

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case number: JR 1538/09

In the matter between:

TELKOM LTD

Applicant

And

THE CCMA

1st Respondent

COMMISSIONER PD FINE

2nd Respondent

SOLIDARITY obo BOTHA

3RD Respondent

Judgment

Molahlehi J

Introduction

1] This is an application to review and set aside the arbitration award issued under case number GAJB 5821-09. In terms of that arbitration award the second respondent (the commissioner) found that the dismissal of the third respondent, who for ease of reference I shall in this judgment refer to as “the employee,” have been procedurally fair but substantively unfair. It was for that reason that the commissioner ordered that the employee be reinstated.

2] The late filing of the review application was not opposed by the respondents. I see no reason why condonation for the late filing of the review application should not be granted.

The background facts

- 3]The employee was charged with misconduct concerning the assault on another employee, the complainant, who was employed as a contract cleaner by another company. Again for ease of reference I will in this judgment refer to Ms Matodzi as “the complainant.” The employee was found guilty and dismissed for that reason. After the decision of the disciplinary enquiry the employee launched an internal review of the decision to dismiss him. The internal review confirmed the dismissal.
- 4]In her testimony in support of the case of the applicant, the complainant testified that on the day of the alleged assault and in the morning thereof she was busy cleaning the restroom when she heard the mop falling outside the door. Her investigation revealed that it was the employee who caused the mop to fall, she then bend down to pick it up. According to her she suddenly felt a kick from behind as she bent down to pick the mop up. She was kicked by the employee and when she enquired why he was kicking her, the employee simply laughed and walked away.
- 5]The complainant further testified that when she reported the matter to Mr Dawie Olivier, she was told that the employee denied kicking her and that he said what he kicked was the mop.
- 6]The applicant then went to see the doctor as she was in pains. The doctor having heard what happened advised the complainant to report the incident to the police. After examining her, the doctor noted the injuries she had sustained as a result of the alleged assault.
- 7]The complainant opened a case of assault with the police and the employee was prosecuted in the magistrate court. He pleaded guilty to the charge of assault with the intent to do grievous bodily

harm and was sentenced to a fine of R500-00 or (8) eight months imprisonment. A further (12) twelve months imprisonment was suspended for (5) five years. He was also declared unfit to possess a firearm.

8]The second witness of the applicant was Dr T.T. Setshogoe who testified that she had examined the complainant during October 2008. According to the doctor the complainant could not walk properly and was in a lot of pain. The doctor further testified that there were soft tissues and lower abdomen tenderness that were consistent with damage caused by a blunt instrument.

The case of the third respondent

9]In his defense the employee testified, that on the day in question he went into the ladies rest rooms and when he came out he tripped over the mop. At that point the complainant came out of the restroom and bend over to pick up the mop *“he touched her bum with his shoe and said “Ek sal jou sommer skop op jou boud”*.

10]After the incident he left the workplace but was later called by someone who required him to explain what happened in the restrooms. He was also required to submit a written statement which he did the following day. According to him he would have apologized to the complainant had she been at work the following day.

11]He was thereafter arrested and released on a R1000 bail the next morning. At the criminal court hearing he pleaded guilty because he was advised to do so by his attorney. He also testified that he had a good relationship with the complainant.

Grounds for review

12]The applicant contended that the commissioner failed to apply his mind to the relevant facts which were before him and that his

arbitration award is full of speculation and conjecture. The applicant also complains that the commissioner:

- made factual findings not supported by any evidence.
- disregarded the direct evidence of the doctor on the injuries sustained,
- disregarded the evidence that he was found guilty in a court of law on assault with intent to do grievous bodily harm.

Commissioner's arbitration award

13]As indicated earlier the commissioner found that the applicant had followed a fair procedure in dismissing the third respondent but that the dismissal was substantively unfair and for that reason ordered the employee be reinstated. In his finding about the substantive unfairness of the dismissal the commissioner says that:

“5.2.1. It is in this area of whether the actions of Mr Ertjies Botha warranted dismissal which is more complex.

5.2.2 It is common cause that the Applicant did “kick” Ms Matodzi on 7 October 2008. The question to be asked is whether it indeed was (sic) “assault” and whether dismissal was the correct sanction.

5.2.3 I found certain aspects of the Respondents case questionable. Ms Matodzi testified that she shouted out after being kicked but the person in the next office testified that he did not hear her, yet he was close enough to hear the mop fall.

She only reported the incident around 2 hours later even though it happened within a few offices of the yard manager. She claimed to be crying and in so much pain yet she managed to walk to hospital which according to the Applicant's representatives was around six kilometres away. I feel that if she were truly in such a state then someone would have offered to drive her to hospital. The medical doctor that she saw did not book her off work. It was in fact the medical doctor who suggested that she get a J-88 form from the police and then require her to go and open a case so that she could get a case number. I do not believe that she would have of her own volition gone to the police. As she stated that, "he has not apologized" and he has not paid her medical costs it seems to me that this is all she wanted from him. Ms Matodzi claims of further pain and complications were not substantiated as being directly linked to the incident nor was there any documentary evidence to support her ongoing medical treatment.

14]The commissioner goes further to say that:

"In looking at the circumstances of the incident, despite case 1a highlighting that provocation should be used in mitigation of assault, I find that in this case the lack of provocation mitigates for the Applicant. There was no reason for the

employee to assault Ms Matodzi. I do not believe that a person would be so incensed by having a mop in his way to want to attack someone. I believe the employee when he testified that he certainly did not have any intention to hurt Ms Matodzi.”

15]In dealing with the issue of mitigation the commissioner says that the assault was mitigated by the fact that there was no provocation. It would appear that to a large extent this influenced the finding that the dismissal was too harsh. The commissioner found in this respect that no person could be so incensed by a mob being on his way that he would resort to assaulting another person.

16]The commissioner seems to reject the testimony of the doctor who treated the complainant on the basis that her finding was that pain which she suffered arose from a blunt object and not “due to a foot,” meaning that the evidence did not indicate that it was due to the fact that she was kicked. The doctor’s testimony is also rejected on the basis of the body weight of the employee and the fact that in kicking the complainant he used his “wrong foot.” Apparently the employee is right footed but used his left foot to kick the complainant. It is also on the basis of this that the commissioner found that there was no correlation between the pain which the complainant claim to have suffered and the force used by the employee in kicking her.

17]At the end of his reasoning the commissioner accepts that the conduct of the employee amounted to the applicant’s disciplinary code but found that because of his clean record and long service with the applicant it would not fair to dismiss the employee.

Evaluation

- 18]In applying the reasonable decision maker test there seem to be no doubt there is a need to interfere with the commissioner's arbitration award, in this matter. The decision reached by the commissioner is not one which could have been reached by a reasonable decision maker. The decision reached by the commissioner is unreasonable for a number of reasons. The analysis of the reasoning and the conclusion reached in this matter indicates that the commissioner misconceived the task that was before him and committed fundamental mistakes of law. The commissioner seems to have fundamentally misunderstood the rules of evidence including the principles governing mitigation.
- 19]The commissioner for instance rejects the evidence of the doctor which was never contested by the third respondent. The commissioner's observation about what the doctor said could have been the cause of the injury to complainant has no basis in law. In a strange way the commissioner also blames the doctor for having advised the complainant to report the assault to the police. It also appears that the commissioner blames complainant for what happened to her.
- 20]It would appear from the analysis of the arbitration award that the commissioner lacked the understanding of how the principle of mitigation applies in the context of provocation. It would seem the commissioner did not understand the nature of the offence he was dealing with. In fact the fact that the employee reacted in the manner as he did when complainant enquired from him as to why he was throwing the mob on the ground ought to be consider as

an aggravating rather than a mitigating factor. Because the reaction that resulted in the kick was not provoked the commissioner ought to have, in the absence of a better explanation as to the violent reaction on the part of the employee, found that the appropriate sanction was dismissal despite the long service that he had with the applicant.

21]The finding that the employee's kick could not cause injury because the employee is 185kg in weight is totally irrational and accordingly makes the arbitration award of the commissioner unreasonable. Assault is an unlawful invasion of a person's physical integrity carried out without that person's consent or permission. The strength or force used by the perpetrator of force is irrelevant.

22] The same applies to the finding that the employee did not have the intention to assault the complainant. It is apparent that the commissioner assessed the intention to assault on the part of the employee on the basis of what he simply had to say. He failed to appreciate that he needed to assess the intention to assault on the basis of the totality of and the objective facts which were placed before him.

23]The explanation given by the employee is that the complainant brought the charges against him because she wanted to get some money from him for her medical fees. The allegation that the complainant required the employee to pay for the medical costs incurred is irrelevant. In any case the medical costs were incurred as a result of his violent conduct.

24]Had the commissioner applied his mind and appreciated the task at hand he would have given considerable weight to the version that assault was a serious offence. The evidence of the doctor

which as indicated was not challenged indicates that the injury suffered by the complainant was serious. This is further corroborated by the evidence of the employee himself, that he pleaded guilty to assault with intention to do grievous bodily harm at the magistrate court. The explanation as to why he pleaded guilty at the criminal trial bears no merit and should have been rejected.

25]The fact that the complainant had to walk a distance of 6 km is irrelevant as there was no evidence before the commissioner that there was another hospital nearer. There was also no evidence that the complaint had other means of travelling to the hospital. The observation about the fact that the complainant could have obtained a lift to the hospital suggests strongly that the commissioner misconceived the issues he was dealing with. It is also irrelevant that the complainant reported the assault to the police at the advice of the doctor.

26]In dealing with the issue of mitigation the commissioner ought to have appreciated that he was dealing with a distinct enquiry which had to be conducted upon the conclusion of guilt on the part of the employee. The so-called mitigation comes into play as part of assessing whether the sanction imposed is fair or not. In essence the enquiry entails assessing the circumstances of the employee in relation to his or her employment and other factors that may have caused him to commit the offence such as provocation or self defense.

27]It has now been accepted, as stated in ***Motsamai v Everite Building Products (Pty) [2011] 2 BLLR 144(LAC)***, that it is the commissioner who has to determine what a fair sanction should be having regard to all the facts presented to him including the

seriousness of the offence.

28]An attack on another employee in the absence of provocation would serve as an aggravating factor which ordinarily would significantly decrease the chances of leniency in the imposition of a sanction.

29]The commissioner failed to appreciate that once he had concluded that an assault had occurred then the obvious conclusion would have been that an offence was committed. The enquiry to follow thereafter would have been to determine whether there were mitigating or aggravating factors. In assessing the gravity of the offence the commissioner had to take into account any defense which the employee may have put forward. One of such defenses could have been provocation. The commissioner found that there was no provocation but however used the absence thereof as a mitigating factor and thereby totally misconceiving the application of the concept of provocation in our law.

30]In assessing the fairness of the sanction the commissioner failed in his consideration to take into account the fact that the employee says that he would have apologized had the employee come to work the following day. If this is to be believed the question is why did he not do it when he had a number of opportunities to do so. He could have conveyed his apology through Mr Olievier who confronted him about the incident and more importantly he could have admitted the incident at that stage. He also had two other opportunities where he could have apologized, being at the disciplinary and the internal review hearings. At all the stages, except at the criminal court hearing, he denied the assault. All these together with the fact that the victim was a defenseless woman should have weighed heavily against the years of service

and the clean record which the employee had. A person in the position of the employee should have known better what the consequences of his conduct are likely to lead to. If he was to be believed that he never intended to invade the privacy of the complainant as indicated he could have owned up immediately when was confronted by Mr Olivier or if that opportunity did not avail itself , he could have done so at the disciplinary hearing and or at the internal review stage.

31]In my view anything less than a dismissal in this matter would have been a clear message that the applicant does not regard physical integrity of its individual employees as a serious offence. More importantly anything less than a dismissal would have meant that the applicant condoned violence against women. There can be no doubt that an assault on a woman in itself should be regarded as an aggravating factor. Except in certain sports like wrestling, employees are not employed to assault others. Failure to take appropriate steps in assault cases will result in fear to the vulnerable and defenseless and may result in lack of labour peace. The interest of an employer in eliminating acts of violence at the workplace is not only limited to protecting the individual employees but also to ensuring labour peace which in turn ensures proper morale and productivity.

32]In broad terms the commissioner in arriving at the conclusion as he did is basically saying that violence against others is permissible as long as the force used in the assault is not too much. It is must be noted that in the present instance the force used was found by the doctor to have been considerable because it resulted a serious injury on the complainant.

33]It is in the light of the above discussion that I belief that the

applicant's review application stand to succeed.

34]The applicant has requested that a costs order should be made against the third respondents. The overriding consideration in that regard is that the applicant still has the relationship with one of the third respondents. I do not believe that a cost order should for that reason be made.

35]In the premises the following order is made:

1. The arbitration award issued under case number GAJB 5821-09 is reviewed and set aside.
2. The arbitration award is substituted by the following:
 - “1 The dismissal of the applicant was substantively fair and therefore the unfair dismissal claim of the applicant is dismissed.”
3. There is no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

Date of Hearing: 19 November 2010

Date of reasons: 23 March 2011

Representation

For the applicant: Mr P Maserumule of Maserumule Inc

For the respondent: Mr E van Niekerk of Solidarity

