



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P268/11

In the matter between:

MZIMASI NATHANIEL MANELI

Applicant

and

NATIONAL BARGAINING COUNCIL

CHEMICAL INDUSTRY “NBCCI”

First Respondent

ROBERT NIEMAND “PANELIST”

Second Respondent

ASPEN PHARMACARE (PTY) LTD

Third Respondent

Heard: 23 May 2013

Delivered: 12 June 2014

Summary: An error which does not lead the arbitrator to reach an unreasonable decision does not render an award reviewable.

Review in terms of section 145 of LRA – Dismissal for misconduct.

JUDGMENT

LALLIE J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent in which he dismissed the applicant's claim of unfair dismissal on the basis that his dismissal was substantively fair as he had made himself guilty of the charges which had been preferred against him. The review application is opposed by the third respondent.
- [2] The application was filed just over two weeks late and the applicant applied for condonation. The main ground the third respondent sought to rely on in opposing the condonation application is that the applicant had no prospects of success. The applicant is required to have reasonable prospects of success and the test to determine whether they exist is to establish whether he could be successful in the review application. The applicant has made averments which, if proved, could lead to his success in the review application. He therefore has reasonable prospects of success. Having considered the degree of lateness, the reasons proffered by the applicant, that granting condonation would be fair to both parties and not prejudice the third respondent. The interests of justice also militated towards the success of the application. For these reasons, the application for condonation is granted.

Factual background

- [3] The facts of this matter are mostly common cause. They are that the applicant was dismissed by the third respondent on 10 August 2010, after 17 years' service. At the time of his dismissal, he was the chairman of CEPPWAWU (the union) shop stewards committee. The events leading to the applicant's dismissal have their genesis in the third respondent's attempt to amend its disciplinary code. Email was exchanged between shop stewards and the third respondent with regard to the amendment but no agreement could be reached. On 28 July 2010, the applicant forwarded an e-mail to Mr Geyser (Geyser), the third respondent's CEO and copied nine other employees in which he attacked Geyser's leadership style. He accused him of behaving like Hitler and the apartheid leaders of the past. He stated that his e-mail suggested that he had no compassion and was inhumane. He further informed Geyser that his action incited his subordinates to act like small Indian cobras who do not ask question but attack while

he was like a king cobra. He also expressed the view that Geyser's actions were creating uneasiness and panic to the entire company including his subordinates who did not trust him and did not know how to behave after his memos. In the letter dated 2 August 2010, the applicant informed all the third respondents' employees that any disciplinary action that was influenced by the communication (between the union and the third respondent's management) should not be entertained until the third respondent had met the union organiser to discuss the matter.

- [4] The third respondent found the e-mail inflammatory and preferred the following charges against the applicant:

‘Charge 1: Conduct unbecoming of a Shop Steward alternatively not acting in good faith towards your employer.

Charge 2: Gross insolence in that you were rude and disrespectful in your correspondence dated the 28th July 2010 to Dr Geyser.

Charge 3: Attempt to incite staff in your correspondence dated the 02nd August 2010.

Charge 4: Gross misconduct in relation to your timekeeping and unauthorized absences for the period including, but not limited to 26 July 2010 – 04 August 2010.’

- [5] The applicant was dismissed having been found to have made himself guilty of the acts of misconduct he was accused of. He challenged the decision to dismiss him at the first respondent where the arbitrator consolidated charge 1 and 2 into charge 2, as separating them constituted an impermissible splitting of charges, and found the applicant guilty of the second and third charge. He also found the applicant guilty of the last charge based on his plea. In the application at hand, the applicant seeks an order reviewing and setting aside the arbitration award.

The award

- [6] The applicant raised the defence that he was acting in his official capacity as a spokesman of a collective, referring to the union. The arbitrator rejected it and relied on cases consistent with the following dictum in *Mondi Paper Co Ltd v Paper Printing*

*and Allied Workers Union and Another*¹ which was referred to with approval of *BIFAWU and Another v Mutual and Federal Insurance Company Ltd*:²

‘No doubt a shop steward should fearlessly pursue the interests of the members he represents and he ought to be protected against being victimized for doing so. However, this is no licence to resort to defiance and needless confrontation. I do not agree with the view of the court a quo that the fact that he was acting in his capacity as shop steward serves to ‘mitigate’ conduct which objectively is unacceptable. Notwithstanding the position to which he has been elected, a shop steward remains an employee, from whom his employer is entitled to expect conduct appropriate to that relationship’.

- [7] The arbitrator found that the duty to be respectful and act in the employer’s best interests were paramount in the relationship of employment. By not expressing remorse at the arbitration, the applicant damaged his prospects of re-employment substantially. The mitigation of the applicant’s lengthy years of service were outweighed by the irreparable breakdown in the trust relationship. Inconsistency in the application of discipline was not proved. Progressive discipline could be applied in respect of the charge relating to absenteeism and time keeping. Dismissal was found to be the appropriate sanction for the second and third charge.

Grounds for review

- [8] The applicant sought to rely on a number of grounds which may be grouped into two categories. The first consists of submissions that the arbitrator failed to apply his mind and exceeded his powers as an arbitrator thereby committing gross irregularities which are based on aspects of the arbitration the arbitrator failed to take into consideration. These submissions do not constitute valid ground for review because they are issues which should have been raised at the arbitration. They cannot be raised for the first time on review as the test for review involves the reasonableness of the award based on the evidence before the arbitrator.
- [9] The applicant submitted that the arbitrator failed to take into consideration that the applicant’s witness would have prove that the e-mail was written by the shop steward

¹ (1994) 15 ILJ 778 (LAC) at 780F-G.

² [2006] 2 BLLR 118 (LAC) at para 20.

committee members. The applicant, through his representative, agreed that witness would not be called. The applicant's desire to call witness and the purpose for which they were going to be called should have been raised with the arbitrator. Having agreed that no witness would be called this ground for review has no merit.

- [10] The applicant submitted that the arbitrator failed to consider and appreciate that the applicant's home language is Isixhosa and not English and that the e-mail does not suggest that the applicant or the shop steward committee was disrespectful. The arbitrator failed to consider that the applicant was not charged with breach of the third respondent's IT policy but gross insolence in that he sent an e-mail which was construed as offensive. His failure to consider the true meaning of the content of the email with regard to 'Hitler or apartheid leaders'; as the email did not suggest that Geyser or his management were Hitler or apartheid leaders.
- [11] There is a further category of grounds for review which the applicant submitted constitutes misconduct and gross irregularity which justify the reviewing and setting aside of the award. It includes the arbitrator's failure to consider the evidence before him in that he wrongfully concluded that the email was signed and sent by the Applicant. He failed to provide reasons for concluding that remarks or accusations were inflammatory and/or offensive. He disregarded that the third respondent acted inconsistently. He failed to consider the email of 2 August 2010 properly and not provide reasons for concluding that the applicant incited other employees.

The test for the review

- [12] The test for preview is trite. It is whether the commissioner reached a decision a reasonable decision maker could not reach on the evidence before him or her.³ The correct approach to mistakes made by arbitrators is expressed as follows in *Herholdt v Nedbank Ltd (Congress of South African Trade union as Amicus Curiae)*:⁴

‘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 section 145 (2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated

³ See *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC).

⁴ [2013] 11 BLLR 1074 (SCA) para 25.

by section 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry 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’.

- [13] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*,⁵ it was held that the review court is required to consider the gross irregularity that the arbitrator is said to have committed and then apply the reasonableness tests established by *Sidumo*. It was further held that a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing; and came to a conclusion that is reasonable.⁶
- [14] It was argued on behalf of the third respondent that the award is reasonable. A consideration of the award in its totality reveals that the arbitrator dealt with the main dispute before him and reached a reasonable conclusion. The grounds that the applicant sought to rely on do not hold water. Without adopting the piece meal approach that the courts, including the LAC in *Gold Fields (supra)*, warn against, I consider it important to bring to the applicant’s attention the reasons for the dismissal of his application. The ground that the arbitrator failed to consider that the applicant was acting in a representative capacity as a mitigating factor has no basis. The arbitrator acknowledged that the applicant was the chairman of the shop stewards committee. He dealt with that issue in detail and even relied on decided cases in reaching his conclusion. Even if he erred in not considering the applicant’s status as a mitigating factor, he found that the trust relationship between the applicant and the third respondent had been irreparably damaged because the applicant had shown no remorse. No amount of mitigation would have influenced the arbitrator to decide differently. The decision is reasonable as the omission had no effect on the outcome of the arbitration.

⁵ [2014] 1 BLLR 20 (LAC) at para 15.

⁶ Ibid at para 16.

[15] The applicant argued that the arbitrator erred in dismissing him for the misconduct involving the letter of 20 August 2010 because he did not show how he incited employees of the third respondent. The arbitrator erred in not giving reasons for his decision that the applicant incited the third respondent's employees. A determination needs to be made whether the arbitrator's omission led the arbitrator to reach an unreasonable decision. The answer is in the negative. This omission did not influence the arbitrator's decision. The arbitrator's reasoning shows that he found respect and acting in the employer's interests paramount in the employment relationship. He further found that lack of remorse had damaged the relationship between the applicant and the third respondent irreparable. The omission would, therefore, not have influenced the arbitrator to decide differently and it does not remove the award from the bounds of reasonableness. The award falls within bounds of reasonableness.

[16] In the premises the following order is made:

16.1 The application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Abrahams

Instructed by: Coltman's Attorneys

For the Third Respondent: Advocate Grobler

Instructed by: Van Der Walt Attorneys

LABOUR COURT