

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Case Number: J250/98

In the matter of:

JOHANNES LOWEWIK COETZEE

Applicant

and

JUSTICE LEBEA, N.O.

First Respondent

SANTAM LTD

Second Respondent

JUDGEMENT

CHEADLE, AJ:

[1] This is a review of an arbitration award made by the first respondent, a commissioner appointed by the Commission of Conciliation, Mediation and Arbitration in terms of section 117 (2) of the Labour Relations Act, 66 of 1995 (the 'LRA'). The application to review was brought under section 145 of the Labour Relations Act, 66 of 1995, which provides for the limits and the procedure for the review of arbitration awards made under the auspices of the Commission. The application was not defended by either the first respondent or the employer, cited as the second respondent. The first respondent did not file supplementary reasons.

The facts giving rise to this review

2. The facts that gave rise to the review are as follows:

- (a) On 17 March 1997, the applicant assaulted a fellow employee, a Mr Khumalo.

- (b) The incident was reported to their branch manager, a Mr Jacobsohn.
- (c) The branch manager did not follow the company's disciplinary procedure but sought to 'settle' the dispute in an informal manner. The applicant and the branch manager believed that the complaint was satisfactorily resolved by this informal intervention.
- (d) Approximately two months later, the assistant general manager for the southern Gauteng region, a Mr Cornelius learnt of the incident and immediately instituted the company's disciplinary procedures against the applicant.
- (e) After the disciplinary hearing, the applicant was dismissed.
- (f) The applicant disputed the fairness of the dismissal and referred the dispute to the Commission in terms of section 191(1)(b) of the LRA for conciliation.
- (g) Conciliation proved to be unsuccessful and the applicant referred the unresolved dispute to arbitration in terms of section 191(5)(a).
- (h) The first respondent conducted the arbitration and an award was made to the effect that the dismissal of the applicant was both procedurally and substantively fair. It is that award that is the subject of this application for review.

Grounds of review

[3] The review is based on the first respondent's alleged gross misconduct (paragraph 22 of the affidavit). Under that head, the applicant claimed that the first respondent had (a) failed to apply his mind; (b) 'entertained irrelevant and improper considerations'; (c) and filed to act in 'a judicial and proper manner' (paragraphs 23 and 24 of the affidavit).

[4] there is not a jot of evidence that the first respondent did not act judicially or that he had acted improperly. To accuse the first respondent, a commissioner appointed by the Commission of Conciliation, Mediation and Arbitration, of not applying his mind is one thing, but to accuse him of impropriety without substantiating that accusation borders on contempt. There is not a jot of evidence that he took irrelevant or improper considerations into account. Indeed, the applicant himself testifies that he has no knowledge of the nature of these considerations in paragraph 23 of his affidavit. It does a great disservice to our public institutions to weigh in with unsubstantiated claims of impropriety.

[5] That leaves the charge that the first respondent failed to apply his mind in making the award. In paragraph 25 of his affidavit, the applicant details the grounds upon which that charge is based. That paragraph reads as follows:

'Had the First Respondent properly applied his mind:

- (a) he would have realised that convening of my disciplinary hearing was outside the Second Respondent's powers and as such a nullity.
- (b) he would have realised that convening of my disciplinary hearing was in direct violation of the Second Respondent's disciplinary code and as such a nullity.
- (c) he would have realised that any evidence heard at such disciplinary hearing was invalid and any finding and as such a nullity;
- (d) he would have reached the decision that the hearing held by the second respondent was plagued with procedural irregularities, as conceded in Cornelius evidence above.

- (e) basic fundamental rules of procedure such as prosecuting together with presiding over the hearing and not giving me an opportunity to hear evidence was blatantly ignored;
- (f) he should have realised that summary dismissal by its very nature is immediate and having regard to the length of time that had passed was totally inappropriate.
- (g) that the relationship between the employees and the employee-employer relationship had not been irreparably harmed and a continuous working relationship was possible.
- (h) he would have realised the Second Respondent's disciplinary hearing was a farce with a predetermined conclusion.
- (i) he would have realised [that] while the nature of the offence may warrant dismissal the facts of this incident did not.
- (j) he failed to apply accepted legal principles as laid out in our case law.
- (k) he prevented me from exercising my constitutional right to legal representation.'

[6] These grounds often cover the same ground and accordingly it is more convenient to categorise them.

- (a) there is an attack based on the so-called 'nullity' of the disciplinary hearing (subparagraphs (a), (b) and (c));
- (b) there is an attack based on the employer's conduct of the hearing (subparagraphs (d), (e) and (h));
- (c) there is an attack on the appropriateness of the sanction of dismissal (subparagraphs (f), (g) and (i));
- (d) there is an attack based on the first respondent's failure to apply accepted legal principles;
- (e) there is an attack based on the first respondent's decision not to permit the applicant legal representation at the hearing.

[7] Let me at once deal with the attacks referred to in the above paragraphs (d) and (e). No evidence as to what legal principles the first respondent failed to apply (other than those contained in the applicant's attack on the legal procedural irregularities), was proffered. The arbitrator's exclusion of legal representation was not pursued. No constitutional right of legal representation was identified let alone advanced.

The 'nullity' of the disciplinary hearing

[8] The nub of this ground of review seems to be that the first respondent failed to take into account that-

- (a) the company could not institute disciplinary proceedings against the applicant because the matter was settled;
- (b) the institution of disciplinary proceedings 3 months after the complaint was in violation of the company's disciplinary procedures;

[9] It is not altogether clear what the applicant intended by stating that the holding of the disciplinary hearing amounted to a nullity. But one must assume that if the matter had been settled as alleged, there was no need for a dismissal let alone a disciplinary hearing.

[10] Before assessing whether the first respondent applied his mind to these considerations it is important to briefly reiterate the obvious: a review is different from an appeal. A review concerns itself with the manner in which the tribunal comes to its conclusion rather than with its result. An appeal, on the other hand, is concerned with the correctness of the result. The two remedies for challenging the decision of a tribunal may, on occasion, be co-extensive, particularly if it is the very process of reasoning that is the subject of the review. But this should never constitute a basis for blurring the essential differences between the two. The fact that a reviewing court may have come to a different result if the matter had been brought on appeal can never be, on its own, a basis for attacking the process of reasoning. If it did, then the distinction between appeal and review would be obliterated. And whatever effect the constitutional entrenchment of the right to administrative justice may have on our common law, it does not mandate a destruction of the distinction between these two remedies. What then distinguishes the two remedies when it comes to applying them to the reasoning process employed by a tribunal? It seems to me that the seeds of the distinction lie in the phrase so commonly used to describe a process failure in the reasoning phase of a tribunal's proceedings - 'the failure to apply one's mind'. That test is different from the one that applies to an appeal - namely, whether another court could come to a different conclusion. Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying one's mind is whether the outcome *can* be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes not on the correct one.

[11] Did the first respondent then apply his mind to the settlement of the dispute and the lateness of the disciplinary hearing? It is obvious from the reasons given in support of the award that the arbitrator considered both these issues in some detail and that he advanced justifiable reasons for holding as he did, namely that the respondent 'acted reasonably in instituting disciplinary proceedings' against the applicant. In the passage headed 'Procedural Fairness', he spells out his reasons. A summary of which is:

- (a) he finds that the second respondent acted with reasonable speed and diligence in instituting disciplinary proceedings once it learnt of the assault, any delay in the institution of those proceedings arose because of the branch manager's action in dealing with the matter informally and not in accordance

with the second respondent's disciplinary procedures. It would seem that the first respondent accepted the second respondent's version that this informal procedure was a 'cover up' and there is certainly enough uncontested evidence recorded elsewhere in the award that that was a reasonable conclusion to make.

(b) he finds that there was no 'settlement'. He says that this is so 'especially *also* in the light of the concession made by Mr. Jacobsohn that the manner in which he dealt with the incident involving Mr. Coetzee was not in accordance with the company's disciplinary procedure and did not constitute disciplinary action' (the emphasis in mine). On the reason, alone, the first respondent has applied his mind and concluded that because the procedure was by-passed, no procedurally recognized outcome (ie settlement in so far as the second respondent was concerned) could flow from it. But it is clear that this reason, though a special one for him, is not be only reason for the finding. That must be the force of the word 'also' emphasized by me in the quoted text. Although it would be better not to have to determine these questions by inference, it must follow that once having found that there was a cover up, the first respondent must have relied on the evidence of Mr. Khumalo to the effect that he 'was not happy' if the matter was not taken any further, a piece of evidence confirmed by the applicant in his founding affidavit in paragraph 15.2.

(c) he finds that given the seriousness of the incident and its implications for those employees that witnessed the assault, the respondent could not be seen to condone assaults by whites on black employees. Accordingly the institution of disciplinary proceedings although late was reasonable and therefor not unfair.

The employer's conduct at the disciplinary hearing

[12] Other than the irregularity concerning the late institution of disciplinary proceedings, the applicant alleges that the following irregularities were committed by the company in the conduct of the disciplinary proceedings namely that the chairman of the enquiry-

(a) also performed a prosecutorial role in the proceedings (para 25(e) of

the applicant's founding affidavit);

- (b) failed to give the applicant the opportunity to hear evidence (para 25(e));
- (c) Spoke to a material witness in the absence of the applicant (para 13.10);
- (d) failed to disclose that fact to the applicant (para 13.11);
- (e) took the advice of his superior at head office before dismissing the applicant, which advice was that the applicant should be dismissed.

[13] It is evident from the testimony summarised by the first respondent that Mr Cornelius both investigated the charges against the applicant and presided over the hearing. Although I am not of the view that that is necessarily an irregularity, it is not for me to decide. The LRA has left that decision to the commissioners. It is for the commissioners to decide what amounts to procedural unfairness in disciplinary hearings. There is no evidence proffered in respect of the allegation that the applicant was not given the opportunity of hearing all the evidence against him, unless the allegation is a repetition of the allegation concerning Mr Cornelius's conversation with Mr Khumalo. As to the other allegations, the applicant alleges in the founding affidavit that Mr. Cornelius, a witness for the second respondent, gave the following evidence at the arbitration hearing. I quote from the affidavit:

'13.10 He, while presiding over the hearing, spoke to Khumalo in my absence to find out why he did not want to testify.

13.11 He never informed me that he had spoken to Khumalo.

13.12 He spoke to Head Office and Mr. Bester concerning what finding he should be made

13.13 Mr. Bester advised him that he should be dismissed.'

[14] All that is said in the award concerning allegations is a summary of Mr Cornelius' testimony, which reads as follows:

'Mr. Cornelius further testified that he chaired the disciplinary hearing involving Mr. Coetzee. Mr Khumalo was not present during the first session of the disciplinary hearing but only attended the second session. Cornelius gained the impression on the disciplinary hearing that Mr. Khumalo was intimidated by the surrounding of the disciplinary hearing and seemed to think that he was there only as a witness. For this he decided to discontinue with the meeting and asked Mr. Khumalo to make a written statement about the incident.'

[15] I have before me the three bald allegations by the applicant and a little context in the award. There is no record before me. The applicant did not even attach the disciplinary code or the agreed minute of the disciplinary hearing to its application, both of which appear to have been before the first respondent. These charges of procedural irregularity are not mentioned at all in the first respondent's award, let alone dealt with by him. He did not supplement his reasons nor did he respond to the application. I do not know whether these

allegations were ever raised in the arbitration hearing, or whether raised, not pressed. The only inference that I can draw from what is before me is that the first respondent did not apply his mind to these attack on the procedural fairness of the dismissal. These three allegations are relevant to any enquiry into the procedural fairness of a dismissal. Whatever their eventual weight may be, the applicant has a right to a reasoned judgment on these issues, particularly when it is the subject of a review - that is why the rules provide the facility for decision makers to supplement their reasons. I accordingly regard the first respondent's failure to apply his mind to these allegation of procedural unfairness to constitute a gross irregularity justifying the setting aside of the award.

Appropriateness of the sanction

[16] The next ground of attack was based on the first respondent's failure to take into account the inappropriateness of the sanction. This attack boils down to the first respondent's failure to take into account the applicant's length of service, his clean disciplinary record, and the fact that he maintained a good working relationship after the assault. It is quite evident from the award that the first respondent applied his mind to the question of mitigation. He might have not mentioned the fact of the good working relationship explicitly in his assessment. But it is quite clear that he regarded the assault as very serious misconduct justifying dismissal, which even 12 years of employment without fault could not mitigate. A commissioner is obliged only to give brief reasons in terms of section 138(7)(a) of the LRA. It is not necessary that the arbitrator give full reasons. But if challenged on review, an arbitrator ought to expand on the reasons, if the application for review calls out for the commissioner to do so, which this one did. It is important for a commissioner to respect both the reviewing party's right to have an award reviewed and this court's role in reviewing awards by ensuring that the court has full reasons and the record, or what there is of it, before it when hearing the review application.

Costs

[17] The applicant seeks costs against both respondents. Although costs normally follows the result, I do not think that it is fair to order the respondents' to pay the applicant's costs for the following reasons:

- (a) the applicant made unsubstantiated and gratuitous allegations against the first

respondent;

(b) the applicant failed to attach the record of the disciplinary hearing, which may well have had a bearing on the allegations of procedural irregularity in respect of which the applicant has succeeded in this application; and

(c) the narrow basis on which the applicant finally succeeded in its application to review the award made by the first respondent.

Conclusion

[18] The award is set aside and remitted back to the first respondent for a fresh decision. The only issues in respect of which there must be fresh consideration before a new award is made are the allegations of procedural unfairness contained in paragraphs 13.10 to 13.13 and 25(e) of the applicant's founding affidavit dated 19 January 1998 in this application.

[19] There is no order as to costs

Acting Judge Halton Cheadle

11 September 1998

REPRESENTATIVES

Counsel for Applicant :
Counsel for First Respondent :
Counsel for Second Respondent :
Amicus Curiae :