



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO. JR24/09

In the matter between:

HALBERG GUSS (PTY) LTD

Applicant

and

METAL AND ENGINEERING INDUSTRY

BARGAINING COUNCIL

First Respondent

MPHO PHETLA N.O.

Second Respondent

NUMSA obo JOHANNES MOGAPI

Third Respondent

Heard: 12 October 2011

Delivered: 10 November 2011

JUDGEMENT

LOUW AJ

[1] This matter concerns an application in terms of s 145 of the Labour Relations Act 66 of 1995 (the Act) to review an award reinstating the third respondent

(employee) in the applicant's employ. The award was made by the second respondent (the arbitrator), an arbitrator appointed by the first respondent.

[2] The third respondent was dismissed on 24 January 2007 following a disciplinary enquiry into an alleged incident involving fighting and assaulting another employee, one Lazarus Thage. The incident occurred on 22 January 2007.

[3] The third respondent referred a dispute concerning his dismissal to the first respondent for conciliation, which process failed. The matter came before the arbitrator who found the third respondent's dismissal to be unfair and accordingly reinstated him with retrospective effect.

[4] A reading of the award shows that the arbitrator in essence found that the third respondent acted in self-defence, or as the arbitrator formulated it, that the pushing between the third respondent and Thage was, insofar as it concerned the third respondent's involvement, an act to "avert further blows from Thage", and that the pushing between the third respondent and Thage "came about after the insults and attacks by Thage towards the third respondent."

[5] The applicant attacks the award on various grounds. One of these grounds, essentially is a complaint that the applicant did not have a fair trial considering the totality of the circumstances of the incident, and more particularly that the applicant's representative was not given an opportunity to present testimony as to the "seriousness of the offence and the reason why both the third respondent and Thage was subsequently dismissed and justifiably so".

[6] According to the applicant both Mogapi and Thage were senior employees with the third respondent ranking in seniority over Thage and that both were dismissed as they were actively involved in the fighting and/or assault [on one another I take it].

[7] Despite the arbitrator having given the applicant's representative an undertaking that he will be allowed to present evidence on these issues [once again assuming that his evidence would have concerned the applicant's zero tolerance policy towards the kind of conduct displayed by the third respondent].

[8] Counsel appearing for the applicant referred me to various passages in the transcript of the arbitration proceedings relating to the arbitrator's undertaking and the applicant's representative's repeated request to testify with regard to the issues mentioned in paragraph 7. These passages certainly confirm the issue under questioning.

[9] The fact of the matter is however that the arbitrator found that the third respondent's involvement in pushing the applicant was merely designed to 'averting further blows from Thage'. Should this finding turn out to be a decision which a reasonable decision maker could reach, then clearly any complaint about the applicant's representative not having been given an opportunity to testify concerning the seriousness of the offence, the reason why both the third respondent and Thage was subsequently dismissed, and any matter related to a policy of zero tolerance are of no consequence. This is, however, not to say that arbitrators act appropriately when they deliberately ignore a request that further evidence be led without considering the possible relevance of the intended testimony, especially after such an undertaking was given. If circumstances such as these crop up in argument before the arbitrator he should at least deal and answer such an argument which may go a long way in preventing unnecessary review applications. Arbitrators should by now begin to understand that they need to answer and indulge parties before them on matters raised in arguments lest it be found that they did not properly apply their minds in reaching, and very often, far reaching decisions.

[10] The second attack on the award concerns the arbitrator ignoring the fact that it was the third respondent who went to Thage's office to confront him in full view and in the presence of other junior officials. It is obvious from the award that the arbitrator ignored this important fact which may well have led him to come to a different conclusion insofar as the period of retrospective reinstatement of the third respondent is concerned. One may well understand the need of the third respondent wanting to confront Thage concerning the rumours passed on to the third respondent. Was it, however, reasonable for him to do so during working hours and in the presence of other junior officials, and especially considering the senior position which he occupies in relation to the entire workforce. In the above regard the evidence of de Jager (applicant's representative at the arbitration) may very well

have been of some significance. To this extent the arbitrator's failure to abide his undertaking, coupled with de Jager's repeated requests and inquiries to present his evidence precluded the applicant from having a proper and fair trial. That such is an obligation placed on an arbitrator is unambiguously set out in section 194(1) of the LRA.

[11] If the third respondent dealt with the above aspect and concluded that he found the respondent's conduct in this regard as of no consequence for whatever reason(s), his conclusion on this aspect may very well have been a conclusion which a reasonable decision-maker could have reached. Neither the applicant nor this court is privy to the reason(s) why he chose to ignore this particular aspect.

[12] Other than the aspect dealt with above, and after having perused the transcript, coupled with the arbitrator's conclusions on the evidence, I see no reason to conclude that the decision made by the arbitrator that the dismissal of the third respondent was unfair should be interfered with on the principals enunciated by both parties during argument.

In the premises the following order is made;

1. The award insofar as it was found that the third respondent's dismissal was unfair is confirmed.
2. The relief granted by reinstating the third respondent retrospectively for a period of twelve months is set aside and is remitted to the second respondent for consideration *de novo*.
3. I believe that this is not a case where an order for costs should be made in view of both parties being partially successful.

LOUW AJ

Appearances

For the Applicant: Advocate L. Erasmus

Instructed by: Du Randt Attorneys

For the Respondent: D. Cartwright of D. Cartwright Attorneys

LABOUR COURT