



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Reportable

Of interest to other Judges

Case no: JR 957/2014

In the matter between:

BIDAIR SERVICES (PTY) LTD

Applicant

and

COMMISSIONER NOMUSA MBHELE

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

JEFFREY NGOAKO MASHISHI

Third Respondent

Heard: 5 January 2016

Delivered: 27 January 2016

Summary: Review Application – Award – Subsequent variation ruling – principle of peremption – whether employer loses right to review award it has accepted and complied with – Ellerines Furnishers (Pty) Ltd v CCMA & others incorrectly decided – employer loses right to review award – employer bound to election not to challenge award – employer does not lose right to review subsequent variation ruling

JUDGMENT

VENTER, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹, as amended, ("the LRA"), for the review and setting aside of an arbitration award ("the Award") issued by Commissioner Mbhele ("the Commissioner") in terms of which she held the dismissal of the third respondent ("Mashishi") to be substantively unfair.
- [2] In addition to the review and setting aside of the award the applicant, by way of an amended notice of motion dated 6 May 2015², also sought the review and setting aside of a variation ruling of the Commissioner dated 9 April 2014. During argument before court, Mr Hutchinson who appeared for the applicant abandoned the review and setting aside of the variation ruling of 9 April 2014 and formally withdrew the amended prayer 2 of the notice of motion.
- [3] Due to the withdrawal of the review application in respect of the variation ruling of 9 April 2014, the only application before me is the review of the Award dated 9 October 2013 as varied by the Commissioner on 9 April 2014.

Background facts

- [4] Mashishi was employed by the applicant in the capacity of customer services agent earning R6,180.00 per month. Mashishi worked with the Singapore Airlines check-in team handling passengers.
- [5] On 27 December 2012 an incident occurred at the workplace which resulted in Mashishi being charged with gross negligence, failure to comply with a lawful instruction, behaviour which causes or may cause the company's name to come into disrepute and breach of company rules and regulations. As a result of the incident, Singapore Airlines requested that Mashishi be removed from its operations.
- [6] On 29 January 2013 a disciplinary hearing was convened and the leading of evidence was concluded. No outcome was issued. The outcome and sanction of dismissal were only issued four months later on 22 May 2013.

¹ Act 66 of 1995.

² Pages 1 - 4 of volume 3 of the record.

- [7] Pending the outcome and chairperson's sanction, Mashishi was reallocated to work in arrivals with no reduction to his salary. For the period from 29 January 2013 to 22 May 2013 Mashishi continued to work at the applicant.
- [8] On being dismissed Mashishi invoked the dispute resolution mechanisms in terms of the LRA and referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). The arbitration was conducted on 1 October 2013 before the Commissioner.
- [9] The applicant led the evidence of one witness, Eddie Swanepoel ("Swanepoel"). Mashishi testified and did not call any other witnesses.
- [10] After analysing the evidence before her the Commissioner concluded as follows³:

'It is evident that the applicant breached a rule. The respondent led extensive evidence regarding the importance of breaching a rule. It is further evident that the applicant was on a final written warning for gross negligence. I find that the applicant was reasonably aware of the rule.

Normally the employee would be dismissed after receiving a final written warning, in this case, it is more probable that the employment relationship was not irretrievably broken as the respondent would not have placed the applicant on arrivals after the disciplinary hearing. I find that the decision to dismiss the applicant was unfair. The respondent did not lead any evidence that there were no alternative positions.'

- [11] The Commissioner, having found the dismissal substantively unfair and accepting that Singapore Airlines requested Mashishi's removal from its operations and that reinstatement into his old position was therefore not appropriate, awarded Mashishi relief in the form of re-employment.
- [12] The relief is set out in the award as follows⁴:

³ Page 17 paras 26 and 27 of volume 2 of the record.

'The respondent, BidAir Services, is directed to re-employ the applicant, Jeffrey Ngoako Mashishi, to an alternative position with effect 01 November 2013.'

- [13] On 4 November 2013 Mashishi reported to the applicant for re-employment. The Applicant offered Mashishi the alternative position of baggage handler at a salary of R3, 098.50.⁵ Mashishi rejected this offer on the basis that due to a back injury he is unable to stand for long periods and lift heavy objects⁶.
- [14] On 11 November 2013 the applicant offered Mashishi another alternative position of cleaner at a hourly rate of R14.45 per hour. In the offer letter the applicant indicated that the offer is made in line with the Award⁷.
- [15] It appears that Mashishi did not accept this offer as on 21 November 2013 Mashishi's attorney, G J Brits addressed correspondence to the Applicant requesting an offer of re-employment to the position of customer services agent, alternatively a suitable alternative position⁸.
- [16] The applicant responded to the correspondence and stated as follows⁹:
- 'Kindly take note that BidAir Services is in compliance with the CCMA award, as it clearly instructed that Mr Mashisi is to be re-employed in an alternative position by the 01 November 2013. The award does not specify re-employment as a customer service agent nor any other position.'
- [17] The applicant again offered Mashishi the position of cleaner.
- [18] As the applicant interpreted the relief awarded to Mashishi to be re-employment into an alternative position and not re-employment into a

⁴ Page 15 of volume 2 of the record, para 32.

⁵ Page 47 of volume 2 of the record.

⁶ Pages 48 and 49 of volume 2 of the record.

⁷ Page 46 of volume 2 of the record. The offer states "*As per the conditions of the CCMA award handed down by Commissioner Nomusa Mbhele dated 09 October 2013 in which it was ordered that the Company offer you an alternative position within the organisation.*"

⁸ Page 44 of volume 2 of the record.

⁹ Page 41 of volume 2 of the record.

customer services agent position or any other suitable position, Mashishi launched a variation application on 23 January 2014¹⁰.

- [19] On 12 February 2014 the Commissioner issued a variation ruling¹¹ in which she varied paragraph 32 of the Award on the basis that it was ambiguous. The Commissioner concluded as follows¹²:

'It is clear from the submissions that the applicant holds a Diploma in travel and tourism and have numerous qualifications in the field of travel and tourism. I find that paragraph 32 of the award is ambiguous as it opens the interpretation by the respondent which prejudices the applicant.

Paragraph 32 of the arbitration award is varied as follows:

The respondent, BidAir Services, is directed to re-employ the applicant, Jeffrey Ngoako Mashishi, to the position equivalent to his qualifications and experience with effect from 01 November 2013.'

- [20] The matter does not end here. On 13 February 2013, obviously dissatisfied with the variation ruling, the applicant brought a rescission application¹³ in which it sought the rescission of the variation ruling on the ground that it was issued in its absence.

- [21] The rescission application was not supported by an affidavit and in fact consisted only of written submissions.

- [22] The applicant states in the written submissions that:

'The respondent hereby respectfully submits that it had not received the condonation application nor the variation application thereby denying it the opportunity to oppose said applications.'¹⁴

- [23] The applicant further submitted that it had complied with the award in that it offered Mashishi two alternative positions.¹⁵

¹⁰ Pages 80 - 92 of volume 2 of record.

¹¹ Pages 18 - 20 of volume 2 of the record.

¹² Paras 15, 16 and 17.

¹³ Pages 39 - 43 of volume 2 of the record.

¹⁴ Para 2 page 39 of volume 2 of the record.

- [24] In the written submissions in the application for rescission the applicant does not deal with the factor of a *bona fide* defence to the variation application and in fact admits that the award is vague as 'it again does not direct the respondent as to which specific position it should re-employ the Applicant to.'¹⁶
- [25] The Applicant further submitted that there are no suitable alternative positions available equivalent to Mashishi's qualifications and experience¹⁷.
- [26] On 9 April 2014 the Commissioner issued a rescission and variation ruling¹⁸.
- [27] It appears from the rescission ruling that Mashishi opposed the rescission application on the basis that it was not on affidavit and the applicant had not set out the grounds for rescission.
- [28] The Commissioner after considering the parties' submissions in the rescission application concluded as follows¹⁹:

'The respondent submitted that the application is not in compliance with Rule 31 of CCMA rules. Rule 31 (10) provides: "Despite this rule, the Commission or a commissioner may determine an application in any manner it deems fit." I will therefore accept the applicant's rescission application.

In *Shoprite Checkers (Pty) Ltd Limited v CCMA & Others* (2007) 28 ILJ 2246, the Labour Appeal Court held that the applicant for rescission should show good cause as a ground for rescission. The test for good cause involves two factors, namely, the explanation for the default and whether the applicant has a *prima facie* defence.

Although there is proof that the notice of the condonation and variation applications were served by facsimile, in *Edgars Consolidated Stores (Pty) Ltd v Kalanda & Others* (2007) 7 BLLR 632, the Labour Court held at paragraph

¹⁵ Para 5 of the application states as follows "The respondent respectfully submits that the it had complied with said award in that it offered the applicant two alternative positions which were available at the time, the applicant subsequently refused said offers".

¹⁶ Para 13 page 40 of volume 2 of the record.

¹⁷ Page 40 para 13 of volume 2 of the record.

¹⁸ Pages 68 - 71 of volume 2 of the record.

¹⁹ Pages 69 and 70 paras 7, 8, 9 of volume II of the record.

11: "Commissioners ought to, by now, appreciate the inherent danger of accepting transmission slips as conclusive proof that notification of legal proceedings has taken place. It is therefore probable that the applicant did not receive the variation and condonation applications.'

[29] The Commissioner rescinded the variation ruling.

[30] After rescinding the variation ruling the Commissioner then on her own decided to vary the award. In varying the award the Commissioner changed the relief from re-employment to compensation equivalent to six months remuneration.

[31] The Commissioner concluded as follows²⁰:

'Paragraph 32 of the arbitration award is unclear as it does not indicate the alternative position for the applicant. It is evident from the employer's rescission application that the only available position is that of a cleaner. I believe that the applicant would be prejudiced to work as a cleaner as he is an experienced Customer Service Agent. When an award of re-employment was made, it related to re-employment to the position equivalent to the applicant's qualifications and experience.

In the absence of any position equivalent to the employee's qualifications and experience, the fourth sentence of paragraph 30 is varied to read: Based on the substantive unfairness of the applicant's dismissal, I am of the view that the applicant should be compensated with six months remuneration as the applicant had two and a half years employment service, it had been approximately five months from the dismissal date to the arbitration date and I have considered that the applicant's dismissal was procedurally fair.

Paragraph 32 of the award section is varied to read: The respondent, BidAir Services, is directed to pay the applicant, Jeffrey Mashishi, R40 680,00 (forty thousand six hundred and eighty rand), calculated at R6780,00 x 6, within fourteen days of receipt of this variation ruling.'

[32] The applicant (for reasons not known to the court) was not satisfied with the variation ruling. On 16 May 2014 the applicant launched the review

²⁰ Page 70 paras 12 - 14 of volume II of the record.

application seeking the review and setting aside of the award as varied by the Commissioner on 9 April 2014²¹.

[33] The grounds of review set out in the founding affidavit are that the Commissioner applied her mind to irrelevant factors and should not have been influenced by the fact that Mashishi remained on duty pending the disciplinary hearing²².

[34] In the supplementary affidavit the applicant amplifies its grounds of review and submits that the Commissioner's finding was unreasonable given the fact that Mashishi was on a final written warning²³. The applicant further requests the review and setting aside of the variation ruling of 9 April 2014²⁴.

[35] In the answering affidavit²⁵ Mashishi raises the point that the first time the applicant became dissatisfied with the award was when it was varied to a monetary amount²⁶. Mashishi submits that the award is an award any reasonable commissioner would have arrived at on the evidence before him/her²⁷.

[36] Mashishi further submits that the Commissioner was well within her rights to vary the award on both occasions and to award compensation²⁸. Mashishi takes no issue with the variation of the relief by the Commissioner from re-employment to compensation.

Peremption:

[37] Peremption is a well-known principle in our law and has been applied by this court and the Labour Appeal Court ("the LAC") in numerous labour disputes²⁹.

²¹ Pages 1 - 4 of volume 1 of the record.

²² Pages 5 - 11 of volume 1 of the record.

²³ Pages 31 - 33 of volume1 of the record.

²⁴ Page 33 para 7 of volume1 of the record.

²⁵ Page 21 of volume 3 of the record.

²⁶ Page 26 paras 8.3 and 8.4, page 27 para 9.3 of volume 3 of the record.

²⁷ Page 30 para 13.11 of volume 1 of the record.

²⁸ Page 30 para 13.12 of volume 1 of the record.

²⁹ See *Doorgesh v Commission for Conciliation, Mediation and Arbitration and others*, unreported judgment, case number CA4/2014 (dated 6 November 2015), National Union of Metal workers of

[38] In *Dabner v South African Railways & Harbours*³⁰ Innes J said that:

'The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.'

[39] In *NUMSA & others v Fast Freeze*³¹ the LAC stated that:

'If a party to a judgment acquiesces therein, either expressly, or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well-known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot or cold, or have one's cake and eat it.'

[40] In *NEHAWU obo E.S. Chakela v Vaal University of Technology and others*³², this Court set out the requirements for peremption as follows:

'The requirements of peremption in review matters can be summarized as follows:

- i. Where a right to review exists, the party desiring to review loses that right where he or she has acquiesced in the arbitration award unconditionally and without any reservation which acquiescence may be express or implied from conduct.
- ii. The acquiescence by conduct entails the applicant conveying outwardly to the other party the attitude or stance towards the award.

SA & others v Fast Freeze (1992), Singh v FNB & others unreported judgment, case number D397/2011 (dated 9 September 2014) and Jusayo v Mudau NO & others (2008) 29 ILJ 2953 (LC).

³⁰ 1920 AD 583 at para 594.

³¹ (1992) 13 ILJ 963 (LAC) at page 969.

³² Para 9, Unreported judgment, case number JR2456/2008 (dated 9 October 2014).

- iii. The conduct must be consistent with an intention to abide by the arbitration award and inconsistent with an intention to review it.
- iv. The test to determine whether the applicant has manifested an outward attitude in relation to the award is objective and thus the subjective state of mind or intention of the applicant is irrelevant.
- v. The Court in considering whether the award has been preempted will determine whether fairly construed the conduct of the applicant leads to the conclusion of abiding with the award.
- vi. The onus of proving that an award has been preempted rests with the party seeking to rely on that doctrine.
- vii. The party seeking to rely on preemption stands to fail if more than one inference may be fairly drawn from the conduct of the other party. This means that the conduct relied upon to evoke preemption has to be unequivocal.

The basic requirement to sustain a claim of preemption entails having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal. In other words the applicant loses his or her right to challenge on review the arbitration award where the review application is instituted after accepting the outcome of the award unequivocally and without any reservation.'

[41] In *Singh v First National Bank and others*, Prinsloo AJ stated that³³:

'The concept of preemption is based on the general notion that a litigant has two elections to make: either accept or reject the outcome of the judgment or the arbitration award. As a general rule a party that preempts the arbitration award would not be entitled subsequently to challenge that arbitration award. The basic requirement, however, to sustain a claim of preemption entails having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal.'

[42] Applying the well-known principles of preemption to the facts of this case, there is no doubt in my mind that the applicant expressly and unequivocally,

³³ Unreported judgment, case number D397/2011 (9 September 2014) at para 30.

unconditionally and unreservedly acquiesced in the Award when it offered Mashishi the alternative positions of baggage handler and cleaner on 4 and 11 November 2013 and again on 21 November 2013. This conduct of the applicant was wholly inconsistent with an intention to challenge the Award.

- [43] When the applicant made the offers to Mashishi it had no intention of challenging the Award, the applicant accepted the Award, accepted the reasoning of the Commissioner on the merits of Mashishi's unfair dismissal claim and accepted the relief granted by the Commissioner in the form of re-employment. The applicant did not only accept the relief granted but, and on its own version, complied with it when it offered Mashishi the positions of baggage handler and cleaner. The applicant's correspondence to Mashishi's attorneys makes it clear that the applicant itself considered the offers of the alternative positions to be in compliance with the Award. The intention of the applicant was unequivocal. The applicant elected to accept the Award, elected to comply with the Award and elected to offer Mashishi re-employment into alternative positions (which on its own version was compliance). The applicant is bound to these elections.
- [44] The applicant was not only satisfied with the Award in that it did not intend to challenge the Commissioner's findings and the relief awarded in terms thereof but was also prepared to accept Mashishi back into its employment. I agree with Mashishi that the applicant only decided that it was not satisfied with the Award when the Commissioner *mero motu* changed the relief from re-employment to compensation. In my view it was then too late for the applicant to change its mind and to decide that the Commissioner's reasoning on the merits of Mashishi's dismissal was grossly unreasonable.
- [45] It defies logic that the applicant was happy to accept Mashishi back into its employment, was prepared and did offer Mashishi alternative employment and only after doing so and after the Commissioner having varied the relief from re-employment to compensation, decided that the Commissioner's conclusion that dismissal was not appropriate was grossly unreasonable.

[46] I find it quite astonishing that the applicant was prepared to re-employ Mashishi (in a far junior position and at a far lower rate of remuneration), was not prepared to offer Mashishi a suitable alternative (as prescribed by section 193(1)(b) of the LRA and which is an inherent part of the remedy of re-employment), and was after numerous applications in the CCMA, not prepared to make payment to Mashishi of the compensation of R40 680.00.

[47] During argument Mr Hutchinson referred me to the judgment of acting Justice Bank in *Ellerines Furnishers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*³⁴ where it was held that:

'Simply put, once a variation ruling is handed down by a Commissioner the entire arbitration award then becomes open to review by any party affected by such variation on any of the recognised grounds of review, despite an earlier possible peremption of such right of review on the part of an affected party.'

[48] In the *Ellerines* case the commissioner found the retrenchment of the employee to have been procedurally unfair and awarded the employee five months compensation calculated on the employee's net pay. The employer paid the employee the compensation awarded. The employee, however, sought variation of the compensation awarded to him on the basis that the compensation should have been calculated on his gross remuneration. The Commissioner varied the amount and issued a variation ruling. The employer then decided to challenge the commissioner's finding on the procedural fairness of the dismissal and the variation ruling.

[49] Bank AJ's reasoning for concluding as he did is as follows:

'In my view, once it can be said that a right of review exists such right cannot be circumscribed by the peremption of a portion of that right or that only certain grounds of review may be raised but not others. Not only would this give rise to the possibility raised by Mr Makapane on behalf of Ellerines but I find this to be an outcome that pushes the bounds of what may be termed the overriding objective of the LRA: the fair, just and expeditious resolution of labour disputes. It would also constitute a fettering of the discretion of the Court to review and

³⁴ (2015) 36 ILJ 215 (LC) at para 19.

set aside any award or ruling that falls within the grounds of review set out in the LRA as amplified, refined and evolved over almost twenty years of jurisprudence in this and other Courts under the LRA³⁵.'

- [50] I am in respectful disagreement with Bank AJ. Where an affected party unequivocally expresses an intention not to challenge an award and in expressing this intention complies or offers compliance with the award, such affected party loses its right to review the award. The affected party is bound by its election not to challenge the award. Under these circumstances no right to review exists, it is lost when the affected party unequivocally and unreservedly offers to comply with the award.
- [51] I further respectfully disagree with Bank AJ that in not permitting an affected party, who has acquiesced, to review an award that has been subsequently varied, the discretion of this court to review an award that is open to review in terms of section 145 of the LRA will be fettered. This court should not be adjudicating review applications of arbitration awards which have been accepted by the parties and where compliance has either occurred or has been tendered.
- [52] In my view Bank AJ erred in that he failed to consider the effect of the affected party's election to accept the award and that the consequence of that election is that the affected party loses its right to challenge the award. Bank AJ also failed to consider that the grounds for a variation of an award are limited to a variation to the extent there is an ambiguity or an obvious error or omission in the award³⁶. In my view a variation of an ambiguity or obvious error or omission in an award by the commissioner should not open up the entire award to review where the affected party has elected to accept the award, even if the acceptance of the award came before the variation.

³⁵ At para 18.

³⁶ Section 144 of the LRA provides that any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling, erroneously sought or made in the absence of any party affected by that award; in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or granted as a result of a mistake common to the parties to the proceedings.

- [53] In contrast to Bank AJ I am of the view that to allow an affected party to challenge an award that is perempted would be contrary to the scheme and objectives of the LRA being the fair, just, expeditious and effective resolution of labour disputes and would be contrary to fair labour practices.
- [54] If an affected party is permitted to challenge an award which it has accepted simply because a subsequent variation ruling was issued the affected party is given an opportunity to change its mind, to have a second bite at the cherry, to have its cake and eat it, to blow hot and cold and to approbate and reprobate. This is inconsistent with the well-established principle of peremption and is not in the interests of fair labour practices.
- [55] It would also create uncertainty for the other party should an affected party be permitted to challenge an award it has accepted and has complied with merely because of a subsequent variation ruling being issued which ruling either only corrects an obvious error or omission or clears up an ambiguity in the award.
- [56] I use the following example to illustrate how untenable this situation and approach is and how it could lead to absurdities. An employee is reinstated in terms of an award. The commissioner grants the employee back pay calculated at the employee's net remuneration. The employer complies with the award and reinstates the employee and pays the employee the back pay as incorrectly calculated by the commissioner. The employee applies for variation of the calculation of the back pay to a calculation on his gross remuneration on the basis of an obvious error. The calculation of the back pay is varied by the commissioner in a variation ruling. The employer thereafter launches a review application and challenges the award. In terms of the *Ellerines* judgment³⁷ the employer will be entitled to review the award granting reinstatement despite the fact that it has complied with the award and the employee has been reinstated. If the employer is successful in the review application and the award is set aside what would happen to the employee who was reinstated in compliance with an award that no longer exists? It

³⁷ Supra.

could lead to the absurd consequence of a dismissal dispute being remitted back to the CCMA for rehearing in circumstances where the employee is employed by the employer. If the court in the review application was to substitute the award with an order that the dismissal was fair what would happen to the employee who is working at the employer but who, as a consequence of the court order, has been fairly dismissed?

- [57] This approach could never be consistent with the objectives of the LRA and the right to fair labour practices.
- [58] Once a party has accepted an award and in exercising its election complies or offers to comply with the award, the affected party loses the right to review the award.
- [59] This does not mean that the affected party loses its right to oppose any subsequent variation application or to challenge any subsequent variation ruling varying the award. The affected party's right to review any subsequent variation ruling is not circumscribed. If the variation ruling is unreasonable or the commissioner, in issuing the variation ruling, committed misconduct, a gross irregularity or exceeded his/her powers, the affected party will have the right to challenge such variation ruling. The right to challenge such variation ruling is not lost; the right to challenge the perempted award is lost.
- [60] The Award was perempted when the applicant, by offering compliance, expressed the intention not to challenge it.
- [61] The applicant did not lose its right to challenge the variation ruling of 12 February 2013 if it felt this ruling to be unreasonable and did not lose its right to challenge the variation ruling of 9 April 2014 if it felt that the commissioner exceeded her powers in amending the relief.
- [62] Instead of challenging the variation ruling of 9 April 2014 the applicant launched a review application against the Award and the commissioner's finding of substantive unfairness, a finding it accepted.

[63] The applicant acquiesced in the Award and the review application should be dismissed on this ground alone.

Merits of Review Application

[64] However, and if I am incorrect in the application of the principles of peremption I am of the view that the review application is without merit. The Award is an award any reasonable commissioner would or could have arrived at on the evidence before him/her.

[65] Swanepoel failed to lead any evidence on the intolerability of the continued employment relationship and the irretrievable breakdown in the trust relationship between the applicant and Mashishi. To the contrary the evidence before the Commissioner was that despite Mashishi's misconduct he continued to work at the applicant for the period from the incident on 27 December 2012 to his dismissal on 23 May 2013. This was a period of 5 months during which the applicant had no issue with Mashishi working at its operations, despite his misconduct.

[66] In absence of any evidence on the intolerability of the continued employment relationship the Commissioner's finding that the relationship was not intolerable was a reasonable conclusion. The evidence of Swanepoel that Mashishi was "apprehensive", "not willing to assist" and was "rebellious"³⁸ during the months he worked at arrivals is not evidence of intolerability.

[67] Mr Hutchinson argued that the Commissioner should not have considered the appropriateness of the sanction as the fact that the applicant was on a final written warning was sufficient for her to conclude that dismissal was appropriate. Mr Hutchinson further argued that re-employment was not the appropriate remedy for a misconduct dismissal.

[68] I do not agree with Mr Hutchinson. After finding that Mashishi was guilty of the misconduct the Commissioner was obliged to consider the appropriateness of the sanction of dismissal.

³⁸ Page 6 para 13 of volume 2 of the record.

[69] As held by Basson J in *Jansen v CCMA & others*³⁹:

'From the foregoing it is apparent that the consideration of an appropriate sanction constitutes an important yet separate component of the arbitration process. This was confirmed by the Labour Court in *Theewaterskloof Municipality v SALGBC (Western Cape Division) and Others* where the Court held as follows:

'....In order to maintain the necessary distinction, some assistance may be drawn from the perspective that **a typical arbitration comprises essentially two phases**. The first is the receipt and evaluation of evidence in order to make factual findings. That phase is governed by the ordinary rules of evidence and procedure and no value judgment is involved. **If the employee's guilt is established, the second phase arises, being the identification and weighing of the factors relevant to the determination of sanction**. Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory policy and framework; and adequate regard to the pertinent juris prudence as developed by the courts. **Only then can a value judgment, properly so called as a comparative balancing of competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair**'.

Furthermore, it is also a trite principle that the mere fact that a commissioner finds an employee guilty of misconduct does not as a matter of course entitle an employer to dismiss. See in this regard *Ikwezi Municipality v South African Local Government and Others* where the Court held as follows:

'The sole issue on review, as articulated by Mr Grogan, is whether this Court should interfere with the arbitrator's finding that dismissal was an appropriate sanction in the circumstances. Mr Wade submitted that this refers to a pure penalty review for unreasonableness, which is not the basis of its attack. In this vein, Mr Grogan submitted that the gravity of the misconduct is only one of the many factors to be taken into account by the arbitrator as set out by the Constitutional Court in *Sidumo (supra)*. Seen in context the publication of the letter did not constitute misconduct

³⁹ Unreported judgment, case number JR297/2009 (20 March 2014) at paras 7 and 8.

of such gravity so as to automatically warrant dismissal. It reflects the kind of criticism that appears in the media daily. **In any event, there is no misconduct, however serious, that automatically licences an employer to dismiss an employee. The LAC confirmed in *Toyota South Africa Motors (Pty) Ltd v Radebe and Others* that mitigating factors must always be considered. This would mean that even where an employee is found guilty of serious misconduct, on consideration of all the facts dismissal may not be determined to be an appropriate sanction.** The applicant's submission that there is in essence a contradiction between the finding that the employee is guilty of misconduct and the remedy of reinstatement cannot therefore be sustained. **The ultimate test is whether the arbitrator applied his mind to determining whether the sanction is appropriate in the circumstances** having regard to, among other factors, the misconduct committed".'

[70] In *City of Cape Town v SALEBC & others*⁴⁰ Basson J held that:

'In respect of sanction it is accepted that it is not the task of the commissioner or the arbitrator to merely rubberstamp the sanction imposed by the employer following a disciplinary hearing. The commissioner or arbitrator should apply his or her own sense of fairness in respect of whether or not dismissal is an appropriate sanction. Although it is the employer that dismisses, it is the commissioner who must decide whether or not the dismissal was fair.'

[71] The Commissioner considered the appropriate sanction and came to the reasonable conclusion that in absence of evidence on intolerability and considering that Mashishi worked at the applicant for a 5 month period after the incident, continued employment was not intolerable and dismissal was too harsh. This conclusion of the Commissioner is reasonable and is not open to review.

⁴⁰ (2011) 32 ILJ 1333 (LC) at para 15.

Costs

- [72] This matter involves arbitration proceedings, an award, a variation application, a variation ruling, a rescission application, a rescission ruling and variation ruling and an opposed review application brought largely by the applicant in an effort not to re-employ Mashishi into a suitable alternative position and not to make payment to Mashishi of the compensation awarded in terms of the variation ruling of 9 April 2014.
- [73] The litigation in this matter was in my view unnecessary and disproportionate to the compensation ultimately awarded to Mashishi.
- [74] The applicant's conduct leaves little to be desired. The offer of the positions of baggage handler and cleaner at less than half the remuneration Mashishi was earning at time of dismissal was unreasonable and not done in good faith. The applicant's rescission application was unnecessary as the Commissioner was simply clarifying an ambiguity in the award. The Commissioner was simply giving effect to the provisions of section 193(1)(b) of the LRA.
- [75] The only review application that had merit was the review of the variation ruling of 9 April 2014 as the Commissioner had no power or competence to vary the relief from re-employment to compensation. However at an extremely late stage during the hearing of the review application the applicant withdrew this relief and I am not able to set it aside.
- [76] The review application has no merit. The Award was perempted by the applicant and under these circumstances I am of the view that it is appropriate that costs be awarded to Mashishi who has been forced by the applicant's conduct and litigious approach to oppose numerous processes before two tribunals in an attempt to defend the Award and get the relief awarded to him.
- [77] Applying the principles of an award of attorney and own client costs I am satisfied that, considering the facts of this case, that an attorney and own client costs order is just.

[78] In *Sentrachem Ltd v Prinsloo*⁴¹, the Supreme Court of Appeal held as follows:

'On appeal, the Court reiterated that an award of attorney and own client costs had to be seen as an attempt by the Court to go one step further than an ordinary order of costs between attorney and client so as to ensure that the successful party was indemnified with regard to all reasonable costs of litigation.'

Order:

1. The review application is dismissed.
2. The applicant is to pay the respondent's costs on an attorney and own client scale.

Venter, AJ

Acting Judge of the Labour Court of South Africa

⁴¹ 1997 (2) SA 1 (SCA).

Appearances:

For the applicant: Advocate W Hutchinson

Instructed by: Moodie and Roberts

For the third respondent: Advocate Olivier

Instructed by: Britz Attorneys

LABOUR COURT