



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable

Case no: C787/2010

In the matter between:

NEHAWU obo LINDA MGIJIMA

Applicant

and

CARLTON JOHNSON

First Respondent

METROPOLITAIN HEALTH CORPORATION

Second Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Third Respondent

Date heard: 15 November 2013

Date delivered: 15 April 2014

Summary: Unopposed Review of an arbitration award

JUDGMENT

Rabkin-Naicker J

- [1] This is an unopposed review application to review and set aside an award dated 28 April 2011, under case number W ECT 217 – 10. Despite the citation in this matter, the applicant was not represented by NEHAWU and had initially

brought her application unassisted. On 22 May 2012, the matter was struck off the roll and the applicant was ordered to file a condonation application due to the fact that she had not been aware that the arbitration record required to be filed and served. On 15 November 2013 the review and condonation applications were heard. I granted condonation and considered the applicant's review on its merits.

- [2] The applicant was dismissed after being charged with gross misconduct: “in that on 6 November 2009 you deliberately and intentionally directed insulting and derogatory language, behaviour or action to the CEO of MHG, namely Blum Khan; you allegedly promoted disharmony in the workplace and at the year end function which took place on 6 November 2009 with your actions in the above-mentioned....” There followed a disciplinary hearing where she was found guilty and given the right to appeal within two working days of receipt of the decision which was sent to her on the 2 December 2009. She subsequently appealed but was unsuccessful.
- [3] In his award the first respondent (the Commissioner) found that he was faced with two conflicting versions in the evidence before him. He recorded the evidence as follows:

“The respondent contended that the applicant had used derogatory language whilst on the other hand the applicant denied guilt on all the allegations. Having carefully considered the evidence I have concluded that the respondent had proved through credible evidence that the applicant is guilty of misconduct. Manzini presented clear and coherent evidence that he was present during the speech on 6 November 2009 and that he heard the applicant using the following terms “you are talking shit or rubbish and futsek”. The evidence also points to the fact that applicant had pointed towards the CEO and that she raised her voice. Manzini came across as a credible witness and his evidence is accepted without reservation.

The applicant's allegation that Manzini had presented false evidence is unfounded and is not supported by any concrete evidence. I find it peculiar that the applicant and her witnesses only heard certain parts of

the speech. There can be no question that the evidence of the applicant's witnesses was designed to advance the applicant's case and is not a true reflection of the events of 6 November 2009. I find it hard to believe that the applicant's witnesses could not hear the comments when Manzini, who was further away from the applicant's table, could give a clear account of the events. The balance of probabilities weighs heavily in favour of the respondent's version. The mere fact that Manzini had not included all the material facts in his e-mail does not imply that he was dishonest.

I must record at this stage that the respondent and applicant had attributed different interpretations to the words "ama Simba". The respondent maintained that the words imply that the CEO was talking "shit" whilst the applicant party maintained that the word does not exist in the IsiXhosa language. The applicant argued that at best the term implies that the CEO was talking "rubbish". Having considered the evidence, I am of the view that it is not necessary to decide which interpretation is correct. I say this on the basis that the use of the term is clearly to insult and degrade. In the circumstances, I accept as more probable the version of the respondent and it follows that the applicant is guilty as charged."

- [3] The Commissioner having found the applicant guilty of misconduct, went on in his award to consider the principles set out in **Sidumo** with regard to determining the fairness of dismissal as a penalty. He stated that he was of the view that the sanction of dismissal is justified in the circumstances of the matter before him. The Commissioner went on to say: "The applicant demonstrated gross disrespectful and insulting behaviour towards the company's most senior employee. I must state for the record that the respondent must take some of the responsibility for the actions of the applicant. I say this on the basis that the respondent served alcohol at the function and it must accept that there was the very real possibility is that the employees was going to misbehave (sic). The respondent cannot serve its employees alcohol and then dismiss them when they misbehave, without taking the consumption of alcohol into consideration."

- [4] The Commissioner notwithstanding the above consideration stated as follows:
- “In deciding whether to intervene with the sanction of dismissal it is necessary to consider whether the applicant has shown remorse. Instead of the applicant taking responsibility for her actions the applicant presented false evidence to the arbitrator. Where an employee denies allegations of misconduct and lies about it in order to advance his/her case it cannot be expected of the arbitrator to come to his/her assistance. In the present matter I would have considered a sanction short of dismissal had it not been for the lack of remorse and the fact that the applicant had presented false testimony to the arbitration.”
- [5] The Commissioner thus decided that he found no legal basis to interfere with the sanction of dismissal and concluded that her dismissal was substantively fair. In her supplementary affidavit, the applicant sets out the grounds for review. First she avers that the finding by the Commissioner regarding the interpretation of the term ‘ama Simba’ shows that he failed to apply his mind to the evidence before him and committed a gross irregularity: "in that he failed to establish during the proceedings whether indeed if the words were actually said by the applicant thus requiring a need to interpret the meaning of the words and to establish who these words were directed to." It appears that a further ground for review is that the Commissioner failed to give sufficient weight to the evidence of applicant's witnesses. Further there is an allegation of bias on the part of the Commissioner. It is also alleged that the Commissioner failed to justify why he was using the **Sidumo** case to uphold the dismissal when gross disrespect had not been proved against the applicant on a balance of probabilities. No references are made to the record to support these propositions.
- [6] Having considered the record of the proceedings before the Commissioner and the reasoning in his award, I do not find that the award is susceptible to review. The Commissioner was correct to apply the **Sidumo** test in the way that he did. Furthermore, given the jurisprudence on the reviewability of awards the applicant simply does not provide any sound basis for the award

to be set aside. In **Goldfields Mining South Africa (Pty) Ltd (Kloof Goldmine) versus CCMA and others**, the Labour Appeal Court summarised the questions a reviewing court should ask in a matter such as the one before me as follows:

“The questions to ask are these: (I) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (II) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (III) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (IV) Did he or she deal with the substantial merits of the dispute? And (V) is the arbitrator's decision is one that another decision maker could reasonably have arrived at based on the evidence?”¹

- [7] A consideration of the record and the award in this matter reflects that an affirmative answer must be given to all of the above listed questions. Furthermore, I take into account the judgment of the Supreme Court of Appeal in the **Herholdt** matter² where that court held as follows:

“In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”

¹ JA2/2012 at paragraph 20

² *Herholdt v Nedbank Ltd* (701/2012) [2013] ZASCA 97 (5 September 2013)

[8] The Commissioner's consideration of the question of remorse weighed together with his findings on the credibility of applicant and her witnesses cannot be gainsaid by this court. His ultimate decision in my judgment was one that a reasonable decision maker could reach on all the evidence before him. For these reasons I make the following order:

1. The application is dismissed.

Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant :Adv. M.I. Motimele instructed by MPM Incorporated