

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 2024/08

Reportable

In the matter between:

REMA TIP TOP (PTY) LTD

Applicant

And

OSMAN, S M N.O (cited in his capacity as

Commissioner of the Commission for

Conciliation, Mediation and Arbitration)

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

THERON, JOHAN LOMBAARD

Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application for review and/ or set aside of the arbitration award issued by the first respondent (“the arbitrator”) in terms of section 145 of the Labour Relations Act, 66 of 1995 (“the Act”). The arbitrator found the third respondent’s (“the employee’s”) dismissal to have been substantively and procedurally unfair and awarded him compensation in the sum of R115 725.00, being an amount determined by the

arbitrator to be equivalent to three months' remuneration.

Background facts

[2] The employee commenced employment with the applicant on 1 September 2006 as branch manager of its Kathu branch. He was responsible for all aspects of branch operations, administration and management. Various complaints were raised regarding the employee's failure to adhere to work standards, systems and procedures, which resulted in the branch running at a loss and management of the applicant having to take steps to remedy the unsatisfactory state of affairs.

[3] The employee was duly charged with five charges related to incapacity in the form of poor work performance but at his disciplinary enquiry was found guilty only on charge four which related to "failure to adhere to work standards, systems and procedures in developing job cards and office administration". In addition, noting that the relationship between the parties had deteriorated the chairperson of the disciplinary enquiry, Peter Gentle, recommended a warning together with corrective remedial action as the appropriate sanction. The applicant however decided that a sanction of dismissal was more appropriate and issued the employee with a notice of dismissal. The notice stated the reason for dismissal as being the chairperson's finding of guilt and that although the sanction recommended was a warning the applicant's view was that "base (sic) on the severity of the charge and the financial implication thereof, we took dismissal as the appropriate sanction". The notice further records the chairperson's conclusion that: "[t]he trust relationship between the company (sic) has clearly reached a point where to further pursue the relationship would be untenable. There is open hostility and during the hearing personal slights and innuendos were made".

Grounds of review

[4] The review is based on the ground that the award is wrong in fact and in law, was irregularly arrived at and cannot be objectively justifiable having regard to the evidence properly adduced at the arbitration. It was submitted that it is therefore not an

award that a reasonable decision maker could have arrived at on the material before him.

[5] The applicant takes issue firstly with the arbitrator's confusion about whether the charge on which the employee was found guilty was one of misconduct or incapacity. In this regard the arbitrator concluded that the applicant had "shot itself in the foot" by submitting in its opening statement that the employee had been charged with misconduct but dismissed for the trust relationship having broken down. This tainted his approach to the entire matter and resulted in him misconstruing the issue raised by the applicant, which is not that misconduct justified dismissal as a matter of principle but that dismissal was the only option given that the employment relationship had become untenable. The issue therefore, the applicant submitted, is not the misconduct but the appropriate sanction in such circumstances. The arbitrator, in focusing on the categorisation of the charge and concluding that the chairperson had erred in this regard, misconstrued both the nature of the charge as well as the evidence before. Instead what he would have found had he applied his mind to the evidence before him, was that the employee knew what was expected of him but failed to apply or implement the relevant rules and procedures at his branch. This cannot be anything other than misconduct at its most basic level in the form of negligence in the discharge of his duties. It is for this reason that the chairperson, appreciating the distinction, enquired into the existence of a rule, knowledge of the rule and whether it had been infringed. The employee's indifference to work rules was clearly misconduct and it was not a case of him not being able to perform his job. In failing to appreciate this distinction the arbitrator applied flawed reasoning which tainted the entire award. Furthermore the arbitrator failed to have regard to evidence concerning a complete breakdown and in fact open hostility between the employee and applicant, which meant that any form of corrective discipline would have been unjustified and dismissal was the only plausible alternative. In ignoring this critical evidence and finding that the dismissal was unfair he therefore made an award that was unreasonable.

[6] The applicant further takes issue with the finding that there was a procedural irregularity in the disciplinary proceedings in that the chairperson relied on the written

statement of a witness who was not called to testify. He should have found that since the statement was not disputed it was admissible by agreement, and in failing to do so the arbitrator misconstrued the laws of evidence and thus arrived at a conclusion that was unreasonable.

[7] The arbitrator's criticism of the chairperson of the disciplinary enquiry, Gentle, was unjustified. All he had done was to convey the employee's hostility towards management that emerged during the hearing, and there was no basis on which the arbitrator could have concluded that his testimony was "aggressive". The manner in which the arbitrator assessed the evidence of the chairperson was therefore grossly irregular and he not only misconstrued the chairperson's role but also his conclusion. If the arbitrator had properly considered Gentle's evidence and the disciplinary enquiry record, it would have been clear that he would in the normal course have issued a warning together with a performance improvement process but left the determination of sanction to the applicant given the relationship breakdown. This was a reasonable and proper approach and it is unclear what the arbitrator found to be problematic.

[8] The arbitrator simply ignored crucial documentary evidence and in so doing made unwarranted negative inferences concerning the testimony presented by the applicant. This emerges from the issue of legal representation. The record of the disciplinary enquiry indicates that the employee had never asked for legal representation, and stated that he would represent himself. The issue of legal representation had been resolved prior to the commencement of the disciplinary enquiry and the chairperson was not expected to make a ruling on the issue. The arbitrator's criticism of the evidence of Van Niekerk, the applicant's witness, is therefore completely unfounded. Furthermore, Gentle had never testified that he refused the application for legal representation. In fact he had said it was not his place to rule on such issues. The arbitrator therefore contradicts his own award, which indicates that he did not properly apply his mind to the evidence. Furthermore, the employee had never objected to the disciplinary hearing proceeding and the finding that the employee was refused legal representation is irregular and based on ignoring crucial documentary evidence.

[9] The arbitrator in his award creates defences for the employee without him having

raised these in his evidence. In this regard the arbitrator finds that the employee's version was that he was unable to call witnesses because of intimidation. This, the applicant submitted, did not emanate from the evidence and was a conclusion reached by the arbitrator of his own accord and constitutes an unfair finding as well as a denial to the applicant of *audi alteram partem*.

[10] The evidence that the employee was dismissed for his refusal to participate in illegal activities, or that there was a relationship between Van Niekerk and Gentle was never raised with the applicant's witnesses in cross examination nor prior to the arbitration. The arbitrator accepted this crucial evidence instead of rejecting it and in so doing demonstrated that he was biased against the applicant.

[11] The arbitrator ignored pertinent documentary evidence in determining the employee's remuneration for the purposes of the relief awarded. In this regard payslips were placed before him which indicated that the monthly salary of the employee was R26 500.00 per month instead of the R38 575.00 determined by him. There is no indication of the method by which this calculation was reached and this is in itself a gross and reviewable irregularity.

Analysis

[12] The crux of the review is whether the arbitrator failed to distinguish between the charge of poor performance and misconduct. The starting point is to have regard to the issues he was required to determine as set out in the pre-arbitration minute and which he recorded as follows:

2. The issue to be decided by myself pertains to whether the dismissal of the applicant was both procedurally and substantively fair. The applicant contested procedurally that the finding of charge 4 at the disciplinary hearing was not in line with the charge and therefore the applicant was prejudiced in that he was deprived of the right to properly prepare on the charge; the applicant was not afforded the opportunity to call witnesses at the internal disciplinary hearing; the applicant was not afforded the opportunity to cross-examine the statement of Mr. Shaun George whose statement was handed up to the Chairperson and

finally the applicant was not afforded the opportunity to be represented at the hearing as his fellow workers had feared intimidation from the respondent and the applicant was refused legal representation.

3. Substantively the applicant contended that he contested the same issue as per point 1 of the procedure; that there was no rule; the applicant had not been aware of the rule and the appropriateness of the sanction was challenged.

[13] The arbitrator further had regard to the charge sheet which referred to five charges based on incapacity for poor work performance, and the finding of the disciplinary enquiry that the employee was guilty in respect of charge four. The nub of the employee's complaint during the arbitration was that he was required to defend a charge related to poor performance which was then elevated to misconduct during the enquiry. Gentle's evidence was that irrespective of the hostility between the parties he felt that the employer should take corrective measures. He went so far as to say that what the employee had done was gross negligence but he still recommended corrective measures. This was based, as the arbitrator identified, on admitting evidence related to misconduct, which was not the charge being considered.

[14] In his analysis of the evidence and argument the arbitrator confirmed that the applicant had "shot itself in the foot" by contending that the employee had been charged with misconduct when the charge stated on the notice of disciplinary enquiry clearly related to poor work performance. He also noted that the applicant's representative had conceded that although the chairperson recommended a warning with corrective action for poor performance the applicant chose instead to dismiss the employee on the grounds of misconduct, which is not the charge he faced. He found that the employee had in all probability prepared his defence at the disciplinary enquiry on the basis of poor work performance and not misconduct. He cannot be said to have been biased in this regard or to have issued a ruling which was unreasonable.

[15] In reaching his conclusion the arbitrator also had regard to the employee's uncontested evidence about the context in which the charges of incapacity emerged. This was to the effect that he had received no training when he was appointed; his

branch was audited three times in nine months and no problems were found; he had been rewarded with a performance bonus which was paid even after his dismissal in November; and that the branch was vastly understaffed (which Van Niekerk had conceded).

[16] Mr Snyman, on behalf of the applicant, submitted that corrective measures would have served no purpose given the relationship breakdown. He submitted further that being pedantic about labeling the charge merely obfuscated the conduct in that the only difference between negligence and poor work performance was whether the conduct was intentional. What is significant, he submitted, is whether the parties understood the substance of the charge. The evidence of Van Niekerk, Gentle and the employee was that they understood the charge to relate to negligence. Moreover, it was not necessary to import the exactness required in criminal charges to disciplinary proceedings as per the *dictum* of Van Niekerk J in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration & others* (2006) 27 ILJ 1644 (LC). Thus when an employee is charged with poor performance and he is found guilty of misconduct in the form of negligence this is a species of poor work performance in that it relates to negligence in the performance of his duties. However, Mr Grobler submitted on behalf of the employee that this obscures the real issue – that it is not fair or appropriate to elevate a charge during a disciplinary proceeding from poor performance to misconduct and then to rely on the lack of prospects of restoring the employment relationship to justify dismissal as a sanction. The employee was charged with incapacity and presented mitigation in respect of this and was found guilty on only one charge. The charge for which he was dismissed was not put to him at the disciplinary enquiry nor was he given an opportunity to respond thereto. Furthermore it is trite that in the context of the Act there is a vast difference between misconduct and incapacity both conceptually and practically. In this context the sacrosanct principles of natural justice were violated and the arbitrator's decision was justifiable and eminently reasonable.

[17] The arbitrator's conclusion that the chairperson's failure to invite submissions on legal representation could have resulted in the employee being denied the right to a fair

hearing at the disciplinary enquiry. The employee's evidence was his attorneys sent a written request that they be permitted to represent him at the disciplinary enquiry and he was informed that "this is not an issue we are addressing you". The chairperson decided it was not his role to hear submissions since the applicant had made the decision to refuse legal representation at the disciplinary enquiry. The arbitrator's criticism did not amount to saying this reasoning was wrong, but that submissions could have been invited on the issue in order to determine whether the complexity of the charges warranted representation. He held that "in the absence of such a consideration the applicant could have been denied his right to a fair hearing". This was based on submissions made by the employee at the arbitration and not raised *mero motu* by the arbitrator and is in my view not assailable.

[18] In regard to the intimidation finding the arbitrator appears to have drawn an inference from the employee's evidence that colleagues were approached to represent him but declined because they were afraid of being victimised. This was also an issue identified in the pre-arbitration minute. However the evidence related only to representation at the enquiry and the employee admitted that he was afforded the opportunity to call witnesses. The arbitrator, in stating that "in all probability" the employee could not call witnesses because of intimidation and victimisation, appears to have drawn an inference based on this evidence and this cannot be said to be an unreasonable inference.

[19] In regard to the hearsay statement of George being admitted, irrespective of whether it was challenged by the employee or not it would remain inadmissible. It contained allegations that appear to have led partly to the conclusion about the employee's misconduct, and when it was put to Gentle that it was inappropriate to admit the statement in a poor work performance enquiry his response was to the effect that "a rose like any other name is still a rose". This can hardly be said to epitomise the fairness that underpins the disciplinary process in terms of the Act, and the arbitrator's conclusion that Gentle confused the different standards of conduct involved in misconduct and poor performance and therefore admitted irrelevant evidence would appear to be justified.

[20] Finally, on the ground of review pertaining to the basis on which the arbitrator computed the employee's remuneration, it is clear from the record that the parties were unable to reach agreement on all the components of his remuneration for the purposes of any compensation award to be made. The arbitrator requested written submissions on the issue and ultimately appears to have made his determination based on the written submissions of the employee's attorneys which computed his remuneration at R38 575.00 per month based on a basic salary of R21 000.00 and various allowances, most of which (save for the housing allowance) appears to have been an agreed component of the employee's package despite being disputed at the arbitration. This cannot be said to be a misdirection or gross irregularity that justifies setting aside the remedy as unreasonable.

[21] In the circumstances none of the grounds of review are in my view justified. Therefore, the following order is made:

The review application is dismissed with costs.

U. Bhoola

Judge of the Labour Court

Date of hearing: 11 August 2011

Date of judgment: 18 August 2011

Appearance :

For the applicant : Mr S Snyman of Snyman Attorneys

For the Third Respondent : Advocate S Grobler instructed by Johan Lombaard Theron
c/o Louw and Da Silva Inc.