

IN THE LABOUR COURT OF SOUTH AFRICA

Held in Durban

Case no: D 681/07

In the matter between

CREATIVE WOOD DESIGN CC

Applicant

And

D. ADJODHA

First Respondent

M. MASIPA

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

JUDGMENT

SHAI, AJ

INTRODUCTION

[1] This is an application for the review and setting aside of an award issued by the Second Respondent “**the commissioner**”, dated 24 September 2007 under case no KNDB9010-07 and issued under the auspices of the Third Respondent. The Commissioner had found that the dismissal of the First Respondent was unfair. The First Respondent is opposing the application.

[2] The First Respondent was employed by the Applicant as a driver, and in addition he assisted with loading of vehicles and other aspects as

may be required. He was charged of “unauthorized absence from the firm from the period of 18 June 2007 to 20 June 2007” and dismissed. He challenged the fairness of his dismissal within the auspices of the Third Respondent whereupon the Second Respondent as I said earlier found the dismissal to be unfair and ordered that he be compensated for his dismissal.

THE FACTS

- [3] At arbitration hearing the Applicant led evidence that its managing member, Mr Cominos (“**Cominos**”) received a message on 18th June 2007 from a person who normally travels with the First Respondent, that he had dropped the First Respondent at White House to attend to a private matter, and would arrive at work at 10h00. When he did not arrive at 10h00, Cominos, called him on his cellular number, and when he failed, he called his home telephone line. It was then confirmed that he had gone to the rent office but would report for duty.
- [4] The following day, when he did not arrive again, Cominos phoned and the First Respondent said he had a sore back and would be visiting the doctor the following day. On the fourth day, being the Thursday, the First Respondent reported for duty. At about 12h00, Cominos asked him where he was and he said he had a sore back but he had no medical certificate. As a result Cominos told him that he will hold an enquiry to determine whether that absence was authorised.
- [5] During the course of the day the First Respondent went to the doctor to obtain the medical certificate. The medical certificate

only covered 19-20 June 2007 and not 18 June 2007. Further that it recorded only that the doctor was informed by the First Respondent that he could not perform any work on 19 and 20 June 2007 due to pain. This kind of medical report is not acceptable or *bonafide* in the industry, firstly, because there is no diagnosis and the doctor was visited after the fact. He further testified that the First Respondent had previous warnings and was also sitting on a final written warning for being absent from work without authorisation. The Applicant has a policy which requires employees to get permission to be absent from work and evidence was led that the First Respondent knew about it and had signed for it.

- [6] The First Respondent testified and confirmed that he was dismissed for being absent from work without authorisation and that he did not contact Mr Cominos as he had no airtime. When he was told that at the disciplinary hearing he never mentioned that he had a sore back on 18 June 2007, he said that he did not want to say all at the disciplinary hearing. At the arbitration he insisted that he had a sore back on 18 June 2007 as well. It appears that at the disciplinary hearing he testified that on 18 June 2007 he did not go to work because he had a private matter to attend to.

At the end of the disciplinary hearing he was found guilty and dismissed. He then referred the dismissal dispute to the CCMA and as I said in paragraph 2 above the Second Respondent found the dismissal to be unfair and ordered Compensation in his favour. It is this award that is subject to this review application.

GROUND FOR REVIEW

- [7] The Applicant grounds of review are listed as follows:

- 7.1 The Second Respondent failed to take into account all material which was before her at the arbitration when coming to a decision.
- 7.2 The Second Respondent appeared to have considered that the mere existence of a factual dispute must be inevitably lead to finding that the onus of proving that a dismissal was fair, has not been discharged.
- 7.3 That the Second Respondent has failed to assess the credibility of the witnesses, a consideration of inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of irreconcilable versions before the commissioner.
- [8] From the above it is clear that the Applicant's complaint against the Second Respondent is that she failed to take into account all the material that was before her and that as a result failed to assess the said evidence as a reasonable commissioner should have done. The three criticisms are interrelated.

EVALUATION

- [9] The test for review has been laid out in the well known case of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 [CC]. The court therein held that the provisions of s145 of the Labour Relations Act 1995 ("the LRA") were suffused by the constitutional standard of reasonableness. This is arrived at by answering the question which was formulated

in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* [2004] 7 BLLR 687 [CC] as follows: Is the decision reached by the commissioner one that a reasonable decision maker could reach? To succeed in this application the Applicant must therefore satisfy this court that the Second Respondent's decision is one that a reasonable arbitration could not have reached.

- [10] In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* at para 286 the court said the following on this point. "Where a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitute a gross irregularity in the conduct of the arbitration proceedings, as contemplated by section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed gross irregularity in the conduct of the arbitration proceedings."
- [11] Going through the award it is clear that the commissioner failed to take into account the disciplinary record and evidence which was part or tendered at the arbitration hearing. It was testified at the arbitration hearing that the First Respondent gave the reason of not reporting for duty as being to attend to a private matter which turned to be a rent issue. Indeed going through the record the First Respondent confirmed at the disciplinary hearing that he had to

attend to issues relating to rent and was taken from pillar to post. However, at the arbitration hearing he said that he did not report for duty because he had a sore back including also on 18 June 2007. When he was asked about this contradiction he said he did not want to say much at the disciplinary hearing. It is clear from the award that the commissioner ignored this part of evidence.

- [12] Grogan J. *The South African Law of Dismissal* Juta (2002) at 320 says of the nature of the arbitration hearing:

“Arbitration of unfair dismissal disputes is not merely a review of employer’s conduct, but a full hearing of the merits.”

See also *Gibb v Nedcor Ltd* [1997] 19 ILJ 364. The above statement shows the hybrid nature of the arbitration hearing. That is, as much as it is a fresh hearing in the sense that new evidence may be led, however, evidence that was led at the disciplinary hearing and placed before the commissioner at the arbitration hearing cannot be simply be ignored. It is my view that had the commissioner considered this evidence especially at the time he was weighing the versions of both parties to determine whether the Applicant has discharged its onus to justify the dismissal he would have found that the credibility of the First Respondent would be at stake because of contradictory nature of his evidence and also the fact that he procured the medical certificate after the fact. The issue was whether on 18 June 2007 the First Respondent had authority to be absent from his work. He did not have and offers this contradictory evidence.

- [13] The second ground of review is that the Second Respondent appears to have considered that the mere fact of the existence of a factual dispute must inevitably lead to finding that the onus of proving that a dismissal was fair, has not been discharged. The commissioner, at paragraph 23 of her award says the following:

“It is common cause that on Monday 18 June 2007, the Applicant sent a message through Rajpaul. What is not clear is the nature of that message. On his version, he felt pain on his way to work and asked him to inform Mr Comins that he would not be able to report for duty on that day. Both versions are equally probable and especially because the applicant did not attend work two successive days thereafter”

Mr Comins’s evidence however, was that Rajpaul informed him that the Applicant would be arriving for work at 10h00 and when he did not arrive, he called the Applicant to establish where he was and was informed that the Applicant would arrive for work.

- [14] Had the commissioner taken into account the evidence by the First Respondent at the disciplinary hearing he would have realised that there is clear contradiction in his evidence at the arbitration. At the arbitration he led evidence as aforesaid but at the disciplinary hearing he confirms that he had to attend to a private matter. At page 18 of the index arbitration record bundle of documents the First Respondent testified as follows:

“I had a problem on Monday morning I had to sort out some matters, Mr Cominos is aware of the problem was in terms of me telling him about a week before my accident that I had 14 days in which to pay a sum of R3 000.00 transfer fees... I jumped into the car I said to the guy

please convey a message that I will try to be there I said to him I repeat I will try to be there 10h00.”

This evidence is also consistent with Mr Cominos’s evidence that someone at the First Respondent’s house told him that he had gone to the rent office and will be arriving for work that day. This evidence was led at both the disciplinary hearing and arbitration.

- [15] It is common cause that when a trier of facts is faced with a factual dispute, he has to rely on assessment of the credibility of witnesses. On this point the court in the case of ***SteellenboschFarmers Winery Group Ltd & Another v. Martell et Cie & others (1) SA 11 (SCA)*** said the following:

“to come to a conclusion of the disputed issue a court must make findings on: (a) the credibility of various factual witnesses, (b) their reliability, and (c) the probabilities. As to (a), the court’s findings on the credibility of a particular witness will depend on its impressions on a variety of subsidiary factors, not necessarily in order of importance, such (i) as the witness candour and demeanour in the witness-box; (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version; (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b) a witness’s reliability will depend from the other facts mentioned under (a) ii, vi and v above. On (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability of each party’s version on each of the disputed issues. In the light if the assesment of (a) (b) and (c), the court will then, as a final step, determine whether the party burdened with the onus of proof has

succeeded in discharging it. The hard case which will doubtless be a rare one occurs when a court's credibility findings compel it in one direction and it's evaluation of the general probabilities lies in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail."

[16] The above process is lacking in the award of the Second Respondent. Had the Commissioner assessed the evidence as above he would have made a credibility finding in relation to the contradictory evidence by the First Respondent and certainly an adverse one.

[17] Hence I find that the commissioner committed a reviewable irregularity for failing to take into account all the evidence before him and asses it as a reasonable commissioner would have done.

[18] I have already found above, that the commissioner has failed to take all evidence into account and to asses it as he should. In such circumstances the court shall interfere with the award. In my view, it will serve no purpose to refer the matter back to the CCMA. Taking into the account that the Applicant was on a final written warning for a similar offence I make the following order:

[19] I will substitute the order of the commissioner with the following order:

1. The award issued by Second Respondent dated 24 September 2007 under case number KMDB 9010-07 is reviewed and set aside.

2. The dismissal of the First respondent is substantively fair.
3. I make no order as to costs.

SHAI AJ

DATE OF HEARING : 3 FEBRUARY 2011
DATE OF JUDGMENT : 18 FEBRUARY 2011

Appearances:

On behalf of the Applicant : Mr Roy Monk of LIVINGSTONE
LEANDY INC.
On behalf of the Respondent : Mr T. Sithole of LEGAL AID of
SOUTH AFRICA