



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

CASE NO: PR 138/14

In the matter between:

AFRICAN BULK EARTHWORKS

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER THEMBA CHOBOKOANE N.O

Second Respondent

INNOCENT ZAKHELE ZULU

Third Respondent

Heard: 9 November 2016

Delivered: 17 November 2017

Summary: An application to review and set aside an arbitration award of the CCMA may not be granted when the applicant has not established that the commissioner has either misconceived the dispute before him or her or reached an unreasonable decision.

JUDGMENT

LALLIE, J:

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent who will be referred to as the commissioner in this judgment. It is opposed by the third respondent.

Factual background

- [2] The applicant conducts business in the construction sector. It employed the third respondent as a construction health and safety officer from May 2012 until 21 February 2014 when he was dismissed for unauthorised absence from duty. It is common cause that the third respondent was absent from work on 28 January 2014. On 27 January 2014, the third respondent phoned Mr Booyce (Booyce), the applicant's site agent at the East London site where the third respondent was working. The third respondent's version was that the purpose of the phone call was that he wanted to find out whether he should report for duty the following day. Booyce responded in the negative as he was not going to be at work. The applicant's version which was presented by Booyce was that Booyce told the third respondent to report for duty on 28 January 2014. The third respondent's absence was construed to be misconduct by the applicant. He was subjected to a disciplinary enquiry and as he was on a final written warning for similar misconduct, he was dismissed. He referred an unfair dismissal dispute to the first respondent which would be referred to as the Commission for Conciliation, Mediation and Arbitration (CCMA) in this judgment. The commissioner arbitrated the dispute and issued an award in which he found the third respondent's dismissal substantively unfair and ordered the applicant to pay him compensation equivalent to three months' remuneration.

The award

- [3] The commissioner submitted the first respondent's version that Booyce told him not to report for duty on 28 February 2014. His reasons were that as no work could proceed in his absence, Booyce told the workers not to report for

duty on 28 February 2014. He rejected Booyce's evidence that the reason for instructing the third respondent to report for duty was that, unlike the contractors he told not to report for duty, he gave the third respondent a different instruction because he was the applicant's permanent employee. The commissioner noted that Booyce testified that he told the third respondent to report for duty because he wanted the third respondent to do Booyce's work which he usually assisted him with. Booyce is not computer literate. The first respondent from time to time assisted him by doing some of his work on the first respondent's slip. Booyce conceded that by virtue of the first respondent's position of health and safety officer, there was no work to be done by him when the site was not operational. The commissioner found that the first respondent's dismissal was substantively unfair because the applicant dismissed the first respondent for refusing to do Booyce's work. He further found that the applicant acted inconsistently by disciplining two permanent employees who were also absent from work on 28 February 2014.

Grounds for review

- [4] The applicant submitted that the award stands to be reviewed and set aside because the commissioner committed a gross irregularity within the meaning of section 145 (2) (a) (ii) of the Labour Relations Act¹ (the LRA). The award is not rational and justifiable in relation to the evidence presented at the arbitration. The irregularity is based on the commissioner's failure to take into account the fact that the third respondent had assisted Booyce on numerous occasions with site agent administrative work. He failed to consider the contradictory versions before him. He failed to determine the issues in respect of the misconduct which led to the third respondent's dismissal. He further erred in determining the validity of the instruction given by Booyce to the third respondent. The third respondent opposed the application on the basis that the grounds the applicant sought to rely on are not valid. The award according to the first respondent is not susceptible to review.

Test for review

¹ Act 66 of 1995 as amended.

- [5] The applicant sought to rely on errors made by the commissioner in the conduct of the arbitration proceedings. For this Court to find an arbitration award defective as envisaged in section 145 (2) (a) (ii) of the LRA, the applicant is required to establish that the commissioner either misconceived the enquiry the commissioner was required to undertake in determining the fairness of the third respondent's dismissal or that the commissioner reached an unreasonable decision. In this regard see *Head of the Department of Education v Mofokeng and others*². The power to determine the fairness of an employees' dismissal for misconduct has been given to commissioners by the LRA. They make the determinations based on their sense of fairness. The commissioner was required to determine whether the applicant's conduct of dismissing the third respondent for misconduct was fair. In determining whether the applicant has provided grounds to have the award reviewed and set aside, this Court is required to consider the evidence and all the evidentiary material before the commissioner in its totality.
- [6] The totality of the evidence tendered at the arbitration does not support the applicant's case that the commissioner committed gross irregularities. The applicant's averment that the commissioner failed to take into account the evidence that the third respondent assisted Booyce with his administrative work is unsustainable. The commissioner dealt with the issue and made a finding that the instruction given by Booyce was unreasonable and that the applicant should not have dismissed the third respondent for failure to do Booyce's work. The ground for review that the commissioner failed to apply his mind to the contradictory versions before him does not hold water. The commissioner identified the conflicting versions and dealt with the contradictions. He preferred the first respondent's version and gave reasons for preferring it. He dealt with the reason for the third respondent's dismissal. He cannot be faulted for taking into account the instruction Booyce gave the third respondent because it forms an integral part of the reason for the third respondent's dismissal. The commissioner did not misconceive the nature of the dispute before him and his award falls within bounds of reasonableness.

² [2015] 1 BLLR 50 (LAC) at para 32

The applicant did not establish grounds to have the award reviewed and set aside. Its application cannot succeed.

Order

[7] In the premises, the following order is made:

1. The application for review is dismissed.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Van Der Walt of Labuschagne & Van Der Walt Inc.

For the Third Respondent: In person

LABOUR COURT