

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No: JR 1337/10

Date: 2011-08-25

Reportable

In the matter between:

TRIDENT SA (PTY) LTD

Applicant

and

THE METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

SIPHO DLAMINI N. O

Second Respondent

NUMSA OBO ALETTA M MAKHASA

Third Respondent

JUDGMENT

Bhoola J :

Introduction

[1] This is an application for a review and/or set aside in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") of the award of the second respondent ("the commissioner") under case number MEGA 26016, dated 3 May 2010 in the arbitration proceedings between the applicant and the third respondent ("the employer"). The application is opposed by the third respondent ("the employee").

Background facts

[2] The employee was employed as a cleaner by the third respondent on 13 September 2004. It is common cause that on 29 June 2009 she assaulted a fellow employee, Reuben Ntwae on two occasions, following which she was charged as follows : “Physical assault in that on Monday the 29th of June 2009 you slapped Reuben Ntwae twice”. She pleaded guilty to the charge and was dismissed on 14 July 2009.

[3] The employee referred an unfair dismissal dispute to the first respondent and arbitration proceedings were held on 9 December 2009 and 1 April 2010. She did not dispute the procedural fairness of her dismissal.

[4] The commissioner concluded that although the employee was guilty of the assault and therefore of gross misconduct, her actions were justified by provocation and therefore the sanction of dismissal was too harsh in the circumstances. The commissioner ordered that she be reinstated with backpay and issued with a final written warning.

Grounds of review

[5] The grounds of review are set out by the applicant in its heads of argument as follows :

- (1) The award is not one that a reasonable commissioner would have reached taking into account the evidence before him and the law. In amplification of this ground the applicant submits that the commissioner:
 - (a) Had no regard to the fact that the assault had taken place in a very dangerous working environment and the applicant has a duty to ensure a safe working environment;
 - (b) Did not appreciate the fact that the applicant acted consistently in dismissing the employee in that it has previously dismissed employees for similar offences in terms of its disciplinary code and procedure;
 - (c) Did not consider and apply his mind to all the material evidence presented at the arbitration;

- (d) Misconstrued the evidence that the employee should be given a second chance for the mere fact that she pleaded guilty to the charges;
- (e) Misconstrued the legal principles applicable to provocation when he found that the employee had reacted to provocation and that her conduct was justified;
- (f) Unreasonably concerned himself with whether Ntwae was indeed guilty of making the calls in question and the content of the calls as well as whether the employee had proven the contents of the calls;
- (g) Unreasonably and irrationally concluded that dismissal was not an appropriate sanction in the circumstances.

(2) The commissioner should have focused on whether the employee made herself guilty of gross misconduct as suggested in the Code of Good Practice : Dismissal in the Act.

(3) The commissioner unreasonably and irrationally came to the conclusion, despite the fact that the employee committed a dismissible offence, that she should be reinstated and therefore replaced the applicant's standards with his own.

(4) The commissioner failed to apply his mind as there is no demonstration anywhere in the award that the conclusion is logically connected to the overall assessment and the impact of the oral evidence tendered by both the applicant and the employee at the arbitration.

(5) In regard to the principles of provocation, no reasonable commissioner could have accepted same as justification for the employee's repeated assault on a fellow employee.

(6) Therefore, the applicant submits that the award and reasons issued by the commissioner are reviewable *inter alia* on the following grounds :

- a) The commissioner failed to properly, justifiably and reasonably determine and assess all the evidence presented at the arbitration;
- b) The commissioner exceeded his powers in terms of the Act;

- c) The commissioner did not properly, rationally and justifiably apply his mind to the facts and the law in this instance.

The review standard

[6] It is by now trite that the applicable test in reviews following *Sidumo & Another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) is that of reasonableness, which must be determined objectively with due regard to all the evidence before the commissioner. In order to succeed in a review the applicant must therefore establish that the award was one that could not have been made by a reasonable decision maker on the material presented : *Sidumo supra* at [110].

[7] The Constitutional Court has confirmed that a commissioner is required to apply his or her mind to the issues properly, 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.

[8] The applicant must therefore 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]; *Ellerine Holdings Ltd v CCMA & others* (2008) 29 ILJ 2899 (LAC) at 2905-2906.

Evidence led at the arbitration

[9] The evidence of the employee was that after 22:00 on Saturday night 27 June 2009 Ntwae called her on two occasions and made suggestions of a sexual nature to her. There was a third missed call when she switched on her phone on the Sunday morning. The caller identified himself as Reuben, said he worked with her, and she recognised his voice. Ntwae confirmed that it was indeed his phone number which appeared on the employee's mobile phone, but denied that he had made the calls in question. His evidence was that he was asleep that night when the calls were allegedly made, and that only his wife and children had access to his phone.

[10] When the employee reported for work on the Monday morning (29 June) she made enquiries from a shop steward about the phone number. The shop steward, Paulos Mphafe wrote the number down on his hand and went to ask Reuben what his number was and confirmed that the number on the employee's phone was his. The employee then approached Ntwae, asked him why he had called her and insulted her, swore at him and slapped him twice. The assault took place in the presence of witnesses. The employee returned to her work station but about forty minutes later during tea time she again confronted Ntwae about why he had called her and when he did not reply she again slapped him twice.

[11] The employee testified that Mike Calvert, a Director of the applicant asked her about the incident and she replied that she was very angry and apologised to him. Calvert accepted her apology, forgave her and instructed her to return to her workstation. In the arbitration however Calvert said he did not remember whether she apologised, although from the context it appears that he might have misunderstood the question as being whether she apologised to Ntwae. Later he confirmed that an apology did not change the applicant's response to discipline for assault at all.

[12] The employee testified that she was angry. It was put to her by the applicant's representative that she was "too angry to lodge a grievance" and she did not respond. She explained that it had been too early that morning to go to human resources. She admitted that she was aware of the disciplinary code and the grievance procedure and that she had previously lodged a grievance against two female employees who had insulted her.

Evaluation of the award and submissions

[13] It is apparent from the record that the parties were in agreement that one of the issues to be determined by the commissioner was whether or not it was Reuben Ntwae who called the applicant. The commissioner reflects this in his award and this cannot therefore constitute a valid ground for review. Furthermore, it is apparent from the record of the arbitration that the applicant's representative exhaustively

cross-examined the employee on the content of the telephone calls; how Ntwae could have obtained her phone number; and whether she could have encouraged his conduct. At one point the commissioner questioned the relevance of this line of questioning and was persuaded that it was relevant to the applicant's case. It is therefore not surprising that these issues find their way into the award and the commissioner cannot be faulted for this.

[14] The commissioner is unable to find that there is evidence of consistency in discipline on both the testimonies of Calvert and Kerruish, as they were not involved in previous matters and were unable to distinguish between the different cases on their merits. However what he fails to have regard to is the documentary evidence as well as the direct evidence that there is zero tolerance for assault irrespective of the seriousness thereof at the applicant, and that the employee was at all times aware of this.

[15] In regard to the finding of provocation, the employee's representative, Mr Xilongo, referred to *Anglo Operations Limited (Bank Colliery) v Tokiso Dispute Resolution (Pty) Ltd and Others* [2006] ZALC 77 (4 July 2006) as support for the proposition that a finding of provocation in the context of a assault could be justified. The employee relied on the defence of provocation and her evidence was that she acted out of anger. The judgment of Revelas J is distinguishable however in that the court refers to a serious assault, which is not applicable in the current context. The applicant's attorney, Mr Du Randt submitted that this finding was unreasonable in that the commissioner failed to have regard to and apply the legal principles applicable to establishing the defence of provocation. The commissioner obviously took account of her affront at the lewd suggestions made in the call and the admission by Ntwae that the calls emanated from his phone. However, if regard is had to the fact that she had sufficient opportunity to consider how to deal with the matter before returning to work on Monday; that she was unable to explain why she had failed to report a grievance to human resources; and that she availed herself of the opportunity to verify the telephone number that morning, it would be apparent to any reasonable decision-maker that the defence of provocation cannot be sustained on the facts. Her conduct was deliberate in the face of her knowledge of the

disciplinary code and grievance procedure and she cannot be said to have retaliated out of anger.

[16] In determining that dismissal was not an appropriate sanction in the circumstances, the commissioner had regard to the fact that the employee had apologised (to Roger Calvert, whose name he reflected incorrectly in the award although he made a point of checking the spelling in the arbitration) and had pleaded guilty. He states that he took into account various factors set out in the Code of Good Practice: Dismissal, as well as the considerations referred to in *Sidumo supra* relevant to deciding whether the sanction of dismissal is fair. In *Sidumo supra* (at [75]) the Court made it clear that it is the commissioner's sense of fairness that must prevail and the commissioner should not defer to the employer in this regard. The commissioner is therefore required to take into account the totality of circumstances including the importance of the rule that was breached, the reason for the sanction of dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct as well as the effect of the dismissal on the employee : See *Fidelity supra* at [94]. In this regard it is noteworthy that the commissioner had regard to the evidence of Kerruish that mitigation was relevant and that the primary purpose of discipline was not retribution. However, Kerruish and Calvert also made it clear what the significance was of the rule in the context of the enforcement of discipline in a workplace such as the applicant's. In these circumstances to permit an employee to take the law into her own hands seriously undermines discipline in the workplace. Moreover, to interpret a plea of guilty as remorse in the circumstances where it is apparent from the employee's evidence that she felt none, in my view reflects a failure to have regard to the totality of the evidence and to weigh all the relevant considerations.

[17] The commissioner failed to apply his mind to the totality of the issues and evidence before him in reaching his conclusions. Although it is not unreasonable *per se* in these circumstances to conclude that dismissal was too harsh a sanction, and the reaction of the employee is understandable and one has sympathy for her, the award must fall on the grounds of review set out. This leaves the issue of the appropriate remedy and in circumstances where it appears that the record is

substantially complete and all the issues have been ventilated it would be appropriate to substitute the award with an appropriate order.

[18] In the circumstances I make the following order :

1. The award is reviewed and set aside.
2. The award is substituted with an order that the dismissal of the employee was for a valid and fair reason.
3. There is no order as to costs.

Bhoola J

Date of hearing : 25 August 2011

Date of judgment : 31 August 2011

Appearances

The Applicant : Mr J Du Randt, Du Randt Du Toit Pelser Attorneys

For the Third Respondent: Mr J Xilongo, NUMSA Regional Legal Officer