



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2705/13

In the matter between:

AIRCHEFS (PTY) LTD

Applicant

and

MARIA JULIA MPHAHLELE

First Respondent

NTEMBISO QHWESHA N.O (ARBITRATOR)

Second Respondent

BARGAINING COUNCIL FOR THE RESTAURANT

CATERING AND ALLIED TRADES

Third Respondent

Heard: 29 February 2016

Delivered: 3 March 2016

JUDGMENT

MADDERN, AJ

Nature of Application

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("the LRA") to review and set aside the arbitration award issued by the Second Respondent on 4 November 2013 under Case No. DSP/ARB 10/02/11 in terms of which the Second Respondent ("the Commissioner") found the dismissal of the First Respondent ("the Employee") procedurally and substantively unfair and in terms of which reinstatement and 12 months' compensation was ordered.

Background Facts

- [2] The employee had been employed by the Applicant for 23 years and, at the time of her dismissal on 29 September 2009, was employed as a station attendant. On 15 September 2009, the employee was given notice of a disciplinary hearing in terms of which the employee was advised that two transgressions would be investigated and were framed as follows :

1. Failure to obey the reasonable instruction: in that on 5th of August 2009 and 12th of August 2009 you were called by your manager Miriam Selepe to report to the office about your poor attendance, of which you dismally refused in front of your co-workers. On the 4th of September 2009 at about 10h00 a.m. you were called to report to the Logistics Manager's office about your poor attendance of which you dismally refused.
2. Insubordination: in that on 21st of July 2009 you were called to your Manager's office where you were needed to answer on not adhering to the agreement that you and your manager entered into in trying to help you attend ABET, of which you storm out of the office.¹

- [3] Following the internal disciplinary process, the First Respondent was then dismissed. She failed to attend an initial scheduling of the disciplinary

¹ Index of CCMA documents page 27

hearing and on the second occasion, she likewise failed to attend and the hearing proceeded *in absentia*.

- [4] The employee referred a dispute to the Third Respondent where the dispute languished for a period of approximately three years. The Commissioner issued an arbitration award on 4 November 2013.

Grounds of Review

- [5] The Applicant contends that the Commissioner's award is reviewable on the basis that the Commissioner failed to apply his mind, showed extreme bias towards the employee, failed to apply legal principles, drew conclusions on facts not before him and failed to apply his mind as a reasonable decision maker and exceeded his powers, and in so doing reached a decision that no reasonable decision maker could have come to.
- [6] On the *ipse dixit* of the Applicant, the crux of the Applicant's case is that the employee's version is improbable and no reasonable decision maker could have accepted such version in light of the evidence advanced by the Applicant's two witnesses.
- [7] In response, the employee broadly contends that the Applicant failed to establish the fairness of the dismissal, substantively, on a balance of probabilities and that the Second Respondent's award is not reviewable.

Evaluation

- [8] In relation to the allegations of misconduct, the Applicant called two witnesses, Sifiso Ngwenya, the Logistics Manager (hereinafter "Ngwenya") and Miriam Selepe the ESU Manager (hereinafter "Selepe"). Somewhat, curiously, Ngwenya gave no evidence in chief in relation to the instruction issued to the employee on 4 September 2009 to report to his office. The issue was, however, dealt with in cross examination at

which time Ngwenya indicated that the Applicant had refused to come to his office as she was 'not an office lady'.²

[9] In relation to Selepe, she gave evidence in respect of the second instance referred to in the first transgression³ and in relation to the second transgression relating to insubordination on 21 July 2009. In relation to the allegations that the Employee failed to obey a reasonable instruction to report to Selepe's office on 5 August and 12 August 2009, Selepe's evidence was that on 5 August 2009, she called the employee to her office. Selepe contended, at the disciplinary enquiry, that there was a second incident on 21 August 2009 and she continued in this vein, in her evidence before the First Respondent, until she was alerted to the fact that the charge made reference to 12 August 2009 at which time, she then indicated that the minutes of the disciplinary enquiry had been incorrectly recorded.⁴ Selepe further indicated that in respect of the dates she did not recall the dates "very well".⁵

[10] This was not the only instance where Selepe's evidence is contradictory. She also indicated that the intention of calling the employee to her office on 21 July 2009 was to 'discuss her timekeeping which was very poor ...'⁶ In contrast, details of the transgression outlined in the notice of disciplinary hearing reflects that the intention of the meeting was 'to answer on not adhering to the agreement that you and your manager entered into in trying to help you attend ABET'.

[11] The employee's version, in summary, amounts to an admission that she was called to Selepe's office on 5 August 2009 and it is her contention that she did in fact attend at Selepe's office to sign documentation

² Record page 58 line 13

³ Index of CCMA documents page 27

⁴ Record page 102 line 5

⁵ Record page 92 line 18

⁶ Record page 95 line 17

pertaining to sick leave. She denies knowledge of any other occasion on which she was called either to Selepe or Ngwenya's offices.⁷

[12] The Commissioner was required to deal with the mutually destructive and conflicting versions. The Applicant introduced no corroboration in relation to any of the charges. The Employee introduced evidence in relation to her attendance and, in this regard, produced schedules for periods 3 August to 9 August 2009,⁸ 10 August to 16 August 2009⁹ and 17 August to 23 August 2009¹⁰. The employee dealt with the work schedules in her evidence in the context of the second alleged transgression on 21 July 2009. Selepe contended, in the context of the ABET issue, that the employee had absented herself on Mondays contrary to the agreement reached between the employee and Selepe. Considerable time at the arbitration was spent on the nature of the ABET agreement in relation to time off. None of this is relevant other than in relation to the stated purpose of the meeting for 21 July 2009. In other words, was it the attendance issue in relation to the ABET agreement which prompted Selepe to request the employee to attend at her office and in respect of which the employee then "stormed out". The employee's evidence is contradictory in this regard. It was put to Selepe, on behalf of the employee, that the employee will indicate that she did attend the meeting in Selepe's office to discuss ABET.¹¹ When the employee testified, however, she indicated that she 'did not know anything about 21 July'.¹² In essence, the employee, in her evidence, indicated that she only knew about a request to attend Selepe's office on 5 August 2009 and that she had indeed acceded to that request.

[13] In considering an award on review, the appropriate approach for this Court to adopt is one which involves:

⁷ Record page 187 line 11, page 198 line 19 and page 206 line 11.

⁸ Index of CCMA documents page 38.

⁹ Index to CCMA documents page 39.

¹⁰ Index to CCMA documents page 40.

¹¹ Record page 137 line 14.

¹² Record page 198 line 19.

‘... examining the merits of the case ‘in the round’ by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the Arbitrator was not one that could reasonably be reached on the evidence and other material properly before the Arbitrator. On this approach the reasoning of the Arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the Arbitrator reached the result. That assists the Court to determine whether that result can reasonably be reached by that route. If not, however, the Court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and evidence.’¹³

[14] In dealing with the evaluation of the Commissioner’s award “in the round” the Commissioner’s fundamental conclusion was that the Applicant had failed to discharge the onus of proving that the dismissal is fair.

[15] In *Solidarity on behalf of Van Zyl v KPMG Services (Pty) Ltd and Others*,¹⁴ Fourie, AJ stated :

‘[6] For several years the labour courts have held that the duty of an arbitrator when confronted by two irreconcilable versions, is essentially the same as that of a judge in a trial court, as expressed by the Supreme Court of Appeal in *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others*:

‘To come to a conclusion on the disputed issues a court makes 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,

¹³ *Herholdt v Nedbank Limited (Congress of South African Trade Unions as amicus curiae* 2013 (11)(b) LLR 1074 (SCA) at para 12.

¹⁴ (2014) 35 ILJ 1656 (LC) at para 6.

such as (i) the witness' 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' 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."¹⁵

[16] In *Sasol Mining* (referred to in footnote 14) Van Niekerk, J, after quoting the abovementioned passage from *Stellenbosch Farmers' Winery*, held (at para 9) as follows:

¹⁵ This position seems to have been consistently adopted since at least 2007 (see *Vodacom Service Provider Co (Pty) Ltd v Phala NO and Others* (2007) 28 ILJ 1335 (LC), *Lukhanji Municipality v Nonxuba NO and Others* (2007) 28 ILJ 886 (LC) and has been applied fairly consistently since then (see for example, *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others* (2011) 32 ILJ 723 (LC), *SATAWU obo Semate v CCMA and Others* (unreported Labour Court decision case no JR341/2010 (18 December 2012)).

‘One of the commissioner’s prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party’s version.’

[17] In regard to the aforementioned principles, it is my view that the Commissioner’s reasoning is deficient in that the reasoning, insofar as it relates to the probabilities, is cursory and his reasons do not deal at all with an assessment of the credibility of the respective witnesses. Also, the analysis by the Commissioner in the context of the 21st July 2009 to the effect that the charge related to a refusal to go to Ms Selepe’s office is factually incorrect, and this error is compounded in the evaluation by the Commissioner of the evidence where she concludes ‘to me this shows that it is not true that the Applicant refused to go to her office on 21 July 2009....’¹⁶

[18] A material error of fact is not in and of itself sufficient for the Commissioner’s award to be set aside:

‘For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii), the Arbitrator must have misconceived the nature of the enquiry 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

¹⁶ Index of CCMA documents page 133 at para 116.

for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’¹⁷

- [19] I am not convinced that the Commissioner’s reasoning and error to which reference is made above had any material bearing on the outcome.
- [20] In the context of the alleged incident of 21 July 2009, Selepe indicated that the first respondent had stormed out of her office and the employee in doing so contended that the year was half over and, consequently, there was no reason to worry about ABET.
- [21] The Applicant contends that the First Respondent’s version was so improbable that no reasonable decision maker could have accepted it. This argument appears to be hinged on the basis that the employee’s version amounted to “a bare denial” and that this did not counter, on the probabilities the evidence of Selepe and Ngwenya. The employee did not deny the instruction of 5 August 2009. The employee’s evidence was that she complied with the instruction and signed documents relating to sick leave (“sign a doctor’s note”).¹⁸
- [22] The basis of the meeting for 5 August 2009 was apparently the employee’s timekeeping. The Applicant produces no evidence of the poor timekeeping and while the charge reflects that the employee ‘dismally refused in front of your co-workers’ no evidence is introduced from any of these co-workers either. Also, on the probabilities, if the employee had ‘stormed out’ of the meeting of 21 July 2009, why was this not the basis (or at least part of the basis) for the request by Selepe to attend the meetings of 5 and/or 12 August 2009 and why was the ‘insubordination’ not raised before September 2009?
- [23] In relation to the incident on 12 August 2013, even if the discrepancy in the dates is explained, at best for the Applicant, the parties’ respective versions are evenly balanced.

¹⁷ *Herholdt, supra*, at para 25.

¹⁸ Record at page 245 line 6.

- [24] In the context of Ngwenya's instruction on 4 September 2009, once again, the parties' respective versions are, at best for the Applicant, evenly balanced. Ngwenya contends that he issued the instruction and the employee denies that he did. No corroborating evidence is introduced by either party in relation to their respective versions.
- [25] Be that as it may, it is quite apparent from the Commissioner's award that an evaluation of the probabilities was conducted, albeit briefly, in relation to the three dates on which there had allegedly been a failure to obey a reasonable instruction and in relation to the alleged insubordination of 21 July 2009 and, having done so, the Commissioner arrived at the finding that the Applicant had failed to discharge the onus resting upon it.
- [26] This, in my view, represented a finding which was, on all the evidence before the Commissioner, one which a reasonable decision maker could reach.
- [27] In the premises, the following order is made:
- 27.1. The Application is dismissed.
- 27.2. There is no order as to costs.

Maddern, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate L Steenkamp

Instructed by: Jacobs Gonyora Inc.

For the Respondents: Mr E Luthuli of I.T.U

LABOUR COURT