

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Not reportable

Case No:JR824/07

In the matter between:

NORTHAM PLATINUM LTD

Applicant

and

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION (CCMA)

FirstRespondent

A.RAMALOTJA

Second Respondent

NATIONAL UNION OFMINEWORKERS
obo NTSAHBELE

ThirdRespondent

Date of hearing : 3 June 2011

Date of judgment : 29 June 2011

JUDGMENT

GUSH J

1. The applicant in this matter applies for the award of the second respondent to be reviewed and set aside only in so far as the second respondent found that the applicant had failed prove that the third respondent was guilty of sexual harassment and that his dismissal was accordingly unfair.

2. The third respondent had been charged with sexual harassment and absenteeism and had been found guilty by the applicant on both charges and dismissed. The third respondent referred a dispute to the first respondent which dispute was arbitrated by the second respondent. The second respondent found that the applicant had conducted the disciplinary enquiry in accordance with a fair procedure and had fairly found the third respondent guilty of absenteeism. Having found that the applicant had failed to prove, “on a preponderance of probabilities” that the third respondent was guilty of sexual harassment, the second respondent determined that the decision to dismiss the third respondent was unfair and ordered the applicant to reinstate him.

3. The third respondent was employed by the applicant on 14 March 2003 as a general labourer. At the time of his dismissal, on 12 December 2005, he held the position of assistant grade one construction.

4. The incident that led to the third respondent dismissal took place on 19 November 2005, was reported to the applicant on 24 November 2005 and ultimately led to the disciplinary enquiry and dismissal of the third respondent.

5. At the arbitration that followed, the applicant led the evidence of the complainant only in respect of the sexual harassment charge and the third respondent gave evidence himself.

6. The second respondent recorded in his award that he was faced with two conflicting

versions and that:

“... the surrounding factors do not also provide aid to assist me in this regard. Setsoe (the complainant) alleges that the [third respondent] uttered the words and the [third respondent] denies it ... As to why she delayed [reporting the incident] her submission is that she was too busy.”

7. The second respondent then concluded:

“Having heard both parties’ evidence and saw (sic) the demeanour of the witnesses, I can only conclude that the evidence of the applicant is more probable. The respondent failed to prove its case on a preponderance of probabilities in respect of this count. The applicant is consequently found not guilty of this charge.”

8. The applicant's grounds of review are that the second respondent committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers and/or acted unjustifiably in that he dismissed the evidence of the applicant’s witness and failed to attach sufficient weight to the veracity thereof and by deciding that the applicant had failed to prove the charge.

9. These grounds are more akin to grounds of appeal than grounds of review. The role of the court in considering applications to review decisions of arbitrators is set out in *Bestel v Astral Operations Ltd and Others* ¹, where the Labour Appeal Court held:

¹ [2011] 2 BLLR 129 (LAC).

“It is important to emphasise ... that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.”²

10. Further to this, following the decision in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*³ which established the test which requires the court to determine the reasonableness of the result or outcome of the award, or as set out in *Bestel* determining the “justification for the decision”, the court has recognised that:

“... in addition to the result-based test established by *Sidumo* ... an award will also be reviewable for process-related reasons, where the commissioner, for example, commits a (latent) gross irregularity in the form of a material error of law or the failure to apply the mind to materially relevant considerations. In addition to constituting a (latent) gross irregularity, these errors also constitute acts of what may be termed “process-related” unreasonableness.”⁴

11. The issue therefore, considered together with a consideration of the reasonableness of the award, is whether it can be said that the second applicant “committed a gross irregularity, exceeded his powers or acted unjustifiably” in that in reaching his

² At para 18.

³ [2007] 12 BLLR 1097 (CC)

⁴ *SA Airways (Pty) Ltd v Blackburn and Others* [2010] 3 BLLR 305 (LC) at 21

decision that the applicant had failed to prove that the third respondent had committed the misconduct or whether the applicant is merely appealing against the decision of the second respondent.

12. In argument, the applicant submitted that the conclusion reached by the second respondent was “sweeping” and “unsubstantiated” and that this constituted a gross irregularity or misconduct. In his award, the second respondent who had the benefit of hearing and seeing the witnesses give their evidence in person summarised their evidence and concluded that there were two conflicting versions and that in there are no surrounding factors to assist him in determining the whose version is correct. The second respondent then concluded that the applicant had not established on a balance of probabilities that the third respondent was guilty of the misconduct on the strength of his having heard the evidence and observed the witnesses demeanour.

13. It is so that the alleged misconduct is serious and that employers are obliged to take such matters seriously and act accordingly. The difficulty faced by employers in pursuing incidents of sexual harassment however is that there are seldom witnesses to the misconduct and the arbitrator is more often than not faced with two conflicting versions. In such circumstances it is imperative for the employer to adduce such corroborating evidence as may be available. In matters concerning allegations of sexual harassment an arbitrator is enjoined to be cautious when faced with the evidence of a single witness and only the employee’s evidence in reply in determining which of the two versions is to be preferred. An important consideration in this regard

is that the employer bears the onus in establishing the misconduct on a balance of probabilities. The second respondent has clearly taken this into account.

14. Where, however, it is clear that a commissioner has failed to take into account material evidence and, had he done so, the result may have been different the commissioner commits a gross irregularity and the award may be reviewable. The applicant however does not accuse the second respondent of not taking into account material facts but accuses the second respondent of not giving what it believes to be sufficient weight to the facts and evidence and the probabilities. That in essence, constitutes an appeal against his assessment and the conclusion he reached having heard the evidence and having observed the witnesses as opposed to an irregularity on the part of the second respondent.

15. Although the second respondent's analysis of the evidence is brief, it cannot be said that he did not take into account material evidence properly placed before him. Whilst this court may disagree with his conclusions, it cannot be gainsaid that the second respondent had the benefit of hearing the evidence in person. That his conclusions may differ from that of this court in itself does not make the award reviewable

16. In the recent matter of *National Union of Mineworkers v Samancor Ltd and Others*⁵ the SCA held that:

⁵ (625/10) [2011] ZASCA 74 (25 MAY 2011)

“It is trite that an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere. Section 145 of the Labour Relations Act 66 of 1995 permits the Labour Court to set aside an award for one or other defect stated in s 145(2).”⁶

17. In the circumstances I am not satisfied that the second respondent committed misconduct or a gross irregularity in reaching the conclusion that the applicant had not proved on a balance of probabilities that the third respondent was guilty of misconduct. Even applying the test as enunciated in *Sidumo* it cannot be said that the decision by the second respondent was one that a reasonable decision maker could not have reached.

18. As regards costs section 162 of the Labour Relations Act gives the court a discretion to make an order for costs according to the requirements of law and fairness. In the circumstances of this matter I am of the view that the dictates of fairness are that no order as to costs should be made.

19. I make the following order:

19.1. The application is dismissed;

19.2. There is no order as to costs.

GUSH J

Appearances:

For the applicant : Adv G J Scheepers

Instructed by : van Zyl le Roux & Hurter Inc.

For the respondent : Mr. Motaung

Instructed by : Nomali Tshabalala Attorneys.