



IN THE LABOUR COURT OF APPEAL SOUTH AFRICA JOHANNESBURG

Reportable

Case no: JA 155/2017

In the matter between:

NKOMATI JOINT VENTURE

Appellant

and

COMMISSIONER FOR CONCILIATION,

First Respondent

MEDIATION AND ARBITRATION

LIZELLE KRIEL WESSELS (N.O)

Second Respondent

IAN SMITH

Third Respondent

NATIONAL UNION OF MINEWORKERS

Fourth Respondent

Heard: 20 November 2018

Delivered: 12 December 2018

Summary: Review of arbitration award – duty of commissioner to assist unrepresented litigants - employer contending that failure by the commissioner to lend a helping hand and to inform it that it was required to re-open its case and lead evidence in rebuttal of employee's new version was a gross irregularity – held that:

The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the

issues. An arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award where under a duty to lend a helping hand and then fails to do so.

Commissioner finding that dismissal unfair because employer failed to lead evidence to prove that employee guilty of the charged – court finding that court finding commissioner ought to have intervened when employee recanted on his plea of guilty and directed employer to re-open its case – the failure to lend a helping hand at that stage amounted to a gross irregularity in the conduct of the arbitration proceedings, which resulted in an unreasonable outcome. Labour Court's judgment and award set aside – matter remitted to the CCMA for a determination *de novo* before a commissioner other than the second respondent.

Coram: Sutherland and Jappie JJA and Murphy AJA

JUDGMENT

MURPHY AJA

[1] The appellant appeals against the judgment of the Labour Court (Moshwana J) of 19 September 2017 in which it dismissed with costs the appellant's application to review and set aside an arbitration award issued by the second respondent ("the Commissioner"). The appeal is opposed by the third respondent ("Smith") and the fourth respondent ("NUM").

[2] Smith was employed as a Shaft Operations Supervisor in February 2014. His appointment imposed certain obligations on him in terms of the Mine Health and Safety Act¹ ("the MHSA") to ensure the safety of employees under his supervision whilst on duty at the workplace. At disciplinary proceedings in March 2015, he was charged with four offences: i) failure to comply with the Standard Operating Procedure: Human Resources ("the HR SOP") relating to

¹ Act 29 of 1996.

overtime and standby by not following the pre-approval check process during the March 2015 payroll run; ii) failure to comply with the instruction that overtime requisitions be signed by the Engineering Section: Head of Department, Mr Gary Strong ("Strong") and instead instructing an unauthorised subordinate, Mr Willie Mkhonazi ("Mkhonazi") to obtain related signatures from Strong; iii) failure to adhere to the induction booking process by not booking his subordinates for periodic induction before the 17 March 2015 deadline for such training; iv) failure to carry out instructions from his superiors that disciplinary steps be taken against one of his subordinates for alleged misconduct.

[3] At the disciplinary hearing, Smith pleaded guilty to the first, second and fourth charges but not guilty to the third charge (failure to adhere to the induction booking process). The chairperson of the disciplinary hearing found him guilty on all four charges and dismissed him on the grounds that the charges were serious and that he was subject to a valid final written warning. Smith unsuccessfully appealed against his dismissal and thereafter referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The dispute was arbitrated before the Commissioner on 7 October 2015. Neither party was legally represented at the arbitration. The appellant was represented by its Human Resources Superintendent, Mr Tumi Sefularo ("Sefularo") and Smith was represented by an organiser from NUM, Mr Dumisane Mavhungu ("Mavhungu"). During the arbitration, Smith stepped away from his guilty plea and for the first time offered an exculpatory version of his conduct. The Commissioner ultimately found that the appellant failed to prove that the dismissal was fair and ordered reinstatement.

[4] The principal issue in this matter concerns the nature and extent of the duties of a commissioner of the CCMA to assist legally unrepresented parties to conduct their cases in arbitration. In its application to the Labour Court, the appellant sought to have the award reviewed and set aside on two grounds: i) the Commissioner failed to lend a helping hand to the appellant (as contemplated in clause 21.3 of the CCMA Guidelines) when Smith retracted his plea of guilty and changed his version during the arbitration; and ii) the

award was unreasonable because the Commissioner ordered Smith to be reinstated despite the fact that he had pleaded guilty during the disciplinary hearing and was subject to a final written warning.

- [5] Clauses 20 and 21 of the CCMA Guidelines are the source of the so-called helping hand principle. The provisions require an arbitrator at the commencement of arbitration proceedings to inform the parties (*inter alia*) of: i) the fact that the proceedings will be recorded; ii) any potential conflicts of interest; iii) the rules of proceedings; iv) the role and powers of the arbitrator; iv) the procedure in terms of which documents are introduced into proceedings; and v) the requirement that if evidence of a witness is disputed, the other party should, at the appropriate stage, question the witness in that regard and put its version to the witness so that the witness has an opportunity to respond.² Clause 21 of the CCMA Guidelines is of particular relevance. It reads:

‘21 The extent to which the arbitrator deals with any of these issues should be determined by the experience of the parties, or their representatives, and their knowledge of CCMA procedures. If it is evident at a subsequent stage that a party or its representative does not understand the nature of proceedings and that this is prejudicing the presentation of its case, the arbitrator should draw this to the attention of the party. Circumstances in which it may be appropriate for the arbitrator to do this include if a party:

- 21.1 fails to lead evidence of its version under oath or affirmation;
- 21.2 fails to cross-examine the witnesses of the other party or fails to put its version to those witnesses during cross-examination; and
- 21.3 changes its version of events or puts a new version during proceedings.’

- [6] The Commissioner was evidently aware of her duties to assist the parties and appropriately attempted to do so. At the commencement of the arbitration

² Clause 20 of the CCMA Guideline.

proceedings, she narrowed the issues in dispute as follows:

‘Okay can I confirm the only thing in dispute and needs to be determined by the Commission is whether there is a rule or awareness and the breach to these charges which is basically detailed at page 9 of the Respondent’s bundle together in terms of the sanction whether or not it is harsh or whether or not in essence counselling would have sufficed in the poor work performance versus a written warning. Okay is that correct parties?’

- [7] Sefularo and Mavhungu confirmed that these were the issues in dispute. Sefularo then proceeded to give evidence on behalf of the appellant. He testified that Smith had pleaded guilty to the first, second and fourth charges during his disciplinary enquiry, was on a final written warning for a similar offence; and had attended an induction programme and was therefore aware of the HR SOP. He testified further that the appellant’s disciplinary code provided that an employee on a valid final written warning could be dismissed for the commission of a similar offence. Mavhungu thereafter cross-examined Sefularo during which he did not challenge or dispute the guilty plea, the valid final written or that Smith was aware of the HR SOP. His cross-examination focussed rather on the argument that the appellant should have counselled Smith for poor work performance instead of disciplining him for misconduct. Mavhungu also did not put Smith’s altered exculpatory version to Sefularo. At the end of his testimony, Sefularo closed the appellant’s case without calling any further witnesses.
- [8] Smith then gave his evidence in chief during which he essentially recanted his plea of guilty to the first, second and fourth charges. He testified that he did not fully understand the charges, had been coerced into pleading guilty to them and in fact had done nothing wrong. Sefularo cross-examined Smith but limited his line of enquiry to confirming that Smith had pleaded guilty to the three charges, was on a valid final written warning, understood the charges and had not put his exculpatory version to the chairperson of his disciplinary enquiry.
- [9] During the course of the arbitration, the Commissioner intervened on occasion to seek clarification. At the conclusion of Sefularo’s evidence in chief, the

Commissioner said:

‘Okay just before you conclude and I need to enquire into this, you have taken me through the charges. I have noted I have not received any evidence in terms of the actual transgressions apart from that he pleaded guilty to them. Are you standing by that?’

[10] Sefularo responded that the fact that Smith had pleaded guilty clearly showed that he accepted that he had committed a transgression and thus he thought it was unnecessary to go into further detail. This was obviously wrong in that evidence was needed to establish both the charge on which Smith had pleaded not guilty and the seriousness of the offences for the purpose of determining the appropriateness of the sanction of dismissal. The Commissioner limited her response to this explanation by asking merely if that was his testimony. Mavhungu’s cross-examination was of a limited nature, taking up a mere four pages of the transcript, and was confined to debating with Sefularo whether the conduct of Smith amounted to an instance of poor performance rather than misconduct. At the conclusion of it, the Commissioner asked Sefularo if he intended calling other witnesses, in particular, two persons he had mentioned to her off record. Sefularo replied that he was closing his case without calling them.

[11] During the course of Smith’s testimony, the Commissioner asked him if he understood why he had pleaded guilty at the disciplinary hearing and after listening to his exculpation remarked: “So you pleaded guilty but you had a reason”. Later, while Mavhungu was exploring the issue of poor performance, Smith commented that the charges did not relate to poor performance. The Commissioner then intervened as follows:

‘Can I note for the record that the challenge is no longer poor work performance? It’s actually whether or not the applicant committed the misconduct or not. So the narrowing of the issues is now changed. The Commission will determine whether the applicant is guilty of the charges. Anything else?’

Mavhungu responded that he would stop there and with that ended his leading of Smith. As mentioned earlier, Sefularo limited his cross-examination of Smith to seeking concessions from Smith that he had pleaded guilty to the three charges, was on a valid final written warning, understood the charges and had not put his exculpatory version to the chairperson of his disciplinary enquiry.

- [12] In her award, the Commissioner, having concluded that Smith was aware of the relevant rules, dealt with the evidentiary issue as follows:

'In terms of the breach; the actual misconducts.....both parties failed to address the evidence appropriately in relation to the proceedings before the Commission being *de novo*. The Respondent solely relied on that the Applicant pleaded guilty, that the Applicant had a Final Written Warning and that the policy...calls for a dismissal.... The Applicant's evidence, on the other hand, was not tested with the Respondent but informs the Commission that although he pleaded guilty to the misconducts he had reasons (which on its own can be regarded as reasonable) but those reasons could not be weighed on a balance of probabilities; together with the probabilities could not be tested as the Respondent also failed to lead any evidence surrounding the circumstances of the charges levelled and the plea being confirmed. Consequently, the balance of probabilities remains weighed 50/50 and as the onus rests with the Respondent to discharge the fairness of the dismissal, the Commission is bound to favour the Applicant. The Commission therefore cannot in fairness confirm the dismissal as appropriate in the circumstances.'

- [13] On review, the appellant contended that the failure by the Commissioner to lend a helping hand and to inform the appellant that it was required to re-open its case and lead evidence in rebuttal of Smith's new version or defence was a gross irregularity as contemplated in section 145(2) of the LRA and resulted in there not being a fair trial of the issues.

- [14] The Labour Court held that the helping hand principle did not apply in this instance because what had transpired did not amount to changing a version. As for the order of reinstatement, it found that section 193(2) of the Labour

Relations Act³ (“the LRA”) required the Commissioner to order reinstatement unless the exceptions in that section applied and that a plea of guilty does not necessarily exclude reinstatement. The appellant had thus failed to show that the award of the Commissioner was so unreasonable as to warrant interference on review.

- [15] The Labour Court, while acknowledging that the helping hand principle had been applied in various cases,⁴ was of the view that it is no longer applicable since the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ which would require the court to uphold a reasonable award even where a helping hand was not provided when it should have been.
- [16] The Labour Court in any event found further that Smith had not changed his plea of guilty to the three charges whilst giving evidence during the arbitration proceedings; and thus the Commissioner did not commit a gross irregularity in the conduct of the arbitration proceedings by failing to advise the appellant that it needed to reconsider re-opening its case. Its conclusion was informed by the view that arbitrations are proceedings *de novo*, meaning that what happened at the disciplinary hearing did not continue to the arbitration as the process began anew with the parties bearing different onuses depending on the issues. The appellant was obliged to lead evidence on the charges afresh and to prove that Smith was guilty of misconduct and that the misconduct, if proven, was grave enough to warrant dismissal. On this basis, the Labour Court distinguished between Smith’s version at the disciplinary hearing and his version at the arbitration hearing and held that the appellant became aware of the version at the arbitration hearing but failed to lead any evidence in rebuttal. It found that a commissioner does not carry a duty to assist litigants on how to prosecute their cases because that would be contrary to the requirement of impartiality.
- [17] The appellant has raised various grounds of appeal. It is not necessary to deal with them all.

³ Act 66 of 1995.

⁴ *Dinbaza Foundries v CCMA and Others* (1999) 20 ILJ 1993 (LC) at para 87; *Bafokeng Rasimone Platinum Mine v CCMA and Others* [2006] 7 BLLR 647 (LC) at para 12.

⁵ [2007] BLLR 1097 (CC) (*Sidumo*).

- [18] The reasoning of the Labour Court that the *Sidumo* case dispensed with the helping hand principle is not quite correct and may overstate the effect of the judgment. An arbitrator may commit a gross irregularity, fail to fairly try the issues or render an unreasonable award where under a duty to lend a helping hand and then fails to do so. Where the circumstances and procedural fairness so require, a commissioner must intervene in accordance with the precepts set out in the CCMA Guidelines. Not to do so will invariably result in an unreasonable award. The purpose of the helping hand principle is to prevent a procedural defect by ensuring that there is a full ventilation of the dispute and a fair trial of the issues. A commissioner commits a reviewable irregularity not only when the outcome of an award is unreasonable but also where the nature of the enquiry has been misconceived, which may happen when the issues are not ventilated by proper lines of enquiry.
- [19] The Labour Court's conclusion that Smith did not recant in his plea of guilty is mistaken. He obviously did. The appellant proceeded on the basis that at least three of the charges had been established by the evidence at the disciplinary hearing by virtue of Smith having admitted to them by pleading guilty. That is not to say Smith was not at liberty to change his version at the arbitration hearing. But, the fact remains that the appellant was caught off guard at the arbitration hearing as was evident from the stated assumptions of Sefularo in presenting the appellant's case. The question is what was the duty of the Commissioner in the circumstances?
- [20] At the closing of the appellant's case, by reason of the limited nature of the line of cross-examination, the only issue that appeared to be in dispute was whether the appellant should have counselled Smith for poor work performance instead of disciplining him for misconduct. Mavhungu did not cross-examine Sefularo on whether dismissal was a fair sanction. Mavhungu also did not put Smith's exculpatory version to Sefularo, namely that he had not understood the charges, was not guilty of the charges, had pleaded guilty to the charges for an ulterior reason and hence placed his misconduct in dispute. Sefularo thus was entitled to assume that Smith was not placing his final written warning, awareness of the rule or contravention of the rule into

dispute.

[21] Smith then recanted on his plea of guilty in his evidence in chief. The award provides a clear indication that the Commissioner understood that Smith had recanted his plea of guilty to the three charges. Moreover, she re-defined the issues. Once that happened, the appellant needed to lead evidence on the merits of the charges. Yet the Commissioner found that Smith had placed the merits of the three charges in dispute and that the dismissal was consequently substantively unfair because the appellant had failed during the arbitration proceedings to prove that Smith was guilty of these charges. She arrived at this conclusion without advising the appellant that it needed to consider re-opening its case in order to lead evidence on the merits of the three charges. Sefularo's cross-examination of Smith indisputably indicated that he mistakenly believed that he did not have to deal with the merits of the three charges. It was at this stage that in fairness the Commissioner should have applied a helping hand and told Sefularo that the appellant was entitled to reopen its case. The failure to do that constituted a gross irregularity in the conduct of the arbitration proceedings, which resulted in an unreasonable outcome rendering the arbitration award reviewable in terms of section 145(2)(b)(ii) of the LRA.

[22] It is accordingly unnecessary to consider the other appeal grounds dealing with the question of sanction and the remedy of reinstatement. The matter must be remitted to the CCMA for consideration by a different Commissioner. In view of the ongoing relationship between the appellant and NUM, the appellant rightly does not seek an order of costs.

[23] The following orders are made:

[23.1] The appeal is upheld and the award of the Second Respondent is set aside.

[23.2] The dispute is remitted to the First Respondent for consideration anew by a commissioner other than the Second Respondent.

JR Murphy

Acting Judge of Appeal

Sutherland and Jappie JJA concur

APPEARANCES:

FOR THE APPELLANT: Adv MJ van As

Instructed by Cliffe Dekker Hofmeyr Inc

FOR THE RESPONDENT: Adv M Makoti

Instructed by: Mathobi Attorneys