



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 2602/13

In the matter between:

MASSTORES (PTY) LTD t/a MAKRO WONDERBOOM

Applicant

and

MIYEN ACHARI

First Respondent

SACCAWU

Second Respondent

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

Third Respondent

COMMISSIONER ET VAN KERKEN N.O.

Fourth Respondent

Heard: 1 February 2016

Delivered: 7 March 2016

Summary: The commissioner's decision that the First Respondent's dismissal was substantively unfair was unreasonable. In view of the evidence that the relationship had irretrievably broken down, the commissioner ought to have found the dismissal to have been fair.

JUDGMENT

Introduction:

- [1] This is an application to review an arbitration award made by the Fourth Respondent (“the Commissioner”) under case number GATW 704-13, in terms of which the dismissal of the First Respondent (“the Employee”) was found to have been substantively unfair.

Background facts:

- [2] On 1 November 2010 the Applicant employed the Employee as a telesales coordinator in its Centurion Branch.
- [3] During or about March 2011 the Employee however suffered a stroke, which occasioned him to be unable to work for approximately six months thereafter.
- [4] Upon the Employee’s partial recovery and return to work (during or about August or September 2011) he was placed in an alternative position as recommended in terms of a health assessment report compiled from a variety of medical reports issued by the relevant medical practitioners and specialists who had treated the Employee. The Applicant endeavoured to accommodate the Employee’s physical condition in terms of his alternative position.
- [5] From early on after the Employee returned to duty, he encountered difficulties with his relationship with his Manager at the time, one Deon Janse Van Rensburg (“Van Rensburg”). This resulted in the Employee being charged with three counts of serious misconduct relating to disrespect or abuse, threat of harm and gross insubordination on 9 February 2012. These charges against the Employee were however withdrawn on 10 February 2012 after the General Manager of the Applicant’s Centurion Branch had reached a compromise with the shop stewards of the Second Respondent.

- [6] Unfortunately the compromise reached with SACCAWU did not result in the relationship between the Employee and Van Rensburg improving and on 12 March 2012 Van Rensburg reported a further incident of insubordination and intimidation alleged to have been carried out against him by the Employee.
- [7] During May 2012 management of the Applicant intervened when Van Rensburg complained of further acts of insubordination by the Employee. The Applicant's Human Resource Manager, Donovan Wright ("Wright") accordingly indicated during a meeting held on 18 May 2012 that formal disciplinary action would be taken against the Employee. No disciplinary action was however taken at the time against the Employee. The Applicant however simultaneously took a decision to transfer the Employee from Centurion to the Applicant's Wonderboom branch. The transfer occurred in terms of a written notice, which notice cited the reason for the Employee's transfer to Wonderboom as the Employee's partial incapacity.
- [8] After his transfer to Wonderboom, the Applicant was alleged to have committed various further acts of insolence towards the Applicant's members of senior management, which actions were alleged to have brought the Applicant's name into disrepute.
- [9] Consequent upon the above, the Employee was charged with misconduct (on 14 November 2012) when he was handed a notice to attend a hearing and in terms of which notice he was required to answer to the following charges:
- [9.1] *Gross Insolence towards Senior Management, in particular that on:*
- [9.1.1] *"May 18, 2012 in the meeting and presence of.... you rudely and aggressively raised your voice against Deon Janse van Rensburg (Food Manager – Centurion) and stated that 'Deon must not tell you what to do as this is not the time of apartheid'.*
- [9.1.2] *"June 28, 2012 in the meeting and presence of ... you allegedly rudely insulted the integrity of Fran Rennie) HR Manager – Wonderboom) by*

stating 'that she misled you regarding the functions of Back Returns Clerk.'

[9.1.3] July 10, 2012 in the teleconference and presence of ... you stated that 'you have nothing against Wonderboom but something against Donovan', and further hereto you stated that 'you don't think Donovan is competent. You are not criticizing people, you are just telling the truth.'

[9.1.4] August 23, 2012 in the meeting and presence of ... you allegedly stated that 'Donovan does not know what he is doing.'

[9.1.5] September 14, 2012 in the meeting and presence of ... you aggressively and rudely pointed your finger at and raised your voice against Fran Rennie allegedly stating 'that she deliberately misled you in the role Back Returns Clerk.'

[9.1.6] October 29, 2012, in the presence of customers and fellow colleagues you became grossly insolent towards your line manager Mr. Kutlwano Marobyane ("Marobyane") by screaming at him, swearing at him, verbally insulting him and rudely pointing your finger at him.

[9.2] Bringing the Company name into disrepute by leveling unsubstantiated allegations against the Company and Management in particular on:

[9.2.1] June 22, 2012 in the meeting and presence of...you allegedly made the statement to Fran Rennie that 'Donovan Wright intended to punish him and that Jimmy Ditshego (HR Manager – Centurion) must tell the shop stewards that the idea is to get rid of him or to punish him for sending him to Wonderboom, hate is involved.

[9.2.2] June 28, 2012 in the meeting and presence of... you allegedly made the statement that 'Fran Rennie came to fetch you at Centurion'.

[9.2.3] August 7, 2012 in the meeting and presence of ... you stated to Donovan Wright that your consideration for employment and moving to Cape Town was because 'you do not trust management', and then leveled the allegation towards both Fran Rennie and Jimmy Ditshego that 'too much nonsense in Centurion, and Wonderboom, no honesty, backstabbing from Top to the Branches when they hate somebody'.

[9.2.4] August 21, 2012 in the meeting and presence of ... you allegedly stated that 'this thing with Donovan's interference will not stop, Donovan started it and we are going to end it'.

[9.2.5] September 14, 2012 in the meeting and presence of ... you allegedly accused Fran Rennie of 'slamming the door in the face of Ponce Dibetle on June 22, 2012.'

- [10] A disciplinary hearing in relation to the above charges was held on 20 and 21 November 2012 and was chaired by Leon Bezuidenhout ("Bezuidenhout"). Bezuidenhout found the Employee guilty as charged and, after considering mitigating and aggravating factors, imposed a sanction of dismissal.
- [11] The Employee appealed against the above decision. His internal appeal was heard by Hennie Gouws on 13 December 2012, but was dismissed.
- [12] On 14 January 2013, the Employee referred an alleged unfair dismissal dispute to the CCMA. The arbitration commenced on 7 June 2013 and was finalized on 8 October 2013. The commissioner issued an award ("the award") on 22 October 2013.

The arbitration award:

- [13] The commissioner found as follows:

- 13.1 Any verbal explanation by the Applicant to the Employer to the effect that the net effect of his monthly remuneration would not be reduced was worthless in the event that it was not reduced to writing;
- 13.2 It was accordingly reasonable for the employee to believe that his salary was being reduced to R 5000 from R 20 000;
- 13.3 The evidence of the troubled relationship between the Employee and Van Rensburg was not relevant to the charges preferred against the Employee, which only relate to events occurring later and once the Employee had been transferred to Wonderboom;
- 13.4 There was no evidence warranting a finding of guilty in respect of Charge 1.1 brought against the Employee;
- 13.5 The Employee was justified in believing that Fran Rennie had mislead him in relation to the salary he would earn at Makro Wonderboom subsequent to the transfer and the job functions he expected to perform once transferred to Wonderboom;
- 13.6 The Employee was not guilty of charge 1.2 since the utterances complained of did not attack the characteristics of Ms. Rennie, such as honesty and accordingly did not impinge her integrity. The Employee had pleaded guilty to this charge;
- 13.7 As a result of the Employee's own evidence, he was satisfied that the Employee was guilty of charge 1.3 and of charge 1.4 due to the Employee having pleaded guilty to this latter charge;
- 13.8 The evidence (Dibetle's testimony, the Employee's own testimony (a denial) and the audio recording) supported a finding of not guilty in relation to charge 1.5;

- 13.9 Marobyane was not a reliable witness due to the fact that the documentary evidence presented casted doubt upon his reliability;
- 13.10 On a balance of probabilities the Employee showed his middle finger to Marobyane without Marobyane having shown him the middle finger first, which constituted insolence;
- 13.11 The Employee made the statements and uttered the insults as alleged by the Applicant in charge 1.6 and he was accordingly guilty of this charge;
- 13.12 In disallowing the Employee to use the dect mobile phone, the Employee was unfairly limited in the performance of his duties. This finding was however reached after the commissioner found that it was unnecessary to fully record the different versions offered by Marobyane and the Employee in relation to the different functionalities of the dect mobile telephone and the to land line telephones;
- 13.13 Since it was not the Employee's case that he was provoked by Marobyane, he was still guilty of charge 1.6;
- 13.14 The Applicant failed to prove that its name had been brought into disrepute in the eyes of outsiders and therefore the Employee could not be competently convicted of any of the charges listed under charge 2;
- 13.15 The Employee was only guilty of charges 1.3, 1.4 and 1.6;
- 13.16 Van Rensburg's evidence (in relation to what transpired at the Applicant's Centurion branch) was not relevant to the determination of a sanction in the matter;

- 13.17 Marobyane did not testify that it would be intolerable to continue the employment relationship with the Employee;
- 13.18 The withdrawal of the charges against the Employee during February 2012 did not support a contention by the Applicant that a continuation of the employment relationship was rendered intolerable through the Employee's conduct;
- 13.19 The Applicant's conduct would have made it difficult for any employee to trust its *bona fides* and to settle in any of its branches. The Applicant's conduct led to the Employee's sense of frustration;
- 13.20 Cautioning by the Applicant was not sufficient to establish progressive discipline;
- 13.21 The Applicant's testimony in relation to the breakdown of the trust relationship was not objective in view of the facts;
- 13.22 The incidences of insolent conduct committed by the Employee and of which he was found guilty, do not justify a sanction of dismissal;
- 13.23 The Employee is to be retrospectively reinstated with retrospective pay amounting to R 40 866, 00.

The grounds for review:

- [14] The Applicant has raised several grounds for review in challenging the award. The grounds for review can be categorized into two categories, namely that the arbitration award is unreasonable and secondly that the Commissioner committed gross-irregularity in the manner in which she conducted the arbitration proceedings.
- [15] In relation to the issue of gross-irregularity, the Applicant complains that the Commissioner misconstrued the nature of the enquiry she was to conduct,

ignored relevant evidence, which was presented at the arbitration hearing and failed to assess the evidence on the probabilities.

The test for review:

- [16] In terms of section 145 of the LRA this court may set aside awards if it is satisfied that the award was defective. An award is defective *inter alia* in terms of section 145(2)(a) if the arbitrator committed misconduct in relation to her duties and/or if the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings.
- [17] The Constitutional Court has ruled in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) ("*Sidumo*") that the awards of arbitrators are reviewable if they do not meet the constitutional requirement of "reasonableness". The court found further that the constitutional standard of reasonableness must be taken to have 'suffused' the review grounds set out in the LRA if section 145 is to comply with the Constitution.
- [18] An arbitrator commits an error of fact in the event that she fails to apply the rules of evidence. An award based exclusively on hearsay evidence, will accordingly be reviewable. In addition an arbitrator's failure to apply the cautionary rule to the evidence of a single witness resulted in an award being set aside on review¹.

¹ Blue Ribbon Bakeries v Naicker & others [2000] 12 BLLR 1411 (LC).

[19] An arbitrator fails to apply her mind when an arbitrator ignored or gave insufficient weight to relevant evidence, or gave excessive weight to immaterial evidence, or drew conclusions from evidence, which were not supported in law or logically².

[20] The test that this court must accordingly apply in deciding whether the Commissioner's decision is reviewable is whether the conclusion reached by the Commissioner was so unreasonable that no other arbitrator could have come to the same conclusion.

[21] In *Herholdt v Nedbank Ltd*³ the test to be applied was enunciated as follows:

"A review of CCMA awards is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(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 errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence their effect is to render the outcome unreasonable."

² John Grogan: *Labour Litigation and Dispute Resolution* (Second Edition) 386.

³ (2013) 34 ILJ 2795 (SCA).

[22] In *Fidelity Cash Management Services v CCMA & Others*⁴ the Labour Appeal Court referred to what the Constitutional Court had held and found that:

“to determine whether a CCMA commissioner’s arbitration award is reasonable or unreasonable, the question that must be asked is whether or not the decision or finding reached by the Commissioner ‘is one a reasonable decision-maker could reach’. If it is an award or decision that a reasonable decision-maker could not reach, then the decision or award of the CCMA is unreasonable and, therefore, reviewable and could be set aside. If it is a decision that a reasonable decision-maker could reach, the decision or award is reasonable and must stand’. The court further held that the court needs to remind itself that the task of determining the fairness or otherwise of a dismissal is, in terms of the LRA, primarily given to the Commissioner. In exercising the power to review the court needs to consider the totality of the evidence before the Commissioner, determine whether the Commissioner dealt with the principal issue, considered the evidence and reached a reasonable decision.”

[23] It is against this background that the Applicant’s grounds of review must be assessed.

Evaluation:

[24] I am to consider in terms of this review whether the conclusion reached by the Commissioner (in finding the Employee’s dismissal substantively unfair) is one that a reasonable decision-maker could not reach.

⁴ [2008] 3 BLLR 197 (LAC).

[25] In determining whether the dismissal was fair, the Commissioner must first determine whether misconduct was committed. If so, like in the present instance, the commissioner must determine whether the sanction of dismissal was fair. In determining the fairness of the sanction of dismissal, the commissioner must determine whether the trust relationship between the employee and the employer has broken down irretrievably as a result of the misconduct. The question of whether the relationship between the parties has irretrievably broken down has to be assessed on the evidence presented by the employer. The test to apply in determining whether the dismissal sanction was fair is whether the misconduct rendered the continued employment relationship intolerable⁵. In the decision of *SACCAWU v OK Bazaars Kimberley*⁶, it was held that the real test is whether the trust relationship between employer and employee has been breached to such a degree that the employment relationship has become intolerable. It was held further that the question whether the trust relationship has broken down irretrievably is a question of fact and not a question of law.

[26] In *Edcon Limited v Pillemer N.O.*⁷, the SCA held in this regard that the seriousness of the misconduct depends not only on the act itself, but on the way it impacted the employer's business. The employer must accordingly lead evidence to the effect that the breakdown of the relationship is beyond repair.

⁵ *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC).

⁶ [1998] 7 BALR 887 (CCMA).

⁷ [2010] 1 BLLR 1 (SCA).

[27] I agree with Mr. Masuku that the evidence demonstrated the Employee as a repeat offender, as an employee prone to refusing to subject himself to the authority of his supervisors and as an employee who resorted to insolence in his engagement with the management of the Applicant on a variety of issues. These factors determine that a workable employment relationship was no longer capable of being maintained between the parties. The Employee furthermore made it clear that he was not prepared to subject himself to the authority of the Applicant and thereby broke down the employment relationship in a serious, ongoing and deliberate manner. The Employee furthermore consistently acted in an insolent fashion towards his employer (in circumstances where his employer had endeavoured to accommodate and treat the Employee equitably wherever possible) and through his robust engagement with his employer tarnished the trust relationship.

[28] From the evidence it is moreover clear that the Employee acted in a deliberately disrespectful and recalcitrant manner with total disregard for the authority of his employer as argued by Mr. Masuku. I have to agree further that the Employee is a person who is shown in terms of the evidence to demonstrate no remorse for his conduct, who repeats misconduct and who fails to commit at all to the values applicable in most workplaces. The Commissioner's conclusion to the contrary (especially in the face of the guilty charges and common cause pleas of guilt in relation to serious acts of misconduct) make the award unreasonable in terms of the test set out above. This aside, the Commissioner's conclusions were unreasonable having regard to the material before her.

[29] In light of the above, I am of the view that the Applicant's review application should succeed. For avoidance of doubt, the conclusion reached by the Commissioner (in finding the Employee's dismissal substantively unfair in the circumstances) is one that a reasonable decision-maker could not reach.

Order:

[30] In the premises I make the following order:

1. The arbitration award handed down by the Fourth Respondent under case number GATW 704-13 is reviewed and set aside;
2. The arbitration award is substituted with the following award:
 - 2.1 The dismissal of the Employee (First Respondent) was substantively fair;
 - 2.2 There is no order as to costs.

C Potgieter AJ

Acting Judge of the Labour Court South Africa

Appearances:

For the Applicant: Mr. B Masuku from Mervyn Taback Inc.

For the Respondent: Mr. Lekala of SACCAWU

LABOUR COURT