

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2281/21

In the matter between:

SACCAWU o.b.o. WONDER DLAMINI

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

DAVID SELLO N.O.

Second Respondent

CHOPPIES HEBRON

Third Respondent

Heard: 25 April 2024

Delivered: 29 April 2024

This judgment was handed down electronically by circulation to the parties and/or legal representatives by email. The date for hand-down is deemed to be 29 April 2024.

JUDGMENT

MAKHURA, J

[1] This review application is against the arbitration award (award) issued by the second respondent (commissioner) under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA), the first respondent in these

proceedings. The commissioner found the dismissal of Mr Wonder Dlamini (employee) fair and dismissed his unfair dismissal dispute. The application was brought in terms of section 145 of the Labour Relations Act¹ (LRA). The application is opposed by the third respondent (company).

- [2] The employee was charged with and dismissed for unlawful removal of company property in that on 20 March 2020, he removed the company's property (lemon juice) without approval or authorisation.
- [3] The company's star witness was Patricia Chauke (Chauke), who was employed as a security guard. Her evidence was that on 20 March 2020, the employee took an empty bottle and went to the bakery section. When the employee came back from the bakery section, he was carrying the same bottle with lemon juice inside. The employee went through the security checkpoint, where he was searched and went outside. Chauke became suspicious of the substance contained in the bottle and went to look for her supervisor. She spoke to her supervisor (Jonathan) and they both went to the parcel counter, where the employee left his bag. The parcel counter is situated within the store. Jonathan took the employee's bag from the parcel counter and searched it - Chauke testified that Jonathan *"took the bottle out of [the employee's] bag and went to the fridge"*. The reference to the fridge is the cold room. Chauke, Jonathan and the manager went to taste the contents of the bottle. They concluded that the substance contained in the bottle was lemon juice. The tasting happened in the absence of the employee.
- [4] With reference to the video footage that was produced as part of the evidence, Chauke testified that the employee was seen picking a bottle of lemon juice from the floor and going to the cold room. At the time of entering the cold room, the employee had an empty bottle he collected earlier from Chauke and a bottle of lemon juice. The employee was then seen exiting the cold room with a bottle that

¹ Act 66 of 1995, as amended.

contained a substance. He went to the security checkpoint where he was searched by another security guard and went outside. Chauke blamed the security guard who was searching the employee for not doing his job. She said that the security guard did not perform his work properly.

[5] Chauke further testified that the employee threatened her and she had to call her brother to accompany her home.

[6] During cross-examination, Chauke was asked about the substance contained in the bottle that the employee was carrying when he exited the cold room and when he was searched at the security checkpoint. She was specifically asked why she said the bottle contained lemon juice. She responded:

'MS PATRICIA CHAUKE: Because he get (sic) to the door, having it in his hand. I as a security, I felt that what he has in his hand, it is similar to lemon juice, that is why I got suspicious.' (Own emphasis)

[7] The employee disputed during cross examination that he threatened Chauke. The employee's version was not materially different to Chauke's evidence, except for the substance contained in the bottle. He testified that he asked Chauke for an empty bottle, took it from where Chauke pointed and went to the bakery section. He poured tap water into the bottle and then proceeded to the cold room. On his way, he picked up a bottle of lemon juice that was on the floor and went inside the cold room. There are no cameras in the cold room. He came out of the cold room with one bottle, which the company alleged was lemon juice and the employee alleged that it was water. He proceeded to the security checkpoint where he was searched, with his hands up in the air and holding the bottle. After a search by the security guard, the employee then went outside. He came back later, went to the parcel counter, and placed the bottle inside his bag. His evidence was that the substance in the bottle, at the time of exit was water and that when he returned, the bottle contained traditional medicine.

[8] The commissioner summarised the evidence as follows:

'In this matter, the [company] contends that the Applicant put lemon juice inside the bottle he got from the counter. The Applicant contends that he put water in the bottle from the taps. On the video footage, the Applicant is not seen putting water inside the bottle but taking lemon juice from the floor and going inside the cold room. At that time, he is also holding a bottle, not showing whether the content is water or juice. It is only after the Applicant returned from the cold room where there is no camera footage that the bottle, he had in his hand is now containing a substance that is clearly not water. I am saying this because the content of the bottle did not look colourless. This is seen at the point where the Applicant is holding the same bottle and seem to be assisting a person who appeared to be a customer.'

[9] The commissioner then refers to the threats allegedly made by the employee against Chauke. It was common cause that although Chauke reported the alleged threats by the employee, the company did not discipline the employee. Further, Chauke did not lay a criminal case. The commissioner found that:

'The Applicant refuted the allegation by stating that management could have taken the threats serious and investigated the matter, but nothing was done by management in as far as the threats were concerned.'

[10] In the next paragraph of the award, the commissioner continued:

'The Applicant is not disputing that ... Patricia Chauke was accompanied by her brother at the station. I will accept that there were threats made by the Applicant to her. This finding is informed by the Applicant's failure to refute the allegation that he threatened Patricia to the extent that her

brother was involved in her protection. Having accepted that Patricia was threatened by the Applicant, I will also on a balance of probabilities conclude that the threat emanated from the issue pertaining to the lemon juice... (Own emphasis)

[11] In conclusion, he found:

'I accept that the Applicant was not involved when management tasted the contents of the bottle. It cannot be fair to simply attach the blame on the Applicant about the contents of the bottle if he did not know whether the bottle they used to taste belonged to him and whether the contents they tasted was in fact juice. I accept that the Applicant was supposed to be part of the tasting or at least be present when the tasting is (sic) done. However, the threats the Applicant made to Patricia Chauke did not come from any other differences that the Applicant had with her other than that she said that he had a bottle a (sic) lemon juice. It is in my view that the Applicant raised the threat because he was angered by what ... Patricia said. This finding is in addition to what was viewed on the footage in the bakery department before the Applicant exited, which was not water.'
(Own emphasis)

[12] The commissioner dismissed the procedural challenge. He concluded that the employee's dismissal was procedurally and substantively fair and proceeded to dismiss his unfair dismissal claim.

[13] The employee challenges the award on the basis that the commissioner committed several errors. He referred to a number of instances of alleged errors, most of which are, in my view, immaterial. For instance, the commissioner appeared to have quoted the incorrect charge. However, nothing turned on this as it is clear in his summary and analysis of evidence and facts that the commissioner dealt with and addressed the correct charge. Mr Khanya,

appearing for the company, agreed that this is of no material consequence. The commissioner is also criticised for being lazy and failing “*to pay attention to the facts placed before him*”.

- [14] The employee further contends that the commissioner incorrectly found that the employee did not challenge the evidence led by Chauke that he threatened her. In short, the employee’s complaint is that the commissioner committed errors and failed to apply his mind to the evidence which is borne out by his incorrect factual findings.
- [15] The test to review an award is as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*². It is well established that in determining whether an award is liable to be reviewed and set aside, this Court is required to determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.
- [16] In *Makuleni v Standard Bank of SA (Pty) Ltd and others*,³ the Labour Appeal Court (LAC) held that the award may be reviewed and set aside only if the conclusions are untenable.
- [17] In *Duncanmec (Pty) Ltd v Williams Itumeleng NO and others*,⁴ the LAC restated the common basis upon which awards are reviewed:⁵

‘The principles relating to review of arbitration awards are now trite and need not be restated. Suffice to say that arbitration awards may be set aside if the award is disconnected from the evidence resulting in an unreasonable outcome.’ (Own emphasis)

² (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

³ (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC).

⁴ [2020] 7 BLLR 668 (LAC).

⁵ *Ibid* at para 23.

- [18] It is trite that the enquiry into substantive fairness of a dismissal is two-fold – first, a determination whether the employee is guilty of the allegation/s of misconduct and if so, second, an enquiry into the appropriateness of sanction.⁶ The onus is on the employer to prove the fairness of dismissal by proving guilt and appropriateness of sanction.
- [19] On the merits, the commissioner found that the employee threatened Chauke, and concluded that he threatened her because of the issue pertaining to the lemon juice. He found in one instance that the evidence of Chauke relating to the threats was refuted but later found that this evidence was not refuted. The record shows that the employee put to Chauke during cross-examination that she was misleading the commission and that if she was threatened, the company would have charged the employee. It was directly put to her that she was “never threatened”. However, Chauke insisted that she was.
- [20] The commissioner then concluded that the employee is guilty of unlawful removal of company property because the threats emanated from the lemon juice incident. The reasoning and finding are unsound. The employee was not charged with threatening Chauke. The connection or link the commissioner seeks to draw between the alleged threat and the misconduct is irrational. Even if it is accepted that the employee threatened Chauke, that does not prove that the bottle found in his bag contained lemon juice. The commissioner was distracted by and placed unnecessary focus on the irrelevant evidence relating to the alleged threats and thereby diverted from the correct path in the conduct of the arbitration. The result is the untenable and unreasonable conclusions that he reached.
- [21] The company had to prove that the bottle allegedly removed from the employee’s bag contained lemon juice. The company failed to discharge its onus. The investigation, which involved taking and searching the employee’s bag without

⁶ Item 7 of Schedule 8 of the Code of Good Practice: Dismissal.

his authorisation or permission and in his absence was, in my view, not only clumsily and poorly conducted, but it also violated the employee's fundamental right to privacy enshrined in the Constitution.⁷

- [22] The commissioner's decision is contradictory and untenable. On the one hand, he found that the employee could not have known that the bottle used when tasting the content belonged to him. He found that it would be unfair to blame the employee if he did not know whether the bottle the company used to taste the substance belonged to him and whether the contents they tasted were in fact lemon juice. However, he immediately thereafter placed reliance on the alleged threats and found the employee guilty of unlawful removal of the substance contained in the bottle.
- [23] The commissioner has misconceived the enquiry, embarked on a wrong enquiry and failed to apply his mind to the evidence and essentially found the employee guilty based on unproven circumstantial facts.
- [24] Having found the employee guilty, he failed to engage in an enquiry into the appropriateness of sanction. The commissioner's failure to consider the appropriateness of the sanction is a material irregularity sufficient to set aside the award. The award is not sustainable and stands to be reviewed and set aside.
- [25] On the evidence presented before the commissioner, the company failed to discharge its onus that the employee was guilty of the offence and that the sanction of dismissal was appropriate. Even if the employee is guilty, there was no evidence led by the company to show that the employee's misconduct led to an irretrievable breakdown of the employment relationship. The failure to lead

⁷ See: section 14 of the Constitution of the Republic of South Africa, 1996. The section provides that:

"14 Privacy

Everyone has the right to privacy, which includes the right not to have –

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed."

evidence on the appropriateness of the sanction is a choice the company made. The only conclusion to follow from these findings is that the dismissal of the employee was substantively unfair. The next issue to consider is the remedy.

[26] The full record of arbitration proceedings is before this Court. No purpose would be served in referring the matter back to the CCMA. The company investigated the incident because Chauke “felt” and “suspected” that the employee had a bottle that contained something “similar” to lemon juice. What followed was a violation of the employee’s right to privacy, disguised as an investigation. His bag was searched without his permission and in his absence. The substance contained in the bottle allegedly found in the employee’s bag was tasted in his absence.

[27] The employee has sought the primary remedy of reinstatement. Section 193 of the LRA sets out the relief which a commissioner or this Court may grant upon finding that a dismissal was substantively and/or procedurally unfair. Where a dismissal is found to be substantively unfair and the employee seeks to be reinstated, the primary remedy of reinstatement must be awarded.⁸ The employer bears the burden to prove that reinstatement should not apply retrospectively.⁹ The employee is not guilty of the offence. He is entitled to reinstatement. There is no reason to deprive him of full back pay.

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

Order

1. The arbitration award issued under case number GATW5788-20 dated 19 October 2021 is reviewed and set aside.

⁸ Section 193(2) of the LRA; see *Booi v Amathole District Municipality and Others* (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC) at paras 39 – 40; *Notisi v South African Police Service and others* [2023] ZALAC 33; [2024] 4 BLLR 380 (LAC) at paras 58 – 60.

⁹ *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC).

2. The award is substituted with the following order:

‘2.1. The dismissal of the employee by the third respondent on 4 April 2020 is hereby declared substantively unfair.

2.2. The third respondent is ordered to reinstate the employee retrospectively from the date of his dismissal, on the same terms and conditions of employment that existed prior to his dismissal and without any loss of benefits.

2.3. The third respondent is ordered to pay the employee back-pay from the date of his dismissal until the date he reports for duty within 14 days of this judgment and order.

2.4. The employee is ordered to report for duty on 6 May 2024.’

3. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. N. Lekala (Union official)

For the Third Respondent: Mr. S. Khanya of Ismail & Dahya Attorneys