



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA

(Held in Johannesburg)

Reportable

Case no: JR3528/09

In the matter between:

COMMUNICATION WORKERS' UNION

First Applicant

KHESWA, M AND OTHERS

Second to Sixth Applicants

and

SA POST OFFICE LIMITED

First Respondent

SWANEPOEL, A N.O.

Second Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Third Respondent

Heard: 18 January 2012

JUDGMENT

MILLS AJ

- [1] This is an application in which the Applicants seek an order to review and set aside the arbitration award issued by the Second Respondent under the auspices of the Third Respondent on 04 November 2009.
- [2] The arbitration award was a result of an arbitration which was conducted in terms of the Labour Relations Act, No 66 1995 ("the Act") in respect of a dismissal dispute between the Applicants and the First Respondent.
- [3] The Applicants seek an order that their dismissals were substantively and procedurally unfair, alternatively, directing that the unfair dismissal dispute be remitted to the Third Respondent for determination by another arbitrator.

Background facts

- [4] For the purposes of this judgment, it is not necessary to analyse and deal in any detail with the factual circumstances surrounding the dismissal dispute. Counsel for the Applicants submitted that the Second Respondent had committed no reviewable irregularity in regard to her analysis and appreciation of the factual matrix giving rise to the dismissal of the Second to Sixth Applicants.
- [5] Nevertheless, in order to appreciate the grounds of review raised by the Applicants it is necessary to set out the facts briefly. The Second to Sixth Applicants were employed by the First Respondent at its Krugersdorp Mail Centre at the time of their dismissals. The Krugersdorp Mail Centre is referred to as the Hub.
- [6] On 11 July 2007, a number of employees of the First Respondent employed

at the Hub stopped working and commenced singing in the canteen. Notwithstanding management's request that the employees return to work, they refused to do so. The employees who had gathered in the First Respondent's canteen at the Hub informed management that their work stoppage was attributable to the difficulties the employees were experiencing with their union officials. Management of the First Respondent contacted representatives of the First Applicant to attend on the Hub to address their membership's grievance.

- [7] At the conclusion of the meeting between the body of employees of the First Respondent who had assembled in the canteen and the union officials of the First Applicant, it was communicated to members of the First Respondent's management that the assembled employees had requested that the union officials convey a message to management that they should not report for duty the next day, on 12 July 2007.
- [8] In response to the threat that they would not report for duty on 12 July 2007, the First Respondent arranged additional security at the Hub for 12 July 2007. Management of the First Respondent was assured that security arrangements had been made for them for 12 July 2007 and that management should attend work on 12 July 2007.
- [9] On 12 July 2007, a group of employees of the First Respondent assembled in the canteen at the Hub. What transpired thereafter and the factual findings made by the Second Respondent based on the evidence prescribed appear not to be in dispute and were not challenged by the Applicants. In summary, on 12 July 2007, the employees of the First Respondent gathered in the canteen and started singing and dancing. The assembled employees then advanced from the canteen towards the administration offices of the Hub to confront management. While some of the management tried to exit the premises, the assembled employees advanced on one of the First Respondent's managers, Mrs Kiloeng Evelyn Riet ("Mrs Riet").
- [10] While advancing on the office of Mrs Riet a number of the members of management of the First Respondent attempted to exit the premises of the Hub. Mr Kabelo Gerald Mokgatle ("Mr Mokgatle"), who was coming to

investigate the commotion, was confronted by the advancing group of employees.

- [11] The identified individual applicants thereupon set about assaulting Mr Mokgatle. Mr Mokgatle appears to have been lucky to have escaped serious injury and he managed to escape.
- [12] The employees, including Second to Sixth Applicants, thereafter turned their attention on Mrs Riet and set about assaulting her. The security personnel of the First Respondent managed to intervene and save Mrs Riet from serious bodily harm, albeit not before she did suffer minor injuries.
- [13] A member of the security personnel who intervened to protect Mrs Riet was also assaulted by the employees including the Second to Sixth Applicants.
- [14] The First Respondent's security, with the assistance of the South African Police Services, ultimately restored order.
- [15] As a result of the assault which had taken place on 12 July 2007, the second to sixth Applicants were placed on paid suspension after the individual applicants had been identified.
- [16] The Second to Sixth Applicants were charged with assault and attempted assault as a result of the attack on Mr Mokgatle and Mrs Riet. The Applicants were all found guilty of misconduct and were dismissed from their employment on or about 03 November 2008.
- [17] The Second to Sixth Applicants, represented by the First Applicant, the representative trade union, referred a dispute for alleged unfair dismissal to the Third Respondent on 14 November 2008.
- [18] The arbitration hearing commenced on 22 June 2009 and was postponed to various dates. The hearing was concluded on 09 October 2009. On 04 November 2009, the Second Respondent issued the arbitration award which is the subject of this review application. The Second Respondent held that the dismissal of the Second to Sixth Applicants were procedurally and

substantively fair.

[19] On 24 December 2009, the Applicants launched the review application.

[20] Under the heading "Grounds of review", the Applicants submit that the Second Respondent committed a number of reviewable irregularities in arriving at the conclusions which she made in her arbitration award. In summary, it was contended that the Second Respondent:

20.1 failed to advise the union official, as a labour representative, of the implications of not putting various allegations to the employer's witnesses. It is submitted that the failure to advise the union official accordingly amounted to gross misconduct in relation to her duties as a Commissioner;

20.2 committed gross irregularities in that she had made findings about whether an assault was committed on 11 July 2007 based on the actions of the union representative and not that of the Applicants;

20.3 did not approach the case in a disinterested and objective manner but allowed herself to be influenced by extraneous factors such as her evaluation of the union officials moral character compared to that of Mr Mokgatle and Mrs Riet; and

20.4 in making findings about such issues, should took account of evidence and issues which are not material to the fairness of the Applicants' dismissals or to the evaluation of the evidence before her.

20.5 in failing to consider the medical examination conducted on Mrs Riet, which did not show any evidence of any injuries on her body other than her hands, the Second Respondent failed to consider material evidence on an important issue in the enquiry, namely whether Mrs Riet was assaulted which amounts to misconduct in relation to her duties as an Arbitrator;

20.6 failed to consider the documentary evidence pertaining to the alleged postal of delivery of the Notice of Enquiry, which did not demonstrate that the notices were in fact received; and

20.7 failed to consider whether the suspension of the individual constituted an unfair labour practice.

[21] On 28 October 2010, the Applicants filed a Notice in terms of Rule 7(a)(8)(b) in which the Applicants indicated that they stood by their Notice of Motion and Founding Affidavit.

[22] At the commencement of the argument by Counsel for the Applicants, I was informed that the Applicants no longer took issue with any of the factual findings made by the second Respondent.

[23] In other words, I understood the Applicants to have abandoned the grounds of review which suggested that the second Respondent had committed a gross irregularity in the conduct of the proceedings in making any findings about whether an assault was committed or in regard to the second Respondent's evaluation of the evidence presented to her during the arbitration hearing.

[24] Counsel for the Applicants, Mr Ngcukaitobi, in a very eloquent and well-reasoned argument, indicated that the Applicants only relied on one reviewable irregularity by the Second Respondent. This reviewable irregularity was premised on the grounds that the Second Respondent, in her arbitration award, had neither understood nor applied the test in *Sidumo*.¹ In particular, I was referred to paragraph 78 of the *Sidumo* judgment in which Acting Justice Navsa (as he then was) stated.

[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long service record. This is not an exhaustive list.

¹ See *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* 2008 (2) BCLR 158 (CC)

[79] To sum up, in terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner was not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision the Commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[25] Mr Ngcukaitobi also referred me to the case of Edcon Limited v Pilemmer NO and Others².

[26] In particular, I was referred to paragraph 23 of the *Edcon* judgment where Mlambo J A stated:

'It is inevitable that courts, in determining the reasonableness of an award, have to make a value judgment as to whether a commissioner's conclusion is rationally connected to his/her reasons taking account of the material before him/her. That this is the correct approach has been stated on a number of occasions by the LAC, this court in the Sidumo matter as well as the Constitutional Court in the same matter. In my view, Pillemer's finding that Edcon had led no evidence showing the alleged breakdown in the trust relationship is beyond approach. In the absence of evidence showing the damage, Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly found to be unfair. She cannot be faulted on any basis and her conclusion is clearly rationally connected to the reasons she gave, based on the material available to her. She did not stray from what was expected of her in execution of her duties as a CCMA arbitrator....'

[27] Mr Ngcukaitobi argued that no evidence was presented by the First Respondent to prove that the trust relationship between the First Respondent and the Second to Sixth Applicants had been breached. In the context of this matter, it would be necessary to consider the relationship between the employees' assault and continued employment, and the bearing of such factors as long service.

[28] Mr Ngcukaitobi referred me to the case of *De Beer's Consolidated Mines Ltd*

² [2010] 1 BLLR 1 (SCA) and specifically those paragraphs in the judgment dealing with evidence which is required to be adduced to show an alleged breakdown in a trust relationship.

*v CCMA and Others*³ where Conradie J A considered the relationship between an employee's dishonesty and continued employment and the bearing of such factors as long service. Conradie J A stated:

'The seriousness of dishonesty- ie whether it can be stigmatized as gross or not - depends not only, or even mainly, on the act of dishonesty itself, but on the way it impacts on the employer's business'.

- [29] Mr Ngcukaitobi further argued that there was no evidence in the arbitration award of the Second Respondent that she had considered a relationship between the Applicants' assault and continued employment. The Second Respondent had not considered the factors such as long service and, relying on the *Edcon* judgment, that evidence showing the adverse impact of the assault, if any, on the business of the First Respondent was critical.⁴
- [30] Mr Ngcukaitobi went on to point out that the Second Applicant had 21 years of service as appears from the arbitration award. However, the years of service of the Third to Sixth Applicants was neither dealt with in the arbitration award and neither was the evidence adduced by the Second Respondent during the arbitration hearing.
- [31] Mr Ngcukaitobi also went on to argue that the Second Respondent had not posed a single question which she was required to do so in terms of the *Sidumo* judgment, namely, whether the dismissal of the Applicants was fair or not.
- [32] Counsel for the Respondent, Mr van As, pointed out that the grounds of review submitted on behalf of the Applicants had not been pleaded by the Applicants in the founding papers or in reply to the Respondents answering affidavit. Mr Van As further argued that the grounds for review cannot be implied from the submissions contained in the founding affidavit filed in support of the review application. Simply put, Mr Van As contended that the founding papers did not support the contentions advanced by the Applicants in argument before the Court.

³ (2000) 21 ILJ 1051 (LAC) at para 17-27 [also reported at [2007] 12 BLLR 1097 (LAC) at para 25.

⁴ See *Edcon Ltd v Pilemma NO and Others* (Supra) at para 20

- [33] I have scoured both the affidavits in the review application and the Heads of Argument filed on behalf of the Applicants and I cannot find a single averment in the founding affidavit, the replying affidavit or the Heads of Argument which even remotely establish a connection to the grounds of review eloquently argued by Mr Ngcukaitobi in Court.
- [34] The case which the Respondents are required to meet in Court is not made out, explicitly or by implication, in the founding papers to the review application. The Respondents' answering affidavit was not directed to countering a review on the grounds raised by the Applicants in Court. Neither has the commissioner been given the opportunity to consider this attack and formulate a response to it.
- [35] The application must succeed or fail on the basis of the grounds of review set out in the founding papers. All of these are directed to show that the Second Respondent misdirected herself in regard to her evaluation of the evidence. In particular, that the Second Respondent misdirected herself in finding that the Second to Sixth Applicants assaulted Mrs Riet and Mr Mokgatle. These grounds of review were abandoned at the commencement of the Applicant's argument.
- [36] The grounds of review relied upon by the Applicants at the hearing of the review application had to be raised in either the founding affidavit or the supplementary affidavit as contemplated in rule 7A (8)(a) of the rules of this Court. The Applicants failed to do so.
- [37] This is a review application by which proceedings are launched by way of notice of motion. In such cases it is the founding affidavit and supplementary affidavit which a judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas*⁵ and has been said in many other cases:

'.... An applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the

⁵ 1924 WLD 67 and 68.

application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny’.

[38] The *dictum* in the *Pountas’ Trustees* case above was approved by the Supreme Court of Appeal in the case of *Director of Hospital Services v. Mistry*⁶.

[39] It follows that the Applicants in this matter could not extend the grounds of review by making fresh submissions from the bar. These grounds of review have not been available to the Respondents to affirm or deny and do not form part of the issues raised in the review application.

[40] To again make the point, Molahleli J, in this Court, in the case of *Northam Platinum Ltd v Fganygo NO and Others*⁷ stated that:

‘In my view, the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies on in challenging the reasonableness or otherwise of the commissioner’s award in his or her founding affidavit.’

[41] Recently the Constitutional Court has reaffirmed this reasoning in the case of *Betlane v Shelly Court CC*.⁸ The Constitutional Court restated the reasoning that a case must be made in the founding papers, but then the Court made an exception to that rule because of the special circumstances surrounding that case. In the case of *Betlane* the original complaint was filed by a lay person who did not have the benefit of legal assistance until it was time to file the replying affidavit. Because of this fact, the Court allowed the party to make the complaint for the first time in the replying affidavit. At all material times, the Applicants in this review application were legally represented and the exception referred to in the said case would not be applicable in this application.

[42] The precedent seems quite clear that a party must state all grounds for review in its opening papers. There is at least one narrow exception to this

6 [1979] 1 All SA 292 (A) at page 300.

7 (2010) 31 ILJ 713 (LC) at para 27.

8 2011 (1) SA 388 (CC) at 29.

rule, but that exception is limited to special circumstances where legal assistance was initially inadequate.

[43] I am persuaded, and no argument was presented to me otherwise, that there are no special circumstances that would permit an exception to the general rule in this application. Moreover, in this case the revised grounds for review were not presented until the application was argued in open court. The courts have adopted such a strict standard in order to avoid any unfairness to the opposing party. To acknowledge the new grounds for review in this application would seem especially unfair to the Respondents.

[44] I therefore conclude that the application to review must fail.

[45] In the result I make the following order:

1. The application is dismissed with costs.

T E Mills

Acting Judge of The Labour Court

Judgment handed down by Waglay AJP on 13 July 2012.

APPEARANCES:

FOR THE APPLICANTS: T Ngcukaitobi

INSTRUCTED BY: Cheadle Thompson & Haysom

FOR THE FIRST RESPONDENT: M Van As

INSTRUCTED BY: Howes Incorporated