



REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable / Not Reportable

Case no: JA 53/13

In the matter between:

GOLD ONE AFRICA LIMITED MODDER

EAST OPERATIONS

Appellant

and

JOHANNES PETRUS DIEDERIK VAN DER

WESTHUIZEN

First Respondent

COMMISSIONER THABA SEKHABISA

Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Third Respondent

Heard: 29 May 2014

Delivered: 03 July 2014

CORAM: Davis JA, Ndlovu JA et Molemela AJA

JUDGMENT

DAVIS JA

Introduction

- [1] This is an appeal against the judgment of the Labour Court of 6 December 2012, leave having been granted by the court *a quo* to this Court on 8 May 2013.

The background

- [2] First respondent commenced employment with appellant on 8 February 2010. At the time of his dismissal on 18 November 2010, he was employed in the position of Acting Chief Foreman and earned a salary of R 14 500.00 per month. He was charged with assaulting a fellow employee. A disciplinary hearing in respect of this alleged misconduct was held on 17 November 2010 which he did not attend. The chairperson of the enquiry found first respondent to be guilty of the allegations against him and issued the sanction of dismissal. First respondent appealed this outcome. The appeal hearing was attended by first respondent on 22 November 2010. The chairperson of the appeal hearing confirmed first respondent's dismissal. As a result thereof, first respondent referred the dispute to third respondent.
- [3] At the hearing before second respondent, first respondent testified that on 10 October 2010 he was busy with a meeting when the mine representative opened the door to his office. According to first respondent:

'As he was about to enter I placed my hand on his chest and said woh they are busy with a meeting and then I placed my hand on the door handle. That mine representative said so now you want to assault me. So I said no I leave the door and I leave my hand away from him and I waited for the mine overseer.'

First respondent confirmed that when the representative from appellant's human resources department, Ms Funeka Mokoena sought, in terms of appellant's disciplinary code, to parade him on 11 October, he refused to attend a meeting at her office. Later he refused her request to sign the notification that he should attend the disciplinary hearing. It appears from the evidence that first respondent knew that a disciplinary hearing was to be held on 17 November 2010, that he did not attend that hearing but did attend the appeal hearing where he was represented.

- [4] The chairperson of the relevant branch of the National Union of Mineworkers, Mr Mtunzi Ciko also provided evidence to second respondent. He testified that he had approached first respondent with a complaint that one of appellant's workers had been pushed by first respondent, who was the shift supervisor. He reported the matter to Mr Steve Tekane who called first respondent to his office together with Mr Ciko. According to Mr Ciko he began to discuss the allegation with Mr Tekane:

'He then asked us to what happened. Why was the complainant pushed so hard? Before I could repeat what I was saying Wessie (first respondent) stood up and grabbed me by the clothes and then pushed me very hard against the wall'.

- [5] Second respondent examined this evidence and held as follows:

'The testimony of Mr Ciko was clear, coherent and simple. I find Mr Ciko's version probable. The applicant's defence was that why did Mr Ciko wait for a month before lodging the grievance. Mr Ciko however testified that he lodged the grievance on the day of the incident. I find the applicant's version that he only put his hand out and it was Mr Ciko that put his chest against his hand to be highly improbable. It was clear that the applicant assaulted Mr Ciko. I am of the view that the applicant's aforesaid conduct was of a serious nature and warrants his dismissal.'

- [6] In deciding the review application the court *a quo*, per Molahlehi J, upheld the review, essentially on two grounds. The court accepted first respondent's argument that he had not been properly paraded in terms of the disciplinary code of the appellant and consequently the charges had not been properly served upon him as a result of which he was entitled to absent himself from the disciplinary hearing which proceeded in his absence. Furthermore, no explanation was provided as to why the complainant (Mr Ciko) had not lodged his complaint within 48 hours of the incident. In short the learned judge drew the inference that if the complainant regarded the alleged incident as serious, he would not have taken more than a month after the incident occurred to report the matter to management.

The appeal

[7] On appeal three issues emerged as central to the disposition of this dispute being:

1. Whether the dismissal was substantively unfair?
2. Whether second respondent provided sufficient assistance to the first respondent at the hearing, given that first respondent was unrepresented at the hearing? and
3. In terms of clause 8.7 of appellant's disciplinary code, if an employee fails to attend the enquiry, he has to be given a second notification for hearing on a date at least 24 hours later. As it was common cause that this had not taken place, first respondent contended that there had been a significant procedural irregularity.

Substantive fairness

[8] Mr Marx, on behalf of first respondent, submitted that second respondent had not taken account of clear discrepancies in the overall evidence of Mr Ciko. He referred to the following statement of Mr Ciko to the disciplinary enquiry :

‘The supervisor was standing on the door to my left-hand side, he pushed me hardly and roughly on my chest, I lost a bit of my balance then I asked as I recovered my stance what was happening with him.’

According to Mr Marx, in Mr Ciko's evidence before second respondent, he said: ‘Before I could repeat what I was saying Wessie had stood up, grabbed me by the clothes and then pushed me very hard against the wall.’

[9] According to Mr Marx these passages constituted two different versions of events. Accordingly, second respondent should have treated this evidence with considerable care, in particular because Mr Ciko was a single witness.

[10] Mr Redding, on behalf of the appellant, pointed to discrepancies in the evidence of first respondent. I have already indicated the nature of first respondent's evidence in chief, namely that he placed his hand on the chest of the complainant. In cross examination he said the following:

'Without knocking he just opened the door. So, I said, woh, my hand in a forward motion and then he came to my hand. Sort of brought his chest against my hand. I told him we are busy with a meeting.'

[11] The question is whether this decision of the second respondent is one which a reasonable decision maker could not reach. **Sidumo v Rustenburg Platinum Mines Ltd** 2008 (2) SA 24 (CC) at para 110.

[12] In applying the test in **Sidumo**, *supra* Cachalia JA and Wallis JA in **Herholdt v Nedbank (Cosatu as amicus curiae)** 2013 (6) SA 224 (SCA) at para 13 reminded reviewing courts that the distinction between a review and an appeal must be preserved. Thus:

'While the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions'.
(para 13)

In amplification thereof, the learned judges of appeal said:

'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.' (para 25)

[13] In the present case, taking account of the argument concerning the two versions which Mr Marx suggested were offered by Mr Ciko in his evidence as well as the evidence given by first respondent, it cannot, on any plausible basis, be found to be unreasonable to have concluded that an assault had taken place. In this context, appellant's disciplinary code provides that either assault or attempted assault is a serious offence. On the basis of the evidence presented to second respondent it cannot be said that the weight and relevance which the second respondent attached to the evidence had the effect that the outcome was unreasonable. Expressed differently, a

reasonable decision maker was entitled to conclude that first respondent's conduct constituted an assault in terms of the appellant's disciplinary code. It follows that there is no merit in the argument that the second respondent's decision to confirm the dismissal was substantively unfair and hence this decision to dismiss first respondent should be set aside.

Assistance to first respondent by second respondent

[14] First respondent contended that as he was not represented, second respondent had not provided sufficient assistance to him during the hearing. In his supplementary affidavit, first respondent averred as follows:

'The second respondent failed, refused and/or neglected to assist me, an unrepresented lay person, to place his case properly before the CCMA, i.e.

- i. assisting me in explaining to me what evidence should be led;
- ii. assisting me in what allegations should be made;
- iii. assisting me in explaining to me how to place my version before the CCMA.

The 2nd respondent failed, refused and/or neglected to assist me, a lay person, in cross examination of the respondent's witnesses.

The 2nd respondent failed, refused and/or neglected to assist me in putting my case properly before the CCMA.'

[15] In answer, appellant, by way of an affidavit deposed to by Mr Rule, contended that first respondent had presented a full version of events at the arbitration hearing. Mr Rule averred that, although Mr Fourie's request to represent first respondent at the arbitration had been refused, he doubtlessly would have assisted first respondent in the latter's preparation prior to the hearing. Further, first respondent neglected to inform the court what further evidence second respondent should 'have extracted from him had he been so "assisted"'.

[16] If a reviewing court must avoid 'judicial overzealousness' in setting aside

administrative decisions that do not coincide with the courts own view, it must also be careful not to impose its conception of the manner in which an institution such as third respondent organizes a hearing. Before a court interferes with a decision made by a representative of third respondent, the least that is required by a complainant as first respondent is a clear exposition as to how an arbitrator should have come to the assistance of the complainant. In this case, an examination of first respondent's cross examination of Ms Mokoena reveals that he put his version to Ms Mokoena and asked all of the questions which could reasonably be expected by a cross examiner. The cross examination of Mr Ciko was somewhat shorter. The reason appears to be that the essential point first respondent made was that Mr Ciko had waited for 'a month and six days before you lodged a complaint'.

- [17] For these reasons in particular, it is difficult to see on this record precisely where the second respondent failed to conduct a fair hearing. Were this court to come to the aid of every unrepresented person who, after receiving *ex post facto* legal advice, claims that there was procedural unfairness at the hearing conducted by a member of third respondent but does so vaguely at best, or in general terms without any specification, the very process of arbitration hearings before so vital an institution as third respondent would grind to a litigious halt. Almost every case in which an adverse finding against an unrepresented person has been made would then be the subject matter of a review. On these papers and on these facts, there is no merit in the argument of first respondent.

The failure to provide first respondent with 24 hours' notice

- [18] Mr Redding conceded correctly that no notice had been given to first respondent, sufficient to comply with clause 8.7 of the appellant's disciplinary code. He was therefore constrained to contend that as first respondent had been given a right to appeal against the decision of the disciplinary body and had exercised this right, the appeal hearing had taken the form of a rehearing in which first respondent had participated. Mr Redding referred to **Khoza v Gypsum Industries Limited** [1997] 7 BLLR 857 (LAC) where this Court held that any procedural defect in a disciplinary enquiry may be cured on appeal.

On this basis, Mr Redding submitted that the requirement of procedural fairness had been met.

[19] The facts upon which the decision in **Khoza**, *supra* had been based, do not appear to have been replicated in this case. When the documentation reflecting the appeal enquiry is examined, it appears that first respondent was represented at the appeal hearing. He appeared to treat the hearing as a conventional appeal in that he stated his grounds of appeal as “sentence too harsh” and further “he did not assault the person laying the charges”. But it does not appear from the record that a process of examination and cross examination of witnesses took place at the appeal hearing, sufficient to justify the submission that the appeal hearing was in effect a hearing *de novo*.

[20] In **Khoza**, *supra* Myburgh JP at 860 I said:

‘At the initial enquiry and on appeal the appellant is represented by an attorney which is an unusual privilege. The appellant’s interest was safeguarded where specific charges were put to him, he had sufficient time to prepare, his attorney given the opportunity to test the respondent’s evidence, the appellant gave evidence and he appealed against the initial finding.’

None of this occurred at the appeal hearing in this case in which it appeared that only argument was heard, subsequent to which the initial decision was confirmed.

[21] In my view, a breach of clause 8.7, that is the failure to give first respondent the additional 24 hours’ notice before the disciplinary enquiry on 17 November 2010 could take place, was not cured by the appeal hearing. On this point therefore, there has been a procedural irregularity and accordingly a failure to dismiss the first respondent on procedurally fair grounds. In turn, this justifies an appropriate award of compensation, which given that the offence was an assault of a shop steward and that there was an appeal hearing, should not be more than six months remuneration.

[22] In the result, the appeal must succeed in part in that the decision of the court a

quo must be set aside and replaced by the following order:

1. The application for review of the decision of the second respondent is upheld.
2. It is declared that the decision to dismiss applicant is substantively fair.
3. The decision to dismiss the applicant is found to be procedurally unfair.
4. The first respondent is ordered to pay compensation to the applicant in the amount of 6 months remuneration calculated at applicant's rate of remuneration on the date of dismissal.
5. There is no order as to costs.

There is no order as to costs incurred in the prosecution of the appeal.

Davis JA

Judge of the Labour Appeal Court of South Africa

Ndlovu JA and Molemela AJA concur in the judgment of Davis JA

Appearances

For the appellant: Adv A Redding SC and L.Louw

Instructed by: Edward Nathan Sonnenbergs

For the First respondent: Adv H.E. Marx

Instructed by: Roets & Du Plessis