

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

NOT REPORTABLE

CASE NO: JR442/2010

In the matter between:

FANI COSMUS NDHLOVU

APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1ST RESPONDENT

NKOSINATHI MASEKO (COMMISSIONER)

2ND RESPONDENT

ATLAS CRANE HIRE

3RD RESPONDENT

JUDGMENT

Nkutha AJ

Introduction

[1] The applicant, Mr Fani Ndhlovu [“the applicant”], an employee of the third respondent, seeks an order reviewing and setting aside the arbitration award issued by the second respondent [“the commissioner”] under case number GAJB 27829-09 dated 23 December 2009. In terms of that arbitration award, the commissioner found the dismissal of the applicant to have been substantively and procedurally fair.

[2] This matter was unopposed and the applicant unrepresented. However, Mr Levin appeared on behalf of the third respondent who, after looking at the court file, decided not to oppose the matter.

[3] The order was handed down with brief reason on the date of the hearing. This judgment provides detailed reasons for the order thereof.

Background facts

[4] The applicant was employed by the third respondent as a crane operator and was placed at Group Five in Witbank. The third respondent is in a business of leasing cranes to construction companies and at that time it had a contract with Group Five. The applicant was the only crane operator and the third respondent relied on him to meet its contractual obligations with Group Five.

[5] The nature of the contract dictated that applicant worked over weekends and for the duration of the project he was offered accommodation in a guest house at the third respondent's cost.

[6] The applicant was dismissed for dishonesty, absence without permission and putting the company's name into disrepute by sleeping in a car.

- [7] The third respondent led evidence at arbitration to show that the applicant had asked for weekend off to see his family. However, permission was denied because Group Five had asked for the services of the crane that particular weekend. Mr Sizane, the applicant's supervisor testified that he was the only person who could authorise the applicant's weekend off and not Mr Robert Mchunu, a Group Five foreman, as alleged by the applicant. However, when approached Mr Mchunu denied having given the applicant permission to take weekend off.
- [8] The applicant was also charged with sleeping in his car, despite having a comfortable accommodation paid for by the third respondent and thereby putting the company's name into disrepute. Mr Sizane testified that there were other employees who were using the facility and did not complain. However, the applicant had told him that he wanted to be moved from the guest house to a hostel he had been accommodated in before and that he be paid the difference in terms of costs. According to Sizane that offer was rejected because the applicant had complained about the said hostel and hence he was relocated to the guest house.
- [9] In his defence, the applicant was adamant that Mr Mchunu had given him the permission. On the issue of sleeping on duty, the applicant testified that his room had evil spirits and spells. As a result, he could not sleep in that room and decided to sleep on his car.

The grounds for review and the award

[10] The applicant contended that the arbitration award was reviewable based on commissioner's irregular conduct in that he failed to have regard to the evidence presented during the arbitration proceedings, and in particular the mitigating circumstances.

The legal principles and analysis

[11] Even though this matter was unopposed it is incumbent upon the Court to establish whether or not there is a *prima facie* case to interfere with the arbitration award on review.

[12] Section 145 of the Labour relations Act 66 of 1995 ["the Act"] provides limited grounds for review and is suffused by the constitutional standard of reasonableness.¹ In essence, the applicant must show that the decision reached

¹ The grounds for review set out in section 145(2) are as follows:

“(a) that the commissioner -
 (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 (iii) exceeded the commissioner's powers.”

by the CCMA commissioner is one which a reasonable decision maker could not reach.²

[13] The courts have clearly stated that the issue of whether or not the commissioner committed a gross irregularity or failed to apply his or her mind demands a survey as to whether or not the commissioner did afford the complainant a full and fair hearing by determining all the issues which were placed before the arbitrator during the arbitration proceedings. The inquiry in this respect focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the arbitrator.

Application of the legal principles

[14] The applicant submitted that he had been afforded full and fair hearing by the commissioner. He contended further that he had no qualms with the conduct of the commissioner as he conducted himself professionally.

[15] However, he submitted that he subsequently managed to obtain more evidence in his defence and would like to present it to court. The applicant seemed to be more perturbed by the fact that he had not received his pension payout. The applicant was accordingly advised that the court has no jurisdiction over the

² See *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para108.

issue of unpaid pension and was advised to seek assistance with legal aid institutions like ProBono.org.

[16] It is my view, based on the arbitration award, that the commissioner succinctly dealt with evidence before him and made a rational decision. It is clear from his analysis of evidence that the applicant failed to call Mr Mchunu who could have vindicated him on the charges of dishonesty and absence without permission. It is, however, conspicuous in the applicant's founding affidavit that he no longer alleges that it was Mr Mchunu who had given him permission to be absent but Mr Wurth, one of the third applicant's senior managers. He failed to give an explanation for changing his version when invited to do so in court.

[17] The applicant conceded that he was the only crane operator. While the third respondent led evidence to prove that the applicant's conduct jeopardised its contract with Group Five.

[18] On the charge of putting the third respondent's name in disrepute, the commissioner rejected the applicants' evidence that his room had bad smells because there were other employees who used the same facility with no problems.

[19] The applicant was clear in his submissions that he was not challenging the conduct of the commissioner, and nor his reasons for the arbitration award. In essence, the applicant seeks to appeal the arbitration award. In *Sidumo* the Court stated, quoting from Professor Hoexter, that review for reasonableness does tend

to blur, in a limited sense, the distinction between appeal and review as it entails scrutiny of the merits of administrative decisions. Nonetheless, it was stated further that “...the danger lies, not in careful scrutiny, but in 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions.’”³

[20] Accordingly, the task of this court is to ensure that the decisions taken by CCMA commissioners fall within the bounds of reasonableness as required by the Constitution.⁴ In the matter at hand, it is clear that the commissioner aptly applied his mind to the evidence which was before him during the arbitration hearing. The arbitration award accordingly constitutes a reasonable finding and I find no reason to set it aside.

[21] In the premises, the following order is made:

1. The application is dismissed.
2. There is no order as to costs.

Nkutha AJ

Date of hearing: 20 July 2011

Date of reasons for Judgment: 30 July 2011

³ See *Sidumo* at para 109.

⁴ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* 2004 (4) SA 490 (CC) at para 45.

Appearances

For the Applicant: Unrepresented

LABOUR COURT