



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 895/10

In the matter between:

STEVEN TSIU

Applicant

and

CCMA

First Respondent

COMMISSIONER T TSHAYANA

Second Respondent

LEONARD DINGLER (PTY) LTD

Third Respondent

Heard: 29 January 2015

Delivered: 31 July 2015

Summary: Review of arbitration award

JUDGMENT

WHITCHER J

Introduction

- [1] This is an application in terms of section 145 of the LRA to review and set aside the arbitration award dated 1 March 2010 (“the award”) issued by the second respondent (“the commissioner”) in which award he concluded that the dismissal of the applicant was substantively and procedurally fair. The third respondent (“the respondent”) opposed the application.
- [2] The essential test in deciding whether an arbitration award should be reviewed and set aside is the following: is the award *one* that a reasonable decision-maker *could* not reach. In respect of the result, both on guilt and sanction, it is not sufficient to list the arbitrator’s alleged misdirections. The applicant must establish that the decision is *incapable* of justification on all the material before the commissioner. The evidence before the arbitrator must be viewed in its totality.
- [3] In relation to process-related issues, the unreasonableness of the actions flows from an established, material failure or irregularity on the commissioner’s part *and* a demonstration that this conduct impacted on the outcome. For instance where an applicant argues that the arbitrator failed to take into account certain evidence, the applicant must demonstrate, not only that the alleged facts are relevant, material and proven, but that the failure to take the evidence into account turned the case on its head.
- [4] Commissioners enjoy a certain latitude of discretion flowing from section 138 of the LRA to decide how to conduct arbitrations. Among others, it is a function of theirs to attempt to ‘move things along’. A fair outcome must be achieved speedily and with the minimum of legal formalities. A reviewing court must therefore allow certain essentially discretionary powers and functions of commissioners, especially as to the conduct of the hearing, to be exercised and recognise that, in some instances, what might constitute a legal irregularity in a court is but a legalistic quibble in the CCMA.

- [5] As expressed in *Sidumo*, decisions as to fairness are primarily in the domain of the commissioner. The creation of this domain is part of the legislative intent identified in *Sidumo*, the use of which means that decisions by different commissioners may lead to different results without this court necessarily being able to interfere.
- [6] The applicant complained that Mr Gumede, the respondent's representative (the HR manager), discussed another matter with the commissioner after the arbitration adjourned and while packing up. While such interaction is not ideal, the applicant failed to demonstrate how this conduct could give rise to a reasonable suspicion of bias. The respondent pointed out that subsequent to this event the applicant applied for the recusal of the commissioner but this event did not form the basis of the application. If the applicant was so aggrieved by this event, he would have raised it in the recusal application so that the commissioner could have addressed this allegation of bias.
- [7] The applicant criticised the commissioner for allowing a company witness to produce a document that was not in the bundle before the commissioner. The respondent demonstrated, with reference to the record, that this did not occur in circumstances which deprived the applicant of a fair hearing.
- [8] The applicant's representative questioned the respondent's witness, Mr Masiki, who was the production supervisor, about whether the applicant was given an opportunity to appeal against his dismissal. When the witness stated that the applicant was given an opportunity to appeal, the applicant's representative demanded that Masiki prove this. In response Masiki produced a document that was not in the bundle before the commissioner. The applicant's representative asked for and was given an opportunity to peruse the document and to question Masiki on the document.
- [9] The applicant alleged that the commissioner angrily disallowed the applicant's representative from cross-examining Masiki on procedural fairness.

- [10] The record however shows that the representative did in fact cross examine Masiki on procedural fairness and moreover that his cross-examination of Masiki was repetitive and primarily consisted of questions which Masiki was obviously not in a position to answer as he was not the chairperson of the disciplinary hearing. When the commissioner pointed this out to the applicant's representative, the commissioner acted as a reasonable commissioner would have in the circumstances. As indicated earlier on, litigants are entitled to a fair hearing but commissioners enjoy a certain latitude of discretion flowing from section 138 of the LRA to decide how to conduct arbitrations. Among others, it is a function of theirs to attempt to 'move things along'. A fair outcome must be achieved speedily and with the minimum of legal formalities.
- [11] The applicant complained that the commissioner assisted certain witnesses but the record indicates that the commissioner had merely attempted to seek clarity from the witnesses.
- [12] The applicant criticised the commissioner for permitting the respondent's representative to ask leading questions. The applicant however failed to allege and indicate that this was in relation to material facts in dispute and that this impacted on the totality of the evidence of these witnesses and the other material evidence before the commissioner.
- [13] In summary, the applicant failed to demonstrate that it was not given a fair hearing on material and relevant issues.
- [14] The applicant submitted a list of evidence and alleged the commissioner ignored such evidence. The applicant failed to demonstrate, with reference to the record, that these factual allegations were proved, material and relevant and affected the outcome.
- [15] The respondent, on the other hand, established that the material proven facts before the commissioner were that the applicant deliberately and repeatedly refused to obey a lawful and reasonable instruction *and* prevented another employee from performing his job. The respondent further demonstrated, with reference to the record, that there was no

merit to the applicant's excuses and explanations for this conduct and that it had tried to resolve the matter with the applicant and had tried to accommodate the applicant's complaints. All these factors informed the final decision of the commissioner.

- [16] The applicant alleges that other employees had committed similar offences but were not dismissed and accordingly the commissioner ought to have found his dismissal unfair on this ground. Other than allegations, I found no relevant evidence on record from the applicant which establish that there were no material distinguishing factors in his case and the other cases in question. In any event, even if there were no material distinguishing factors, an employer is not required in the name of consistency to repeat a previous decision made in error or one which is patently wrong.
- [17] The applicant contended that in assessing whether the sanction of dismissal was fair, the commissioner ignored the applicant's length of service. The commissioner does not mention the applicant's length of service in his assessment of the fairness of the sanction, so he gave it very little or no weight at all. Even if the commissioner ignored the applicant's length of service and his conduct constitutes an error of fact, this ground of review is dismissable on the basis that the applicant has failed to demonstrate that this error had a material effect on the outcome.
- [18] Moreover, before the award can be set aside on review the reviewing judge has to find that the arbitrator's assessment that the employer did indeed act fairly in imposing the sanction of dismissal is a finding to which no reasonable arbitrator *could* have arrived at *on the material before* him or her. In my view a reasonable decision-maker could reasonably have arrived at the same conclusion that the commissioner arrived at having regard to the following material on record: the deliberate nature of the offence, the fact that the respondent tried to resolve the matter with the applicant and accommodate him, the reason for the instruction, the mendacious defence of the applicant and the

absence of any evidence of remorse or an inclination by the applicant to concede the reasonableness of the instruction at any stage.

[19] The applicant argued that the commissioner should have found that the dismissal was procedurally unfair. Their main issue appears to concern an allegation that the applicant was not given a proper appeal hearing. According to the evidence on record, the applicant was given an opportunity to exercise this right.

[20] In summary, the applicant failed to demonstrate that the conduct of the commissioner deprived him of a fair hearing on material and relevant issues. In respect of the alleged errors of fact, the applicant failed to demonstrate that they were errors of fact. Even if they were errors of fact, the applicant failed to demonstrate that they were material errors of fact which impacted on the outcome.

Order

[18] The application is dismissed with no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES

FOR THE APPLICANT: Mr R K Mashego

FOR THE RESPONDENT: Samantha Coetzer

Instructed by: Bowman Gilfillan

LABOUR COURT