contradictory to the original defence and an afterthought to fabricate a defence.

5. That Bosman ran three kilometres to the main gate which showed that he deserted his post, drawing from this an inference that Bosman deliberately left his post and raised three defences to hide the truth.'

Evaluation

[26] The review test by now is trite¹. The question to be asked by the review Court is whether the decision reached by an arbitrator is one that no other reasonable decision-maker may reach. Differently put, the decision falls outside the bands of reasonableness. It is not about the correctness of the decision.

[27] Mr Cook, on behalf of the Applicant, argued that the various factors submitted by the Applicant in his evidence should not have been regarded as new defences raised but as factors listed to demonstrate why the Applicant left his post and that there was a difference between leaving his post and deserting his post. He argued that the Second Respondent never bothered to properly comprehend whether the individual had justification for leaving his post.

[28] Mr Beckenstrate argued that the Applicant altered the basis of its first challenge as it no longer contended that the Second Respondent erred in taking hearsay evidence into account, and for the first time in its argument introduced the definition of desertion of post as contained in the Code of Conduct of the Third Respondent and then contended that the Second Respondent would have concluded that the Applicant had a valid reason to leave his post.

[29] It was his argument that this completely new basis for the Applicant's case was impermissible and should be dismissed. He added that an Applicant in a review application must make its case out in the Founding and Supplementary Affidavit and that the reviewing Court is limited to deciding issues that are raised in the Applicant's affidavits.

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

[30] I do take note that the definition of desertion was not part of the Applicant's stated grounds for review. However, when considering the content of the pleadings filed on behalf of the Applicant, the evidence of the Applicant, which the Second Respondent took issue with was recorded in it.

[31] The test was defined by the LAC in *Gold Fields Mining SA (Pty) Ltd v CCMA*², where the Court formulated the following questions to determine whether an award made by a commissioner was reviewable as follows:

31.1 In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed to give the parties a full opportunity to have their say in respect of the dispute?

31.2 Did the arbitrator identify the dispute he was required to arbitrate (this may only become clear after both parties have led their evidence)?

31.3 Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?

31.4 Did he or she deal with the substantial merits of the dispute, and

31.5 Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence presented?

[32] The crisp question to be determined therefore is whether the Second Respondent committed a gross irregularity when he failed to weigh all the relevant evidence and the probabilities of drawing inferences and making findings not justified by the evidence.

[33] Tip AJ, in *Standard Bank of SA Ltd v CCMA & Others*³ (1998) 19 ILJ 903 (LC) held that relief by way of review would be available:

'[24] Where a commissioner sitting as arbitrator has misconstrued oral or documentary evidence, or has ignored or misapplied relevant legal principle, to an

² [2014] 1 BLLR 20 (LAC); [2013] ZALAC 28 at para 14.

³ (1998) 19 ILJ 903 (LC) at para 24.

extent that is inappropriate or unreasonable, then such commissioner has failed in the task under the Act.'

[34] This approach was echoed in *Carephone v Marcus NO & Others*⁴ (1998) 19 ILJ 1425 (LAC) where the test in this regard was succinctly stated as follows:

'[24] ... is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion he or she eventually arrived at?'

[35] Based on the above, and taking into account that which is about to follow, it is clear that the Second Respondent did not apply his mind properly to the real facts placed before him.

[36] The facts were as follows:

36.1 The Applicant went to work not feeling well and informed his superior, Mr Zweli Kula that he was unwell,

36.2 He alerted Mr Kula that he had a runny stomach and that he would not be able to stay alone, to which Mr Kula stated that he would not have to stay alone and that he would bring him water,

36.3 At approximately 23:50 he called Mr Kula enquiring where the water was, Mr Kula fetched him and took him to the farmhouse to get water,

36.4 Upon their return to the boom gate, Mr Kula left him there and drove off with his water and radio,

36.5 When he called Mr Kula, he was told that Mr Kula was busy doing his work,

36.6 He decided that it was not safe for him and that he would go to a safe place, and opted to go to the main gate,

36.7 Mr Kula followed the Applicant, drove past him, and went to write a statement,

36.8 He had asked for water since 18:00,

36.9 It was dark and he worked without a proper uniform, wearing his own clothes in the heart of winter.

⁴ (1998) 19 ILJ 1425 (LAC); [1998] ZALAC 11.

[37] The fact that the Second Respondent ignored these pertinent aspects and regarded it as an indication that the Applicant had not been consistent and clear in his evidence and that the fact that he contradicted his initial defence with the defence being an afterthought or fabrication demonstrated that the Second Respondent committed a gross irregularity therein that he failed to weigh all the relevant evidence presented, the probabilities when drawing his inferences and that his findings were not justified by the evidence presented.

[38] Therefore, I hold that the Applicant's second ground of review must succeed.

[39] The third ground of review, namely that the Second Respondent failed to consider a less punitive sanction to dismissal follows from the finding on the second ground of review. It also resonated with the fourth ground of review, ergo that the Second Respondent failed to consider the mitigating factors.

[40] I interpose here to state that I do not agree with the way in which the fourth ground of review was formulated. It is never the duty of the arbitrator to impose a sanction; it is the duty of the arbitrator to consider whether the sanction imposed was reasonable and suitable.

[41] In the *Sidumo* matter referred to above, the Constitutional Court (CC) held that the following pertinent factors should be equally considered (and weighed against each other) in determining an appropriate sanction for the misconduct:

41.1 The nature and seriousness of the charge the employee found guilty of.

41.2 Whether progressive discipline can be utilised to transform the incorrect conduct.

41.3 The harm or potential harm caused by the employee's conduct.

41.4 The effect of dismissal on the employee.

41.5 Whether additional training and instruction may result in the employee not repeating the misconduct.

41.6 The employee's disciplinary record and length of service.

41.7 The presence or absence of dishonesty in the employee's conduct.

41.8 Whether the employee admitted the misconduct or disputed it and, if the employee disputed it, whether the employee behaved dishonestly or inappropriately in doing so.

41.9 Whether the misconduct is serious and makes a continued employment relationship intolerable; however,

41.10 This list is not exhaustive.

[42] Hence, it was the role of the arbitrator to weigh the above-mentioned factors in deciding whether the sanction imposed met the criteria.

[43] The Second Respondent misinterpreted the facts placed before him. The Second Respondent subsequently did not draw the necessary inferences that the misconduct did not suit the punishment meted out. The particular circumstances that led to the Applicant abandoning his post played a vital role in his decision to not remain at the gate where he had been posted, and that should have been taken into account. The Applicant is not entirely blameless, but a sanction short of dismissal would have sufficed.

[44] For the reasons set out above, I believe that the award must be set aside.

[45] Accordingly, I make the following order:

Order

1. The arbitration award of the Second Respondent is reviewed and set aside.
2. The matter is referred back to the CCMA for arbitration before a commissioner other than the Second Respondent.
3. I make no order as to costs.

A.H. Swanepoel

Acting Judge in the Labour Court of South Africa

Appearances

For the Applicant:

Adv A.L. Cook

Instructed by:

Larry Dave Incorporated Attorneys

For the Third Respondent:

Mr C. Beckenstrate

Instructed by:

Moodie and Robertson Attorneys

LABOUR COURT