



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1090/2011

In the matter between:

JOHANNES PETRUS DIEDERIK

VAN DER WESTHUIZEN

Applicant

and

GOLD ONE AFRICA LIMITED,

MODDER EAST OPERATION

First Respondent

COMMISSIONER THABO SEKHABISA

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: 26 October 2012

Delivered: 06 December 2012

Summary: Review application- Commissioner failing to consider the seriousness of the offence and whether the offence has resulted in the breakdown in the relationship between the parties.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number GAEK 4340/10, in terms of which the dismissal of the applicant was found to have been for a fair reason and the dismissal of the applicant by the third respondent was accordingly confirmed.
- [2] The applicant has also applied for condonation for the late filing of the Rule 7(A) notice. Having regard to the explanation proffered, I see no reason why condonation should not be granted.

Background facts

- [3] The applicant was charged with the assault of a fellow employee, Mr Ciko, who at the time was a shop steward of the NUM. The alleged assault occurred at the shift manager's office. According to the applicant, Mr Ciko entered the shift manager's office without knocking at the door. The applicant told Mr Ciko that they were busy in the meeting upon which he (Ciko) approached him aggressively and enquired from the applicant whether he wanted to assault him.
- [4] The applicant testified during the arbitration hearing that whilst busy in the meeting with the mine overseer, Mr Ciko entered the office without knocking. He further testified that he placed his hand on Mr Ciko's, chest as he was entering the room and indicated to him that they were busy with a meeting. Ciko according to the applicant only left the office after being told do so by the mine captain. He was thereafter informed a month and six days later that he was dismissed for allegedly assaulting Mr Ciko.
- [5] In relation to the notice to attend the disciplinary hearing, the applicant stated that he was approached by Ms Mokoena who told him to go to the office to sign for the notice of the disciplinary hearing. He refused to go

and collect the notice as according to him the incident occurred more than a month ago at that stage.

- [6] The disciplinary hearing was accordingly conducted in the absence of the applicant. The applicant was found guilty and dismissed and the subsequent internal appeal was also unsuccessful.
- [7] The applicant being unhappy with the outcome of the internal disciplinary proceedings referred an alleged unfair dismissal dispute to the CCMA which was, subsequent to failure of the conciliation, arbitrated by the Commissioner.

Grounds for review

- [8] The applicant has raised several grounds of review which is not necessary to repeat in this judgment as in my view the crucial issue in this matter is whether the decision of the Commissioner, was reasonable or otherwise. In broad terms, the applicant contends that the arbitration award is reviewable because the Commissioner committed a gross irregularity in the conduct of the proceedings, exceeded his powers and that the decision he reached was unreasonable.

The arbitration award

- [9] The Commissioner, in his analysis of the evidence which was before him, found that the applicant was paraded on 11 November 2010 and further that he was issued with the notice to attend the disciplinary hearing on 12 November 2010 by Ms Mokoena. The Commissioner further found that the applicant was aware of the time, date and venue where the disciplinary hearing would take place.
- [10] As concerning the assault, the Commissioner found that the applicant did not dispute having grabbed Mr Ciko by his clothes and pushed him against the wall whilst he (Ciko) was trying to resolve the dispute on behalf of another employee. In this respect, the Commissioner accepted the version of Mr Ciko and found that he (Ciko) was assaulted by the

applicant. It was for this reason that the Commissioner found the dismissal of the applicant to have been for a fair reason.

Points in limine

[11] The third respondent has raised two points *in limine*. The applicant did not pursue the second point. The first point concerns the *locus standi* of the deponent to the founding affidavit which, in my view, is in sustainable. The third respondent contends that there is no proof that the applicant was authorised to attest to the founding affidavit. The issue of *locus* standing of a person attesting to a founding affidavit received attention in this Court in the unreported matter in *Prime Media v Mchunu*.¹ In answering the same question as is the case in the present instance, the court quoted with approval the decision of the Supreme Court of Appeal in the matter of *Games and Another v Telkom Namibia*² where it was held that:

[19] ...The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.'

Evaluation

¹ Case no: JR 157/2011

² 2004 (3) SA 615 (SCA) at para 19.

- [12] It is common cause that Ms Mokoena approached the applicant and informed him that there was a notice for him to attend a disciplinary hearing, and required him to sign for at some office. The applicant refused to go and sign for the notice because as stated earlier he contended that the incident for which he was been charged for had occurred more than a month ago. He conceded during cross examination that he was fully aware of the incident for which he was required to sign the disciplinary notice for.
- [13] The applicant contended firstly that he was not paraded in terms of the policy of the respondent and secondly he disputed that he was served with the charges on the day he was approached by Ms Mokoena.
- [14] Initially Ms Mokoena stated that she had paraded the applicant, but later conceded that the applicant was not paraded and that is why she approached him to hand the notice of the disciplinary hearing. This in my view placed the credibility of the testimony of Ms Mokoena into questioning to the issue of whether the applicant received a proper notice to attend the disciplinary hearing.
- [15] It would appear from the reading of the record that Ms Mokoena presented conflicting versions in relation to the issue of whether she did serve the notice of the disciplinary hearing and also whether she had paraded the applicant. The Commissioner accepted her evidence without dealing with these contradiction which was an important aspect in as far as the procedural fairness was concerned.
- [16] In my view, the Commissioner ought to have rejected Ms Mokoena's version with regard to these two issues. It seems to me that on the facts and the circumstances of this case the applicant should have been paraded, at least so that he was made aware that the disciplinary hearing would proceed without him. I say this on the basis that Ms Mokoena told him about the disciplinary hearing verbally and also that he was never paraded. In other words, even if the requirement for convening a disciplinary hearing was to be disregarded, the minimum requirement that the respondent ought to have met to satisfy the standard of fairness

was to have called the applicant on the day of the hearing and informed him that the disciplinary hearing would proceed without him. In this regard, it was not disputed that on the day of the hearing the applicant was present at work.

- [17] The complainant never answered the question as to why was his complaint not lodged within 48 hours after the incident. The essence of this question as I see it is if indeed the complainant regarded the alleged incident that happened to him as serious, why did it take him so long to lodge his complaint. It would appear from the record of the proceedings that it was common cause that the report about the assault was made more than a month after it occurred. The explanation for the delay in reporting or instituting the disciplinary proceedings was crucial because that goes not only to the procedural aspect of reporting the incident but to how serious the complainant regarded the incident itself. The delay in instituting the disciplinary hearing also has a bearing and ought to have been taken into account by the Commissioner in considering the impact that the incident had on the relationship between the parties. It is not clear from the record as to what date did the complainant lodge his complaint. It would appear from his answers during cross examination that the complaint was reported sometime after the occurrence of the incident. There is no evidence from the respondent as to why it took so long to institute the disciplinary proceedings.
- [18] The above facts are also important and ought to have been taken into account by the Commissioner in determining whether the dismissal was an appropriate sanction. It is apparent from the reading of the arbitration award that the Commissioner failed to consider whether on the facts and the circumstances of this case the dismissal was an appropriate sanction. The Commissioner failed also to determine whether the relationship between the parties had irretrievably broken down.
- [19] In my view, the only reasonable inference to be drawn from the above analysis is that the first respondent did not regard the incident as serious enough to warrant prompt attention. It, therefore, follows that the offence could not have been regarded by the first respondent as serious enough

to warrant a dismissal because if it did then the attention to it would have been prompt. In other words, the offence was not serious enough to break down the employment relationship between the parties. In fact, except for mentioning that the relationship between the parties had broken down during the closing submission by the representative of the respondent there is no evidence presented by the respondent in this regard.

[20] In light of the above analysis, I am of the view that the applicant has made out a case warranting interference with the arbitration award on review. I am, further, of the view that it would not be in the interest of expeditious resolution of this dispute to remit it back to the CCMA. There is sufficient material before this court to assist in determining the matter. I also do not see why costs should not be allowed to follow the results.

Order

[21] In the premises, the following order is made:

21.1 The arbitration award made by the second respondent under case number GAEK 4340/10, is reviewed and set aside.

21.2 The arbitration award is substituted with the following order:

21.2.1 The dismissal of the applicant, Mr Van Der Westhuizen, was both substantively and procedurally unfair.

21.2.2 The respondent, Gold One Africa, Modder East Operations is ordered to reinstate the applicant without loss of benefit and with back pay to the date of the dismissal.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr J C M Roets of Roets & Du Plessis Attorneys

For the Respondent: Mr I D Gwaunza of Edward Nathan Sonnenbergs

LABOUR COURT