

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Not reportable

Case No: JR 369/10

In the matter between:

DEPARTMENT OF LOCAL

GOVERNMENT AND HOUSING : LIMPOPO

First Applicant

MEC : DEPARTMENT OF LOCAL

GOVERNMENT AND HOUSING : LIMPOPO

Second Applicant

And

THE GENERAL PUBLIC SERVICE

SECTORAL BARGAINING COUNCIL

First Respondent

A.C. MANNDE N.O

Second Respondent

M. P. LENTSWANE

Third Respondent

JUDGMENT

BHOOLA J :

Introduction

[1] This is an application to review and set aside the arbitration award issued by the second respondent ("the arbitrator") of 12 January 2010 issued under case number PSGA 1445-08/09.

Background facts

[2] The third respondent (“the employee”) was employed as Manager: Strategic Planning in May 2007, and was dismissed on 22 January 2009 following a disciplinary enquiry in which he was charged as follows:

“On or about 13 November at or nearby Aventura Hotel in Bela-Bela during the Vuna awards you committed an act of sexual harassment in that you raped Ms Marcia Alfred (“the complainant”), thus contravening Annexure A of the Disciplinary Code and Procedures for the Public Service”.

[3] The employee lodged an appeal, which was unsuccessful, and referred a dispute concerning his unfair dismissal to the first respondent. The arbitrator found that his dismissal was substantively unfair but procedurally fair and awarded him reinstatement.

Grounds of review

[4] The applicants raise a number of grounds of review in their written heads of argument, and these were distilled by Mr Moshwana during his oral submissions into the following (without however abandoning the written grounds):

- 1) The arbitrator made a finding that was inconsistent with the evidence before him when he concluded that the complainant did not testify that she pushed the employee away as a sign of refusing his kissing. In so doing he ignored the evidence of the complainant that she had resisted the

- intimate contact and told him that she was not interested. Accordingly he ignored material evidence and failed to apply his mind to the issues to be determined and his award is reviewable on this ground.
- 2) The arbitrator placed too much weight on the complainant's statement that the employee fondled her, and drew an inference that was unjustified when he found as follows : "I fail to see how a person who was raping got time and space to fondle the lady's private parts". In reaching this conclusion he failed to take into account the complainant's evidence that she said no and told him to stop. The conclusion about fondling emanated from the disciplinary enquiry and it is clear from the context that the arbitrator misconstrued her evidence.
 - 3) The finding that the parties engaged in consensual sex ignores the evidence of the complainant that she objected and tried to push him away. He completely disregards her evidence when he concludes that she "did not testify that she pushed the Applicant away as a sign of refusing the kissing". The record is replete with her references to resisting the conduct of the employee and telling him to stop until she succeeded in pushing him away. The arbitrator's failure to take this material evidence into account constitutes a gross irregularity which renders the award reviewable on the unreasonableness standard.
 - 4) The arbitrator rejects the complainant's evidence that the employee forced his knees between her legs. He finds that the employee rebutted this evidence. However, there was no direct challenge to this evidence either in cross-examination nor in the answering affidavit (in which it seems to be

pleaded that by implication he did not do so). Mr Moshwana submitted that this in itself constitutes a gross irregularity. It was uncontradicted and renders the award unreasonable.

- 5) The conclusion that the complainant was willing to go to the employee's room ignores the evidence relating to the basis upon which she agreed to accompany him, and the inference drawn is not necessarily the only one that can be drawn in the circumstances.

[5] Mr Moshwana cited *Bestel v Astral Operations Ltd* [2011] 2 BLLR 129 (LAC), where the court referred to an article by Anton Myburgh dealing with the scope of the *Sidumo* test (See A Myburgh "*Sidumo v Rusplats: How have the Courts deal with it?*" (2009) 30 ILJ 1)) as follows :

[14] Myburgh contends that a commissioner's finding, on the facts, will be considered to be unreasonable if the finding is:

- i) unsupported by any evidence;
- ii) based on speculation by the commissioner;
- iii) entirely disconnected from the evidence;
- iv) supported by evidence that is insufficiently reasonable to justify the decision; or
- v) made in ignorance of evidence that was not contradicted.

[15] In coming to this conclusion, Myburgh cites a dictum of Van Niekerk AJ in *Sil Farming CC t/a Wigwam v CCMA* (unreported LC judgment cited by Myburgh at 13) in which he states: 'A commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to

reasonably justify the decision arrived at or where the decision maker ignores uncontradicted evidence.

Third Respondent's Opposing Submissions

[6] Mr Schneage submitted that the evidence led at the arbitration should be viewed in its totality, and that the award is equitable should not be interfered with. It is based on the arbitrator having heard the evidence first hand and he is in the best position to draw conclusions based on the conduct, reliability and credibility of witnesses. It is incorrect moreover that the arbitrator failed to apply his mind to the evidence of the complainant in reaching the conclusions he did – in fact he specifically rejects her evidence about being forced with the employee's knees. Furthermore, it was on the basis of her evidence that the fondling issue emerged and the arbitrator was obliged to have regard thereto, and it is not correct that the employee did not testify about this conduct. The arbitrator applied his mind to the totality of evidence led and drew negative inferences that were justified in the circumstances. The arbitrator in the circumstances correctly drew the inference that there was consent by the complainant and a proper analysis of the award and the record reveals that the arbitrator did not commit any misconduct, nor act irregularly nor exceed any of the powers conferred upon him.

[7] The arbitrator correctly determined the matter on balance of probabilities, which is the correct standard of proof in labour matters: see *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC), and rejected the cautionary rule applicable to single witness evidence .

He was faced with circumstantial evidence which he properly had regard to, and he was in the best possible position to draw inferences which he did based on the totality of evidence before him. This approach is consistent with that advocated in *Aluminium City (Pty) Ltd v MEIBC* (2006) 27 ILJ 2567 (LC) where the court held that a commissioner should not rely exclusively on the absence of direct evidence establishing the employee's guilt, without having proper regard to the existence of circumstantial evidence, and further that circumstantial evidence should not be evaluated on a piecemeal basis but the commissioner should step back objectively and draw inferences based on a balance of probabilities from the evidence as a whole. This was the approach taken by the arbitrator in evaluating the evidence as a whole and he cannot be said to have made an unreasonable award. He was not required to every specific fact into account as asserted by the applicants.

[8] A number of authorities were cited by Mr Schneaage asserting that the commissioner's own sense of fairness must prevail – *inter alia* *Woolworths (Pty) Ltd v CCMA & others* [2008] 8 BLLR 812 (LAC) and *Engen Petroleum Ltd v CCMA & others* (2007) 28 ILJ 1507 (LAC). However, these authorities make reference to fairness in the determination of sanction as opposed to deference.

Evaluation

[9] It is by now trite that the applicable test is as set out in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) and requires an evaluation of whether the decision could have been made by a

reasonable decision maker on the evidence before him. This requires the arbitrator to apply his mind to the determination of the issue before him and the evidence led on material issues. It follows that where an arbitrator fails to do so his award falls to be set aside. This approach was confirmed by Ngcobo CJ in *Sidumo* (supra) in the following terms :

[268] It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceeding.

[10] In my view it is apparent from the submissions made by the applicants that the finding reached by the arbitrator on a number of material aspects was unsupported by the evidence, and was made in disregard of material evidence led by the complainant. If one applies the *Sidumo* test as described by Myburgh above, the arbitrator falls foul of nearly all the categories justifying the unreasonableness of the award. It appears moreover that he applies a criminal standard to interrogating the conduct of the complainant instead of determining whether there was a valid reason for the employee's dismissal. He pays no regard to the seriousness of the misconduct and in fact proceeds to make a value judgment of the conduct of the complainant. This is

apparent from *inter alia* the following paragraph in the award : “*This man (the applicant) is the one that is pestering Marcia with the love affair proposal. According to Marcia’s testimony she ones (sic) told the Applicant that she does not want to date dogs like him (arbitrator’s own emphasis). I find Marcia’s testimony inconsistent with his (sic) action. I view the Applicant to be Khathu’s competitor but Marcia’s actions seem to be embracing the Applicant. I take it that Marcia was going to distance herself from the Applicant especially at the time she was waiting for her boyfriend. To the (sic) worse Marcia left her purse in the custody of this unreliable dog (arbitrator’s own emphasis) amidst the sea of her colleagues. Marcia trusted the Applicant even above those who offered her transport to the events”.* The arbitrator’s emphasis in the extract above, which is contradicted elsewhere in the award (where he summarises her evidence as being that “dogs like him were not wanted in this world” referring to men who cheat on their wives) confirms that he made findings in ignorance of evidence that remained uncontradicted. On this basis the award must fall to be set aside and in the circumstances there is no need to enquire into the procedural irregularities relied upon in the applicant’s written heads. Given that the record is complete and the dismissal occurred in 2009, it is in the interests of expediency and the fair administration of justice to substitute an order rather than remitting the matter for re-consideration by another arbitrator.

Order

[11] In the premises, I make the following order :

(a)The award is reviewed and set aside.

(b)The award is substituted with an order declaring the dismissal of the third respondent to be substantively fair.

(c)The third respondent is to pay the applicants' costs.

Bhoola J

Judge of the Labour Court

Date of Hearing : 1 April 2011

Date of Judgment : 6 May 2011

Appearance

For the Applicants : Mr G Moshwana from Mohlaba & Moshwana Inc

For the Third Respondent: Adv Schneaage instructed by Lombard Attorneys