



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JR 915/13

In the matter between

ABEDNEGO PENS KHAMALI

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

NINA SIELE N.O.

Second Respondent

NORTH WEST UNIVERSITY (POTCH)

Third Respondent

Heard: 27 January 2016

Delivered: 1 February 2016

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the second respondent, to whom I shall refer as 'the commissioner'. In her award, the commissioner found that the applicant's dismissal by the third respondent was substantively and procedurally fair.

Factual background

- [2] The background facts are recorded in the award under review. For present purposes, it is sufficient to note that the applicant was employed in the protection services department as a security officer on the Potchefstroom campus of the third respondent. The applicant was dismissed consequent on an incident in which a number of the third respondent's employees were dismissed following an act of misconduct committed by them after certain complaints had been lodged by members of staff of the protection services department. The charges brought against the applicant in particular were that he had conducted himself in a manner that negatively affected the integrity, good name and public image of the third respondent and that he had committed an act which involved an element of dishonesty or misappropriation which could cause detriment to the University. The first charge flows from events between 1 and 6 February 2012 when it is alleged that the applicant, with other employees, accused other employees, members of SAPTU, of being racist, in a manner that was aggressive and resulted in certain foreign students not wishing to enter the officers concerned. The second charge relates to the basis of the accusations themselves, which the third respondent alleged to be false and which had caused it to conduct a commission of enquiry, the result of which was that none of the allegations were

substantiated. The enquiry concerned was conducted by advocate P Roopa, and completed on 12 June 2012.

- [3] The applicant was found guilty on both charges, and as I have indicated, was dismissed on 22 November 2012.

The award.

- [4] In her award, the commissioner summarised the evidence of the four witnesses who testified on behalf of third respondent. In essence, the case against the applicant was that he was part of a group of employees who had entered the SAPTU office shouting and behaving in an aggressive manner. The conduct of the employees were such that international students and persons concerned was the hosting of international students were shocked at the behaviour that they'd witnessed and felt intimidated. The second witness for the third respondent, a Ms Van der Spoel, is recorded as having testified that 'she had never been so intimidated and scared in her entire life.' The applicant's case, in essence, was that he was not a party to the and really behaviour concerned – he had a grievance and related to that raised by other employees in the group and found himself in the wrong place at the wrong time.
- [5] The commissioner correctly identified that she was faced with two mutually destructive versions and that she was required, in weighing up the two versions, to consider the demeanour of the witnesses, the consistency or inconsistency of the versions, and the probability of each version .
- [6] In her award, the commissioner concludes the following:
20. Mr Wissing summarised the evidence of the witnesses presented by the respondent and submitted that they were consistent and credible. He said that it was no coincidence that the first two witnesses testified confirmed to have seen the applicant with the group at the stage when the meeting got out of hand. At all times the applicant was present and displayed unruly behaviour during the

meeting. At no stage did the applicant make an attempt to keep order and warn his colleague not to raise their voices to such an extent that they instilled a sense of fear in their colleagues.

21. Mr Abednego Pen Khamali, submitted that the testimony presented by the respondent's witnesses were a fabrication of lies in that he was charged for being present in the meeting of SAPTU. He believed that he was set up in that he never participated in the act of intimidation and the unbecoming behaviour that were displayed by the group of employees in the SAPTU boardroom during the meeting. He said that he was late and when he arrived the meeting was already in disarray. I found the statement to be untrue and riddled with inconsistency as the applicant failed to put it to the respondent's witnesses and thus failed to challenge the respondent's evidence that he was part of the group.

22. The applicant did not advance any explanation as to why he failed to distance himself from the unruly behaviour of the other employees. The applicant's testimony that he visited the SAPTU's offices to raise his long outstanding grievances and excuse concocted as a defence in order to disassociate himself from the actions of his colleagues. It is not a coincidence that all the employees were employed at the protection unit.

23. The applicant could not give a consistent account of his failure to ensure the safety of personnel on the campus as part of his duties as a protection officer. It is trite law that the relationship between employer and employee is one of trust and confidence. Also as per the common law, conduct that is inconsistent with duty of trust warrants a termination of employment.

24 before found that the actions of the entire group including the applicant affected university negatively and brought the name of the university into disrepute in particular that they were visitors within the campus who commented about the behaviour of the applicant and his group. University took appropriate steps to discipline the applicant and his group.

25 As regard charge number 2 whereby the applicant is accused of having

made false and racist remarks during the investigations. It is highly unlikely the people of such high integrity and years of practice as legal gurus could falsely make such damning allegations against the applicant. They do not derive any benefit from falsely implicating the applicant and/or his colleagues. It is also true that Adv Roopa could not have thumb-sucked issues said to be complaints when he is not within the campus. It is for this reason that I found the remarks made by Adv Roopa was the true reflection of what the applicant and his group had communicated to Adv Moeleketsi and confirmed with Adv Roopa.

26. On the totality of the evidence, found that the applicant did commit the misconduct which the respondent had levelled against him. The applicant failed to take reasonable steps to ensure that it complied with the respondent's procedures by not ensuring that his behaviour was appropriate as a protection officer.

27. I accordingly, find that the applicant's dismissal was substantively fair.

- [7] The commissioner went on to find that the applicant's dismissal was procedurally fair. In doing so, she appealed the third respondent's contentions that it had attempted to conduct a disciplinary hearing but that its efforts had been thwarted by the applicant and his colleagues who behaved in a disruptive and rude manner, to the extent that the third respondent had no choice but to abandon the attempt to hold a disciplinary hearing. The commissioner found that the applicant had been afforded an opportunity to defend the allegations made against him but that he and his colleagues had made it impossible for the hearing to proceed.

Grounds for review

- [8] The applicant's grounds for review are unclear, to say the least. Much of the applicant's founding affidavit is concerned with the applicant's disciplinary hearing, and appears to be an appeal against the finding that he was guilty of misconduct and ought to be dismissed. For that reason, when the application was called, it was stood down to allow the applicant to reflect on his position and

take advice. To the extent that the applicant alludes to the arbitration proceedings that are the subject of these proceedings, and affording the founding affidavit a generous reading, the applicant has certain procedural complaints, the first relating to the pre-trial conference, and the most material relating to the introduction into evidence of the report compiled by Adv Roopa.

Applicable legal principles

- [9] This court is entitled to interfere with an award made by a commissioner if and only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The applicant contends for the latter, on the basis reflected above. However, the failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)).
- [10] The Labour Appeal Court recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.
- [11] It bears reiterating that the above principles distinguish a right of appeal from a right of review. This court is not entitled to set aside a commissioner's decision

simply because the court would have come to a different conclusion on the same facts. This court is not entitled to intervene if the commissioner makes mistakes of law or mistakes of fact. The commissioner is allowed to be wrong. All that the commissioner may not do is make a decision that falls outside of the band of decisions to which reasonable decision-makers could come on the available material. As the Labour Appeal Court has noted on more than one occasion, the threshold to be met by an applicant in a review application is set high and it is not often that this court will interfere.

Evaluation

- [12] As I have mentioned above, the founding affidavit does not contain a single ground for review which bears any resemblance to the test to be applied. The applicant does not assert that the outcome of the arbitration proceedings, in the form of the commissioners award, was unreasonable nor does he articulate any specific basis on which it might be suggested that the award is unreasonable. For this reason alone, the application stands to be dismissed.
- [13] Even if I were to accept the applicant's complaints, individually or collectively, as constituting an assertion of an unreasonable decision on the part of the commissioner, there is no basis on the record to reach such a conclusion. The commissioner was, as she recorded, faced with a material dispute of fact. The applicant denied being part of the group that committed what were not disputed to be acts of serious misconduct committed during the course of the meeting. While the applicant did not dispute that he failed to disassociate himself from the group in any active sense, he denied having engaged in disruptive behaviour, contending that he was present to articulate his own dispute with the third respondent's management and in the case of the disciplinary hearing, denying that he was part of any misconduct.
- [14] There can be no real complaint at the manner in which the arbitration hearing

was conducted. Adv Roopa's report was introduced. Mr Engels gave direct evidence refuting the allegations of racism made against the third respondent. The record discloses that the applicant has given a full opportunity to present his evidence and to cross-examine the third respondent's witnesses. Insofar as the applicant in his heads of argument contends that the commissioner 'gave a platform' only to the third respondent to conduct its case at the arbitration hearing, similarly, the record does not disclose this to be the case at all.

[15] The applicant's real complaint is that the commissioner disbelieved him and on that basis, found for the third respondent. It is well-established that in an appeal hearing, an appeal court is reluctant to interfere with credibility findings made by the presiding judge or officer. In the case of the review, as the authorities quoted above have clearly established, the process by which the commissioner weighs the evidence and the weight attached to or exclusion of particular evidence (whether by way of a credibility finding or otherwise) is not in itself a basis for review. In my view, the factual findings made by the commissioner are sustainable by reference to the record and her conclusion that the applicant's version was less probable than that proffered by the third respondent is not so unreasonable that it constitutes a decision to which no reasonable decision-maker could come. In short, even if the applicant had articulated clear and legitimate grounds for review, there is no merit in the application.

[16] Mr Wissing, who appeared on behalf of the third respondent, charitably did not seek an order for costs.

For the above reasons, I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: In person

For the Respondent: Mr. H. Wissing of Henk Wissing Inc.

Labour Court