



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case No: P 420/12

In the matter between:

SIYABULELA BASHE

Applicant

And

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER SIYABONGA COKILE

Second Respondent

OMEGA RISK SOLUTION (PTY) LTD

Third Respondent

Heard: 17 October 2013

Delivered: 27 January 2015

Summary: The fairness of a dismissal is determined by a CCMA commissioner. The Labour Court will not review a commissioner's decision on the fairness of a dismissal if it falls within bounds of reasonableness.

JUDGMENT

LALLIE J

Introduction

- [1] In this application, the applicant seeks an order reviewing and setting aside an arbitration award of the second respondent ("the commissioner"). The application is opposed by the third respondent.

Factual background

- [2] The applicant was employed by the third respondent as a security guard. On 8 February 2012, while posted at Dolphin's Leap, one of the sites the third respondent provided services at, he fought with Mr Mase ("Mase"), his fellow employee. He was charged with assault for physically assaulting Mase during working hours alternatively fighting with Mase. He was further charged with bringing the third respondent's name into disrepute by committing the misconduct involving Mase which was detrimental to the interests of the third respondent. He was found guilty of fighting and committing action detrimental to the interests of the third respondent which brought the third respondent's name into disrepute and dismissed. Aggrieved by his dismissal he referred an unfair dismissal dispute to the first respondent. It was arbitrated by the commissioner who issued an award in which he found the applicant's dismissal substantively fair. In this application the applicant seeks an order reviewing and setting the award aside.

The award

- [3] Giving reasons for his decision, the arbitrator found a number of facts common cause. They included the fight between the applicant and Mase on 8 February 2013, in which the former stabbed the latter with a screw driver. Mase suffered stab wounds to the head and shoulder. The applicant was hit by Mase once and he sustained an injury on his lower lip. Although Mase had a knife in his possession, he did not stab the applicant.
- [4] The commissioner was impressed by Mase and Ms Schnetler ("Schnetler") as witnesses. He found that Schnetler's evidence was consistent, she did not try to support the third respondent's case with assertions she could not back up and found Mase to be a credible and reliable witness who answered questions clearly and had a good recollection of the events of 8 February 2012. He made the opposite findings about the applicant who got upset,

evasive and argumentative when asked to explain improbabilities in his version. The commissioner rejected the applicant's version that he was provoked by Mase as it was not supported by evidence. He found his version contradictory and his defence of self-defence improbable. He accepted Schnetler's unchallenged evidence that the fight by the applicant and Mase in full uniform at a public place early in the morning when people were going to work could leave a damaging impression of the third respondent.

- [5] The commissioner considered item 7 of schedule 8 to the LRA, the code of good practice for dismissal, the third respondent's disciplinary code as well as the totality of the circumstances of the case before him including the appropriateness of the sanction of dismissal and concluded that the applicant's dismissal was substantively fair.

Grounds for review

- [6] The applicant submitted that the commissioner committed a gross irregularity in that he ignored aspects of the evidence which had an impact on the credibility findings. Those aspects include Schnetler's absence during the fight. She could therefore not testify as to who started fight which she did not even report to the police. The failure, to attach due weight on Mase's evidence that he carried a knife at the workplace. The inherent probabilities did not favour Mase's version. When Mase's version is properly weighed against the applicants' it cannot be accepted as probable. Mase gave two different reasons for refusing to report the fight to the police. The applicant submitted that Mase resigned and looked for alternative employment because his hands were not clean. The commissioner failed to play an inquisitorial role and establish reasons for the failure to call the applicant's manager as a witness as he was aware of the sms which triggered the fight.
- [7] A further attack on the award is mounted on the commissioner's finding that the applicant was not a credible witness. Probabilities are that he was upset when giving evidence because he lost his job as a result of the fight. The commissioner was criticized by the applicant for adopting an armchair critic approach to the fight which led him to reject the applicant's defence of self-

defence, the history of bad blood between the applicant and Mase and that Mase was in possession of a knife. As the versions before the commissioner were equally probable he should have found in the applicant's favour. The applicant also submitted that the commissioner committed a gross irregularity by finding that he was guilty of the second charge in the absence of direct evidence. In reaching the conclusion that the sanction of dismissal was appropriate, the commissioner failed to consider that senior management was aware of the bad working relationship between Mase and the applicant and could have created a new rule preventing the carrying of dangerous weapons at the workplace. He failed to apply his mind to alternative sanction and to consider whether he was suspended and how the suspension affected the trust relationship. The third respondent's failure to suspend the applicant reflected that the trust relationship was not damaged beyond repair. The applicant submitted that the commissioner rendered an unreasonable award as a result of the gross irregularities he committed which deprived him of the right to a fair hearing in that he was not afforded an opportunity to have his evidence fairly and properly assessed.

The review

- [8] The test for review is trite. It is whether the commissioner reached a decision a reasonable decision-maker could not reach on the evidence before the commissioner¹. In conducting arbitrations commissioners have to exercise their powers in section 138 of the LRA. The approach to be adopted by the reviewing court is expressed thus in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*²:

'[18] In a review conducted under section 145 (2) (a)(c)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing

¹ *Sidumo and Others vs Rustenburg platinum Mines Ltd and Others* 2008 (2) SA (CC)

² [2014] 1 BLLR 20 (LAC)

court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*'.

[9] The applicant's grounds for review are based on the piece-meal approach. A number of the grounds the applicant seeks to rely on have no merit and, are highlighted by the third respondent in its answering affidavit and heads of argument. It was argued on behalf of the third respondent, correctly so, that it is not apparent that the commissioner relied on any evidence by Schnetler in finding on the probabilities that he favoured Mase's version. The applicant sought to rely on the discrepancy on the evidence of Mase and Schnetler on why Mase elected not to lay criminal charges against the applicant for the assault. He suggests how the commissioner should have handled the issue. The manner in which the commissioner dealt with the issue is reasonable. The attack on the award on the basis that he was required to establish why Mase did not wait for the outcome of the disciplinary proceedings before tendering his resignation has nothing to do with the test for review. It is an alternative view which leaves the manner in which the commissioner handled the issue unassailed.

[10] Amongst the grounds which do not hold water, is the submission that the commissioner committed a gross irregularity and unreasonably concluded that the applicant lacked credibility. He further submitted that probabilities were that the applicant was upset because he lost his job due to the incident. The commissioner stated that the applicant was upset. The applicant did not disclose the reasons for being upset, they therefore cannot be speculated at this stage.

[11] The commissioner was required to consider the principal issue before him, evaluate the facts and come to a reasonable conclusion. See *Gold filed supra*³. An assessment of the totality of the evidence reflects that he dealt with the principal issue before him which was the substantive fairness of the applicant's dismissal for the acts of misconduct which led to his dismissal. He was faced with two mutually exclusive versions. He dealt with them and gave reasons for preferring the third respondent's version. He considered the credibility of the witnesses before him and forwarded reasons for his credibility finding. This court does not interfere with credibility findings easily. In *Network field Marketing (Pty) Ltd v Mnghezana NO and Others* the Court relied on the following *dictum* in *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others*⁴ where the court held thus:

‘In dealing with demeanour and credibility in relation to the magistrate's findings Van Zyl J said the following:

‘Of course, the judicial officer, who has sight of the witness and is able to assess their evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however, speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a Court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified.’

[12] When the difference between appeals and reviews is taken into account, the review court should even be more reluctant. I could find no reason for not accepting the commissioner's credibility findings. They are based on the evidence before him and reasonable.

[13] The applicant sought to rely on the weight the commissioner should have attached to evidence. When a commissioner makes errors in dealing with and

³ Para 16

⁴ 2004 (2) SA 433 (SCA) at para 38.

attaching weight to evidence, his or her conduct does not render his or her award reviewable. See *Herholdt vs Nedbank Ltd and Others*⁵.

- [14] There is merit in the applicant's submission that no direct evidence was led to prove that he brought the third respondent's name into disrepute by fighting in public wearing its uniform. The commissioner, however, found the misconduct of fighting serious enough to justify dismissal. The commissioner expressed that view thus:

'Having regard to the importance of the rules that were breached by the applicant, the seriousness of the act of misconduct committed by the applicant, the fact that assaulting or being violent towards a co-employee and using unnecessary violence against any person in the course of duty or in uniform according to the respondent's disciplinary code is dismissible offence, the respondent's evidence that the applicant has destroyed the trust relationship, the applicant's reasons for challenging his dismissal and approaching the CCMA with unclean hands. I am of the view that the sanction of dismissal imposed by the respondent was appropriate in the circumstances. I accordingly find on a balance of probabilities that, the applicant's dismissal was substantively fair.'

- [15] The applicant failed to prove that the award falls outside the bounds of reasonableness and his application cannot succeed.

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

16.1 The application for review is dismissed.

Lallie J

Judge of the Labour Court of South Africa

⁵ [2013] 11 BLLR 1074 (SCA) para 25

APPEARANCE

For the Applicant: Mrs Van Staden of the Justice Centre

For the Third Respondent: Mr Unwin of Chris Unwin Attorneys

LABOUR COURT