



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR77/11

In the matter between:

RUSTENBURG PLATINUM MINE LIMITED –

UNION SECTION

Applicant

and

VILJOEN, D.H.

First Respondent

RAMOTSHELA, MATHEWS, N.O

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Date of hearing : 09 July 2013

Date of judgment: 11 July 2013

Summary: Arbitration award reviewable in so far as the Commissioner awarded reinstatement while the employee indicated that he did not seek reinstatement. The court confirmed compensation amount equivalent to what the Commissioner awarded as back pay to be a fair compensation.

JUDGMENT

BALOYI AJ

Introduction

[1] The Applicant is seeking to review and set aside the arbitration award made by the Second Respondent wherein the dismissal of the First Respondent was found to be procedurally fair and substantially unfair. The Second Respondent awarded relief of reinstatement coupled with back pay equivalent to six months remuneration. The award follows the First Respondent's referral of unfair dismissal dispute to the CCMA which was ultimately arbitrated by the Second Respondent. Both the review application and the opposition were filed out of time and the parties applied for condonation of such lateness. The representatives of both parties agreed not take issues against each other in this respect, they wished to have the matter dealt with on its merits.

Background facts

[2] The brief facts of the matter is that, the First Respondent was dismissed for having uttered racial remarks towards Shopstewards at a work place which included the use of "K" word. The three Shopstewards testified in support of the Applicant's case to the effect that they heard the remarks in question from the First Respondent who appeared to have been angry at the moment of such utterances. The First Respondent denied making any racial remarks as he only spoke to one Alfred Tshepo Phefo when enquiring about procedures applicable for release of Shopstewards. According to the Applicant's case, the remarks were made after Phefo told the First Respondent that his enquiries should rather

be directed to the Employee Relations Officer. Motlatsi Letsa, one of the three witnesses of the Respondent witnessed an incident wherein the First Respondent was requested by Phefo to remove his hand from Phefo's computer and the First Respondent responded by uttering racial remarks.

[3] The second Respondent's finding of the unfairness of the dismissal was based on the fact that the Applicant's three witnesses who were in the same office which is the scene of misconduct differed about the source of the First Respondent's anger which led to the remarks. According to Phefo and Tshabalala the racial remarks were made for no reason while according to Letsa the request by Phefo to have the First Respondent's hand removed from the computer triggered the insults. The Second Respondent found this as a discrepancy in the evidence of the Applicant and went on to make a finding which is subject matter of this application.

[4] The Applicant's grounds of review are based on the fact that the commissioner reached conclusions that are not rationally justifiable which no reasonable decision maker would have reached. The grounds were backed by facts in sequence of what transpired at the time of misconduct. It is not worthwhile to repeat them herein save to point that the Applicant's submissions amongst others are that; The Second Respondent was required to determine whether the First Respondent was guilty of the offence charged with, in so doing it was his duty to weigh the evidence presented by the parties against each other. The Second Respondent lost focus on what he was to determine, the

speculative assessment of the First Respondent's mind could not be a determining factor on whether the words were uttered.

[5] Ms Hanif for the applicant emphasized that the Second Respondent's finding is indicative of his failure to properly weigh evidence placed before him. Ms Schonken for the Third Respondent submitted that the issue of burden of proof was more determining on whether the remarks were uttered or not. The burden rested on the Applicant. In the light of the First Respondent's abandonment of relief of reinstatement at the commencement of arbitration proceedings, Ms Schonken conceded that the awarding of reinstatement was not based on what was placed before the Second Respondent.

Evaluation

[6] It is trite that the court in scrutinizing the award it should not expect that commissioners should apply mathematical precession towards their decision making process. The Second Respondent appears to have given clear reasons (though not in a simple language) for his finding. What can be extracted from the award and the record is that there were mutually destructive versions from the parties. The Second Respondent's finding against the Applicant (who had a burden of proving the fairness of the dismissal) is not the one which a reasonable decision maker could not reach. The discrepancy in the Applicant's evidence according to the Second Respondent in respect of the touching of the computer which was seen differently or not seen at all by other witnesses justifies the Second Respondent's arrival at the decision made. Having been faced with mutually destructive versions by witnesses the Second Respondent was

therefore entitled to accept the Respondent's evidence as more probable or consistent see *Masilela v Leonard Dingler (Pty) Ltd*¹.

[7] In this regard the award of the Second Respondent does not deserve to be interfered with in so far as his finding on unfairness of the dismissal is concerned. The worrying issue is the reinstatement relief awarded. The Second Respondent clearly recorded it at the commencement of arbitration proceedings that the First Respondent was not seeking reinstatement and the First Respondent confirmed same. His awarding of reinstatement despite First Respondent having not asked for, constitutes an irregularity which warrants correction of the award but not to be entirely set aside. Since reinstatement has fallen away the only relief available to the First Respondent is compensation. An equivalent of six months remuneration as determined by the Second Respondent when awarding back pay based on the period which the First Respondent was out of work between the date of dismissal and the award is fair and reasonable. There is no need to interfere with the quantum save to say that it is no longer back pay but compensation. This is not a matter which calls for a cost order against any of the parties as there is partial success on both of them.

[8] With regard to condonation applications by both parties in respect of the review application and answering affidavit, I am inclined to grant such applications with no order as to costs.

Order

¹ (2004) 25 ILJ 544 [LC] at paragraph 29

[9] In the premises, the following order is made;

8.1. The late filing of the review application and late filing of first Respondent's answering affidavit are condoned,

8.2 The review application is dismissed in part and upheld in part,

8.3. Part of the arbitration award relating to the relief is reviewed and set aside and replaced with the following one;

8.3.1. The dismissal of the First Respondent is found to be unfair,

8.3.2. The Applicant is ordered to pay the First Respondent R123 420-00 which is an equivalent of six months remuneration within 14 days of this order,

8.4 I make no order as to costs.

BALOYI AJ

Appearances:

For the Applicant:

Ms S Hanif of Edward Nathan & Sonnenbergs Attorneys

For the First Respondent:

Ms Schonken of Shonken Incorporated