



_____**REPUBLIC OF SOUTH AFRICA**

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 809-13

In the matter between:

SPAZIO LIGHTING (PTY) LTD

Applicant

~~and~~And

THE METAL AND ENGINEERING

INDUSTRIES BARGAINING COUNCIL

First Respondent

SEELE MOKOENA N.O

Second Respondent

THE NATIONAL UNION OF

METAL WORKERS OF SOUTH AFRICA

Third Respondent

THEMBA JOHANNES HLONGWANE

Fourth Respondent

NKOSIYAKHE ZUMA

Fifth Respondent

MZIWANELE MFUNDISI

Sixth Respondent

Heard: 20 November 2014

Delivered: 19 March 2015

Summary: Review application. The employee charged with misconduct of intimidation during the strike. The applicant failing to call as witness those employees who were alleged to have been intimidated.

JUDGMENT

MOLAHLEHI, J

- [1] This is an application to review and set aside the arbitration award made by the second respondent (the Commissioner) under case number MEGA. 3847 dated 2 April 2013 in terms of which the dismissal of the individual respondents was found to have been substantively unfair and, accordingly, the applicant was ordered to reinstate them.

The background facts

- [2] The individual respondents who were prior to their dismissal employees of the applicant were charged and dismissed for misconduct related to their conduct during the strike action. The charges against them read as follows:

'Charge 1: Gross misconduct in that you committed an act of misconduct in that you unlawfully and intentionally intimidated non-striking employees and prevented them from entering the Company or about 5 July 2011.

The misconduct is compounded in the light of the fact that you threatened non-striking employees with use of physical violence and verbally shouted at non-striking employees and assaulting with weapons when they entered the Company's premises or about 5 July 2011.

Charge 2: Gross Insubordination in that you wilfully, intentionally and deliberately failed to follow Management's instructions to cease and desist your unlawful actions intimidation, harassment and threat of violence against non-striking employees on 5th of July 2011, was picketing outside the Company's premises.'

- [3] The individual respondents assisted by their union, NUMSA referred an alleged unfair dismissal dispute to the first respondent (the bargaining Council). A failure to resolve the dispute during the conciliation process led to the matter being referred to arbitration before the arbitrator. As indicated above the arbitrator found that the dismissal was unfair and ordered that the individual respondents be reinstated by the applicant.
- [4] The applicant being unhappy with the outcome of the arbitration proceedings, brought the current proceedings in terms of which it seeks to have the arbitration award set aside on the grounds set out below.
- [5] The case of the applicant in contending that the dismissal of the individual respondents was for a fair reason was based on the testimony of two witnesses; namely, Mr Wilson, the operations manager, and Mr Vernon, the production manager.
- [6] The essence of the testimony of the two managers was that the individual respondents contravened the strike and picketing rules which was agreed upon for July 2011 by the union and the employers' organisation. They further testified that because of the manner in which the individual respondents and others conducted themselves the applicant had to obtain an urgent interdict in this Court restraining them from blocking and interfering with the access of other employees and customers into its premises.
- [7] Mr Wilson testified that he observed the individual respondents, through close circuit television as they were blocking the main gate of the applicant. Mr Vernon testified that he saw them intimidating non-striking employees from entering the applicant's premises. He also

Commented [N1]: Please review the meaning here.

testified that he saw the fourth respondent holding a stick in his hand and in an intimidating manner blocking employees from entering the premises. He states that he instructed the individual respondents to cease their intimidating conduct.

- [8] The individual respondents in their defence denied having engaged in any conduct of intimidation. They conceded having had sticks in their hands on the day in question but stated that they used them for the purposes of marshalling employees who were on strike.

The arbitration award

- [9] The arbitrator, in arriving at the conclusion that the dismissal of the individual respondents was unfair, essentially, rejected the version of the applicant and in particular the testimony of Mr Wilson which he had found to be contradictory. The arbitrator further found that although the applicant had presented photos showing the individual respondents standing at the gate, there was no evidence to support the allegation that they were intimidating other employees from entering the premises of the applicant. He does accept that the photo does show one of the applicants standing at the gate with a stick.

The grounds of review

- [10] In brief, the contention of the applicant in challenging the arbitration award is that the Commissioner:
- a. failed to apply his mind properly to what the photographs depicted in particular in relation to the intimidation by the individual respondents.
 - b. failed to take into account the fact that the applicant had obtained an interdict on an urgent basis in this court on the grounds of the intimidation.
 - c. take into account the fact that the evidence of Mr Vernon was corroborated by Mr Wilson.

- d. to accord the necessary weight to the evidence of the security officer whose evidence although was hearsay it was supported by evidence of the photographs which were presented during the hearing including the urgent interdict which was obtained against the union and the individual respondents.
- e. in the circumstances of this case committed gross irregularity and acted unreasonably in relation to the conclusion as he did.

Evaluation

[11] The standard to apply in considering this application is the one which is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ which requires an enquiry into whether or not the decision reached by the Commissioner is one that a reasonable decision-maker could not reach?.² As stated recently by Lagrange J in *Nelson Sekobo v MEC: Department of Basic Education (Gauteng Department)*,³ the most important aspect of the test is that it focuses less on the reasoning of the arbitrator as such and more on whether the arbitrator's findings are ones that no reasonable arbitrator could arrive at on the evidence before the arbitrator. The purpose of the reasoning of the Commissioner in a review application is to assist the Court in determining whether the decision reached is one which a reasonable decision maker could have reached.⁴ In other words, the reasoning of arbitrator is not determinative of the reviewability of the arbitration award.

[12] As stated earlier, the case of the applicant in contending that the dismissal of the individual respondents was for a fair reason was based on the testimony of two witnesses; namely Mr Wilson the operations manager and Mr Vernon the production manager. The essence of their testimony is that they observed the individual respondents intimidating

¹ (2007) 28 ILJ 2405 (CC).

² *Ibid* at para 110.

³ (Case no: JR 409/13) [2015] ZALCJHB 51 (24 February 2015) at para 18.

⁴ See *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at para 12.

those of the employees who did not want to participate in the strike action by waving sticks. According to them, the individual respondents would waive their sticks to the employees who were standing on the other side of the road whenever they attempted to cross the road to enter the applicant's premises with the view to tendering their services. The individual respondents are also said to have blocked customers from entering the premises. The case of the applicant is also that the conduct of the individual respondents was observed through a close circuit television.

- [13] It would seem to me that in order to prove misconduct related to intimidation, the applicant need to show that the individual respondents had induced fear of injury or harm on the non- striking employees. The fear of injury or harm had to be borne by the non-striking employees on the facts as presented by the applicant. In fact, on their version, the two witnesses were not intimidated because they were inside the applicant's premises.
- [14] It is common cause that the applicant did not call as witnesses any of the employees that it alleged had been intimidated. It follows that the applicant had failed to prove that the individual respondents were guilty of intimidation. It was suggested during argument that the Court should take judicial notice that strikes in our country are always accompanied by intimidation. This was, however, not backed up by any evidence.
- [15] The version that the individual respondents were carrying sticks does not assist the case of the applicant, as concerning the alleged acts of intimidation. In this respect, apparently, the applicant relied on photos taken of the individual respondents carrying sticks. The only photo which was handed in Court during the hearing of this matter shows one of the individual respondents standing at the gate. There is no sign of the stick being waived by the person in the photo instead the photo shows the person with the stick between his legs.

[16] It has to be noted that the individual respondents do not dispute the carrying of the sticks. They, however, contend that they used the sticks in marshalling striking workers.

[17] In my view, the above analysis clearly demonstrates that I have not been persuaded that the decision made by the Commissioner does not meet the constitutional standard of reasonableness. Put in another way, regard being had to the evidence which properly served before the Commissioner, it cannot be said that the decision reached in the present matter is one that no reasonable decision maker could have reached. In the circumstances, the applicant's review application stands to fail.

Order

[18] In the premises, the applicant's application to review the arbitration award made under case number MEGA 3847 dated 2 April 2013, is dismissed with no order as to costs.

Molahlehi, J

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: Anthony Hinds of Anthony Hinds Attorneys

For the Respondent: Union Official