



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2400/13

In the matter between:

LUCKY WITBOOI

Applicant

and

COMMISSION FOR CONCILIATION,

MEDITATION AND ARBITRATION

First Respondent

BRYAN PIETERSEN N.O

Second Respondent

SISHEN IRON ORE MINE (PTY) LTD (KUMBA)

Third Respondent

Heard: 21 February 2018

Delivered: 23 February 2018

Summary: An opposed review application. The applicant contends that the second respondent was duty bound to assist the applicant during arbitration-the *helping hand principle*. Further the applicant contends that the award is not one that a reasonable commissioner can issue. The *principle of helping hand* cannot and should not be encouraged in instances where a commissioner would be assisting a party to advance a case to be impartially judged by him or her. A commissioner should not

be seen to be actively assisting another party in the proceedings. Held (1) the review application is dismissed. (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an opposed application to review and set aside an arbitration award issued by the second respondent on 31 October 2013 in terms of which it was found that the dismissal of the applicant due to incapacity was substantively and procedurally fair.

Background facts

- [2] The applicant was employed as a Haul Truck Operator. He was diagnosed with Type 1 *Diabetes Mellitus*. As a consequence of this ailment he was no longer meeting the profile of the position he held. Attempts were made to accommodate him elsewhere but all in vain. Having failed to accommodate him, the respondent dismissed him for incapacity. The applicant was aggrieved thereby and referred a dispute of alleged unfair dismissal. The second respondent was appointed to resolve the dispute through arbitration. He found that the respondent did not dismiss the applicant unfairly. The applicant was yet again aggrieved and he approached this court for review.

Grounds of Review

- [3] Although the founding affidavit raises a number of complaints, it is apparent that the applicant complains that the second respondent did not extend a helping hand by getting Dr Minuer to testify. Also that the second respondent attached little or no weight to the report of Dr Minuer. Lastly that the award does not meet the reasonableness test.

Evaluation

[4] The test for review does not require repetition at every turn. It is trite that only decisions that a reasonable commissioner cannot make are reviewable. In terms of the well-known authority of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹, an irregularity prevents a fair trial of issues. So for the review court to assess the ground that the second respondent ought to have assisted the applicant regard must be had to what happened during the arbitration hearing and assess the conduct of the second respondent at that time to determine the alleged irregularity.

[5] The transcript of the proceedings reveals the following:

COMMISSIONER: You've handed up a medical document here a Dr Minuer. Will you be subpoenaing or calling him to testify?

MR LEKWELE: Mr Commissioner, we will be directed by the witness that the company will be calling whether to subpoena the Doctor but we don't say we wouldn't. Let's just put it we will be dictated by, or influenced by the witnesses of the company. [My own underlining and emphasis]

[6] From the above it is patently clear that Mr Lekwele knew what to do and when to do it. It is clear from the onset that Mr Lekwele assured the second respondent that the Doctor will be subpoenaed. Therefore, it cannot be expected of the second respondent to later on advise the applicant to call the Doctor. Mr Dlamini for the applicant referred to a portion in the record where the second respondent stated the following:

"...I would like and I am placing this on record, that this specific doctor, Dr Mosidi, be called to come and give evidence in these proceedings.

[7] In his submission, the second respondent should have said the same thing about Dr Minuer. Since he did not do so, he committed an irregularity. I do not agree. Properly considered, the second respondent

¹ [2007] BLLR 1097 (CC)

mentioned that after the objection of Mr Lekwele, who complained about being able to cross-examine Ms Moodley, who was the author of the document she was reading.

- [8] In the light of the above, I do not believe that the *helping hand principle* was required in this case. I must add that this so-called *helping hand principle* was considered in two of the cases of this Court², in a different and distinguishable set of facts. Notably since then this Court³ and the Labour Appeal Court (LAC)⁴ approached this principle with a measure of caution. To my mind regard being had to the test in *Sidumo*⁵, that the grounds in section 145 of the LRA are suffused in the ground of reasonableness and the interpretation of the test in *South Africa (Pty) Ltd (Kloof Gold Mine) v. CCMA and Others*⁶ and many other LAC judgments, the principle if it was ever acceptable, ought to be jettisoned. It is not consistent with the new test of review. If a commissioner fails to raise a helping hand and yet arrives at a reasonable conclusion, it matters not.
- [9] Of course another concern which was raised by the LAC is the difficulty to draw a distinction between a legitimate intervention and assisting to advance another party's case.
- [10] In the circumstances of this case if such a duty exists, I do not believe that there is any irregularity committed by the second respondent which renders her award reviewable. Accordingly, this ground is bound to fail.
- [11] Regarding the little weight argument, the record reflects that the representative of the applicant was warned of this possibility. The transcript reflects thus:

² *Dimbaza Foundaries Ltd v CCMA and others* [1999] 20 ILJ 1763 (LC) and *Char Technology (Pty) Ltd v Mnisi and others* [2000] 7 BLLR 778 (LC).

³ *Kalik v Truworths* [2008] 1 BLLR 45 (LC) and *Anglo Operations v CCMA* [2014] 7 BLLR 719 (LC).

⁴ *Bafokeng Rasimone Platinum Mine CCMA and others* [2006] 27 ILJ 1499 (LAC) at para10 and 17.

⁵ *Supra*.

⁶ [2014] 1 BLLR 20 (LAC).

COMMISSIONER: It's fine, I hear what you are saying. But I will now- if I accept this document, the weight I attach will have to be minimal based on the fact that there won't be any oral evidence on this document as to the author not being here. But I will attach a certain weight to it okay.

- [12] This was raised at the time Mr Lekwele was introducing another document from Dr Minuer. Before then the second respondent asked a pertinent question in the following manner:

COMMISSIONER: Is Dr Minuer going to come and testify?

MR LEKWENE: No Mr Commissioner

- [13] Indeed in law documentary evidence remains inadmissible hearsay evidence. To the extent that the second respondent did not attach weight on the reports by Dr Minuer, he was entitled to do so and he committed no irregularity.

- [14] The last ground relates to the reasonableness of the award. Mr Dlamini submitted that the fact that the applicant was still able to drive, a reasonable commissioner would have found that there is no incapacity and therefore no fair reason to terminate. This submission is more an appeal submission than a review one. I do not agree with this submission. I am unable to fault the following finding of the second respondent:

25...It is important to note that the employee was incapable of performing his duties as a Haul Truck Operator due to his medical condition and also as a result of the regulations of the Department of Mineral Resources.

- [15] The evidence revealed that the applicant was moved to other sections as a result of his medical conditions. Being incapable to perform ones duties is a recognizable ground to terminate employment. The reasonableness test ground must fail too.

[16] In summary, the second respondent did not commit a reviewable irregularity by not extending the helping hand. Also the award falls within the bounds of reasonableness. Accordingly, the review application is bound to fail.

[17] In the results, I make the following order:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr B Dlamini (Union Official)

Instructed by: NUM.

For the Respondents: Mr F Malan

Instructed by: ENS Inc, Sandton.