

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: D863-06

In the matter between:

NAMPAK CORRUGATED CONTAINERS (PTY) LTD

Applicant

And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1ST Respondent

LISTER SULLIVAN NO.

2ND Respondent

GORDON TIMOTHY

3RD Respondent

JUDGMENT

Molahlehi J.

Introduction

- [1] This is an application in terms of which the applicant seeks an order reviewing and to setting aside the arbitration award issued by the second respondent (the commissioner) under case number KNDB7209-06 dated 17TH November 2006.

In terms of this award the dismissal of the third respondent was found to be

unfair and the applicant directed to reinstate and compensate him.

- [2] The application was opposed by the third respondent. The reasons for the order I made on 5th June 2008 reviewing and setting aside the award are set out below.

The background facts

- [3] The third respondent was prior to his dismissal employed by the applicant in its waste department. The applicant is a manufacturer and distributor of corrugated containers. The dismissal of the third respondent arose from three charges relating to misconduct in that he misrepresented himself as an attorney acting on behalf of the applicant, threatening to take legal action against a firm of attorneys on behalf of the applicant and its employee if the firm of attorneys did not furnish him with the information he demanded from it and bringning the name of the applicant into disrepute.
- [4] The misrepresentation as an attorney acting on behalf of the applicant and its employees occurred during January 2006, when the third respondent telephonically contacted Chaplin and Hathorn attorneys (the attorneys), on behalf of Mr Basil Bhekokwake Luthuli, a fellow employee who needed information regarding the balance on a garnishee order which the attorneys had obtained against him (Mr Luthuli) on behalf of one of the client. The telephone

conversation was with Ms Valarie Brisley of the attorneys.

- [5] In her testimony Ms Brisley testified that at the time of the call the caller identified himself as "Gordon Timothy, an attorney" retained by the applicant on behalf of its employees to investigate the garnishee orders. According to her it became apparent during the conversation that the third respondent did not understand the fundamental principles relating to garnishee orders. She became suspicious as in her experience attorneys are generally well versed in the workings of garnishee orders.
- [6] During the telephone conversation Ms Brisley enquired from the third respondent as to which law firm he was working for. The third respondent informed her as indicated earlier that he was from a firm of attorneys known as "Timothy and Associates." According to her the third respondent became abrasive and argumentative when she was unable to provide him with the requested immediately which information related to the outstanding balance of the garnishee against Mr Luthuli. Ms Brisley took his telephone number and undertook to revert back to him as soon as she had found the information he was looking for.
- [7] As promised, Ms Brisley called the third respondent back only to discover that the telephone number he furnished to her was that of the applicant but

nevertheless requested to be put through to him. The call was put through to the third respondent who was immediately on picking up the call challenged by Ms Brisley as to why he misrepresented himself as an attorney. According to her the third respondent did not own up to his wrong doing but instead became again argumentative and abrasive.

- [8] Ms Brisley reported the incident to her superior and in turn it was reported to Mr Joel Sibanda, who was the responsible manager of the third respondent at the applicant's work place. Mr Sibanda requested that the complaint be reduced to writing. The written complaint is contained in two letters from the attorneys to the applicant for attention Mr Sibanda. The relevant parts of the first letter dated 30th March 2006 read as follows:

“Re:MR GORDON TIMOTHY

The telephone of even date refers.

Please be advised, the abovementioned employee of NAMPAK has been calling our office and impersonating himself as an attorney of NAMPAK.

Kindly note, he has been very rude to members of our staff that he has contacted and has even threatened to take matters to court on behalf of Nampak.

We confirm that this is a matter of seriousness as we intend to inform the Law Society of this crime, if your company takes no action against him.”

The contents of the second letter dated 5 April 2006 from the attorneys to the applicant is in essence the same as those of the above.

- [9] Having received the written complaint laid against the third respondent regarding his misrepresentation, Mr Sibanda instituted a disciplinary enquiry which resulted in the dismissal of the third respondent.
- [10] Mr Sibanda testified during the arbitration hearing that he had learnt that the third respondent had from time to time given legal advice to other employees of the applicant, and this was of great concern to him because this exposed the applicant to the risk of being vicariously liable for any incorrect legal advice which may be given by the third respondent. He also testified that the third respondent was studying for an LLB degree, for which studies the applicant was paying for. In relation to the charges which were proffered against the third respondent, Mr Sibande testified that the incident had brought the applicant into disrepute insofar as the attorneys were concerned.
- [11] The third respondent denied ever phoning Ms Bresley and that the first time he heard about the telephone call was when he was suspended. He did not dispute having approached by Mr Luthuli for assistance regarding a balance of an amount he (Luthuli) was owing to a third party. According to the third

respondent Mr Luthuli had requested him to contact on his behalf Bradlows and enquire about the outstanding balance. The lady he spoke to at Bradlows undertook to get the statement of the remaining balance in the account of Mr Luthuli. He also during cross examination conceded having represented employees and given them advice on labour law. The third respondent also denied that the applicant was paying for his LLB studies but stated that the applicant did pay for his Bcom studies.

Grounds of review and the award.

- [12] The applicant contended that the commissioner committed a gross irregularity or exceeded his powers as an arbitrator. In its heads of argument the applicant submitted that the decision of the commissioner is one which a reasonable decision-maker could not have reached in the circumstances of this case. The applicant in particular criticised as being unreasonable the finding of the commissioner that the sanction of dismissal was too harsh.
- [13] In arriving at his conclusion the commissioner reasoned that the third respondent did not act “*wilfully*” and had no intention of bringing the name of the applicant into disrepute. The commissioner found that the third respondent in representing himself as an attorney retained by the applicant to represent employees; “*merely intended to obtain the balance of a debt from attorneys who had not provided*

this to a colleague of his.” The motive of the third respondent for doing what he did according to the commissioner was “*to use the weight of the company,*” to achieve the objective of assisting his fellow employee. And in relation to the appropriateness of the sanction the commissioner reasoned that it was too harsh and based on the following factors:

“1. The applicant has had a 12 years of service with the respondent.

2.The respondent suffered little if any prejudice.

3. The applicant’s action was motivated by to help another employee of the respondent to obtain knowledge he was entitled to.

4The actions had absolutely no impact on the employment relationship.

This was evident by the company taking two months to institute action against the applicant.

In respect to the applicant misrepresenting himself as an attorney there was no dishonesty relating to his employment.”

Evaluation of the award

- [14] The test to apply in evaluating whether or not to interfere with decisions or rulings of CCMA commissioner is that of a reasonable decision-maker as enunciated by the Constitutional Court in the case of in ***Sidumo v Rustenburg Platimum Mines Ltd and others*** (2007) 12 BLLR 2405 (CC). The test entails

conducting an enquiry into whether the decision of the commissioner is one which a reasonable decision –maker could not have reached. In other words the decision of the commissioner would be reasonable and immune from interference by the Court if it is one which a reasonable decision-maker could have reached. The function of the Court in this regard is not to determine the correctness of the decision but its reasonableness.

[15] In **Edcon Limited v Pillemar N.O. & Others (unreported DA4/06)** the court held:

“The court’s function primarily is to ensure that decision made by arbitrators exercising their functions under the Labour Relations Act fall within the bounds of reasonableness.”

[16] The key inquiry in the application of the reasonable decision-maker test is whether the factual conclusions reached by the commissioner in the award is reasonable in the light of the evidence before him or her. Thus, an award would be unreasonable if it is found that there is a glaring discrepancy between the evidence presented and the conclusion reached by the commissioner. In other words an award would be unreasonable if the commissioner completely misconstrued the evidence before him or her.

[17] In the present instance, my view is that the award of the commissioner is

unreasonable because the commissioner failed to properly evaluate and take into account the totality of the evidence which was placed before him. The commissioner misconstrued the principles applicable to the assessment of the evaluation of the fairness of the sanction.

[18] Another important aspect in the assessment of the reasonableness of the award is the fact that the commissioner for some unknown reason failed to take into account in his assessment of the appropriateness of the sanction the fact that the third respondent was also charged and found guilty on two other charges, namely that of misrepresenting himself to be an attorney acting on behalf of the applicant and threatening to take legal action on behalf of the applicant in the event information he required was not furnished to him.

[19] The conduct of the third respondent was in contravention of s83 (1) of the Attorneys Act 53 of 19979. This conduct did not only constitute a criminal offence, committed by a person studying law who should have known that that conduct would also place the applicant at risk. It is this risk which the commissioner ought to have taken into account in assessing the impact of the conduct on the relationship between the parties.

[20] The evidence before the commissioner evidently shows that the third respondent was guilty of placing the name of the applicant in disrepute by projecting himself

as an attorney retained by the applicant and furnishing the telephone number of the applicant in this regard. The applicant's disciplinary code specifically makes it an offence to wilfully bring the name of the applicant in disrepute.

[21] The evidence further shows that the first telephone conversation between the third respondent and Ms Brisley was not a cordial one. Despite this the third respondent proceeded to provide the applicant's telephone number as his contact number. The second telephone call between the third respondent and Ms Bresley was also not harmonious.

[22] It is clear from this evidence that the third respondent was deliberate and resolved in what he was doing. The second telephone call provided him with an opportunity to retract and correct his misrepresentation. This attitude persisted throughout including during the disciplinary and arbitration hearings. In essence the third respondent showed no remorse to the wrong he had committed. In this regard the commissioner found that the third respondent "*behaved badly and was not honest at the arbitration*" hearing.

[23] In my view the prejudice that the applicant suffered is that its reputation was in the eyes of the attorneys tarnished by the conduct of the employee. I have already indicated that the attorneys had threatened reporting the matter to those in authority. The conduct of the employee was aggravated by the fact that this was

not only in breach of the workplace rule but also in all probabilities a criminal offence. It seems to me that the purpose of this rule is not only to protect the integrity of an employer in general but specifically its business and good-will. It is therefore reasonable for an employer to impose a rule which demands that its employees should not engage in conduct which will undermine its integrity and more importantly offend customers and members of the public.

[24] It is therefore unreasonable for the commissioner to have concluded that the dismissal was too harsh a sanction. This is not a decision a reasonable decision-maker could have reached in the circumstances of this case. In the circumstances of this case ought the commissioner to have taken into account that the third respondent did not show remorse and therefore the dismissal as imposed by the applicant was a fair sanction.

[25] It was on the basis of the above reasons that I concluded that the award stand to be reviewed.

[26] The issue of costs of this application was not dealt with in the order issued on the 5th June 2008. This is an obvious error as the applicant did pray for costs in its notice of motion. The order below has been varied in terms of s165 of the Labour Relations Act 66 of 1995 to include the issue of costs. The dictates of law and fairness do not however call for costs to be issued in this case.

Order

In the premises I issued the following order:

1. The arbitration award issued under case number KNDB 7209-06 is reviewed and set aside. The award is substituted by the following award:

“ The dismissal of the applicant, Gordon Timothy was both substantively and procedurally fair.”.

2. There is no order as to costs.

MOLAHLEHI J

DATE OF HEARING: 05 JUNE 2008

DATE OF JUDGMENT: 21 JULY 2008

APPEARANCES

For the Plaintiff: Adv Michael Van As

Instructed by: Cliffe Dekker Inc

For the Respondent: Mr R B Donachie (Attorney)

Instructed by :Henwood Britter & Caney Attorneys