



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable

Case no: JR 2676/13

In the matter between:

THOHOYANDOU SPAR

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (CCMA)**

First Respondent

DANIEL PHEEHA SEOPELA N.O

Second Respondent

NUPSAW obo Z MANDIWANE

Third Respondent

Heard: 20 April 2017

Delivered: 27 June 2017

Summary: Review application. Arbitrator failed to consider inherent probabilities where he was confronted with conflicting versions. Award is reviewed and set aside.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 11 November 2013 wherein the Second Respondent (the arbitrator) found the dismissal of Mr Mandiwane (Mandiwane) substantively unfair and ordered that he be reinstated retrospectively.
- [2] The Third Respondent opposed the application.

Background facts

- [3] The background facts are herewith summarised as follows:
- [4] Mandiwane was employed by the Applicant on 6 June 2009 as a general assistant and was dismissed on 3 December 2012 for reasons related to misconduct. Mandiwane was charged with offensive, abusive behaviour and gross insubordination in that he refused to carry out a lawful instruction when he refused to write an incident report as required by the Applicant's policies.
- [5] The Third Respondent referred an unfair dismissal dispute to the First Respondent and only the substantive fairness of Mandiwane's dismissal was challenged.

The arbitration proceedings

- [6] During the arbitration proceedings the Applicant called three witnesses and Mandiwane testified and called no witnesses. The assessment of the merits of the grounds for the review raised by the Applicant calls for a consideration of the evidence that was adduced.

The evidence adduced

- [7] The Applicant's first witness was its security manager, Mr Jeffrey Ramavhinyana (Jeffrey). He testified that on 21 November 2012 he patrolled the shop and he went to the area where the dough for the bakery is made. He found Mandiwane hiding behind a pallet packed with mealie meal and drinking Coke Zero from a 2 litre bottle. When Mandiwane realised that Jeffrey was there, he threw the 2 litre bottle on the floor and kicked it under the pallet and went to the door. Jeffrey asked him whether he was drinking the cooldrink and whether he stole it from the shop. Mandiwane did not respond and Jeffrey asked other employees to assist him to shift the mealie meal and the pallet.

Once the pallet was moved, Jeffrey found a 2 litre bottle cooldrink that was half empty underneath the pallet.

- [8] Jeffrey spoke to Mandiwane and requested him to go to the office of the store manager to report on the incident. Mandiwane refused and Jeffrey reported the matter to the store manager, who told him to tell Mandiwane to go to the office of the store manager. Jeffrey went back to Mandiwane and told him that the store manager wanted to see him. When Mandiwane refused, Jeffrey went back to the store manager and was told to get security to bring Mandiwane to the office. Jeffrey went to Mandiwane with five security officers upon which Mandiwane followed him to the store manager.
- [9] At that point the store manager was not in the office and Jeffrey told Mandiwane that since he saw him drinking the cooldrink, he should write a report. Mandiwane refused and showed signs intending to beat Jeffrey. As Jeffrey and the security officers were about to handcuff Mandiwane, the store manager and the departmental manager arrived. Jeffrey explained to the store manager what had happened and that Mandiwane refused to write a report.
- [10] Mandiwane was shouting and insulting Jeffrey and the store manager asked him to cool down and said to him that he has to write a report on what happened and what he knows. Mandiwane was given a pen and paper to write down what has happened. He was no longer cuffed and when given the paper, Mandiwane shouted and said that he was not going to write the report.
- [11] The store manager and the departmental managers told Mandiwane to write a report, but he refused and pointed his finger at the store manager and it caused a scene in front of customers to such an extent that the store manager asked Jeffrey and other security officers to take Mandiwane out of the shop.
- [12] Jeffrey explained that the Applicant has a policy that provides that any person who allegedly committed an offence in the workplace, should write a report and he as the security manager should also write a report. The senior management will then compare the reports, investigate the incident and make relevant conclusions.

- [13] Jeffrey testified that Mandiwane was requested to write a report stating his version in respect of what happened and the facts that he knew and his refusal to do so constituted a refusal to follow a lawful instruction.
- [14] In cross-examination it was put to Jeffrey that Mandiwane never refused to write the report, but he refused to write a report where he was told what to write in the report. Jeffrey disputed that and testified that he never told Mandiwane what to write, he merely told Mandiwane to write a report on what he knew.
- [15] The Applicant's second witness was its store manager, Mr Calvin Ralikhuvhana (Calvin). Calvin testified that the incident was reported to him by Jeffrey, who told him that he saw Mandiwane drinking a 2 litre cooldrink. He told Jeffrey to request Mandiwane to write a report of his side of the story and Jeffrey left. After a few minutes he heard a loud noise and went to investigate what caused the noise and went to where the noise was coming from. In the supervisor's canteen, where the noise was coming from, he found Mandiwane, Jeffrey and security officers and Mandiwane's hand was cuffed. He immediately ordered them to uncuff Mandiwane and he explained to Mandiwane why he should adhere to the request to write a report and the importance of doing so.
- [16] Subsequently Jeffrey, Mandiwane and the others followed him and he asked what the problem was. Jeffrey responded that Mandiwane was still refusing to write the report and he once again explained to him the importance of writing a report. At that point the departmental manager joined them and he also explained to Mandiwane the importance of writing the report. Mandiwane was handed the incident report papers, but he banged his hand with the paper on the table, raised his voice and refused to write the report. They did not want a scene and tried to calm Mandiwane down, but his voice became louder and he caused an abruption in the store. As he caused a scene, Calvin as the store manager asked him to leave the store. Mandiwane refused to leave and raised his voice even more and shouted and pointed his finger at Calvin, at which point he requested the security officers to escort Mandiwane out of the store.
- [17] Calvin explained the importance of writing a report and testified that it is part of the Applicant's standard operating procedures and incorporated in the

employee's contract of employment. Employees have to write reports when requested to do so. He testified that Mandiwane was aware of it as he has written a report before this incident. He further explained that the Applicant's standard operating procedures are communicated to employees by placing it on the notice board and sharing it in meetings with the employees.

- [18] Calvin testified that dismissal was an appropriate sanction as Mandiwane was given the instruction to write a report more than once and he deliberately refused an instruction from his seniors. Mandiwane disrespected the store manager and the departmental manager in front of other employees.
- [19] In cross-examination it was put to Calvin that one of the reasons why Mandiwane did not write a report was because there was no incident. Calvin testified that the security manager reported an incident involving Mandiwane and that warranted a report from Mandiwane.
- [20] The Applicant's departmental manager, Mr Richard Munyangane (Richard) testified that he was standing with Calvin at the kiosk in the store when Jeffrey came and informed Calvin that Mandiwane refused to write the report. Calvin instructed Jeffrey to tell Mandiwane that he (Calvin) said that he must write the report. After a while there was a noise in the canteen and they went there and found that Mandiwane was handcuffed. Calvin instructed the security officers to uncuff him and Calvin spoke to Mandiwane and emphasized why it was important for him to write an incident report. They left the canteen as it appeared that Mandiwane understood that he had to write the report.
- [21] Shortly thereafter they heard a noise from the canteen and they saw the security officers and Mandiwane coming out of the canteen, approaching Calvin and Richard where they were at the kiosk in the store. Jeffrey informed Calvin that Mandiwane did not want to write the report. Calvin spoke to Mandiwane once again and urged him to write the report. At this point Richard intervened and also emphasized the importance of writing a report. Mandiwane said he could not write a report because he did not do anything. Mandiwane was given the incident paper to write a report, but he started shouting and said they could do whatever they want, he was not going to write the report. Calvin then said it would be better for Mandiwane to leave the store. Mandiwane became aggressive and said he would not write the report,

he would not leave the store and he would not do what they were telling him to do. The security officers thereafter removed Mandiwane from the store.

- [22] Richard testified that the bakery, where Mandiwane worked, was one of the departments he managed in his capacity as departmental manager. He testified that the Applicant's employees know the standard operating procedures as there is a notice board where it is displayed for all employees to see and it is communicated in meetings. He further explained that Mandiwane is aware of the procedure to write a report as he had done so before when he was caught sleeping on duty.
- [23] Richard testified that Mandiwane was issued with a final written warning on 17 September 2012 for *inter alia* gross misconduct related to offensive and abusive behaviour and gross insubordination, which final written warning was valid for a period of ten months, thus still valid when Mandiwane was charged with misconduct in November 2012 and dismissed for misconduct in December 2012.
- [24] Richard testified that dismissal was appropriate as Mandiwane was instructed to write a report firstly by the security manager, when he refused, the store manager instructed him on numerous occasions and the departmental manager also explained to him the importance of writing the report, but he refused to comply with the instruction.
- [25] In cross-examination Richard emphasized that Mandiwane never said that he did not understand that he had to write a report or why it was important for him to do so, but Mandiwane merely stated that he did not want to write the report and he would not write it.
- [26] In cross-examination it was put to Richard that Mandiwane was never requested to write a report, but he was forced to do so. Richard disputed this and testified that he and Calvin explained to Mandiwane why it was important to write a report, after which explanation Mandiwane understood, and he was never forced to write a report.
- [27] It was also put in cross-examination that Mandiwane did not know about the rule to write a report, which was also disputed by Richard. He testified that Mandiwane at no point indicated that he was unaware of the rule that he had

to write a report. In fact, Mandiwane has done so on a previous occasion and he is aware of the rule.

- [28] Mandiwane testified that on 21 November 2012 Jeffrey told him that he knew about the cooldrink and when he denied drinking the cooldrink, Jeffrey said he was going to handcuff him until he told the truth. Mandiwane said that Jeffrey was forcing him to write a report and he told him what should be written in the report. Calvin agreed with Jeffrey, but told him to remove the handcuffs. Calvin said to Mandiwane that he should write a report that he took the cooldrink, which he could not do as he did not take the cooldrink. After he refused to write such a report, the security officers removed him from the store.
- [29] Mandiwane denied that he knew of the existence of the rule to write a report, he denied any knowledge of the Applicant's standard operating procedures, he denied seeing policy documents, he testified that he was unable to read properly and all of the evidence on the Applicant's standard operating procedures and code at work was new and news to him.
- [30] Mandiwane's version was that he would not write the report as he was forced in respect of what to include and write in the report. He conceded that he has written a report before, but was also forced to write that report.

The arbitrator's findings

- [31] In his analysis of the evidence and arguments, the arbitrator summarised the issue as that the Applicant's case was that Mandiwane was dismissed for gross insubordination in that he refused to write a report as required by the Applicant's policies and that Mandiwane's case was that he did not refuse to write the report, but refused to be dictated what to write in the report.
- [32] The arbitrator accepted that there is a rule that provides that employees are required to write a report when requested to do so. He also accepted the Applicant's version that Mandiwane was aware of the policies and procedures and his version that he was unaware was far-fetched and thus rejected.
- [33] The arbitrator found that it was common cause that Mandiwane did not write the report he was required to write but that Mandiwane's conduct by not writing the report was justifiable because Jeffrey and Calvin were dictating the

terms of the report. This finding is informed by the arbitrator's view that Mandiwane was forced to write a report and that Mandiwane's version that he was dictated in terms of what to write in the report was more probable. Mandiwane was reinstated retrospectively.

Analysis of the arbitrator's findings and grounds for review

- [34] The Applicant's grounds for review are all related to the arbitrator's acceptance of Mandiwane's version as the more probable version and his rejection of the Applicant's version.
- [35] The Applicant took issue with the fact that the arbitrator accepted that Mandiwane's conduct in refusing to write the report was justified because Jeffrey and Calvin dictated the terms or the content of the report. The Applicant's case is that the arbitrator failed to provide a reasonable explanation as to why he preferred to accept Mandiwane's version and reject the evidence of the Applicant's witnesses that Mandiwane was not dictated as to what he should write in the report. Further that the arbitrator made no credibility findings against the Applicant's witnesses and attached no weight to Mandiwane's lack of credibility.
- [36] In short the Applicant's case is that the arbitrator provided no proper basis for rejecting its version and evidence and preferring that of Mandiwane.
- [37] *In casu* the arbitrator was clearly faced with two conflicting versions. On the one hand the Applicant's witnesses testified that Mandiwane was requested to write a report in line with the applicable policies and procedures and he had to write his version of events and on the other hand Mandiwane's version is that he could not write the report as he was forced and dictated what to include in the report.
- [38] The approach to be adopted by arbitrators when faced with two disputing versions was set out in *Sasol Mining (Pty) Ltd v Ngeleni NO and Others*¹, where it was held that the arbitrator must conduct an

'. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the

¹ (2011) 32 ILJ 723 (LC) at 727C-F.

witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO and others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'

[39] The arbitrator, faced with two conflicting versions, had to follow the approach as set out by this Court and he had to conduct an assessment of the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him.

[40] In *Sasol Mining* the Court also held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held that:

'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. The commissioner manifestly failed to resolve the factual dispute before him on that basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension.'

[41] It is within this context that the evidence presented and the arbitrator's assessment of the evidence placed before him, should be considered.

[42] The transcribed record shows that in cross-examination it was put to Jeffrey that Mandiwane never refused to write the report, but he refused to write a report where he was told what to write in the report. Jeffrey disputed that and testified that he never told the Mandiwane what to write, he merely told him to write a report on what he knew.

[43] In cross-examination it was put to Calvin that one of the reasons why Mandiwane did not write a report was because there was no incident. Calvin

testified that the security manager reported an incident involving Mandiwane and that warranted a report from Mandiwane. This version is significant as it appears to dispute that there was an incident and a need to write a report.

- [44] In cross-examination it was put to Richard that Mandiwane was never requested to write a report, but he was forced to do so. Richard disputed this and testified that he and Calvin explained to Mandiwane why it was important to write a report, after which explanation Mandiwane understood, and he was never forced to write a report.
- [45] Mandiwane's version was that he would not write the report as he was forced in respect of what to include and write in the report. In his evidence in chief Mandiwane presented some versions that were never put to the Applicant's witnesses, for instance that Jeffrey handcuffed him and told him that he will remain handcuffed until he has written a report stating that he drank the cooldrink. Mandiwane also adopted an attitude where he denied that he knew of the existence of the rule to write a report, he denied any knowledge of the Applicant's standard operating procedures, he denied seeing policy documents, he testified that he was unable to read properly and all of the evidence on the Applicant's standard operating procedures and code at work was new and news to him. The arbitrator found Mandiwane's denial far-fetched and accepted that he was aware of the policies and procedures.
- [46] All three of the Applicant's witnesses testified that it was explained to Mandiwane why it was important and necessary for him to write the report, that employees have to write reports when required to do so and that they did not force him to write the report and did not dictate the contents of the report.
- [47] In his assessment the arbitrator recorded that the three witnesses of the Applicant's testified that Mandiwane was not forced to write the report and that they have not told Mandiwane to write that he was found drinking the 2 litre cooldrink. The arbitrator then concluded that Mandiwane was forced to write the report and his version that he was dictated in terms of what to write in the report is more probable. This conclusion, the arbitrator held, was supported by the fact that Mandiwane was not charged with stealing the cooldrink, because there was no evidence. The arbitrator found that because the Applicant was unable to charge Mandiwane with stealing in the absence of the report,

showed that Mandiwane was dictated to write that he was found drinking cooldrink and thereby implicating himself.

- [48] Glaringly absent from the arbitration award is an assessment of the credibility of the witnesses or the inherent probabilities of the versions presented. The arbitrator accepted Mandiwane's version and rejected the Applicant's version without providing any reasons why the one version is to be preferred and the other to be rejected.
- [49] The arbitrator's finding that because the Applicant was unable to charge Mandiwane with stealing in the absence of the report, showed that Mandiwane was dictated what to write in the report is not only absurd, but also irrational, unreasonable and disconnected from the issue he had to decide. This finding contains no assessment of the probabilities.
- [50] The Applicant's case is that the arbitrator made a conclusion that no reasonable decision maker could make by concluding that because Mandiwane was not charged with theft, it proved that he was forced to write a report implicating himself. In my view there is merit in this submission.
- [51] The essential ingredients of an assessment of the credibility of the witnesses and the inherent probability or improbability of the versions before him, is missing in the arbitration award. In my view the arbitrator was wholly incapable of dealing with the disputes of fact and he failed to perform one of his primary functions, namely to resolve disputes of fact.
- [52] The arbitrator did not undertake a full analysis of the evidence and the probabilities as they presented themselves during the arbitration proceedings. The arbitrator did not consider Mandiwane's evidence in light of the probabilities, self-interest and credibility of the witnesses.
- [53] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² Ngcobo J stated at 268:

'[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its

² (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC),

case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

- [54] The same considerations apply to an arbitrator who fails properly to resolve an irreconcilable dispute of fact. For these reasons, the arbitrator's award falls to be reviewed and set aside.
- [55] *In casu* the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award may have been different had the arbitrator properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the arbitrator in the conduct of the arbitration proceedings.
- [56] The evidence presented shows that the Applicant's version was consistent that Mandiwane refused to write the report, that report writing when required to do so is part of the Applicant's policies and procedures and that Mandiwane was requested to write a report, but refused to do so and that he acted in an unruly manner when given the incident report papers to write the report. In my view the evidence adduced by the Applicant showed that, on a balance of probabilities, Mandiwane indeed behaved in an offensive and abusive manner and that he was grossly insubordinate when he refused to carry out a lawful instruction when he refused to write an incident report as required by the Applicant's policies.
- [57] The Applicant also takes issue with the fact that the arbitrator ignored the fact that Mandiwane still had a valid final written warning for similar misconduct at the time of his dismissal. This is indeed a relevant and material factor that was ignored by the arbitrator.

Relief

- [58] This leaves the issue of relief.
- [59] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that Mandiwane's case is dismissed.

- [60] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.
- [61] The matter could be finally determined where there is a full record of the proceedings before Court and where it would be in the interest of justice to do so.
- [62] I am in a position to decide and finally determine the matter on the record as it is before me. It is also in the interest of justice to determine the matter finally and not to order a re-hearing of the matter as Mandiwane's dismissal took place as far back as 2012 and in my view, this matter should be and could be brought to finality.
- [63] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.
- [64] In the premises I make the following order:

Order

1. The arbitration award issued on 11 November 2013 under case number LP355-13 is reviewed and set aside;
2. The arbitration award is substituted with an order that Mandiwane's dismissal was substantively fair;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court

Appearances:

For the Applicant : Advocate L Charoux

Instructed by : Stanley Moldt Attorneys

For the Third Respondent : Mr Voyi of Ndumiso Voyi Attorneys

LABOUR COURT