

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

DATE: 10 JULY 2009

CASE NO: JR819/08

In the matter between

EDGARS CONSOLIDATED STORES LIMITED

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

RAYMOND DIBDEN N O

Second Respondent

MUHRCCHAW

Third Respondent

MARY JANE MAHLANGU

Fourth Respondent

J U D G M E N T

DE SWARDT, A J:

This is an application for the review of an arbitration award made by the second respondent, a commissioner who acted under the auspices of the first respondent, in hearing the arbitration between the current applicant and the fourth respondent. The award by the commissioner, i.e. the second respondent, was handed down on 24 March 2008.

The applicant in this matter has applied to have the arbitration award reviewed and set aside, together with certain other relief.

The criteria which have to be satisfied when an application for review is brought, have now been authoritatively set out in the matter of *Sidumo and Another v Rustenburg Platinum Mines Limited and Others 2008 (2) SA 24 (CC)*. In terms of that decision, it is clear that the essential matter for determination is whether or not the award is one which no reasonable commissioner would have made on the evidence which was adduced during the proceedings.

I have had a close look at the arbitration award and I have had regard to the record of the proceedings before the commissioner. In this regard, it must be pointed out that a portion of the transcript of the evidence appears to be missing. In particular, the evidence in chief of Mr Khumalo, who testified on behalf of the applicant, i.e. the employer, at the proceedings before the commissioner, have not been transcribed inasmuch as the tape containing that evidence has apparently gone astray.

Both of the parties were happy to proceed with the matter on the basis that such evidence is not on record. The evidence of the security guard, Mr Khumalo, was in fact on record as far as his cross-examination is concerned.

The commissioner in this matter was faced with two essentially conflicting versions of the events. Mr Khumalo, who was a [.....] year old security guard in the employ of the applicant, testified that he had had a dream the night before the incident occurred to the effect that he was going to have trouble with the fourth respondent employee. He testified that on the day in question, he saw the applicant approaching the door on her way out to knock off. He stopped her and said that he wanted to search her. She was quite amenable to a search being conducted and he took her across to one of the cubicles where people try on garments. He instructed her to wait there while he went in search of a female security officer to body search her.

Mr Khumalo said that while he was walking away to find the female security officer, he kept looking back over his shoulder to where the fourth respondent was supposed to be sitting. He saw her get up and run across the room towards the stock room. He appears to have abandoned his idea of finding a female security officer, because he decided to pursue the fourth respondent. He found her in the stock room where she was allegedly fiddling around near some boxes. He went there and found a piece of ladies' underwear, to wit a panty. He confronted her with the item and said that she was intending to misappropriate it.

The fourth respondent's version of events is slightly different. She says that she was going to knock off early on the day in question, because she had a doctor's appointment. As she was coming out of the door, or was approaching the door to go, Mr Khumalo said to her that he wanted to search her. She agreed and while he went off to find the female security officer, she was instructed to wait near the cubicle. However, she wanted to buy some shoes for her children, in particular, a pair of tackies which had been marked down. The tackies in question had previously costs R59,99 and these were now marked down to R5,00. She says that she was left standing between the fitting room and the stock room. She was facing the tackies. She went and put them down next to a Mr Nkosi and said that she wanted to take them later.

The fourth respondent explained in her evidence that the queue was quite long and she could not really afford to wait until everybody else had been served, because she would otherwise be running late for her doctor's appointment, so she put the tackies in what she thought was a safe place. While she was in this room, she saw Mr Khumalo come past her. She said he ran past her. He went into what they call the hanging room, and when he came out, he had a piece of ladies' underwear, i.e. the panty, in his hands and accused her of having wanted to misappropriate it.

A disciplinary enquiry was held, in the course whereof the fourth respondent was found guilty and she was summarily dismissed. When the matter came before the commissioner, he found in favour of the fourth respondent, made an award

declaring her dismissal to be substantively unfair and ordered that she be reinstated.

The commissioner summarised the evidence and it is apparent that he was fully aware of the fact that there were essentially two conflicting versions of the events on the day in question. The commissioner, however, was mindful of the fact that on the evidence before him which was common cause between Mr Khumalo and the fourth respondent, there had been a measure of bad blood between the two. The fourth respondent had apparently complained to management that Mr Khumalo had been harassing her and Mr Khumalo acknowledged that he was not on good terms with the fourth respondent.

On a conspectus of all of the evidence before him and having seen and heard the witnesses who testified before him, the second respondent came to the conclusion that the applicant had not proved its case. He found in favour of the fourth respondent because he accepted her evidence. In essence, he made a credibility finding in her favour. In particular, at page 21 of the record the commissioner stated the following in his award:

‘There was a suspicion of dishonesty but no hard evidentiary facts to support a conclusion that the applicant’s actions were an act of misconduct related to misappropriation of company property.’

Further down the page the commissioner says *‘The evidence, when assessed on*

the balance of probability, favours the applicant.' (And I pause to mention that when he refers to the applicant, obviously the applicant before him was the fourth respondent in the matter now before me.) He carries on to say:

'And the respondent fails to carry the burden to show that the dismissal of the applicant satisfied the relevant factors set out in Schedule 8 as listed above in respect of substantive fairness. The respondent's submission of the applicant being the guilty party is not sustainable as the only probable version of how the item of underwear could have found its way into the room in question and did not show how other staff and/or Ginger could have been discounted from the probabilities.' (Ginger is apparently Mr Khumalo's first name)

As long ago as in 1948 the then Appellate Division of the High Court of South Africa in the matter of R v Dhlumayo (1948 (2) SA 678 (A) at 705) referred to the fact that a trial court has advantages which a court of second instance can never have, in seeing and hearing witnesses who testify in a matter. The trial court is steeped in the atmosphere of the trial, as his lordship Mr Justice Davis said, and is in a far superior position when it comes to making a credibility finding than a court of second instance can ever be. It is for that reason that credibility findings made a presiding officer in a matter are very seldom disturbed. There has to be clear and cogent evidence on the record that the credibility finding was wrong and unsustainable before it will be interfered with.

I have scrutinised the record of this case carefully and I can find no indication that the commissioner's credibility finding is unsustainable. I can also find no misdirection or irregularity in the proceedings and indeed no misdirection or irregularity has been referred to by either of the parties. In the circumstances, I am satisfied that the application brought by the applicant for the review of the matter cannot succeed.

Accordingly I make the following Order:

1. The applicant's application for the review of the arbitration award issued by the second respondent under case number MP5551-07 is dismissed, with costs.
2. The aforesaid arbitration award issued by the second respondent is confirmed.