

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2305/17

In the matter between:

ROCLA (PTY) LTD – VIRGINIA BRANCH

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION (CCMA)**

First Respondent

COMMISSIONER DIPHOKO, S

Second Respondent

**ASSOCIATION OF MINeworkERS AND
CONSTRUCTION UNION (AMCU) obo T.M DINGINDLELA**

Third Respondent

THEMBIKHAYA MAX DINGINDLELA

Fourth Respondent

Heard: 6 July 2023

Delivered: 21 February 2024

JUDGMENT

MAKOPO, AJ

Introduction

[1] This is an application brought in terms of Section 145 of the Labour Relations Act¹ (the LRA). Rocla (Pty) Ltd – Virginia Branch (the Applicant) is seeking to review

¹ Act 66 of 1995, as amended.

and set aside an arbitration award (the Arbitration Award) issued by Commissioner Diphoko S. (N.O) (Diphoko) on 2 September 2017.

1.1 Diphoko awarded the reinstatement for the Fourth Respondent–Thembikhanya Max Dingindlela (the Employee).

1.2 Diphoko ordered the company to back-pay the Employee in the amount of R 31 387.56.

1.3 This application is duly opposed by the Association Union of Mineworkers and Construction Union (AMCU) (Third Respondent) and Thembikhanya Max Dingindlela (Fourth Respondent).

1.4 The Applicant did not appear at the hearing of the matter when the matter was called at 10h00.

1.5 I allowed the matter to stand down for the Third and Fourth Respondents' Attorney to call the Applicant's representatives as they had filed all the required documents. At 11h05 when the matter was called again, there was still no appearance for the Applicant, and no explanation or any indulgence sought from the court for the non-appearance.

1.5 Advocate Cook, counsel for the Third and Fourth Respondents presented his argument on behalf of the Respondents.

Background facts

[2] The facts pertaining to the present dispute are to a large degree, common cause. Mr Dingindlela was employed by the Applicant as a welder from 11 August 2014. He earned R15.00 per hour and worked 45 hours per week.

2.1 He was notified to attend a disciplinary hearing on the 15th of August 2016 in respect of the following charges:

2.1.1 Gross insolence in that on Friday the 29th of July 2016, you acted disrespectfully by disrupting a meeting held by Management with the workforce regarding wages.

2.1.2 Gross insolence and/or gross misconduct in that on Friday, the 29th of July 2016, you incited a co-employee to follow you when you left the meeting held by Management, whilst management was still busy with the meeting.

2.1.3 Gross insolence in that on Friday the 29th of July 2016, you acted disrespectfully, arrogantly and aggressively towards Management when you were called to be handed a Notice of Suspension by shouting, using an aggressive tone of voice, waving your arms and pointing at Management.

2.1.4 Gross insolence in that on Friday, the 29th of July 2016, you acted arrogantly when you threatened Management that you would take them to the CCMA.

2.1.5 At the disciplinary hearing the Fourth Respondent was found guilty as charged. He was dismissed on the 16th of August 2016.

[3] The Employee referred his unfair dismissal dispute to the CCMA for Adjudication. The award was issued on the 2nd of September 2017. The Commissioner found in paragraph 79 of the award based on the submissions before me, I find that the Respondent discharged his onus that the Applicant's dismissal was procedurally fair.

3.1 The Commissioner in paragraph 104 of the Award, made the following order: *"I am satisfied that the dismissal of the Applicant was both procedurally and substantially unfair"*.

Grounds of review

[4] The Applicant contends that Diphoko failed to properly apply her mind and there were gross irregularities (as she failed to consider the evidence before her and came to a conclusion which no reasonable decision-maker could have made in reinstating the Employee).

Evaluation

[5] Advocate Cook submitted that the arbitration hearing is a *de novo* hearing, and new evidence can and often is brought in at this stage. He submitted that whilst there is an apparent contradiction in the award (i.e., paragraphs 79 and 104 of the award) it does not render the award unreasonable or reviewable. He submitted that the Applicant is nit picking at each and every piece of evidence that was led.

5.1 It is clear from the record of the proceedings that the Fourth Respondent is not the person who first said that they should leave the meeting and in fact was not the first person to leave the meeting, it is apparent that Mr Combrink did not take kindly to being challenged/questioned by the Fourth Respondent and refused to address the concerns raised by the workers, and some hours later he issued a disciplinary letter to the Fourth Respondent who then asked why he was given a suspension letter.

5.2 Mr Cook submitted that the court is called to find whether the decision rendered by the Commissioner is a reasonable decision that a decision-maker could have made.

5.3 It is trite law that the review court must consider when called upon to review and set aside an arbitration award in terms of Section 145 of the LRA.

[6] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*², the court held “A review court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at”.

[7] In *Makuleni v Standard Bank of South Africa Ltd and Others*³, the test for review and setting aside an award of the CCMA is based upon the decision reached by the Commissioner, is one that no reasonable person could have reached.

[8] The Arbitrator listened to voice recordings submitted by the parties and accepted the evidence led in respect of those recordings, I pause to note that those recordings were not before me and were never discovered by the Applicant.

[9] The two critical issues to be decided by the Commissioner were credibility and the reliability of the evidence presented before her. She accepted on the evidence of the recordings, that the Fourth Respondent was not the person who uttered the words “*Let’s rather leave*” first, but there was a voice of a person who said “*Let’s*

² [2013] ZALAC 28; (2014) 35 ILJ (LAC) at para 16.

³ [2023] ZALAC 4; [2023] 4 BLLR 283 (LAC) at para 2.

rather leave” after Mr Combrink stated he was not going to answer questions related to the workers’ salary adjustment.

[10] The Commissioner was conscious that the onus rested on the Applicant (the Company) to prove its case.

Costs

[11] Advocate Cook argued that the Applicant given their conduct and the nature of the papers filed, I should order that they should pay the costs of this application in the event I find in the Respondents’ favour.

[12] In my view, I am satisfied that the award is unassailable on the grounds in Section 145 of the LRA.

[13] In the result, I make the following order:

Order

1. The application for review is dismissed with costs.

N. Makopo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

No appearance

For the 3rd and 4th Respondent: Advocate A. Cook

Instructed by: LDA Inc. Attorneys