



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR297/2014

In the matter between:

THANDO GUMEDE

First Applicant

**SOUTH AFRICAN TRANSPORT AND
ALLIED WORKERS UNION**

Second Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

KEVIN MULLIGAN NO

Second Respondent

TRANSNET FREIGHT RAIL

Third Respondent

Delivered: 30 September 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

- [1] The Applicants approached the Court to seek an order that the arbitration award issued under the auspices of the First Respondent on 7 January 2014 by the Second Respondent (Arbitrator) under case number BC.SATAWU/TFR (SD) GR/11951 be reviewed and set aside. In the award, the Arbitrator had found that the dismissal of the First Applicant (Gumede) was fair. The Third

Respondent opposed the application. The Second Applicant (SATAWU) has since withdrawn from the matter.

Background to the application:

- [2] Gumede was employed with effect from 16 May 2011. She was dismissed on 8 July 2013 following a disciplinary enquiry into two allegations of misconduct pertaining to a refusal to obey a lawful instruction, and assault. At the time of the dismissal she occupied the position of train assistant. An unfair dismissal dispute was referred to the Third Respondent, and when attempts at conciliation failed, it came before the Arbitrator for arbitration.

The arbitration proceedings:

- [3] The allegations against Gumede flowed from an incident that took place on 19 March 2013. All employees reporting for duty at the Third Respondent are required to undergo alcohol testing. This practice is part of the Third Respondent's safety requirements. Employees are required to report to the office of a supervisor, Mr Seeta, who normally administered the testing. Employees are then required to sign a register where the results of the test are also recorded, and then to proceed to their workstations. On this particular day, Seeta was not in his office and the administration of the testing was done by a supervisor, Ms Mthethwa.
- [4] When it was Gumede's turn to be tested, Mthethwa had held out the testing device for Gumede to blow in. According to Mthethwa, Gumede tried to take the device from her, and she responded by pulling it back and again told Gumede to blow into the device. Gumede had merely looked at Mthethwa and then walked out of the office without blowing into the device. At the time, Gumede had already signed the register and when Mthethwa called her back, she simply ignored her and proceeded out of the office. The incident happened in the presence of other employees who were waiting to be tested.
- [5] Mthethwa had reported to Seeta what had happened and informed him that technically, Gumede was not on duty as she had refused to take the test. At about lunch time Seeta was instructed by Mthethwa to call Gumede to her office in order to resolve the issue of testing. Seeta returned and informed

Mthethwa that Gumede had refused to come to the office and had informed him that she (Mthethwa) could do whatever she wanted. Mthethwa then sought advice from her senior, Sibiya, who informed her that she should consider suspending Gumede.

- [6] The following day Gumede had attended the testing and had fully cooperated. Mthethwa nevertheless informed her after the testing that she should stay behind as the matter of the previous day pertaining to her refusal to undertake the test needed to be discussed. Again, Gumede simply ignored her and left the room. Mthethwa nevertheless followed her out of the room and informed her that the issue needed to be discussed, failing which she should leave. Again Gumede refused to cooperate, telling Mthethwa that she would not leave unless instructed so in writing.
- [7] Mthethwa had then contacted the Employee Relations Department for advice and was informed to formally suspend Gumede. She had then prepared the suspension documents and asked Seeta and another colleague to accompany her so that the notice could be served on Gumede. When they attempted to serve the notice on Gumede and asked her to sign the documents and leave the premises, she had simply ignored them. The witnesses accompanying Mthethwa then signed the suspension documents and confirmed that Gumede had refused to comply or sign the document.
- [8] On 22 March 2013 at about 10h15, Mthethwa went to the ladies room which was situated in the office where Gumede worked. Mthethwa entered the office and found Gumede sitting adjacent to the door eating. She then proceeded to the ladies room. A moment later she heard the door closing and the door leading to the bathroom opened. The toilet door of the cubicle she was in opened and Gumede appeared in front of her while she was seated, with a 1.5 litre glass bottle in her hand. She struck Mthethwa in the face with the bottle whilst she was seated saying to her *"Satan! I'm going to get you! What have I done to you?"* Mthethwa managed to block the blows with her arm and the bottle fell to the floor without breaking. Gumede nevertheless continued to beat Mthethwa with her fists. Mthethwa managed to stand up and pulled her pants and tried to reach the bottle which Gumede had kicked away. She had

somehow managed to reach for the door and once inside the office, she had picked up the bottle and thrown it through the window to attract attention.

[9] A number of her colleagues and security personnel had arrived at the scene and separated the two. At the time, Mthethwa was bleeding from the mouth. Statements were taken from them and thereafter they were sent to hospital after being suspended. They both laid criminal charges against each other and were subsequently arrested on charges of assault. They subsequently withdrew the charges against each other.

[10] Gumede's evidence was as follows;

10.1 On 19 March 2013 she had reported for duty at about 07h00 and entered the supervisor's office for testing. She had signed the necessary documents and when it was her turn to blow into the device, Mthethwa kept on pulling it away from her as she attempted to lean forward to blow into it. She had then left without blowing into the device. She had then reported the incident to Seeta and denied that it was her that had refused to blow into the device. When the shift ended, she was not allowed to do the alcohol test.

10.2 The following day she had reported for duty and followed the routine of testing. Again Mthethwa was administering the tests, and she had blown into the device without any incident. Mthethwa had nevertheless shouted at her in front of her colleagues as she was leaving, telling her that she was not allowed to report for duty. She had not responded and had proceeded towards her office.

10.3 A few minutes later Seeta came to her office and informed her that Mthethwa wished to see her in her office. She refused to go to Mthethwa's office as she had shouted at her. Mthethwa nevertheless came to her office whilst Seeta was still there, and informed her that she was her Superintendent and that she had a right to send her from 'pillar to post'. She had then handed her a letter of suspension and both Seeta and Mthethwa left. At some point during the morning Mthethwa again came to her office, and informed her that she should

pack her things as security was coming to chase her out. Nothing happened and she had waited until knock off time.

10.4 On 22 March 2013 she was in her office eating her lunch at about 10h10 when Mthethwa entered her office, took her hand bag from the floor and tossed it out of her office, and then closed the door behind her. Mthethwa then picked up a glass bottle of coke which was behind the door and hit her on the left shoulder with it. She had ducked away and covered her head with her arm to protect it. She somehow got up and ran towards the toilet for safety. Mthethwa nevertheless followed her, grabbed her by her T-shirt and when they were in the toilet she again tried to hit her with the bottle which fell onto the floor. Mthethwa continued to punch her all over her body and pulled her by her dreadlocks and kicked her. At the time she was screaming and shouting for help. Their colleague, Malatji came to the scene and separated them.

The arbitration award:

- [11] In an extensive analysis, the Arbitrator concluded that Gumede's allegations of the chairperson of the internal enquiry being biased were without merit, and held that the dismissal was procedurally fair.
- [12] In regards to substantive fairness, the Arbitrator concluded that the evidence before him did not disclose that Gumede had refused to undergo the test, and that she was frustrated in her attempts to comply with the testing by Mthethwa's actions of pulling the device away from her whenever she attempted to blow into it.
- [13] In regard to allegations of refusing to obey an instruction to meet Mthethwa when she was called upon to do so, the Arbitrator found that a reasonable and lawful instruction had been issued which Gumede had ignored and was therefore correctly found guilty on that charge.
- [14] In regards to the allegations of assault, the Arbitrator concluded that the probabilities favoured the version of Mthethwa as it was improbable that as a manager she would act foolishly and recklessly. It was found that Gumede on

the other hand in the light of the previous incidents, might have realised that she may be dismissed, and that her version of events was improbable, and was thus correctly found guilty on the charge of assault.

- [15] In regards to sanction, the Arbitrator acknowledged that this may have been Gumede's first offence. He reasoned that assault in the workplace is an extremely serious offence and that the assault was perpetrated in a heinous manner with a glass bottle capable of inflicting serious injury. The Arbitrator concluded that the assault in this case was inimical to the continuation of a normal and harmonious working relationship.

The legal framework:

- [16] In accordance with the review test as enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹, the question before the reviewing Court is whether the decision reached by the Arbitrator is one that a reasonable decision-maker could not reach in the light of the material before him. The *Sidumo* test and the approach to be followed by reviewing courts in applying that test was reiterated by Cachalia JA in *Herholdt v Nedbank Ltd* as follows²:

"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 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"³

¹ 2008 (2) SA 24 (CC) at para 110

² [2013] 11 BLLR 1074 (SCA)

³ At para 25

- [17] The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Limited (Kloof Gold Mine v CCMA & Others*⁴ further summarised the test in the following terms;

“In short: 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”⁵

- [18] In considering whether or not the decision that the arbitrator arrived at is one that falls within a band of decisions to which a reasonable decision-maker could come to on the available material, the Labour Appeal Court in *Goldfields*⁶ further proposed practical guidelines which a reviewing court should adopt in assessing whether the result of an award is unreasonable. In this regard, it was held that that provided that the arbitrator gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he or she was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits, the function of the reviewing court is limited to a determination whether the arbitrator’s decision is one that could not be reached by a reasonable decision-maker on the available material⁷.

The grounds of review and evaluation:

- [19] The Applicants attacked the award on the basis that the Arbitrator reached an unreasonable conclusion in deciding that Gumede was correctly found guilty of refusing to obey an instruction. In this regard, it was submitted that Mthethwa’s instruction was unreasonable as she was angry and had shouted at Gumede in front of other employees and secondly, since the instruction was issued in an acceptable manner, it was submitted that it could not be reasonable.
- [20] A refusal to obey an instruction or insubordination is recognised as one of the grounds of misconduct which can lead to a dismissal if it is established that such conduct was gross. It entails a refusal to accept the authority of an

⁴ Case number JA 2/2012 at para 14

⁵ At para 16

⁶ At para 20

⁷ At para 20

employer or superior in a position of authority. In this case, it should be accepted that Mthethwa was Gumede's superior even though the latter appeared not to have known this fact. Gumede had on no less than two occasions refused to heed Mthethwa's instructions to her to come to her office to discuss the issue of testing. She also walked away from Mthethwa when she attempted to address the issue with her.

- [21] As it was correctly pointed out on behalf of the Third Respondent, the manner and how the instruction was issued is irrelevant, and given the circumstances that the instruction was issued, it cannot be argued that it was unreasonable. Starting from the time that Gumede had refused to blow into the testing device for whatever reason the Arbitrator had found that she was justified, it can be said that Gumede's attitude was not to cooperate with Mthethwa in every respect.
- [22] It is acknowledged that it would have been improper for Mthethwa to shout and scream at Gumede at the time that she issued the instruction to her, especially in front of other employees. Gumede nevertheless had no justification to simply ignore Mthethwa's instructions. The instruction in my view was reasonable and lawful, as it had to do with the non-compliance of the employer's safety procedures. It was not for Gumede to simply not complete the safety test and walk away as if nothing had happened. Mthethwa as her superior and person responsible for administering the test was within her rights and authority to want Gumede to account for her actions. At most, Gumede could have simply followed the instruction, discussed the matter with Mthethwa in a civilized manner, and then lodged a formal grievance against her. Her actions of simply ignoring the instruction constituted insubordination, and I am satisfied that on the facts before him, the Arbitrator arrived at a reasonable conclusion in this regard.
- [23] The Applicants further attacked the conclusions of the Arbitrator in regards to the charge of assault. It is trite that when faced with mutually destructive versions, the arbitrator must in resolving the dispute, adopt the approach

elucidated in *SFW Group Ltd and Another v Martell et Cie and Others*⁸, where it was held that;

“.....the Court said that the technique generally employed by Courts in resolving factual disputes of the kind as set out above may be summarised as follows:

‘...To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail' (Citations omitted)

[24] It was submitted on behalf of Gumede that the Arbitrator's conclusions in regard to the charge of assault were unreasonable and were based on speculation. This submission was made based on the Arbitrator's conclusions that firstly, it was unreasonable that Mthethwa would risk her career in such a

⁸ 2003 (1) SA 11 (SCA) at para 5. See also *Heath v A & N Paneelkloppers* (JS932/2012) [2014] ZALCJHB 343 (9 September 2014) at para 45; *Sasol Mining (Pty) Ltd v Ngceleni NO and Others* (2011) 32 ILJ 723 (LC)

reckless and foolish way by attacking Gumede, secondly that Gumede had realised that she had overstepped her bounds by refusing to obey the instruction, and thirdly that Gumede had been frustrated by the events of the previous day.

- [25] It has been held that the court should interfere with an award if the arbitrator's decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and 'involves speculation'⁹. It might be concluded that the Arbitrator's reasoning as above was speculative. At the same time, there is no basis for a conclusion to be reached that the conclusions are far-fetched, or entirely disconnected with the evidence, or unsupported by evidence.
- [26] In this case, the Arbitrator had stated that he was unable to draw adverse inferences from an observation of the demeanour of Gumede and Mthethwa, and had accordingly determined the probabilities of each version. To this end, the Arbitrator had further had regard to Gumede's version and concluded that it did not 'hang together' in the light of the evidence that Mthethwa could not have attacked her with the glass bottle all the way from her office to the toilets. Secondly, the Arbitrator took into account the injuries sustained by Gumede which he concluded were not consistent with her version that Mthethwa had attacked her with the bottle. Thirdly, Mthethwa's version was corroborated by another witness, Malatji, who was the first person on the scene.
- [27] In the light of the evidence before the Arbitrator, it is my view that his findings based on the probabilities of each version cannot be faulted. It is inexplicable that Mthethwa would in the light of the decision to suspend Gumede, take it upon herself to without any provocation, toss Gumede's hand bag out of her office, pick up a bottle, start attacking her and follow her to the toilets and then continue to assault her. The Arbitrator's conclusions that it was improbable that Mthethwa could have initiated the attack were further based on the evidence of Malatji and Sibiya who were the first on the scene, and who had testified that Mthethwa had explained the chain of events immediately whilst Gumede could not give an explanation then. The Arbitrator's summation that

⁹ *Herholdt* at para [13]

since Gumede had not offered an explanation then, she sought time to invent one is also a reasonable one. It does not appear from the record as to what on Gumede's version could have prompted Mthethwa to initiate the assault. However on the probabilities, it was not unreasonable to conclude that Gumede was clearly aggrieved by the events of the preceding day, and the fact of Mthethwa persisting in getting her response on the matter, and issuing her with a suspension letter. I did not understand from her evidence from the record that Mthethwa had any reason to initiate the attack, and the probabilities clearly favoured Mthethwa's version as the Arbitrator had correctly found.

- [28] In regards to the appropriateness of the sanction, it was stated in *Motsamai v Reverite Building Products*¹⁰, that;

'It is now trite that when an Arbitrator arbitrates a dispute, it is the Arbitrator who decides what is the appropriate sanction having regard to: all the evidence presented to him/her; the company's code of conduct; and of course the nature and seriousness of the misconduct. The fact that the decision is that of the Arbitrator does not mean that it can be made in a vacuum. Like any other decision the decision that the Arbitrator arrives at in respect of the sanction must also be one that is reasonable in all circumstances'

- [29] The Constitutional Court in *Sidumo*¹¹ further held that the arbitrator must determine whether the dismissal was fair as an impartial adjudicator and that the commissioner's sense of fairness must prevail and not the employer's view. In further determining the fairness of a dismissal, an arbitrator is also required to take into account a variety of factors including, the totality of the circumstances of the matter; whether what the employer did was fair; the importance of the rule that the employee breached; the reason the employer imposed the sanction of dismissal; the basis of the employee's challenge to the dismissal; the harm caused by the employee's conduct; whether additional training and instruction may result in the employee not repeating the

¹⁰ [2011] 2 BLLR (LAC) at para 22

¹¹ (2007) 28 ILJ 2405 (CC) at para 75

misconduct; the effect of dismissal on the employee and the long service record of the employee¹².

[30] In this case, the Arbitrator had correctly pointed out that assault in the workplace was an extremely serious matter. The Arbitrator had also correctly pointed out that the attack on Mthethwa was of a heinous kind, and was perpetrated with a glass bottle which could have inflicted serious injury. It can also be said that the attack on Mthethwa was premeditated and executed with viciousness. There can never be justification for Gumede's conduct even if she was of the view that Mthethwa had treated her shabbily. Given the manner and form of the physical assault, on that charge alone a dismissal was appropriate, and no form of mitigation under the circumstances would have come to Gumede's aid. The nature of the assault clearly impacted on the employment relationship between Gumede and Mthethwa, and had also impacted on her relationship with other employees and the Third Respondent as a whole. The dismissal was clearly in response to a risk that Gumede posed to the Third Respondent and other employees through her violent conduct. Employers cannot be expected to keep employees who are prone to violent episodes when there are formal channels to vent out their anger and grievances. To this end, I am satisfied that the Arbitrator's sense of fairness prevailed after he had taken all the relevant factors into account. His conclusions that a dismissal was appropriate are unassailable, in the light of the extreme circumstances of this case.

[31] Any contention on behalf of Gumede to the effect that the Third Respondent had acted inconsistently in only disciplining her when Mthethwa was equally involved in the fight is misplaced. Inasmuch as the probabilities do not favour Gumede's version of events, and in circumstances where it is apparent that she had indeed initiated the attack, there was no basis for the Third Respondent to charge Mthethwa as she was clearly a victim of an unprovoked and vicious attack. The Third Respondent had after the fight between the two, suspended both and conducted investigations into whether there was cause to discipline both of them. The investigations had revealed that Mthethwa was the victim of the attack and had correctly decided not to charge her. To the

¹² *Sidumo* At Paras 78 – 79

extent that Mthethwa had not committed any misconduct, there can be no talk of inconsistent application of discipline, and the fact that the Arbitrator failed to deal with this issue does not render the award reviewable, as its determination was not material to the outcome reached.

[31] Having had regard to the material that was placed before the Arbitrator, it is concluded that he gave the parties a full opportunity to state their respective cases at the hearing, identified the issue that he was required to arbitrate, understood the nature of the dispute and dealt with its substantive merits. Even if it could be said that in evaluating the material before him the Arbitrator failed to take some into account or ignored some, the effect of that omission cannot be said to have a distorting effect on the ultimate outcome reached. On the whole, I am satisfied that there is no basis to conclude that the Arbitrator's decision is one that could not have been reached by a reasonable decision-maker on the material placed before him.

[32] The Third Respondent sought a cost order on the basis that the Second Applicant (SATAWU) withdrew from this matter on 2 March 2015, but should nevertheless be held liable for costs as it had initiated this application. The initial pleadings were filed by Mabaso Attorneys who also withdrew from the matter on 25 November 2014. Gumede was represented by Majare Attorneys in these proceedings. I have further had regard to the basis upon which a cost order is sought. I am inclined to agree with the Third Respondent that this application was ill-conceived. I am however persuaded by considerations of law and fairness and conclude that no order as to costs should be made.

Order:

- i. The application to review and set aside the award issued on 7 January 2014 by the Second Respondent under case number BC.SATAWU/TFR (SD) GR/11951 is dismissed.
- ii. There is no order as to costs.

Chalenge

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Mr. D Majare of Majare Attorneys

For the Third Respondent: Mr. P Maserumule of Maserumule Inc Attorneys

LABOUR COURT