

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR749/10

Reportable

In the matter between:

STANDERTON MILLS (PTY) LTD

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

MTUTUZELI NGQELENI N.O

Second Respondent

SACTWU O.B.O MKHONDOANE, VINCENT

Employee

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (“the Act”), to review and set aside the arbitration award dated 23 February 2010 of the second respondent (“the commissioner”) issued under case number MP5710-10. The application is opposed by the employee.

Background facts

[2] The employee Vincent Mkhondoane was a Shift Supervisor employed by the applicant and was dismissed on 12 August 2009 following a disciplinary enquiry in which he was charged with sexual harassment and abuse of power. The charges emanated from complaints made by an employee, Jessie Twala, about his conduct. He referred a dispute concerning his alleged unfair dismissal to the first respondent. Following an arbitration the commissioner found that his dismissal was substantively and procedurally unfair and ordered his retrospective reinstatement.

Grounds of review

[3] The applicant submits that the commissioner committed gross misconduct in relation to his duties, alternatively committed a gross irregularity. It submits further alternatively that the award is not reasonably justifiable having regard to the material before him and is therefore not one that a reasonable arbitrator could have reached in the circumstances.

[4] In amplification of the grounds of review the applicant submits that the commissioner committed material errors of law in that he:

- a) Failed to make an appropriate assessment of all the evidentiary material placed before him, and particularly that the employee at no stage contested the telephone number from which the messages were sent to Hadebe, but only denied that he was the sender;
- b) Ought to have found that the SMS messages corroborated the version of Hadebe and were inappropriate when addressed to someone which it was common cause he was not in a relationship with;
- c) Ought to have found that the evidence of Twala and Hadebe corroborated the version of the applicant and, weighed together, should have been sufficient to constitute proof on a balance of probabilities;
- d) Failed to appreciate that not to discipline someone who reports to you for absenteeism in return for sexual favours clearly constitutes an abuse of power even if it could also constitute a dereliction of duty since in the context of

sexual harassment a charge of abuse of power was more appropriate;

- e) Failed to attach any weight to the fact that the employee had previously been charged with sexual harassment. This in itself should have swayed the probabilities in favour of the applicant;
- f) Placed undue reliance on the fact that the disciplinary enquiry chairperson signed the notice of suspension and conveyed the initial charges to the employee. Such conduct does not in itself suggest a lack of impartiality and does not indicate that the employee was denied a fair trial;
- g) Failed to take into account that evidence was led at the internal disciplinary enquiry which indicated that the video footage did not show the incident complained of.

[5] The applicant submits that the commissioner was grossly negligent in performing his duties and failed to apply his mind, alternatively exceeded his powers, in that he *inter alia*,

- (a) failed to make a proper evaluation of the evidence placed before him, particularly in respect of the SMS messages which emanated from the employee's phone.
- (b) misinterpreted Twala's evidence and wrongly criticised her for giving contradictory evidence. Her evidence remained the same both in the internal disciplinary enquiry and the arbitration in that she testified that on 24 March 2009 the employee came to her home to persuade her to return to work and not to propose love to her as found by the commissioner. Also, he mistakenly found that Twala was not at work on the day she alleged the employee touched her buttocks, namely 22 June 2009, when at all times it was clear that she had been at work on that day;
- (c) placed undue reliance on the role of the disciplinary chairperson in issuing the notice of suspension and the charges against the employee in concluding that there had been procedural unfairness;
- (d) failed to place appropriate reliance on the uncontested evidence that the employee had previously been charged with sexual harassment, when this should have been relevant to the weighing of probabilities.

[6] The commissioner made an award that is not rationally justifiable having

regard to the material properly available at the hearing of the matter in that he :

- a) Disregarded material evidence and failed to consider the evidence of the applicant in its totality;
- b) Failed to consider and find corroboration in the applicant's version given that two women independent of each other raised the same complaint against the employee;
- c) Failed to consider and find corroboration for the applicant's version in the SMS messages sent by the employee to Hadebe, and the fact that he had previously been charged with the same offence;

[7] The commissioner, in the weighing up of probabilities, inherent or otherwise, disregarded or failed to place the appropriate weight on the following factors:

- a) that two women independent of each other raised the same complaint against the employee;
- b) the SMS messages sent by the employee to Hadebe;
- c) the fact that he had previously been charged for sexual harassment.

The review standard

[8] It is by now trite that the test to be applied in assessing the arbitrator's award is whether the decision reached by the commissioner was one which no reasonable decision maker could reach : *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC). The Constitutional Court has confirmed that a commissioner is required to apply his or her mind to the issues properly before her, and that failure to do so will result in an arbitration award being set aside : *Commercial Workers Union of SA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC) at 2485-2486.

[9] In order to succeed in a review the applicant must establish that the award was one that could not have been made by a reasonable decision maker: *Sidumo supra* at [110]. An outcome may be reasonable if there are other reasons besides those advanced by the decision maker that support it. These reasons may be evident from the material before the decision maker and may not always be expressly stated in the award. There is no reason why an arbitration award should be found to be unreasonable simply because the commissioner failed to identify

good reasons that could have been used to justify the decision : *Fidelity Cash Management Service v CCMA & others* (2008) 29 ILJ 964 (LAC) at [102]-[103]. Indeed, it is clear from *Fidelity Cash* that the *Sidumo* test is a stringent one that will ensure that arbitration awards are not easily interfered with. This serves the primary objective of the Act which is the “*effective resolution of labour disputes*”. It is, accordingly, contemplated that awards issued out of the CCMA should not be “*lightly interfered with*” and will, subject to the requirement of reasonableness, be final and binding: *Fidelity Cash supra* at [100]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC) at 1636H-I and *NUM & another v CCMA and others* (2008) 29 ILJ (LC) 378 at [29]. The applicant must show that the outcome falls outside the parameters of what is reasonable: *Edcon Ltd v Pillemer NO & others* (2008) 29 ILJ 614 (LAC) at [21]; *NUM supra* at [28] and *Ellerine Holdings Ltd v CCMA & others* (2008) 29 ILJ 2899 (LAC) at 2905-2906. A review application does not afford the applicant another opportunity to argue its case afresh in the hope of a more favourable outcome.

Evaluation

Findings re Twala’s evidence

[10] The commissioner found Twala’s testimony to be unreliable as she contradicted herself in numerous respects and was unable to explain these contradictions. She testified that the employee touched her on the buttocks on 22 June but she had been charged for desertion for her absence from work from 22 to 27 June. She also testified that the employee visited her at her home to propose love to her, but at the disciplinary hearing she had testified that he in fact came to persuade her to go back to work.

[11] Mr Zondo submitted on behalf of the third respondent that the commissioner was justified in treating Twala’s evidence with caution and is in the best position to make findings in regard to her credibility. He submitted that the fact that Twala raised the allegations of sexual harassment for the first time in her disciplinary enquiry for desertion on 1 July 2009 is significant in that she was on a final warning and knew that a finding of guilty would have led to her dismissal. Furthermore, although she

claimed that the harassment began in 2005, and that the reason for her absence from work was that she was “intimidated and abused” by him, she was only able to cite one incident. When asked to explain the intimidation and abuse she said “the reason I say that is because on 22/06/2009 at 09h00, Vincent Mkondoane came to me, touched my bum and passed me, saying that he is the one that will laugh last in the company. I was embarrassed because he is my superior and very much younger than me”. In these circumstances Mr Zondo submitted that her allegations were an afterthought to shield her from dismissal, and that the commissioner applied his mind reasonably and fairly to the evidence when he rejected her version.

[12] The commissioner’s finding in regard to the second contradiction is not unreasonable. Twala’s evidence at the disciplinary enquiry was that the employee had visited her at home on 24 March and 25 March 2009 to tell her to return to work. However, at the arbitration she testified that “[h]e came to telling (sic) me that he loves me and if I can sleep with him he cannot open a case against me”. Despite being pressed by the commissioner and the employee’s representative, she was unable to explain this contradiction. Nor was she able to explain why the evidence that the employee “used to come to me during lunch time around 02:00pm asking me if we can [go] to the storeroom and sleep there and I disagreed with him” only emerged for the first time in re-examination. The employee’s representative objected to this evidence, which had not been raised at the employee’s disciplinary enquiry by Twala, nor during her evidence in chief or cross-examination in the arbitration.

[13] The abuse of power charge related to the averment that the employee had abused his authority as Shift Supervisor in order to obtain sexual favours from his subordinates, but the commissioner found that this should more appropriately have been a charge of dereliction of duty because the demand for sexual favours had not been proven. He found that although Twala testified that the employee suggested that if she slept with him she would not be charged for her absence from 11 to 24 March 2009, and although she refused she was not charged. He however accepted the employee’s version that he had charged her and that she had been counselled by Mathews Thabethe, her section supervisor.

[14] The evidence of Twala in relation to the charge of abuse of power was as

follows:

“MR MOLOI : The question is why she was not charged, because she says she normally must be charged. But she was not charged for 13 days so we want to know why.

ANSWER NOT INTERPRETED

MR MOLOI : And what was your reaction to that?

MS TWALA : I told him that I cannot sleep with you because I am not in love with you”

She later explains that she gave this answer to what the employee said when he visited her at home. It was put to her that this contradicted her version at the disciplinary enquiry, and she denied this and explained that there were two visits and he was alone on the second visit when he suggested that nothing would happen if she slept with him. It was then put to her that in the disciplinary enquiry this was not her version because she testified that “when I was at work he informed me that nothing would happen to me as I know what he wants”.

[15] When Twala was asked at her disciplinary hearing who she had reported the alleged harassment to, she replied that she had told a colleague, Gladys Thanjekwayo. In response to a question why she did not report the matter to human resources she said that she believed that the employee wielded some authority over them and determined which charges were prosecuted. She believed that “Mkondoane always says the HR department only hears him”, because in all the charges laid against her she had been found guilty. This version is improbable since there was no evidence that as a supervisor he exercised such inordinate power. Furthermore, the fact that the employee was charged with sexual harassment immediately after Twala made the allegations against him negates her version entirely.

[16] At the employee’s disciplinary enquiry she testified that she had reported the incident to Thanjekwayo as well as Jabu Molefe, although in cross examination she only mentioned Molefe and not Thanjekwayo. At the arbitration she said that she reported the incident to Molefe. Thanjekwayo was not called to testify at the arbitration, only at the employee’s disciplinary hearing and accordingly Twala’s

version on this issue should have been (and was) properly rejected by the arbitrator. Mr Zondo submitted that the failure to call Thanjekwayo at the arbitration to prove that she witnessed the harassment incident is fatal.

[17] The applicant's representative Mr Pretorius, submitted that the contradictions are more apparent than real. Twala said she *confided* in Gladys and *reported* the matter to Jabu. This should have been seen as simply the manner in which she spoke and there was no discrepancy. Even in regard to the visits to her home her evidence confirms there were two visits and this is what was put to her. Her evidence was therefore not inconsistent. Furthermore in regard to the fact that she gave evidence in re-examination when she should have given that in chief – she was simply responding to a question put to her in re-examination about the incident at lunchtime. It places too high an onus on her if the evidence construed together is understood to mean that she said what she did in re-examination as an afterthought, and in making this finding the arbitrator misconstrued the evidence.

[18] The adverse credibility findings against Twala appear to have been justified and reasonable given that her evidence was contradictory on a number of material aspects. Credibility issues are indeed difficult to determine in motion proceedings such as these. The commissioner is undoubtedly in a better position to make a finding on this issue. In *Moodley v Illovo Gledhow & others* (2004) 25 ILJ 1462 (LC) at 1468 C-D Ntsebeza AJ observed in this regard as follows :“Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across. I cannot see that I can interfere merely on an assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies...I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court”.

Findings re Hadebe's evidence

[19] The commissioner was unable to determine the allegations of indecent exposure made by Hadebe because he was faced with her word against that of the employee without “any inherent probabilities favouring either of the versions”. Although he was not required to even determine the evidence of Hadebe or the SMS evidence, he did make findings and specifically discounted the evidence of Hadebe that she had received inappropriate SMS messages from the employee and had forwarded them to Jabu Molefe. He found that perusal of the print-out of the SMS messages shows that they were received from +27769267615 but did not show to which number they were sent to. He found that no evidence was led that this was the employee’s cell phone number.

[20] The applicant’s case in the arbitration was based to a large extent on the SMS messages. The employee denied that he had sent any messages to Hadebe, although Mr Pretorius submitted that his cryptic remark to the effect that “I still wonder why” when it was put to him that his number appeared on Hadebe’s phone should have been understood as an admission. Hadebe however failed to produce her cell phone, to which the SMS messages had allegedly been sent. Her explanation that she had “forgotten it at home and ..was not aware that we were going to sit for the hearing”, was highly improbable. She failed to use the opportunity to produce the phone despite the fact that she lived two minutes away. The next day she again failed to bring her phone to the hearing. Although it would appear that the messages were sent from his phone, the applicant fell short of proving that the recipient was Hadebe. It was therefore not possible to establish whether the SMS messages were sent to Hadebe or even forwarded by her to Molefe’s phone. Apart from the missing phone, the SMS messages were not authenticated at all. In any event even if the evidence related to the phone messages had been accepted they seem to suggest that on the probabilities there had been a relationship between Hadebe and the employee and which had ended. In the context of this evidence it is reasonable for the commissioner to have been unable to make a conclusive finding on the probabilities.

[21] Hadebe was called as Twala’s main witness but then made her own allegations of sexual harassment against the employee. In her evidence at the

arbitration she testified about being touched on the buttocks, about indecent exposure and SMS messages from the employee. However the employee had not been charged with any of these offences and this was the first time this evidence emerged. Hadebe moreover appeared to have held a grudge against the employee for having orchestrated her mother's dismissal from the employ of the applicant. She refused to comment when it was put to her that the reason for her levelling the harassment allegations against him was that he had terminated his sexual relationship with her sister. This implies that she had an improper motive and the commissioner appears to have had regard to this in reaching his conclusion.

[22] In regard to procedural fairness the commissioner found that the disciplinary enquiry chairperson had played a significant role in the matter prior to chairing the disciplinary enquiry, and that his failure to allow viewing of video footage placed a question mark over his objectivity in this role. This rendered his dismissal procedurally unfair. The commissioner cannot be faulted for this finding given that it is a fundamental tenet of natural justice that there should be no bias or perception of bias. However he appears to have disregarded the evidence led at the disciplinary enquiry that the video footage did not record the incident. This in itself would however not justify the review. In playing the role he did the chairperson was both player and referee and this, Mr Zondo submitted, cannot be countenanced in the context of procedural fairness requirements.

[23] The last issue is the question of whether the applicant was denied a fair trial given that the arbitrator failed to direct the parties in the conduct of the proceedings and in respect of proving material aspects of their case. In supplementary heads of argument the applicant sought to raise a new ground of review based on the failure of the commissioner to assist the parties in regard to technical legal issues such as the leading of evidence, proof of documents and problems of cross-examination. The applicant cited a number of authorities applicable to the conduct of proceedings involving laypersons. However I do not consider these to be of relevance given that Moloi, the Human Resources officer of the applicant cannot be said to have been in the position of a layperson unfamiliar with arbitration proceedings. He simply failed to lead the evidence necessary to meet the evidentiary burden on a balance of probabilities, and the commissioner cannot be faulted for this.

[24] In these circumstances the applicant has not succeeded in establishing that the commissioner committed gross misconduct in relation to his duties, alternatively committed any gross irregularity, either by failing to apply his mind properly to determining the issues before him or otherwise. Nor can it be said that he failed to take material facts into account in weighing the probabilities. For these reasons the review stands to be dismissed and there is no reason in law or fairness why costs should not follow the cause.

[25] Therefore, I make the following order :

The review is dismissed with costs.

Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 23 August 2011

Date of judgment: 31 August 2011

Appearance:

For the Applicant: Mr D Pretorius from Fluxmans Inc

For the Employee: Advocate Zondo instructed by Cheadle Thompson & Haysom Inc.