



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 43/2014

In the matter between:

NATIONAL UNION OF MINEWORKERS

First Appellant

MWACHANDA M.M

Second Appellant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

M RAMOTSHELA N.O.

Second Respondent

RUSTENBURG PLATINUM MINES LIMITED

Third Respondent

Heard: 28 August 2015

Delivered: 28 November 2017

Summary: Employee dismissed for assault of his shift supervisor. At arbitration the commissioner found the dismissal substantively unfair and awarded re-employment. The Labour Court on review found that the arbitration award was unreasonable and remitted the matter back for re-hearing before another commissioner. The employee and his union appealed the judgment. On appeal found that Labour Court did not err in remitting the matter to the CCMA. Appeal dismissed with costs.

Coram: Tlaletsi DJP, Ndlovu JA and Savage AA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This is an appeal against the judgment of the Labour Court (Wilken AJ), with the leave of that Court, in terms of which the arbitration award of the second respondent, the commissioner, was set aside and the unfair dismissal dispute of the second appellant, Mr M M Mwachanda (the employee), was referred back to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), for re-hearing at the earliest possible opportunity before a different commissioner.
- [2] Prior to his untimely death, our colleague Ndlovu JA was engaged with the writing of this judgment. His death accounts for the delay in the delivery of this judgment in this matter, for which this Court sincerely apologises.
- [3] At the outset of the hearing, and without objection from the third respondent, Rustenburg Platinum Mines Ltd (the employer), the appeal was reinstated. This followed the appellants' failure to file the record within the time periods prescribed in Rule 5(8) of the Rules of the Labour Appeal Court.
- [4] The background to the matter is as follows. The employee was dismissed, following a disciplinary hearing, for the assault of his shift supervisor, Mr Petrus Muller; failing to work according to established standards and procedures in omitting to report a machine breakdown; and insulting and/or abusive language. This followed a dispute, which arose between the employee and Mr Muller during the night shift on 6 August 2009. While it was not in dispute that the employee swore at Mr Muller, the employee stated that Mr Muller then hit him in the face in the presence of another employee, Mr Benny Stander. Both Mr Muller and Mr Stander denied this and stated that Mr Muller responded by repeatedly saying "*thank you*" to the employee. Their

evidence was that the employee attempted to hit Mr Muller, first with a pinch bar, then with a long steel pole and finally with an 8-pound hammer. Although the employee admitted having struck Mr Muller with the steel pole, he claimed to have acted in self-defence.

- [5] Mr Muller, at his own disciplinary hearing, was found to have committed assault but was not found to have made racially offensive remarks to the employee. On appeal, Mr Muller's behaviour was stated to be "*unacceptable*" but he was not dismissed from employment.

Arbitration award

- [6] Aggrieved with his dismissal, the employee referred an unfair dismissal dispute to the CCMA for determination. He contended that his dismissal was unfair in that discipline had been applied inconsistently in that Mr Muller had not been dismissed. At arbitration, the employee's witnesses testified that Mr Muller had directed racially abusive language at the employee. The commissioner identified there to be two irreconcilable versions concerning the alleged assaults and the allegation of racial abuse, but rejected the evidence of Mr Stander and Mr Muller as improbable, while accepting the employee's version as "more plausible". This was despite the fact that the allegation of racial abuse had not been put to the employer's two witnesses in cross-examination. Furthermore, although the commissioner found that the employee exceeded the bounds of self-defence, his dismissal was found to be substantively unfair and he was re-employed with effect from 1 August 2009.

Judgment of the Labour Court

- [7] The employer sought the review of the arbitration award by the Labour Court. The Court found that the commissioner did not apply the appropriate test to evaluate the probabilities of the two irreconcilable versions before him, in the manner detailed in *SFW Group Limited and Another v Martel Et Cie and Others (SFW)*.¹ This was so in that the alleged racial abuse was never put to either Mr Muller or Mr Stander during the course of their evidence in chief or

¹ 2003 (1) SA 11 SCA.

in cross-examination. Furthermore, the Court found that the commissioner did not appreciate the bounds of the defence of self-defence in finding that the employee's assault exceeded such bounds. As a result, the arbitration award was found to be fatally flawed in that the commissioner had misconceived the nature of the enquiry before him and it was one that a reasonable commissioner could not reach on all the material before him. Since many of the factual disputes before the commissioner required careful examination and determination, the Court set the arbitration award aside and referred the matter back to the CCMA for hearing before another commissioner at the earliest possible opportunity.

Grounds of appeal

- [8] The first appellant, the National Union of Mineworkers, and the employee appeal against the judgment of the Court *a quo* on a number of grounds, including that the judge erred both in failing to find that the employee was provoked by Mr Muller, and in finding that the allegation of racial abuse was not put to him in his evidence. Since the arbitration award was reasonable, the Labour Court erred in setting it aside and remitting the matter to the CCMA for a hearing before another commissioner.
- [9] The employer opposed the appeal contending that the Labour Court correctly determined that the commissioner had failed to consider the credibility, reliability and probabilities in the evidence before him and that the allegation of racial abuse was not put to either Mr Muller or Mr Stander in cross-examination. Since on the facts, the employee was guilty of assault, the commissioner ought to have stated as much and for this reason alone the arbitration award is reviewable. Nevertheless, it was stated that the matter was properly ordered to be remitted to the CCMA for hearing before a different commissioner since the Labour Court was not in a position to determine the matter. Consequently, the employer sought that the appeal be dismissed with costs.

Evaluation

[10] This Court has emphasised that the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*² does not mean “...that the grounds of review in section 145 of the Act are obliterated [but]... that they are suffused by reasonableness.”³ In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others (Gold Fields)*⁴ it was stated that:

‘...where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.’⁵

[11] The erroneous recordal or categorisation of an issue by the arbitrator will not justify the setting aside of the award unless such error is material to the outcome, caused unfairness or prejudice⁶ and where (as was the case in *National Union of Mineworkers v Samancor Ltd*⁷ where the arbitrator erroneously categorised the dismissal) it results in an award which is so unreasonable that it falls to be set aside.⁸

[12] However, a resolution of factual disputes is at the core of the commissioner’s task in arbitrating a dispute between parties. For compelling reason, the same technique to be employed by a Court is to be employed by the commissioner when faced with irreconcilable versions, as was set out in *SFW*⁹:

‘To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

³ See *inter alia Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 101.

⁴ (2014) 35 ILJ 943 (LAC) with reference to *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) (*Sidumo*).

⁵ At para 14. With reference to s145(2)(i), (ii) and (iii) of the LRA.

⁶ *National Union of Mineworkers v Samancor Ltd* [2011] ZASCA 74 (25 May 2011); *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC).

⁷ [2011] ZASCA 74 (25 May 2011).

⁸ See paras 8, 10 and 12.

⁹ 2003 (1) SA 11 (SCA) at para 5.

(c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.'

[13] The Labour Court correctly determined that the commissioner had failed to employ this technique in his resolution of the irreconcilable versions before him. It was not for the commissioner to arrive at a decision that one version was probable and another not, without careful regard had to the evidence in the manner set out above. In failing to approach the evidence in such manner, with no resolution of the factual disputes before him, the commissioner quite clearly arrived at a decision which was unreasonable.

[14] From the record, it is apparent that the Labour Court correctly determined that the allegation of racial abuse had not been put to the employer's witnesses in cross-examination. The purpose of a proper cross-examination is to place a one-sided version, which often results from examination-in-chief, into proper perspective by eliciting facts which place a different complexion on the matter, or by demonstrating that the witness is untruthful. In eliciting from an opposing witness facts which are beneficial to the case of the cross-examiner's client and to put such client's opposing and contradictory version to the witness, the decision-maker is placed in a position which permits evidence to be properly

and appropriately assessed.¹⁰ Since key aspects of the employee's case were not put to the employer's witnesses in cross-examination, and had not been canvassed in the evidence of those witnesses in chief, their version on such aspects was not placed before the commissioner. The result was that the commissioner was unable to determine the issue before him in the manner required.

[15] For this reason too, the Labour Court cannot be faulted for finding that the award was not one that a reasonable commissioner could reach on all the material before him. There remained key issues which required determination by the commissioner in the appropriate manner. In setting the arbitration award aside and referring the matter back to the CCMA for hearing before another commissioner at the earliest possible opportunity, the Labour Court approached the matter in the manner required of it.

[16] It follows that the appeal cannot succeed and there is no reason in law or fairness as to why costs should not follow the result.

Order

[17] In the result, the following order is made:

1. The appeal is dismissed with costs.

SAVAGE AJA

TLALETSI DJP Agrees

¹⁰ *Maifu v S* [2008] 2 All SA 657 (W); *S v Azov* 1974 1 SA 808 (T) 810G; *S v Gidi* 1984 4 SA 537 (C); *S v Nisani* 1987 2 SA 671 (O).

APPEARANCES:

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