



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not reportable

Case no.:JR2283/09

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

RAMOTSHELA, M, N.O

Second Respondent

NATIONAL UNION OF MINEWORKERS

Third Respondent

MWACHANDA, M.M

Fourth Respondent

Heard: 7 January 2014

JUDGMENT

WILKEN, AJ

Introduction

- [1] This is a review launched by the Applicant (“the Company”) in terms of Section 145 of the Labour Relations Act, 66 of 1995 (“the LRA”) to review and set aside the arbitration award handed down by the Second Respondent (“the Commissioner”) in case NW 6265/08 dated 9 June 2009. The Company is seeking an order that the matter be referred back to the First Respondent (“CCMA”) for arbitration to be heard before a commissioner other than the Second Respondent.

Background Facts

- [2] The Fourth Respondent (“the Employee”) was dismissed following a disciplinary hearing having been found guilty of the following complaints:
- 2.1 ‘assault and/or fighting;
 - 2.2 not working according to established standards and procedures in that you negligently omitted to report a breakdown on an LHD machine; and
 - 2.3 insulting and/or abusive language”
- [3] The Employee unsuccessfully lodged an internal appeal and referred a dispute concerning his alleged unfair dismissal to the CCMA. After the dispute was unsuccessfully conciliated, the dispute was referred to arbitration and the Commissioner held that the dismissal of the Employee was substantively unfair issuing an award that the Employee be re-employed on the same terms and conditions of employment as at date of his dismissal with effect from 1 August 2009. Given the award, the Employee received no payment from date of dismissal to date of re-employment.
- [4] The genesis of the complaints against the Employee arises from a series of events on 6 August 2009 during night shift when the Employee’s shift supervisor, Petrus Hendrik Muller (“Muller”) found the Employee stationary in a load haul dumper (“LHD”). Muller enquired from the Employee why the

LHD was stationary. The Employee informed him that he had a breakdown. Muller was clearly unhappy that the Employee remained in the LHD and did not report the breakdown so that the LHD could be fixed. Muller responded that the Company would lose money if the LHD was not operated which would result in Employee not making his bonus as it was unlikely the required target would be achieved.

- [5] Muller left the Employee's work area, but later during the evening the Employee approached Muller who was in the presence of a miner, Benny Stander ("Standar"), at the time. Muller was sitting on a 5 litre tin of paint and a discussion ensued between Muller and the Employee concerning the Employee's likely loss of money as a result of the LHD being operational. It is common cause that the Employee then swore at Muller.
- [6] The Employee contends that Muller thereupon assaulted him by hitting him in the face whilst Muller and Standar denied such assault and contended that Muller responded politely by saying "thank you" repeatedly.
- [7] Both Muller and Standar testified that the Employee attempted to hit Muller with a pinch bar at first, but Standar intervened and took the pinch bar away from the Applicant. Thereafter, the Applicant hit Muller with a jumper (which is a steel pole approximately 1.2 meters long and 20mm in diameter). Once again Standar intervened and dispossessed the Employee of the jumper, whereafter the Employee left. The Employee returned shortly afterwards and then attempted to hit Muller with an 8 pound hammer. Again, Standar intervened and removed the hammer from Applicant, whereafter Muller left the scene. The Employee denies having attempted to assault Muller with the pinch bar and/or the hammer, but admits having struck Muller with the jumper. Most notably the Employee stated in his evidence that it was unfortunate that a pillar lessened the blow when he struck Muller.
- [8] At the pre-trial conference, the Employee admitted the assault upon Muller, but contended that he acted in self-defence.

[9] Arising from the incident, Muller was also called to a disciplinary hearing and a joint disciplinary hearing was conducted arising from the events described above by the same Chairman.

[10] Muller was put to answer the following complaints:

2.4 'assault and/or fighting; and

2.5 making of racial remarks towards a fellow Employee'.

[11] Muller was found guilty of assaulting or fighting, but not guilty of making racial remarks towards the Employee. Muller's appeal against his finding of guilt was successful, but strangely enough the chairperson found him guilty of "unacceptable behaviour", which was not one of the complaints he was called upon to answer or found had committed at the disciplinary hearing.

[12] At the arbitration the Employee also challenged its dismissal on the basis of inconsistency given the sanction imposed by the Company upon Muller.

[13] At the arbitration the Employee called witnesses who testified that Stander had confided in them after the event that Muller had treated the Employee badly and by inference, had sworn at him. The nub of the evidence was that Muller had acted in an abusive racial manner towards the Employee."

The arbitration award

[14] The Commissioner identified the two irreconcilable versions concerning the alleged assaults the allegation of racial abuse. The Commissioner proceeded to deal with the irreconcilable versions by concluding that Muller and Stander's version concerning Muller's response to the Employee swearing at Muller was improbable, and on that basis rejected the evidence of both Stander and Muller. The Commissioner accepted the Employee's evidence as "a more plausible version", but found whilst he acted in self-defence he exceeded the bounds of self-defence.

The Law

[15] The test to be applied when faced with two irreconcilable versions is well established and requires the arbitrator to make findings on the credibility and reliability of the witnesses as well as the probabilities.¹

[16] When assessing the credibility of witnesses, a variety of factors need to be taken into consideration, namely:

- 2.6 the witness' candour and demeanour in the witness box;
- 2.7 the witnesses' bias, latent and blatant;
- 2.8 internal contradictions in the witnesses' evidence;
- 2.9 external contradictions with what was pleaded or put on behalf of the witnesses, or with established fact, or with his own extra curial statements or actions;
- 2.10 the probability or improbability of a particular aspect of the witnesses' version; and
- 2.11 the calibre and cogency of the witnesses' performance compared to that of other witnesses testifying about the same incident or events.

[17] Insofar as the assessment of witnesses reliability is concerned, most of the factors mentioned above, and in particular the following factors, must be considered:

- 2.12 the witness' bias, latent and patent;
- 2.13 external contradictions with what was pleaded or put on the witnesses' behalf, or with established fact, or with the witnesses' own extra curial statements or actions;

¹ *SFW Group Limited & Another v Martel Et Cie & Others* 2003 (1) SA 11 SCA.

2.14 the probability or improbability of particular aspects of the witnesses' version;

2.15 the opportunity the witness had to experience, or observe the event in question; and

2.16 the quality, integrity and independence of the witnesses' recall thereof.

[18] With regard to assessing the probabilities, this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed facts.²

Assessment

[19] In coming to the credibility finding, the Commissioner failed dismally in conducting the aforesaid analysis. Not only did he fail to apply the analysis, but failed to recognise that most of the Employee's case surrounding the alleged historical bad treatment by Muller of him and other Employees, the alleged racial abuse he suffered, his version of only having assaulted or attempting to assault Muller with the jumper as a result of him having been provoked (provocation never formed part of the Employee's case) was never put to Muller or Stander.

[20] The Commissioner failed to assess the evidence before him holistically to come to the conclusion which version to accept, having realised that there were two irreconcilable versions.

[21] By failing to adopt the correct approach in dealing with the two irreconcilable versions, the Commissioner misconceived the nature of the enquiry he had to conduct. When a Commissioner fails to have regard to the material facts before him, the Commissioner fails to perform his mandate and in doing so his conduct constitutes a gross irregularity in the conduct of the arbitration proceedings as envisaged in Section 145(2)(a)(ii)

² SFW Supra, page 14 I to page 15 D and *Masilela v Leonard Dingler (Proprietary) Limited* 2004 25 ILJ 544 (LC) at para. 29.

of the LRA.

- [22] The Commissioner's decision is only subject to review, even having committed a gross irregularity as contemplated by Section 145(2)(a)(ii), if his award is one a reasonable arbitrator could not reach on all the material before the arbitrator.³
- [23] The Commissioner in essence found that the Employee was not guilty of assault on the basis that the Company had the onus to prove the assault. The Commissioner not only incorrectly rejected the evidence of Muller and Stander, but also found that Muller's racial abuse of the Employee provoked him to swear at Muller, which resulted in Muller assaulting the Employee on the probabilities, triggering the Employee's assault, such assault constituting self -defence.
- [24] The Commissioner's finding that Muller had racially abused the Employee which in turn provoked the Employee to swear at Muller, triggering in the assault by the Employee upon Muller is fatally flawed. The Commissioner's finding that the Employee was indeed racially abused is not sustainable as the racial abuse was never put to Muller or Stander. Furthermore, the Commissioner's approach of considering it to be academic to deal with the evidence of the Employee's witnesses in relation to Stander allegedly confiding in them that Muller had racially abused the Employee also amounted to a gross irregularity in the conducting of the hearing. Given his finding of the evidence of Stander that Muller had treated the Employee poorly was not academic at all.
- [25] The Commissioner further erred in failing to appreciate the bounds of self-defence. He concludes that the assault by the Employee upon Muller exceeded the bounds of self-defence. It is trite that where a defender uses more force that is reasonably necessary to repel an attack, the defender would be guilty of assault on the attacker and the defender would not be

³ *Herholdt v Nedbank Limited* (2013) 34 ILJ 2795 SCA and *Goldfields Mining SA (Pty) Ltd v CCMA and Others* (JJA2/2012) [2013] ZALAC 28 (0411/2013).

able to rely on self-defence.⁴

[26] The Commissioner accordingly committed a gross irregularity in assessing the evidence and did not apply the correct approach to evaluate whether the Employee's actions amounted to self-defence which, viewed objectively, renders the award unreasonable.

[27] It is evident from reading the transcript and the documents tabled in the arbitration proceedings, that many issues require careful examination in relation to the alleged racial remarks by Muller, his alleged poor treatment of the Applicant, the possibility of inconsistent treatment between Applicant and Muller. In the circumstances it would be appropriated to set aside the arbitration award and refer the matter back to the First Respondent to be considered by another Commissioner.

[28] Miss Tolmay on behalf of the Company advised that she was instructed to seek the Company's costs in the event of it being successful. The basis upon which costs were being sought was that the Employee and the union had sufficient time to reflect upon the application for review and ought to have realised that the opposition to the review was without justification. The issue of costs in Labour Court proceedings depends on law and fairness. Policy considerations requires the Labour Court to adopt an approach which would not deter litigants from defending or prosecuting *bona fide* actions for fear of adverse costs awards.⁵

[29] Accordingly, I issue the following order:

1. the arbitration award issued by the Second Respondent in Case NW 6265/08 dated 9 June 2009 is reviewed and set aside;
2. the First Respondent is directed to enrol the dispute for arbitration for hearing before a different Commissioner at the earliest possible opportunity;

⁴ *S v Ntuli* 1975 (1) SA 429 (A) at 437.

⁵ *MEC for Finance, Kwa Zulu-Natal and Another* [2008] 6 BLLR 540 LAC.

3. there is no order as to costs.

[30] No special circumstances were advanced on behalf of the Company why costs should follow the result, and it was not suggested that the opposition to the review was not *bona fide* given the order that the matter would be referred back to the CCMA and the ongoing relationship between the Company and the Third Respondent, I make no order as to costs.

Wilken,AJ

Acting Judge of the Labour Court of South Africa

23 January 2014

APPEARANCES

FOR THE APPLICANT:

Advocate E Tolmay

instructed by Edward Nathan Sonnenberg
Inc.

FOR THIRD RESPONDENT:

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Attorneys.