

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case number: JR1461-09

In the matter between:

BERGA WANGA CC

Applicant

AND

MABEL SIKITI N.O
COMMISSIONER FOR CONCILIATION
ARBITRATION & MEDIATION (“CCMA”)
DEON WILLEM DANIEL STEENKAMP

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the first respondent (the commissioner) under case number FS6568-08 dated 15th April 2009. In terms of the arbitration award the commissioner found the dismissal of the third respondent to have been unfair and ordered that he be compensated for that reason.

Background facts

[2] The third respondent who in this judgment is referred to as “the employee” for ease

of reference, was prior to his dismissal employed as a farm manager by the applicant. The charges that were proffered against him and upon which his dismissal was based are set out in the applicant's founding affidavit as follows:

“i. Gross negligence in that the Third Respondent failed to take timeous action to prevent or limit the live stock fatalities on Sunday 9 November 2009 with the result that 84 sheep and 16 calves died;

ii. Failure to comply with targets set by the Applicant and discussed and planned at staff meetings and also failure to cooperate in respect of timeous completion and submission of live stock figures and wages;

iii. Conducting himself in such a manner that it amounted to conduct detrimental to the employer/employee relationship in making statements on 12 November 2008;

iv. Destroying the employment relationship by continued negativity and lack of co-operation.”

[3] Following his dismissal the employee referred an unfair dismissal dispute to the second respondent (the CCMA), for arbitration subsequent to the parties having failed to reach consensus solution at the conciliation stage.

The case of the applicant

[4] The case of the applicant in as far as the charge of gross negligence is concerned, and as testified to by its first witness, Mr Hattigh, is that on the day of the incident the

sheep had been trapped at a fence after a hail storm and died as a result of exposure to the cold weather. Mr Hattignh testified that the employee could have avoided the death of the sheep by going out to where they were and rescuing them. According to him the employee could have gone out with a van to pick up the sheep where they were trapped. He further stated that there were other employees who could have assisted him.

[5] Mr Hattignh testified later in his evidence in chief that at the time the sheep were brought to the store some of them were still alive and that they died later because of the manner in which they were packed when they were transported to the store.

[6] The second witness of the applicant was Mrs Bezuidenhout who at the time of the dismissal of the employee was employed by the applicant as a secretary. As concerning the charge of gross negligence Mrs Bezuidenhout, testified that on the day of the incidence they saw heavy clouds as they were travelling from Bloemfontein towards Thaba- Nchu after dropping the children at school. She tried to contact the employee on his cell phone to warn him about the cloud to no avail. She left a message on his cell phone that he should contact her urgently, but he never did.

[7] Some 5 (five) hours later she received a call from the domestic worker informing her that there was damage at the house. They then travelled to the farm which is about a kilometre from where the employee stayed. Mrs Bezuidenhout goes on in her testimony to say that it was the following day that they were informed about the dead

sheep.

[8] As concerning the third charge Mrs Bezuidenhout, testified about comments made by the employee to her regarding other people. According to her the employee enquired from her as to what a certain employees, Mr van de Linder was doing at the applicant's workplace, and why was he employed. The employee is alleged to have said that the applicant accommodated all corrupt and people who steal cattle.

[9] Another charge against the employee concerned the alleged allegation that the employee had a negative attitude. The explanation given for this charge by Mrs Bezuidenhout is that at a meeting of all staff members, the employee was very positive, but the contrary applied as soon as the meeting was over.

[10] As concerning charge three, Mrs Bezuidenhout could not explain why the details of the allegations against the employee were not mentioned in the charge to enable him to prepare. There are about eight negative comments which the employee is alleged to have made against other employees.

[11] During cross examination when asked as to why charge five did not give details regarding the negative attitudes of the employee, Mrs Bezuidenhout, said that, had the employee indicated that the charged lacked clarity, she would have explained it to him or may have postponed the matter.

[12] The third witness of the applicant was Mr van der Linde, who testified about

charge two, which concerned the alleged failure by the employee to build the pill machine timeously testified that the pill machine is used to manufacture lucerne's tablets for animals. He testified that, he learned when he joined the applicant in December 2007 that the production of the machine was planned as early as May 2007, but nothing had happened even at that stage.

[13] According to Mr van de Linde several meetings were held since joining the applicant, where the issue of the machine was discussed. The first meeting was during February 2008, attended by farm managers in the absence of Mr Hatting and Mrs Bezondenhout. At the meeting of 20 June 2008, employee, according to Mr van der Linde, informed Mr Hattingh that the machine would be ready by 21 June 2008.

Grounds for review

[14] The applicant has set out several grounds of review in its founding affidavit. Those grounds are summarised in the heads of argument of the applicant with each ground followed by its motivation.

[15] The first ground of review raised by the applicant is that the commissioner made findings and assumptions not supported by evidence presented before him. In this respect the applicant challenged several findings which were made by the commissioner. The applicant contended that the evidence of the employee was to the effect that there were several steps he could have taken after the hail storm.

[16] The second point made under the ground of making findings unsupported by evidence is the finding that the charges levelled against the employee were an indication of the applicant wanting to get rid of the employee at all costs.

[17] The second ground of review is very similar to the one above in that the applicant contends that the commissioner accepted the version of the employee that his dismissal was orchestrated and that such version was not disputed by the applicant. The complaint of the applicant is that such a version was never put to the applicants witness at the time they testified.

[18] The third ground upon which the applicant basis his case is that the commissioner allowed or accepted hearsay evidence. The complaint of the applicant in this regard is that the commissioner accepted the evidence of the employee that he was told by a certain Mr Cloete that he had been appointed in his position.

[19] The fourth ground of review is that the commissioner misunderstood the evidence which was presented before her.

[20] The applicant further contended that the finding by the commissioner that the dismissal was unfair was not justifiable. It was further contended that the commissioner “failed” to understand the thrust of the misconduct the third respondent had been charged with.

The case of the employee

[21] The employee conceded during the arbitration hearing that on the day of the disciplinary hearing, he could have requested to have a postponement to enable him the opportunity to request further particulars. He says he did not do so because the answer he got regarding the clarity of the charges was unsatisfactory. He decided to proceed with the hearing despite that lack of clarity on the charges because he had obtained certain information regarding the interview for his position of a certain Mr Cloete.

[22] As concerning the first charge the employee testified that the hail from the storm was thick and thus could not drive to where the sheep were. He conceded that he received the cell-phone call from Mrs Bezondenhout at about 16h15. He attempted answering the call but got cut out because of the weak signal. He tried to call back but Mrs Bezeendenhout did not answer. He also conceded that there were clouds on the day in question with some indication that it would rain.

[23] He was questioned at some length as to why he did not contact other shepherd for assistance or contact his employer through his phone or by way of a radio. He says that he phoned one shepherd on his pay-as –you go phone but could not reach him because of the poor reception.

The commissioner's award

[24] The commissioner in his arbitration award makes findings in relation to each of

the charges which had been proffered against the employee. In relation to the first charge the commissioner accepted the defence of the employee that he had tried to contact the shepherds to help him but was unsuccessful. The commissioner further found that the applicant failed to discharge its burden of proving the fairness of the dismissal. The key finding in this regard is that the commissioner found that:

“Even if that is the case, this was an act God and was beyond the control of the applicant.”

[25] In relation to charge two the commissioner found that the charge was misplaced and supported the version that the applicant was out to get the employee at all costs. Charge three was found to be vague as the allegations made against the employee had not been tabled to him to answer. The employee was found not guilty of charge four because the applicant had failed to give the details as to in what way could it be said that the employee damaged the working relationship.

[26] As concerning the motive of the dismissal of the employee by the applicant the commissioner made the following finding:

“[57] *The applicant argued strongly that his dismissal was orchestrated by the respondent that is why he never challenged the vagueness of the charges and did not persuade further then request for a postponement of the legal representation. The applicant testified that a certain Mr Cloete told him that he was interviewed by the respondent for his position. This interview happened days before the*

disciplinary hearing. This was not disputed by the respondent except to say it was hearsay evidence. The information was divulged to the applicant by Mr Cloete himself and corroborated by Mr Martin Amour it was thus not hearsay evidence. The very Mr Cloete was employed 2 days after the applicant had been dismissed which confirm that the dismissal of the applicant was orchestrated.”

[27] In reasoning why the compensation of the employee arising from the unfair dismissal should be limited to six months the commissioner had the following to say:

"I thus award 6 months compensation which is just and equitable considering the fact that the applicant was on a FWW which was still valid at time and was not disputed, the respondent has suffered losses which could have been limited if the applicant was proactive even though it was an act of God.”

Evaluation

[28] The question which the court needs to answer to determine whether or not it should interfere with the decision of the commissioner is whether that decision meets the standard of a reasonable decision maker as set out in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2007 28 ILJ 2405 (CC). The test is whether the decision reached by the commissioner is one which a reasonable decision maker could not reach.

[29] In my view the decision of the commissioner in the present instance is in a

number of respects unreasonable. In the first instance I agree with the applicant that the commissioner made findings and assumptions not supported by evidence which was before him. The finding that the employee sought assistance to no avail is not supported by evidence. The case of the applicant during the arbitration proceedings was that there were certain steps which he failed to undertake. The case of the applicant which the commissioner misconceived to be that the employee ought to have stopped the sheep being trapped because of the storm was in fact that the employee failed to take steps to minimise the loss. In other words the case which the applicant put before the commissioner recognised that incident of the storm was an event which the employee did not have control over. The case of the applicant which called on the employee to answer was what did he do to minimise the loss that ultimately occurred as result of that hail storm. The commissioner seems to have only come to understand that case in his conclusion when he reasoned as to why the employee should receive limited rather than maximum compensation. As will appear later whilst I agree with the reasoning regarding the compensation, I do not agree with the conclusion that the employee was entitled to compensation. The loss of sheep did not occur at the time they were trapped at the fence only but also when they were transported to the warehouse. The employee did not dispute that other sheep died because of the way they were loaded. In other words had the employee taken proper steps in the manner in which they loaded the sheep he could have avoided further deaths of the sheep.

[30] The finding by the commissioner that charges levelled against the employee were indicative of the fact that the applicant wanted to get rid of the employee is not

supported by any evidence and for that reason the decision of the commissioner is unreasonable. The commissioner also found that the applicant did not dispute the version of the employee that his dismissal was orchestrated. In this respect my view is that the commissioner misconceived his task as such a version was never put to the applicant's witnesses during their testimony. There is a well established principle in our law that during cross examination a litigant needs to put his or her evidence to the witness of the other party to afford him or her opportunity to deal with whatever version that party would put forward when his or her opportunity to testify avails. A litigant who fails to challenge or put his or her version to the witness of the other party whilst he or she is still in the witness stand runs the risk of the version of that witness being accepted as truthful.

[31] In the present instance the applicant witnesses were never cross examined about the alleged appointment of Mr Cloete and therefore never had the opportunity to deal with the allegation that his dismissal was orchestrated in order to appoint Mr Cloete. Thus the commissioner ought to have rejected the version about the appointment of Mr Cloete on the basis that it was never put to the applicant's witnesses.

[32] The finding that the cause of the problem was an act God which the employee had no control over was as indicated earlier a misconception of the case which was put before the commissioner by the applicant. The case of the applicant was not that the employee needed to avoid the death of the sheep in the circumstances. The case of the applicant was that the employee failed to take steps to minimise the loss. Again as

indicated earlier that finding is, in direct conflict with the reasoning as to the conclusion reached as concerning the compensation which was awarded to the employee. It seems to me that the basis for reaching that conclusion concerning the limit to the compensation is correct in one respect and is also in line with the proper case which the commissioner was called upon to decide. It is correct with respect to the finding that: *“the respondent (the applicant) has suffered losses which could have been limited if the applicant was proactive even though it was an act of God.”* It is however unreasonable to the extent that the compensation is based on the finding that the dismissal was unfair. In addition to the conclusion reached by the commissioner is unreasonable to the extent that the commissioner despite the existence of a final written warning still found the dismissal of the employee to be unfair. The award of the commissioner is unreasonable because had he applied his mind to the totality of the evidence and the circumstances of this case he ought to have come to the conclusion that the dismissal of the applicant was for a fair reason.

[33] In my view the arbitration award of the commissioner has failed the test of a reasonable decision -maker and thus his award stands to be reviewed.

[34] As concerning the costs, I am of the view that the conduct of the employee in defending the review was not unreasonable and accordingly I do not believe that it would be fair to allow the costs to follow the results.

[35] In the premises the following order is made:

1. The arbitration award of the respondent is reviewed and set aside.
2. The arbitration award is substituted with the award that says that the dismissal of the third respondent was for a fair reason and therefore his dismissal based on the alleged unfair dismissal is dismissed.
3. There is no order as to costs.

Molahlehi J

Date of Hearing : 22 September 2010

Date of Judgment : 2 February 2011

Appearances

For the Applicant : Connie Prinsloo

Instructed by : Vogel Malan Attorneys

For the Respondent: P.M. Venter

Instructed by: Lovius Block Attorneys