

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 628/07

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER A R MOHLALA

Second Respondent

YVONNE MABUZE

Third Respondent

ELSIE MASANGO

Fourth Respondent

LUCAS THABETHE

Fifth Respondent

THOKOZANI DUBE

Sixth Respondent

SACCAWU

Seventh Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (“the Act”), to review and set aside the arbitration award of the Second Respondent issued under case number MP 640906 of 19 February 2007, in which the Second Respondent found the Third to Sixth Respondents (“the individual employees”) to have been unfairly dismissed and ordered their reinstatement. The procedural fairness of the dismissals is not in issue and the only issue before this court is whether the Second Respondent’s finding on the substantive fairness of the

dismissals and the remedy of reinstatement that followed is reviewable. The application is opposed by Third to Seventh Respondents.

Background

[2] The individual employees were dismissed following disciplinary enquiries in which they were charged with serious misconduct consisting of intimidation of customers, blocking the parking area, and transgressing strike and picketing rules.

[3] Four of the Applicant's witnesses, namely Mr Simon Ramovha, Ms Celia De Jager, Ms Bevyne Thomas, and Ms Zelda Maseko gave evidence identifying the individual employees acting as a group in committing the acts of misconduct with which they were charged.

[4] Mr Ramovha, a Sales Manager who was given the task of specifically monitoring the conduct of the striking employees, testified that the individual employees were guilty of confronting customers who bought goods and also chased customers away. When the employer made plans for customers to enter through the back entrance *"these 4 applicants would go around the store and swear at those customers. And the customer would have to run back to the store and come and report to us what was going on out there at the store"*. He further testified that the individual employees could easily be identified by him because they worked under him. He testified that when the police were called to deal with the situation, the acts of intimidation ceased, but continued once the police left the premises. He testified further that the individual employees would shout and swear at customers and used a *vuvuzela* and verbal threats to prevent customers from entering the store. They furthermore blocked the parking area with rocks in breach of picketing rules.

[5] Ms De Jager testified that she saw the individual employees intimidating and swearing at customers, together with employees from another store.

[6] Ms Thomas also implicated the individual employees as acting in a group intimidating customers and blocking their access to the store. She testified that amongst the group of striking employees the individual employees *"were mainly seen...one of them was carrying the rocks"*. The rocks were blocking customers from

coming in and “*those were the main 4 that were seen most of the time...carrying rocks and blocking customers*”. This conduct caused the Applicant to suffer loss of sales. Ms Maseko testified that the individual employees intimidated non-striking workers as well as customers.

[7] There was also specific evidence implicating each of the individual employees. Mr. Ramovha identified Third Respondent as blocking customers, and testified that customers had lodged complaints about her conduct in writing. These statements had been placed before the Second Respondent. Ms Thomas specifically identified Third Respondent and confirmed that the customers knew her because they frequented the Deli section where she worked.

[8] Ms Precious Gumbi, a witness for the Applicant confirmed that the Third Respondent was a Deli employee. Third Respondent denied the allegations made against her but her version did not appear to have been properly put to any of the Applicant’s witnesses during cross examination.

[9] The Fourth Respondent was pointed out by Mr. Ramovha, who testified about her conduct in blocking the customer entrance and intimidating customers. Ms De Jager testified that Fourth Respondent stopped customers at the back entrance of the store. This evidence was not rebutted by Fourth Respondent as she did not testify.

[10] Direct evidence was also led about the Fifth Respondent’s role in intimidating customers, and placing rocks and trolleys in the parking area to prevent customer access. This evidence was similarly not rebutted since Fifth respondent did not testify. The Applicant’s witnesses identified the Sixth Respondent as having participated in various acts of intimidation, including carrying a *vuvuzela* and sometimes a stick. Sixth Respondent similarly did not testify and this evidence was not rebutted. .

[11] Direct and consistent evidence was accordingly led by the Applicant in regard to the serious misconduct committed by the individual employees, and its impact on the relationship between the parties and the business of the Applicant. The Second Respondent appears to have ignored this evidence in determining the dismissals to have been substantively unfair

Grounds of review

[12] The Second Respondent misdirected himself in failing to draw an adverse inference against the Respondents, given their failure to lead evidence. It was submitted by the counsel for the Applicants, Mr. Boda, relying on the dictum of Pillay J in *Blue Ribbon Bakeries v Naicker & Others* (2000)¹² BLLR 1411 (LC) that in situations (such as this one) where the versions of the parties are mutually destructive it is incumbent upon a commissioner, in assessing the probabilities, to draw an adverse inference against the party who fails to call a material witness.

[13] The Second Respondent's finding that the trolleys and rocks were placed in the parking lot for purposes of protecting the picketing area was manifestly unreasonable. This was based on the testimony of only one of the Respondents's, and was contradicted by the evidence of Mr. Ramovha that the reason why the large rocks and trolleys were placed in the parking area was to inconvenience customers. Furthermore, he testified that marshals were present at the premises as required by the picketing rules, which were agreed by the parties as a result of an interdict sought by the employer, and since the picket area was marked there would have been no reason to use rocks to "protect" it. It was submitted that this was not a reasonable conclusion in the circumstances.

[14] The Second Respondent's finding that the Applicant did not lead *any* evidence that the individual employees blocked the front entrance of the store. This, it was submitted, reflects the Second Respondent's complete failure to apply his mind to the evidence before him and is not a conclusion a reasonable arbitrator could have reached in the light of direct evidence to the contrary.

[15] The Second Respondent's finding that the allegations against individual employees were vague and general. It was submitted that this in an indication of the Second Respondent's failure to apply his mind to the evidence, in that such a finding could not have been made by a reasonable decision maker in circumstances where direct evidence about the conduct of the individual employees was led, and was, except in one instance, not rebutted.

[16] The finding of the Second Respondent that the blocking of the parking area was not an act of intimidation. This demonstrates a failure to view the conduct of the individual employees as a whole, and it was submitted, is not a finding a reasonable decision maker could have made in that it bears no correlation to the evidence led on this issue.

[17] The finding that no evidentiary value could be placed on the customer complaints placed before the Second Respondent. The Second Respondent draws an adverse inference on the part of the Applicant for not calling as witnesses the customers who made written complaints, but does not do so in respect of the failure of four of the individual employees (who were at all time present at the proceedings), to testify. Furthermore, he disregarded the customer complaints notwithstanding that they were tendered in evidence and were supported by the direct evidence of other witnesses called by the Applicant, which evidence was unchallenged. Even if the witness statements were considered by the Second Respondent to have been hearsay, it was submitted that they were admissible as a result of being corroborated by the direct evidence of other witnesses for the Applicant who witnessed the events that formed the basis for the statements, and furthermore that in terms of Section 3 of the Law of Evidence Amendment Act, 45 of 1988, hearsay evidence could be admissible in certain circumstances. The court was referred in this regard to *Rand Water v Legodi NO & Others* (2006) 27 ILJ 1933 (LC) in which Revelas J held that an arbitrator had a discretion to permit hearsay evidence or to exclude it. The failure of the Second Respondent to apply his mind to the question, it was submitted, was an irregularity and was unreasonable

[18] The finding concerning the failure to produce the photographs. The record reflects that certain photographs were tendered by the representative of the Applicant, Mr. Molefe, who was a layperson. The Second Respondent did not indicate to Mr. Molefe that he would draw an adverse inference if the photographs were not produced. It was submitted that in these circumstances the adverse inference was unreasonable and the rule had been applied inconsistently and in an unreasonable manner, which resulted in an irregularity.

[19] The remedy of reinstatement was inappropriate in that the Second Respondent took no account of the evidence of intimidation and the breakdown of the relationship between the parties in ordering the reinstatement of the individual employees. Serious misconduct of the type with which the employees were charged leads to the breakdown of the employment relationship and is a justifiable basis for dismissal: *Adcock Ingram Critical Care v CCMA & others* (2001) 9 BLLR 979 (LAC). No account was taken by the Second Respondent of the Code of Good Practice: Dismissal nor of the ruling on sanction in the disciplinary enquiry, which took into account the fact that strike rules had been broken, a court order had been breached and the behaviour of the individual employees in intimidating staff, management and customers had resulted in a breach of trust between the parties, and found that the serious nature of the offence merited the sanction of dismissal. In fact, it was submitted, the Second Respondent took no account of the factors listed in *Fidelity Cash Management Service v CCMA & Others* (2008) 3 BLLR 197 (LAC) by Zondo JP, as constituting the relevant enquiry by a commissioner in these circumstances.

[20] The review was opposed by the Seventh Respondent on behalf of the Third to Sixth Respondents, on the grounds that the Second Respondent's decision was rational and reasonable in the context of the evidence, *inter alia*, that none of the individual employees were arrested or charged with intimidation, no proper records were kept by Mr. Ramovha and he could not recall the exact dates on which the blockages occurred, as well as the failure to lead evidence of customers.

The legal test applicable to reviews

[21] The broad terms of review were the Second Respondent's failure to apply his mind, as well as the reasonableness of his decision.

[22] The *dictum* of the Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) that the grounds of review set out in section 145 of the Act are suffused by reasonableness is by now trite. The *Sidumo* test of unreasonableness has been applied in a number of judgments of this court and has been aptly described by Zondo JP in *Fidelity Cash* (supra at paragraph

96) as requiring that an award “*must be reasonable and if it is not reasonable, it can be reviewed and set aside*”.

[23] It was submitted by counsel for the Applicant that the Second Respondent was obliged to apply his mind to the issues before him, which he failed to do, rendering his decision reviewable. Mr Boda cited as authority for this proposition the recent decision of the Constitutional Court in *Commercial Workers Union v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) in which, despite her dissenting judgment, O'Regan J concurred with the majority that commissioners who do not apply their minds “*are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice*” (at 2501, para 134).

[24] The reasonableness of the decision, furthermore, must be determined “*objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her*”(Fidelity Cash, supra at 227 C).

[25] In my view, in the context of the evidence and issues before the Second Respondent as described above, the finding that the dismissal of the Third to Sixth Respondents was unfair and justified their reinstatement, was not one that a reasonable decision-maker could have reached. Second Respondent failed to have regard to direct and evidence, which was not rebutted by the Respondents, implicating the individual employees in the various acts of serious misconduct in respect of which they were charged and dismissed.

[26] In the circumstances, I make the following order:

- (1) The application for review and set aside of the award of the Second Respondent is upheld;
- (2) The Second Respondent's award is substituted with an order declaring that the dismissal of the Third, Fourth, Fifth and Sixth Respondents by the Applicant is substantively and procedurally fair and justifies their dismissal.
- (3) No order is made as to costs.

Bhoola AJ

Date of hearing : 31.03.09

Date of judgment : 15.04.09

Appearance

For the Applicant : Advocate F A Boda instructed by

For the Third to Seventh Respondents : Mr K Boboyi SACCAWU Official