

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN DURBAN)

CASE NO: D774/05

NOT REPORTABLE

In the matter between

TOP TURF GROUP (PTY) LIMITED

Applicant

And

LOVEDAY SHEZI

First respondent

DUMISANI GIFT NLANGULELA

Second respondent

PATRICK SANDILE MZINDLE

Third respondent

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION

Fourth respondent

SULLIVAN, PHILLIP LESTER *NOMINE OFFICII*
TRAFALGAR PROPERTY MANAGEMENT (PTY)

Fifth Respondent

LIMITED TRAFALGAR POTS AND GARDENS

Sixth Respondent

JUDGMENT

CELE J

[1] This application is in terms of section 166 of the Labour Relations Act (“the Act”)¹ for an application for leave to appeal against an *ex tempore* decision of this court in a matter dated 19 March 2009. The respondents favoured by the judgment have opposed the application. The application sought to have an arbitration award reviewed and set aside in terms of s145 of the Act.

[2] In addition to the submissions made by the applicant in support of its application for leave to appeal, the applicant has contended that the arbitration award which it sought to set aside, has since prescribed. The award was issued on 1 November 2005. It was made an order of court on 12 February 2007. On 19 March 2009, and just before the review application was heard, this court rescinded its order which made the arbitration award its order in terms of S158 (1) (c) of the Act. The review application was then heard and an *ex tempore* judgment dismissing the review application was issued.

[3] The applicant lodged the present application, subsequently the respondent employees lodged a fresh s158 (1) (c) application on 20 July 2010.

Prescription

[4] The submission by the applicant is that the arbitration award in this matter has prescribed since a period much larger than three years from 1 November 2005 has since passed.

[5] The arbitration award in this matter was an order of this court from the time it was so declared on 12 February 2009 until that order was rescinded on 19 March 2009.

¹ Act No 66 of 1995

In this regard, the applicant submitted that the rescission was *ex tunc*, that is, the award is to be treated as if it never existed and therefore that s158 (1) (c) order had no effect on the running of prescription.

- [6] The s158 (1) (c) order is not the one that was either erroneously granted or erroneously sought in the absence of the parties, nor was the order granted when there was a patent error. Rescission was granted upon good cause shown and to enable the review application by the applicant to be heard. The order of the rescission therefore took effect only from the moment it was granted. It had no retrospective effect. It follows that the s158 (1) (c) application and the order did stop the running of prescription.
- [7] A period of three years has not lapsed since the rescission was granted and therefore the award has not prescribed.

The merits of the application

- [8] Six grounds of appeal were outlined by the applicant namely:

“1) The court *a quo* erred in finding that Thomas lied about the incident and specifically erred in finding that Thomas contrary to the other witnesses (including Potgieter) testified that the driver of Trafalgar vehicle approached Potgieter’s vehicle. Thomas in fact testified as in the case of all the other witnesses that Potgieter, firstly, approached the driver of the Trafalgar vehicle.

- 2) The court *a quo* erred in accepting the conflicting versions of the first to the third respondents and rejecting the untested version of Thomas.³
- 3) The court *a quo* erred in requiring the proof of a physical assault prior to considering the guilt the first to the third respondents of behaviour amounting to derivative misconduct especially as the charges at hand was that of bringing the name of the applicant into disrepute.
- 4) The court *a quo* erred in requiring the applicant to meet a greater onus that of it not being “reasonably practicable” to reinstate the first to third respondents.
- 5) The court *a quo* erred in not making any findings regarding the aspects of procedural fairness with specific regard to the effect such finding would have had on the quantum of compensation.
- 6) The court *a quo* erred in not accepting the submissions forwarded on behalf of the applicant during the course of the hearing of the matter.”

[9] The first three grounds of appeal are about the sufficiency of evidential material in proving the misconduct charges and whether or not the assailants were sufficiently identified to be the three respondent employees. For purposes of this application, I shall assume that the difference in the evidence of Ms Thomas and that of Mr. Potgieter (during the internal disciplinary hearing as he did not testify during the arbitration hearing.) was not material. Ms Thomas could not identify those respondent employees who according to her assaulted Mr. Potgieter. She

conceded that some of the employees remained in the van. This concession simply means that, in the absence of any other evidence to the contrary, the three respondent employees could have been those that remained in the bakkie.

[10] In my view therefore, there is no reasonable prospect of another court reaching a different conclusion on this issue.

[11] The next probe is about whether or not it was practicable to reinstate the employees. The applicant submitted that the court erred in this regard in requiring the applicant to meet a greater onus that, of it not being “reasonably practicable” to reinstate the respondent employees. The applicant’s submissions are unclear in this regard. The judgment demonstrated the practical approach to reinstatement but set no “greater onus”. This submission appears to be baseless.

[12] While the expression “procedural fairness” was not used in the judgment the issue pertaining to it was clearly traversed in the judgment. The respondent employees denied the allegations against them and said that Ms Thomas and Mr. Potgieter had made up a story against them, yet the chairperson of the internal disciplinary hearing found *inter alia* that:

- All had common cause; and
- All jumped out of the vehicle

[13] She admittedly took these considerations into account in finding the employees guilty in the absence of any evidence to that effect. Ms Thomas had not testified. The letter she had written was accepted as evidence by Ms Cook. Against the absence of material and relevant evidence, Ms Cook wanted to know from the employees charged why they did not want to admit responsibility. Her biasness in favour of the applicant was clearly obvious and did not have to be formally voiced by the respondent employees. The evidence on her bias stood out clearly in the record. The substance of paragraph 14 to 16 of the judgment sought to appeal against deals with this issue, in my view; there are no prospects of another court reaching a different conclusion on the issue.

[14] The last ground of appeal is no ground at all for lack of specificity.

[15] Accordingly the following order will issue:

- 1) The application for leave to appeal is dismissed.
- 2) The applicant is to pay the costs thereof.

Cele J.