



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/Not reportable

Case no.: JR 1212/2011

In the matter between:

SUPREME POULTRY (PROPRIETARY) LIMITED

Applicant

and

THE COMMISSIONER FOR CONCILIATION, MEDIATION AND

ARBITRATION

First Respondent

MOTAKE PEHELO, N.O

Second Respondent

MATTHEE, JOHAN WILHELM

Third Respondent

Heard: 9 2014

JUDGMENT

WILKEN, AJ

Introduction

- [1] This is a review in which the Applicant seeks to review and set aside the arbitration award of the Second Respondent (“Commissioner”) in case

FS 6650/10 dated 15 May 2011. The application is not opposed.

- [2] In his award, the Commissioner found that the dismissal of the Third Respondent (“the Employee”) was procedurally fair, but substantively unfairly and awarded the Applicant compensation of 10 months’ salary which amounts to R261 250.00.
- [3] In its notice of motion, the Applicant sought the review and setting aside of the award of the Commissioner a stay of the execution of the Commissioner’s award and that its costs be paid by anyone who opposes this application.
- [4] In the heads of argument filed, the Applicant seeks not only to the review and setting aside of the arbitration award, but an order to the effect that the dismissal was substantively fair, ie.that this Court exercises its jurisdiction to finally determine the matter and not to remit the matter back to the First Respondent to be heard by another Commissioner.

Background

- [5] The Employee was dismissed following a disciplinary hearing arising from a complaint that he had sexually harassed a subordinate. The Employee was employed as the Production Manager of the Applicant and it is alleged that the Employee sexually harassed a supervisor, one Buleni Ndlovu but did not report to him directly.
- [6] The complaint of sexual harassment arose from two telephone calls, it being common cause that the Employee had made the two telephone calls to Ndlovu on 30 August and 1 September 2010. It was the Applicant’s case that Ndlovu had reported the telephone discussion of 30 August 2010 the following day to a fellow employee who persuaded her to report it to a Trainee Manager who reported the complaint to the Operations Director. No action was taken after the first report, but after the second telephone call on 1 September, Ndlovu was encouraged to lodge a formal complaint which she did on 9 September 2010.

- [7] It is the Applicant's case that the Employee made lurid and sexually provocative statements to Ndlovu during the telephone conversations on 30 August and 1 September 2010. The Employee on the other hand denies that he made any sexually provocative suggestions to Ndlovu during the aforesaid two telephone conversations.
- [8] When lodging her grievance, Ndlovu prepared a detailed statement of the events surrounding her complaint. At the conclusion of the disciplinary hearing, Applicant dismissed the Employee having found the Employee guilty of sexual harassment and confirmed the dismissal at the internal appeal lodged by the Employee. The Employee then referred a dispute concerning his unfair dismissal to the CCMA.

Arbitration proceedings

- [9] The Applicant called three witnesses at the arbitration proceedings and the Employee, including himself, called five witnesses. The only witnesses who were able to give direct testimony as to the telephone conversations which took place between Ndlovu and the Employee on 30 August and 1 September was Ndlovu and the Employee himself. The versions given by Ndlovu and the Employee as to the content of the conversations were diametrically opposed, Ndlovu contending that the Employee had made sexual advances to her during these conversations, whilst the Employee vehemently denied having made any such advances and contending that Ndlovu on each occasion attempted to borrow money from him.
- [10] Ravin Parkin, a Supervisor at the Applicant, testified that Ndlovu told him that she was uncomfortable with a call she had received from the Employee on 30 August, and did not know what to do. He testified that Ndlovu suggested that the Employee had spoken to her in a sexual manner and that her boyfriend was getting angry. He recommended that the Employee speaks to a trainee Supervisor concerning the incident, David Gibbon-James ("James"). James testified that the Employee

reported the telephone call of 30 August to him on 1 September after having been referred to him by Parkin. He testified that she appeared to be visibly shaken and that he immediately reported the matter to Jack Searle ("Searle"), the Operations Director who adopted the approach that they should see how matters progress. James further testified that Ndlovu reported a further conversation to him on 1 September 2010, and whilst he did not ask what the call was about, Ndlovu said that it was of a sexual nature. He reported that to Searle and was not involved any further in the matter.

- [11] The Employee testified that he called Ndlovu on 30 August as he was unable to speak to Ndlovu when she approached him in his office on 30 August, which he contends was the second time she approached him that day. He testified that she told him earlier that day that her sister had "lost" all her money, ie. Ndlovu's August salary. This is in fact common cause. He testified that he called her back to enquire from her why she wanted to see him again, and she testified that she wanted to borrow money from him. He denied that he made any comments of a sexual nature or with sexual overtones during the discussion on 30 August 2010.
- [12] In respect of the telephone call of 1 September 2010, the Employee testified that he called her in response to a "please call me" and that he was with his wife when he did so. He once again denied having made any statement of a sexual nature or making any sexual overtones and contended that the purpose of the call was to prevail upon him to lend her money.
- [13] The Employee's wife confirmed that she was present when the Employee took a call from Ndlovu on 1 September and that she did not overhear him making any statement of a sexual nature or with a sexual overtone.

The Employee also called Magdalena Thabang, his wife, Stuurman

Mogotsi and Searle to testify.

- [14] Searle's evidence was of a procedural nature but Thabang gave evidence that Ndlovu had jokingly suggested to the Employee that should the Employee arrange a job for Ndlovu's sister she would 'I will put myself on the table. Mr Matthee would choose'.
- [15] Mogotsi appears to have been a reluctant witness and insofar as any harassment of Ndlovu was concerned, was not able to offer any direct evidence. His evidence, all of which was hearsay, painted the Employee as one who had sexual discussions with employees on the one hand, but on the other hand portrayed him as a very harsh manager whom all employees feared. His evidence needed to be approached with great caution as Mogotsi worked night shift whilst the Employee worked day shift.
- [16] Regrettably the record does not contain a transcript of Ndlovu's evidence in chief nor under cross-examination. That part of the mechanical recording appears to have gone missing and the Applicant transcribed that section of the Commissioner's hand written notes which recorded her evidence in chief and cross-examination. No explanation was tendered or proffered why no attempt was made to reconstruct the record as one would normally do in instances where the mechanical recording is no longer available.
- [17] When Applicant's representative at the review, Mr Hutchinson, was called to explain why no steps were taken to reconstruct the record, and stated that the Applicant wished to proceed with the review on the basis of what was before the Court.

Arbitration award

- [18] The arbitration award is lengthy and whilst the Commissioner at the outset expresses his wish not to repeat the details of the evidence of the parties and to provide only brief reasons, he devotes some 26 pages

summarising the evidence and arguments presented, and furnishing his reasons for his award.

- [19] The arbitrator correctly identified the task he had to undertake, namely determining whether the dismissal was procedurally and substantively unfair. He concludes that the dismissal was procedurally unfair and relies on the concession made by the Employee under cross-examination that he was given a fair hearing as well as that the appeal granted cured any procedural irregularities which may have presented itself during the disciplinary hearing.
- [20] Insofar as the substantive fairness is concerned, he identifies correctly his duty to determine whether sexual harassment had occurred. He also appreciated that he was faced with two contradicting versions as to what occurred on 30 August and 1 September when the Employee called Ndlovu.
- [21] Having recognised that he is faced with two conflicting versions, the Commissioner proceeded to examine the probabilities, but in doing so failed to appreciate the underlying task at hand when dealing with two irreconcilable versions.¹
- [22] The Commissioner's starting point in his analysis was that both versions were plausible. It appears that such statement is made in recognition of the fact that he is faced with two irreconcilable versions and that he has to conduct an enquiry as to which version to accept having regard to the credibility of the factual witnesses, their reliability and the probabilities.²
- [23] The Commissioner finds that it was probable that Ndlovu was upset with the Employee for not assisting her sister to obtain a job and that Ndlovu had approached the Employee to borrow money from him. The Court preferred the version of the Employee as to what the content of the telephonic discussion on 1 September was based on finding the

¹ *SFW Group Limited and Another v Martell et CIE and Others* 2003 (1) SA 11 (SCA) at para 5.

² Although this is not what he explicitly states, appears to be what he believed was the case.

Employee's wife, which supported the Employee's version that there were no sexual overtones in the discussion on 1 September, was more credible, and that Ndlovu's evidence concerning her financial position as not credible. He then proceeds to find '... in light of the above, that it is probable that Ndlovu falsely accused the Applicant of sexual harassment'.

- [24] Inherent to this finding must be that the Employee's version was preferred to that of Ndlovu in relation to the content of the discussions on 30 August and 1 September. In other words, that the Employee had not made any sexual utterances as contended for by Ndlovu. However, the conclusion by the Commissioner immediately after finding that Ndlovu, on the probabilities, had falsely accused the Employee of sexual harassment is 'Connected to the above conclusion is the following probable conclusion: the Applicant indeed made sexual advances, but only because Ndlovu led him on or consented or created the impression that she consented'.

The Commissioner then concludes:

'I accept Stuurman's evidence that the Applicant used to make such remarks to female';

'The Applicant was therefore not being frank on this point. His denial was probably meant in protecting his marriage'. and

'Finally, my conclusion regarding the question as to whether sexual harassment took place is that there was consensual love or a sexual relationship between the Applicant and Ndlovu. It was a consensual quid pro quo relationship'.

- [25] The Commissioner's findings are irrational and irreconcilable. In essence, the Employee was dismissed for having made unwelcome and unwarranted sexual statements to Ndlovu on 30 August and 1 September. The Commissioner in essence finds that he prefers the

Employee's version that this did not occur, but on the other hand finds the Employee's denial of such statements was probably made to protect his marriage, and that they were made because Ndlovu had not objected thereto or had consented to him having such discussions with her.

[26] In finding as he did, the Commissioner committed gross misconduct in the conducting of the proceedings in that he failed to undertake the enquiry he had to, namely did any sexual harassment occur on 30 August and 1 September, or not? It appears from the summary of the evidence advanced and his reasoning that the Commissioner failed to appreciate how the peripheral areas of dispute between the parties concerning their relationship impacted upon him in drawing conclusions that are not sustainable in fact or law.

[27] Mr Hutchinson argued that the Commissioner committed a gross irregularity by introducing a defence which was not articulated by the accused party which, in essence, is what the Commission inadvertently had done, by finding the Employee had made sexual advances to Ndlovu, but did so because she had led him on, or had consented thereto.

Analysis

[27] Applying the now well-established test when reviewing a decision of a Commissioner, regard must be as to whether the decision of the Commissioner is a decision that he could not reasonably reach.³ The application of this test has now been further amplified and explained by the Supreme Court of Appeal⁴ as well as the Labour Appeal Court⁵. It is clear that the Commissioner's award is only reviewable if the defect falls within one of the grounds mentioned in Section 145(2)(a) of the Labour

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, 2008 (2) SA 24 (CC) para. 110.

⁴ *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA)

⁵ *Goldfields Mining SA (Pty) Ltd v CCMA and Others* (JA2/2012) [2013] ZALC 28 (04/11/13)

Relations Act, Act 66 of 1995 and amounts to an unreasonable result.⁶

[28] The Commissioner committed gross misconduct in conducting the proceedings by not properly evaluating the material before him. He failed dismally in resolving the irreconcilable versions before him, in assessing the probability the reliability and credibility of the respective versions by concluding that the Employee did not sexually harass Ndlovu because she consented thereto. This is one of those cases where the misconduct of the Commissioner in dealing with the evidence is such that he failed to undertake the task entrusted to him and that the conclusion for that reason is one that no reasonable Commissioner could come to.

[29] Having said that, it is not possible for this Court to substitute the decision as sought for by the Applicant in these proceedings, as a material part of the record has not been placed before this Court, namely the evidence and cross-examination of Ndlovu. With regards to the Commissioner's notes, being the notes the Applicant confined itself to in arguing this review, this Court is not in a position to conduct the exercise required of it to assess the credibility, reliability and probabilities of the two irreconcilable versions.

Wherefore, I make the following order:

1. the arbitration award handed down by the Second Respondent in Case FS6650/11 dated 15 May 2011 is hereby reviewed and set aside;
2. the matter is referred back to the First Respondent to be heard by a Commissioner other than the Second Respondent.

⁶ See *Herholdt*, para. 25 and *Goldfields*, paras. 14 and 18.

Wilken, AJ.

Acting Judge of the Labour Court of South Africa.

24 January 2014

FOR THE APPLICANT : Advocate I Hutchinson
Fluxmans Inc.