



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

Not Reportable

Case No D1004/11

In the matter between:

**SOUTH AFRICAN COMMERCIAL, CATERING AND
ALLIED WORKERS UNION (SACCAWU)**

Applicant

and

IRVIN BONGA PUTINI

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (CCMA)**

Second Respondent

COMMISSIONER NHLANHLA MATHE

Third Respondent

Heard: 18 December 2013

Delivered: 26 November 2015

Summary: Application to review arbitration award – union official dismissed for receiving money from employer where union organised, dishonesty and soliciting funds without consent – arbitrator found dismissal both procedurally and substantively unfair – heads of argument raising new grounds of review not in review application papers – applicant not entitled to raise grounds of review not stated in review application papers – applicant not challenging arbitrator’s finding that union acted inconsistently by dismissing first respondent and not dismissing the Acting Regional Secretary who received free alcohol from the same employer without the consent of the union – application

dismissed with costs

JUDGMENT

ALEXANDER AJ

Introduction

- 1 This is an application, in terms of Section 145 of the Labour Relations Act¹ (“the LRA”), to review and set aside the award of the Third Respondent (“the Commissioner”) in which he found that the dismissal of the First Respondent was both substantively and procedurally unfair and ordered that the Applicant reinstate the First Respondent retrospectively to 22 December 2010, at the rate of R9 783.82 per month, with costs.

Salient facts

- 2 The First Respondent was employed by the Applicant as an Organiser. He was the chairperson of the Durban Metro District for the South African Dance Sport Federation (“FEDANSA”) which is an organisation that promotes dance. From time to time FEDANSA obtained sponsorship from different businesses to promote their activities, such as holding dance competitions. On three occasions in 2009 FEDANSA was paid sponsorships for a total amount of R65 000.00 directly into its bank account by Rhino Cash and Carry (“Rhino”). The sponsorships were made by Rhino to FEDANSA to obtain publicity by way of advertising.

¹ Act 95 of 1995

- 3 The First Respondent was dismissed on 22 December 2010 after being found guilty of:
- 3.1 Alleged misconduct in that he received money from Rhino, which was not for the benefit of the applicant; and
- 3.2 Dishonesty and putting the name of the applicant into disrepute by soliciting funds from Rhino without the consent of the Applicant.
- 4 The First Respondent proceeded to challenge the substantive and procedural fairness of his dismissal by way of arbitration before the second respondent ("the CCMA"). The Commissioner, in an award, dated 24 June 2011, found that the dismissal of the Applicant was substantively unfair and reinstated the First Respondent with backpay, and ordered the Applicant to pay the First Respondent's costs.
- 5 The Commissioner further found that the dismissal of the First Respondent was procedurally unfair because the Applicant refused to allow the First Respondent to be represented at his disciplinary hearing by a fellow employee, Nancy Zibi; his cross examination of witnesses was limited by the chairperson; he was not furnished with the reasons for his dismissal; the National Personnel Committee ("NPC") or the Regional Personnel Committee ("RPC") of the Applicant (and not the chairperson) had the authority to dismiss the First Respondent; after the disciplinary hearing was concluded, a member of the RPC contacted the public relations officer of FEDANSA and asked questions in relation to the subject of the disciplinary enquiry; officials of the Applicant involved in

the disciplinary enquiry deliberated on the matter prior to the decision of the chairperson being taken and the First Respondent was not afforded an appeal hearing in breach of the Applicant's Constitution.

6 The Applicant lodged a review application with this Court on 4 November 2011, which was approximately 64 days late, and brought an application for condonation for the late filing of its review application, on 30 March 2012. The Applicant's explanation for the delay in bringing this application is that its previous attorneys withdrew in all the Applicant's matters as attorneys of record which required the Applicant to instruct another firm of attorneys, which the Applicant brought to the First Respondent's attention. The Applicant's current attorneys were instructed at the end of October 2011 and the review application papers were filed on 4 November 2011. The application for condonation is opposed by the First Respondent.

7 I am satisfied that the Applicant has provided a sufficient explanation for the delay in launching this application and on this basis the Applicant is entitled to an order condoning the late filing of this application.

The law in relation to review applications

8 In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² the majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following:

² (2007) 28 ILJ 2405 (CC)

“Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?”

- 9 In *Herholdt v Nedbank Limited*³, the Court concluded that the review test is as follows:

“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 S145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by S145(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 areas of fact, as well as the weight and relevance to be attached to the 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.”

- 10 In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁴ Waglay JP stated:

“The enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable or, put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material.”

³ (2013) ILJ 34 2795 (SCA)

⁴ (2014) 35 ILJ 943 (LAC),

11 Waglay JP held:

“A review court must ascertain whether the arbitrator considered the principal issues before him / her, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions that he / she arrived at.”

12 More recently, in *Head of the Department of Education v Mofokeng*⁵, the Labour Appeal Court summarised the review test as follows:

“[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the

⁵ [2015] 1 BLLR 50 (LAC)

same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the questions raised for determination.”

The applicant's grounds for review

- 13 In the Applicant's founding affidavit, which was deposed to by Herbert Eviot Mpofana, a paralegal officer, the Applicant contends that the application for review is brought in terms of Section 145(2)(a)(i), (ii) and (iii) of the LRA, and in addition, the award is one that no reasonable Commissioner could have made having regard to the evidence properly placed before him, and in addition, having regard to the reasons stated in his award. In Mpofana's affidavit, he does not indicate specifically in what respects the award is reviewable.
- 14 In the supplementary affidavit, which was deposed to by Matthews Mphikeleli Ndlovu, who was the acting Regional Secretary of the Applicant at the time of the incident, he states that he wishes to provide further grounds for review, and to substantiate the grounds for review raised in the founding affidavit. The specific ground of review raised by Ndlovu is that the First Respondent was guilty of the charge even if FEDANSA, and not the First Respondent, received the donation of R65 000.00 from Rhino.

- 15 Ndlovu then proceeds to contradict himself by raising a second ground of review that the First Respondent's version that the R65 000.00 was paid into the FEDANSA bank account was false.
- 16 In the Applicant's heads of argument, the Applicant accepts that the Commissioner published a careful and well-motivated award, in which he found that the charges levelled against the First Respondent had not been proven, but that in doing so the Commissioner failed to consider that the Applicant had a conflict of interest because he was responsible for negotiating wages and conditions of service for the Applicant with Rhino and yet he solicited and obtained sponsorship for FEDANSA from Rhino in the amount of R65 000.00. It is further submitted that it was not necessary for the money to have been received by the First Respondent personally but that it was enough that FEDANSA received the money, whilst he was the chairman of FEDANSA, because it generated a conflict of interest.
- 17 It is further submitted in the Applicant's heads of argument that the Commissioner was correct in finding that the First Respondent had not personally received the money but that, implicit in the charges, was the fact that the money was solicited and received by the First Respondent, in his capacity as chairman of FEDANSA, which was not for the benefit of the Applicant, was not done in a transparent way and created a conflict of interest that undermined his role as a union organiser. It is contended that he brought the union into disrepute by soliciting funds without the applicant's knowledge or consent.

18 It is further contended by the Applicant in their heads that the Commissioner failed to take this feature into account in his award and that this was a glaring error and oversight that resulted in an award which was wrong and a decision that could not be reached by a reasonable arbitrator, and for this reason, the Commissioner misdirected himself and committed a reviewable irregularity.

19 The First Respondent contends in his heads of argument that nowhere in the Applicant's founding papers does the Applicant raise as a ground for review that the Commissioner ought to have found that there was a conflict of interest.

20 In *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau NO & Others*⁶ Zondo JP said (at para [30]):

“[30] Accordingly, a party which brings a review application is bound by the grounds of review set out in the founding papers. He cannot in oral argument argue on the basis of different grounds of review except if such grounds can be said to be apparent from the review application. In this case the applicant does not pursue the grounds of review contained in the founding affidavit but seeks to argue the case on the basis of grounds which are nowhere to be found in the review application. The grounds it seeks to pursue are not grounds of review that can be said to be apparent from its review application. That cannot be allowed.”

⁶ (2009) 30 ILJ 269 (LAC). 1 See also *CUSA v Tao Ying Metals Industries and Others* [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC)

The rule or standard that was allegedly breached and the applicant's case against the first respondent

- 21 Even if the Applicant had properly raised in its founding papers that the Commissioner misdirected himself, and committed a reviewable irregularity, by not finding that the First Respondent had a conflict of interest, it was not part of the charges against the First Respondent and nor was it the Applicant's case during the internal disciplinary hearing and the CCMA arbitration proceedings.
- 22 The fundamental difficulty in the Applicant's case is that it is not clear what precisely the Applicant's rule or standard is in relation to obtaining consent for soliciting or receiving gifts or donations and the reasons why the Applicant's case against the First Respondent was not consistent in the internal disciplinary hearing, the CCMA arbitration proceedings and in these review proceedings.
- 23 As the acting Regional Secretary for the Applicant in KwaZulu-Natal, Ndlovu was the most senior employee of the Applicant who testified. He did not give evidence about the rule or standard relating to obtaining consent for receiving or soliciting gifts or donations from an employer, although he did testify that he had received free alcohol, which was worth R500.00, from Rhino, without consent from the applicant, and said that he had subsequently disclosed receiving the free alcohol to the shop stewards, and later to his subordinate, Colin Naidoo. Naidoo testified that the First Respondent committed an offence because he received

cash from an employer but that it was not an offence to receive goods from an employer, as was the case with Ndlovu.

24 Evidence was led that the Applicant solicited and received monetary donations from Rhino from time to time, and that members of the Applicant that were employed by Rhino, were not aware of this. No evidence was led regarding the rule or standard in relation to the Applicant soliciting or receiving gifts or donations from employers.

25 In the outcome of the chairperson for the disciplinary hearing, she found the First Respondent guilty of the first charge because he was paid R50 000.00 for four consecutive years and he was unable to show that this money was paid to FEDANSA. In relation to the second charge, the chairperson found that the first respondent acted dishonestly in receiving R50 000.00 per annum for four consecutive years and that he was guilty of corruption because he requested a donation for his own personal gain. She further found that the First Respondent was guilty of extracting a bribe, and not a donation, because Rhino was the only organisation that was being organised by the First Respondent.

26 Whilst testifying before the Commissioner, the chairperson testified that not only did the First Respondent act dishonestly but also that he was involved in fraud and corruption because he was organising at Rhino not in the interest of the workers but in the interest of himself. The chairperson further testified that the donations were not for the benefit of the Applicant but for the benefit of FEDANSA, which contradicted her

outcome for the disciplinary hearing where she found that the money was not paid to FEDANSA.

27 The chairperson testified at the arbitration that she accepted the hearsay evidence of the applicant's witnesses that the first respondent had received R50 000.00 for four consecutive years. The chairperson further testified that this money was for his own personal gain because he owned FEDANSA and he had access to the money and could do whatever he wanted with it. She further testified that the first respondent was involved in corruption because he requested a donation from Rhino for his own personal gain.

28 As stated above, no specific grounds of review are raised in the Applicant's founding affidavit. In the Applicant's supplementary affidavit, the first ground of review is that the First Respondent was guilty of the charge even if FEDANSA, and not the First Respondent received the donation from Rhino. The second ground of review, which contradicts the first ground of review, is that the First Respondent's version that the donation was paid into FEDANSA's bank account was false. Nowhere in the applicant's founding affidavit or supplementary affidavit is it raised as a ground of review that the Commissioner failed to consider that the Applicant had a conflict of interest, and that accordingly his award was wrong and not one that could be reached by a reasonable arbitrator.

29 The Applicant is not permitted to raise new grounds of review in its heads of argument, which were not raised in the Applicant's founding and

supplementary affidavits, and accordingly the Applicant's application ought to be dismissed on this basis alone.

Whether the applicant acted inconsistently in dismissing the first respondent and not dismissing Ndlovu

30 In his award, the Commissioner found that the dismissal of the First Respondent was substantively unfair because the Applicant acted inconsistently by dismissing the First Respondent and not dismissing the acting Regional Secretary, Ndlovu, who personally received free alcohol from Rhino valued at R500.00.

31 This finding by the Commissioner is not raised by the Applicant as a ground of review in its founding papers, or even in its heads of argument.

32 In any event, based on the evidence presented in the arbitration, the Commissioner correctly found that the Applicant acted inconsistently by dismissing the First Respondent and not dismissing Ndlovu for receiving free alcohol from Rhino without consent or authorisation from the Applicant.

33 It was contended by Mr Pillemer, for the Applicant, during argument that the two cases are distinguishable because Ndlovu disclosed to the Applicant that he received free alcohol.

34 But the First Respondent was not dismissed for failing to make a disclosure, he was dismissed for failing to obtain consent. Ndlovu committed the same offence because he did not obtain consent from the

Applicant when he received the free alcohol on 3 September 2010. Ndlovu only disclosed receiving the free alcohol to the shop stewards of Rhino 11 days later, and to Naidoo, who was his subordinate, after Naidoo had told him that the first respondent had received money from Rhino. Ndlovu testified that he told the Regional Officer Bearers ("ROBs") by way of a text message and subsequently told the General Secretary of the applicant at a meeting in November 2010 that he had received free alcohol from Rhino. In April 2011, Ndlovu was told that an investigation had been instituted against him for having received free alcohol from Rhino, but he was not dismissed.

35 The offence that the First Respondent was dismissed for was soliciting funds from Rhino without consent. Ndlovu was not dismissed (or even disciplined) for failing to obtain consent from the Applicant when he received the free alcohol from Rhino. Ndlovu committed the same offence as the First Respondent by not obtaining consent from the Applicant before receiving the free alcohol from Rhino, and the Applicant acted inconsistently in dismissing the First Respondent and not dismissing Ndlovu.

36 The Commissioner's finding that the First Respondent's dismissal was substantively unfair because the Applicant failed to apply discipline consistently by not disciplining Ndlovu remains unchallenged.

Conclusion

37 The Applicant's application to review and set aside the award is dismissed, with costs.

Order

38 I accordingly make the following order:

38.1 The application for condonation for the late filing of the review application is granted;

38.2 The application to review and set aside the award is dismissed;

38.3 The applicant is ordered to pay the first respondent's costs.

ALEXANDER AJ

Appearances:

For the applicant : Advocate M Pillemer SC

Instructed by : Jafta Inc.

For the first respondent : Mr B Mgaga

Instructed by : Garlicke & Bousfield Inc.

LABOUR COURT