

**LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

Case: JR 1147/07

In the matter between:

EVAN GORDON ENTERPRISES (PTY) LTD

Applicant

and

M PHETLA (N.O.)

First Respondent

**NATIONAL BARGAINING COUNCIL
FOR THE CHEMICAL INDUSTRIES**

Second Respondent

LAMOLA ANDRIES CHUENE

Third Respondent

JUDGMENT

LAGRANGE, J:

Background

- ^{1]} There are two applications for consideration in this matter. The first is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ('the LRA') to review and set aside the first respondent's arbitration award dated 13 April 2007. The arbitrator found that the third respondent, Mr LA Chuene, had been unfairly dismissed by the employer on 12 January 2007. The arbitrator held that the dismissal

was only substantively unfair and awarded Chuene compensation of 12 months remuneration on the basis that the continuation of the employment relationship between the employer and employee was impractical. The second application is an application under rule 11 of the labour court rules to dismiss the review application.

- 2] Chuene had been charged with making threats to assault or kill fellow employees as well as managers and directors. The threatening conduct was allegedly directed at two fellow employees, a security guard, Mr E Gordon (a director) and Mr W Gordon (a manager and E Gordon's brother). The independent chairperson who was appointed to chair the disciplinary enquiry found that there was insufficient evidence to find Chuene guilty of threatening most of these individuals. However he found that, despite having more than one opportunity to do so, Chuene did not deny having threatened W Gordon's life, nor did he really deny that the effect of his threat was that W Gordon was too frightened to have anything to do with him thereafter. The only defence which Chuene offered was that he thought the matter had been resolved in a subsequent meeting between them. The chairperson accordingly found him guilty of threatening W Gordon's life and after considering the pros and cons of an appropriate sanction dismissed him.

The rule 11 application

3] The review application was launched timeously and on 31 May 2007 the relevant bargaining Council filed the record of the arbitration proceedings with the labour court under rule 7 A (2) (b), supposedly including two tapes recording the oral evidence. It appears that the tapes were not included in the record filed with the registrar. Chuene's attorneys made enquiries in October 2008 about the lack of progress in the review application and were advised that the bargaining Council had not been able to locate the relevant tapes and that the applicant was in the process of transcribing the arbitrator's handwritten notes. This transcript was forwarded to Chuene's attorneys in mid November 2008. The applicant's attorney then claims that it was contacted by a person claiming to be Chuene's new attorneys asking the applicant not to proceed further with the review application but to explore the possibility of settling the matter. The alleged attorney later phoned to say that she was having difficulty getting hold of Chuene but that she would revert to the applicant's attorneys. It was only in September 2009 that Chuene's original attorneys then filed the rule 11 application.

4] It must be said that the explanation for the delay in pursuing the review application between November 2008 and September 2009 is thin on factual detail to say the least.. There is no attempt made to identify the alleged new attorney, nor is any explanation provided why the applicants did not try to confirm in writing the supposed request to delay the proceedings to permit settlement discussions to take place. This is the normal step one would expect an attorney to take in circumstances where it is important to avoid unjustifiable delays in proceedings. Nonetheless, the launching of the rule 11 application had the desired

effect of bringing matters to a head resulting in the review being set down for hearing. Although I have considerable difficulty accepting at face value in the explanation for the delay in question, for the reasons mentioned, it must also be said that Chuene did not take any steps to put the applicant on terms during this period, but only took a further step in September 2009 when he filed the rule 11 application. It must also be borne in mind that the applicant in the review application did launch the proceedings timeously and did take steps, on its own initiative, to remedy the absence of a transcript of the evidence owing to the inability of the bargaining Council to produce the tape recordings.

5] In the circumstances, I do not think this is an instance where the review application ought to be dismissed on account of undue delay, but should rather to be decided on its merits.

The arbitrator's award

6] The circumstances in which the alleged threat was uttered was that sometime in December 2005, W Gordon heard a lot of hooting outside the applicant's store. On investigation he found that Chuene had parked his car in a way that obstructed a customer's vehicle from exiting. He spoke to Chuene who continued speaking with somebody else. Chuene subsequently moved his car but did not move it enough for the customer to leave. W Gordon approached Chuene again and shouted at him

about moving his vehicle. He claims it was necessary to shout because both vehicles engines were running. Chuene became angry and shortly afterwards approached W Gordon and told him, he might "make a mistake and shoot him". Chuene admits shouting at W Gordon but denies making the explicit threat which was alleged. W Gordon conceded that the two of them were urged to discuss the matter and Chuene had agreed he would not shoot him, but the issue remained unresolved as far as he was concerned. He did not recall the two of them being told they should shake hands and make peace as alleged by Chuene. He maintained that, in any event, his father, Gordon senior, could not have done so because he had passed away by then. Chuene did not dispute that an incident had taken place but said it had occurred in October.

7] Apart from when the incident took place, the only other significant fact in issue was what Chuene had said to W Gordon. Chuene says he never threatened to kill him but simply told him not to shout at him. He further claimed that the issue was resolved at the time in terms of a discussion between them, and accordingly the whole incident was water under the bridge. The reason he believes that the charges have been brought against him was that he subsequently joined a union. According to the findings of the chairperson of the disciplinary hearing it appears that the defence he offered then was that he thought the matter had been resolved.

8] It seems that at the disciplinary hearing that Chuene did not dispute that a threat had been made nor did he suggest that the charges had been initiated for an illegitimate reason relating to his union affiliation.

9] In order to determine which version of events was more probable, the arbitrator seized on the contradiction between W Gordon's evidence in chief that the altercation occurred on 26 December 2005 and his later testimony that it took place earlier that month, but not in October as claimed by Chuene. The arbitrator found that this was a material inconsistency. The arbitrator went on to say:

"The consideration of the inconsistency presented by W Gordon's and Gordon's evidence presents lends credence to the employees of argument that there is probably a motive or vested interest in the testimony of W Gordon she, such as that the Gordon is his brother and hence he supports his evidence merely on that basis. Accordingly, the evidence of the employer is to be rejected whereas that of the employee that the incident occurred during October 2005 is to be preferred" (sic).

10] Significantly, on the basis of accepting that the incident occurred in October 2005, the arbitrator also found, that it followed therefore that the dismissal of Chuene was based on the arbitrary ground of him joining the union. This was because the arbitrator surmised that the issue of the alleged threat had probably been resolved owing to the amount of time that had passed between the incident in October 2005 and the disciplinary hearing in January 2006.

Grounds of review

11] The applicant seeks to review the arbitrator's award on two grounds. Firstly, it claims that the Commissioner did not record the evidence presented correctly and that consequently his findings and the reasons therefore were not rationally connected to the evidence before him. It also claims the arbitrator's reason for accepting the employee's version rather than the employer version was irrational.

12] In its supplementary affidavit, the applicant added two further grounds of review. It argued that if the arbitrator believed that the reason for the employee's dismissal was an improper one, then it was irrational of him to make a finding on the procedural fairness of the dismissal. It was not open to the Commissioner to find both that the dismissal was substantively unfair and procedurally unfair under the circumstances. Secondly, if the Commissioner believed that the reason for Chuene's dismissal was due to him joining a union, then he ought to have realised that he was dealing with an automatically unfair dismissal in terms of section 187 (1) in terms of which the employer had supposedly acted contrary to section 5 of the LRA. Such a claim is not capable of arbitration and should have been referred to the labour court.

13] On the issue of the procedural fairness of the enquiry, the applicant is correct that where a finding of automatically unfair dismissal is made, a finding of procedural unfairness will be beside the point because the fairness of proceedings can only be entertained as an issue bearing on the fairness of the dismissal where the actual reason for dismissal is a competent one for which a fair procedure exists. If the true reason for dismissal is not a lawful one, no amount of the procedural rigour accompanying that illegitimate dismissal matters.

^{14]} An employee who believes that he or she has been dismissed for a reason that is automatically unfair may elect to waive their claim that the dismissal was automatically unfair, and may be content to simply claim that the dismissal was unfair for the ostensible reason given by the employer, thereby casting the onus on the employer to prove the fairness of the dismissal, and avoiding the onerous burden of proving an automatically unfair dismissal. However, if in the course of the arbitration, an employee directly raises an unlawful reason as the true reason for the dismissal and that reason falls within the ambit of an automatically unfair dismissal as described in section 187 of the Labour Relations Act, 66 of 1995 ('the LRA'), then the arbitrator must pause and consider which type of unfair dismissal she is truly being asked to determine.

^{15]} This issue is closely related to the other ground of review namely that the arbitrator had no jurisdiction to decide whether the employee had been dismissed for an automatically unfair reason. However, in this instance, even though the arbitrator effectively agreed that the real reason for the dismissal was an improper one, his final conclusion was that the dismissal could not be substantively fair for this reason. His ultimate conclusion could be based on one of two subsidiary findings, neither of which were articulated in the award. Firstly, he might have accepted that the employer had indeed established grounds of misconduct which could justify dismissal, but that in fact the employer did not take the decision for that legitimate reason but for the improper motive that it wanted to rid itself of a unionist. Alternatively, the employer's failure to prove dismissible misconduct on the part of Chuene also lent support to a conclusion that the real reason was an ulterior and forbidden one.

16] What is noticeable about the arbitrator's award, is that he does not appear to make a clear finding whether or not the employee did make the threat to W Gordon, but merely concerned himself with the timing of the alleged incident. Thus, in saying that he accepted the evidence of the employee over that of the employer he seems to confine his finding only to the *timing* of the alleged incident. Once he accepted the employee's version of the timing, the arbitrator then inferred that the delay between the incident and the disciplinary enquiry supported the employee's version that the reason he had been charged was because of his subsequent involvement in the union.

In the light of this, it appears to me that the only plausible interpretation of the arbitrator's conclusion is that he took the view that, whatever the merits of the charge of misconduct, the employer had not been actuated by those merits to charge and dismiss the employee, but had done so because of the employee's union activities. Moreover, that the arbitrator did not base his ultimate conclusion on whether or not the charge against the employee had been proved, but whether or not the dismissal was motivated by an improper objective on the employer's part. Consequently, I can only infer that the arbitrator effectively decided the matter on the basis that it was an automatically unfair dismissal in terms of section 187 read with section 5(2)(c)(i) of the LRA, which prohibits the dismissal of employees on account of their union membership. When the issue of union membership came to the fore late in the hearing as the supposed reason for the dismissal, the arbitrator should have enquired whether the employee was now seeking to rely on that reason as the reason for his dismissal and to advise him that he had no jurisdiction to determine the fairness of the dismissal on that basis unless both parties consented to the CCMA jurisdiction in terms of section 141(1) of the LRA.

17] Accordingly, the arbitrator decided the fairness of the dismissal on grounds beyond his remit and his award must be set aside, even if he still limited the award of compensation to twelve months.

Relief

18] This is not a matter that ought to be sent back to be heard before another commissioner because as it stands the dispute ought to have been referred to the Labour Court by the employee. In my view the only appropriate substitution of the arbitrator's award is to replace it with a ruling that the CCMA has no jurisdiction to determine the dispute.

Order

19] In the light of the analysis above,

- a) The first respondent's arbitration award dated 13 April 2007, under case number GPCHEM3628 is reviewed and set aside
- b) The arbitrator's award is substituted with a finding that the CCMA lacks

jurisdiction to determine the dismissal dispute which falls within the ambit of section 187(1) read with section 5(2)(c)(i) of the Labour Relations Act 66 of 1995.

c) No order is made as to costs



R LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 08 June 2010

Date of judgment: 16 August 2011

Attendance:

For the Applicant: Craig Berkowitz

For the Respondent: J D Verster

LABOUR COURT