



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 2520/10

In the matter between:

F J KRUGER

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

T DUBE N.O.

Second Respondent

SUN INTERNATIONAL LIMITED t/a SUN CITY

Third Respondent

Heard: 17 January 2013

Delivered: 14 February 2017

JUDGMENT

ROBB AJ

Introduction

- [1] The Applicant seeks to review and set aside an Arbitration Award issued by the Second Respondent, a Commissioner of the First Respondent, on 7 September 2010 under Case Number NWRB 1388/10. The Second

Respondent found that the dismissal of the Applicant by his erstwhile employer, the Third Respondent, was fair and made no order as to costs.

- [2] The Third Respondent opposed the application.

The background facts

- [3] The Applicant was employed by the Third Respondent as an Assistant Maintenance Manager. He commenced employment on 1 December 2004, as an electrician, and was dismissed pursuant to a disciplinary hearing on 3 May 2010. The two charges levelled against the Applicant were that he assaulted a DMG employee, Phillis Ramaoko, on 6 April 2010 by grabbing him by his collar and shaking his head/body in the workplace, and that he made racist remarks to Phillis Ramaoko, Vusi Khumalo and Philemon Mpeu by telling them that they looked like "*baboons at work*". The Applicant was found guilty on both charges, and the sanction of dismissal was handed down in respect of the first charge. In respect of the second charge he was given a final written warning.

- [4] The Applicant lodged an appeal against the finding of the disciplinary hearing, which was held on 18 May 2010. The ground of appeal was that the chairperson of the disciplinary hearing did not consider the evidence properly. The reasons which the Applicant relied upon to support his appeal were as follows:

- 4.1 'The *onus* is on the employer to prove the case. The employer brought 3 witnesses to solidify its case, but one witness disputed what is written on the statement. How do you find a person guilty when the witnesses are not reliable?'

- [5] The appeal hearing was concluded on 18 May 2010 when the sanction imposed by the disciplinary hearing chairman was upheld. The appeal chairman noted as follows:

'1 *Credibility of a witness was questioned and is the basis of the appeal.*

- 2 *The accused did not bring in witnesses or supporting evidence during the inquiry.*
- 3 *The accused did not dispute that he grabbed the employee by his clothes and shook him.*
- 4 *The guest was not called as a witness during the inquiry.*
- 5 *Witness statements (verbal/oral) don't match. Will disregard and focus on the other 2 consistent witnesses.'*

[6] Pursuant to the dismissal of his appeal, the Applicant referred a dispute to the First Respondent. The arbitration before the Second Respondent, a commissioner of the First Respondent, commenced on 13 July 2010 and was completed on 18 August 2010. The accused was represented by an attorney, Mr J D Claassen of Serfontein Viljoen Attorneys, whilst the Third Respondent was represented by its HR Manager.

[7] The Second Respondent heard the evidence of the following witnesses called by the Third Respondent:

- 7.1 Mr Phillis Ramaoko ("Ramaoko");
- 7.2 Mr Vusi Joseph Khumalo ("Khumalo"); and
- 7.3 Mr Philip Nkosana Mpeu ("Mpeu").

The Applicant called as a witness Ms Marie Denise Campbell-Young ("Campbell-Young"), and gave evidence himself.

[8] The underlying facts upon which the charges levelled against the Applicant were based were that on 6 April 2010, at the Sun City Resort, the Applicant had given instructions to Ramaoko, Khumalo and Mpeu, all handymen in the employ of DMG, a labour broker which supplied labour to the Third Respondent. The Applicant gave such instructions at 09:00 on the morning of 6 April 2010, to the effect that the three DGM employees were to clean roof tiles. Ramaoko and Khumalo went on lunch at about 13:00 and returned at about 14:00 when the Applicant arrived. The Applicant told them to meet him

on the ground next to Block 111. On their arrival he accused them of working slowly whereupon an altercation ensued. The three witnesses called by the Third Respondent alleged that Ramaoko was grabbed by the collar and jerked around by the Applicant and that the Applicant said that they were like baboons or monkeys. The Applicant denied that he grabbed Ramakoa by the collar and jerked him around or that he likened the three of them to baboons or monkeys. The witness called by the Applicant, Campbell-Young, testified that she heard a commotion whilst she was inside her unit, upon hearing the commotion she went outside to witness what was going on, and she stated that she saw the Applicant and the three DGM employees shouting at each other. She did not see the Applicant grabbing the collar of one of the 3 DGM employees and also testified that she could not understand the language used during the altercation between the four of them.

- [9] In his analysis of the evidence, the Second Respondent found the evidence of Ramaoko, Khumalo and Mpeu to be credible, and that such evidence was to the effect that the Applicant grabbed Ramaoko by the collar of his uniform and shook him, and likened the three of them to baboons or monkeys. He referred to the fact that the Applicant's witness, Campbell-Young, had denied that there was any grabbing or shoving, and that she became aware of the altercation whilst inside her unit when she heard noise outside, whereupon she watched the altercation from her patio. He referred to the fact that the Third Respondent's representative had put to her that she might not have seen the entire incident. The Second Respondent referred to the fact that the Applicant had denied having assaulted Ramaoko by grabbing his collar and shaking him. He noted that the Applicant was not dismissed for making racist remarks. He dealt with the definition of assault, which he defined as being the unlawful application of force to a person and held that the grabbing and "choking" of Ramaoko clearly fits in the definition of assault. He found that the Applicant had assaulted Ramaoko on the afternoon of 6 April 2010 and held that *"whilst dismissal is the appropriate sanction for assault, the misconduct is aggravated by the fact that the Applicant was a senior employee of the (Third Respondent), as a Maintenance Manager. He held a position of trust and*

could not be expected to expose the Third Respondent to a law suit and bad public image by assaulting subordinates."

- [10] The Second Respondent found that the Applicant's act of misconduct had rendered a continuous employment relationship intolerable for the Third Respondent, which was left with no option but to dismiss the Applicant and in the circumstances he held that the dismissal was substantively fair.

Grounds of review

- [11] The grounds of review relied upon by the Applicant at the review hearing were as follows:

- 11.1 the Third Respondent did not provide the Applicant with a statement by an eye-witness, Campbell-Young, at the disciplinary hearing;
- 11.2 the disciplinary hearing chairman was biased due to an alleged discussion of the case with HR;
- 11.3 alleged inconsistencies in the evidence of witnesses;
- 11.4 the severity of the sanction; and
- 11.5 alleged inconsistency in applying discipline.

- [12] Two further grounds of review which related to a pre-suspension hearing and the Applicant not receiving the ruling and appeal outcome in writing were not persisted with at the hearing of the review.

Test on review

- [13] The test on review is whether the conclusions reached by the arbitrator were so unreasonable that no other arbitrator could have come to the same conclusion. In the landmark decision of *Sidumo and Another v Rustenburg*

Platinum Mines Limited and Others,¹ (*Sidumo*) the Constitutional Court held, *inter alia*, that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

- [14] In *Fidelity Cash Management Services v CCMA and Others*², Zondo JP applied the *Sidumo* test as follows (at para 100):

*'The test enunciated by the Constitutional Court in Sidumo for determining whether a decision for arbitration awarded by a CCMA Commissioner is reasonable is a stringent test that will ensure that such awards are not likely interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached.'*³

- [15] In *Gold Fields Mining South Africa (Kloof Gold Mine) v CCMA and Others*⁴ the Labour Appeal Court held as follows:

*'In short, a review in 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 that is reasonable.'*⁵

- [16] In *Head of the Department of Education v Mofokeng and Others*,⁶ the Labour Appeal Court held as follows:

"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 inquiry. In the final analysis, it will depend on

¹ (2007) 28 ILJ 2405 (CC).

² [2008] 3 BLLR 197 (LAC).

³ At para 110.

⁴ (2014) 31 ILJ 943 (LAC).

⁵ At para 16.

⁶ [2015] 1 BLLR 50 (LAC).

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 affect it may or may not have had upon the arbitrator's conception of the inquiry, 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 same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the inquiry 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 question raised for determination.⁷

The arbitrator's award weighed against the grounds of review

- [17] The first ground of review relates to the statement of Campbell-Young not supplied to the Applicant at the disciplinary hearing, which is common cause. As set out above, Campbell-Young testified at the arbitration, to the effect she witnessed an altercation consisting of shouting and arguing in a language she did not understand. On her own version, she did not witness the commencement of the altercation, since she was inside her unit. Her evidence did not contradict the evidence of the three DGM employees, for precisely those reasons, i.e. she did not witness the entire altercation and did not understand what was said. In the circumstances, the failure to provide the Applicant with her statement initially had no bearing on the outcome of the

⁷ At para 33,

arbitration award. The Second Respondent dealt with this issue in his award, and found that the failure to provide the statement did not contribute to procedural unfairness. That is a reasonable conclusion to reach. This ground has no merit.

- [18] The second ground of review is that the disciplinary hearing chairman was allegedly biased on account of a discussion with the Third Respondent's HR representative. The only reference in the transcript to this is on page 96I (numbered page 131 of the record of proceedings) where the Applicant refers to being unhappy with the chairperson because he told him he was going to consult with the HR Manager. This ground played no role in the Applicant's appeal, and appears to be in the nature of an afterthought, since it was not raised by the Applicant at the time with either the chairperson or the HR Manager. The Second Respondent found it to be probably an afterthought, which is a reasonable conclusion to draw. This ground has no merit.
- [19] The third ground is alleged inconsistencies in the evidence of witnesses. This refers to the evidence of the three DGM employees. The Second Respondent found the three witnesses to be credible. It seems to me that their evidence was materially consistent. References to "monkeys" or "baboons" are inconsequential, and similarly offensive. Grabbing, shaking, pushing and shoving amount to much of the same in an altercation. The evidence of the independent witness, Campbell-Young, is of no assistance in that she did not witness the entire incident and did not understand what was being said. The conclusions drawn by the Second Respondent are reasonable. This ground has no merit.
- [20] The fourth ground is the severity of the sanction of dismissal. Having correctly found an assault, the Second Respondent found a continued employment relationship to be "intolerable". The Applicant himself testified that the trust relationship had suffered irreparably, in submitting he sought compensation, not reinstatement, during the arbitration. The Second Respondent was correct in finding that having found the Applicant guilty of assault, the Third Respondent had no option but to dismiss him. This ground has no merit.

[21] The final ground of review is alleged inconsistency in the application of discipline. This arises out of the mention by the Applicant during his evidence that he was aware that two chefs had physically assaulted each other and both received a final written warning. Neither chef was named by the Applicant, nor was any detail supplied of this alleged incident. No evidence of a material nature having been presented to him, the Second Respondent could not be expected to pronounce on the validity of this bald allegation. The Second Respondent does refer in his award to alleged inconsistent application of rules by the Applicant, without finding such to be present. This was sufficient reference in circumstances where no proper evidence was presented to him. This ground also has no merit.

[22] There is no reason why costs should not follow the result in this matter.

Order

[23] I order that the application for review is dismissed with costs.

Nicholas Robb

Acting Judge of the Labour Court

of South Africa

APPEARANCE:

FOR THE APPLICANT:

Advocate C Goosen

Instructed by Serfontein Viljoen en Swart

FOR THE THIRD RESPONDENT:

Advocate A Cook

Instructed by Saljee Du Plessis Van der Merwe
Inc.

LABOUR COURT