



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR2079/2016

In the matter between:

SOUTH AFRICAN REVENUE SERVICES

Applicant

and

JACOBUS DU TOIT

First Respondent

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

Second Respondent

JOHAN D STAPELBERG N.O

Third Respondent

Heard: 13 June 2018

Delivered: 27 September 2018

Summary: Review application. Reinstatement inappropriate. Compensation awarded.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 18 August 2016 wherein the Third Respondent (the arbitrator) found the First Respondent's dismissal substantively unfair and ordered his reinstatement.
- [2] The First Respondent (the Respondent) opposed the review application.

Background facts

- [3] The Applicant employed the Respondent for a period of 19 years and his last position was that of 'Specialist Auditor'. The Respondent was charged with misconduct relating to assault and fighting whilst on duty. The Respondent was dismissed on 2 February 2016 after he was found guilty of assaulting a co-worker, Casper Visser (Visser) on 8 October 2015.
- [4] The Respondent subsequently referred an unfair dismissal dispute to the Second Respondent the Commission for Conciliation, Mediation and Arbitration (CCMA) and the dispute was arbitrated on 11 July 2016 and 1 August 2016.

The evidence adduced:

- [5] The issue to be decided by the arbitrator was whether the Respondent's dismissal was substantively fair as procedural fairness was not in dispute.
- [6] It is evident from the transcribed record that the Respondent conceded that a physical altercation took place and that he also conceded the extent of the altercation, but that his case was that his conduct was justified in the form of self-defence. A sanction of dismissal would be justified and fair, but in this instance the fairness of the sanction of dismissal was challenged in view of the fact that the Respondent acted in self-defence.
- [7] It appears that the incident was sparked by a question from Mr Visser as to what the Respondent wanted from Mr Visser's wife's Facebook account and what he was doing on her Facebook page. Mr Visser uttered threats to beat up the Respondent. It was common cause that following the threats made by Mr Visser, the Respondent hit him in the face and he bled as a result of this. A

supervisor intervened and separated them. Whilst there was still an exchange of words shortly afterwards, the situation subsequently became diffused.

- [8] It was also common cause that Mr Visser's cheekbone below his right eye was cut in the altercation and he received stitches for that injury.
- [9] The arbitrator identified that the question essentially was whether the incident of 8 October 2015 amounted to an assault or whether it was self-defence.
- [10] Ms Mosoma, a security officer employed by Protea Coin and stationed at the Applicant's premises, testified that she was seated in such a position that she was able to observe the Respondent and Mr Visser on 8 October 2015 and she saw that the Respondent had hit Mr Visser with a fist on his cheek whilst they were standing next to each other. The Respondent used his left hand and swung it to the side and hit Mr Visser on the right cheekbone. Mr Visser carried two cups of tea and a flask and he tried to block the Respondent with it. She testified that Mr Visser did not hit the Respondent. Ms Mosoma called her supervisor, Joe, and told him that people are fighting. Joe came to the scene and he separated them and stood between them. The Respondent tried to hit Mr Visser again. In cross-examination, many questions were posed to Ms Mosoma in respect of where the altercation took place.
- [11] Ms Steinman testified that on 8 October 2015 at around 07:10 she was sitting outside in the smoking area and playing a game on her cellular phone. Mr Visser came out and all of a sudden he slammed the coffee flask on the table next to her and he uttered swear words. She did not look up but got a fright and after she finished the game she was playing, she stood up and as she stood up, the Respondent came down the stairs from the first floor. Mr Visser pointed at the Respondent and he uttered the same swear words towards the Respondent. Ms Steinman testified that she stood up and walked very fast to leave the smoking area and to go inside. As she swiped her card to go inside, the Respondent was approaching and he walked towards her. They were almost next to each other when he turned around and she heard Mr Visser from behind her asking the Respondent what he was doing on his wife's Facebook page. She just walked on and took the lift to go up. In cross-

examination Ms Steinman explained that from what Mr Visser said, she understood that he wanted to fight with or assault the Respondent and when she saw the Respondent coming down the stairs, she wanted to take him away by telling him to go upstairs with her. When she met the Respondent on her way into the building, she did not tell him about what might happen and that he should go upstairs as there was no time to do so. Ms Steinman testified that she did not hear Mr Visser slapping the Respondent on his back.

[12] Mr Mhlengane testified that on 8 October 2015 he was called by his colleagues because there was a fight between employees. He ran immediately to the ground floor where he found Mr Visser and the Respondent next to the lift speaking softly. He saw that there was some sort of an argument between them and that Mr Visser was bleeding and was holding a flask and two cups. He explained that he was standing between the two and that the Respondent tried to come behind him to move closer to Mr Visser and he had to separate them. Mr Mhlengane asked Mr Visser what was going on and Mr Visser answered that nothing happened, notwithstanding the fact that his face was bleeding. After that, the Respondent went up the stairs and Mr Visser got into the lift. Mr Mhlengane thereafter reported the incident to his manager, Ms Natasha van Niekerk.

[13] The Applicant's last witness was Ms Andrew, a Senior Manager: Audit. She was the manager of the section where the Respondent was employed as a Specialist Auditor. She testified that on 8 October 2015 just after 08:00 the Respondent came to her office and he was totally shaken up and indicated the need to tell her what had just happened. She testified that the Respondent was emotional and explained to her that he was in a fight with Mr Visser and it happened when he went downstairs to meet another person and Mr Visser screamed at him and uttered swearing words. The Respondent said that he felt a push from behind and he felt threatened and he reacted by turning around and he punched Mr Visser. The Respondent explained that Mr Visser asked about him being on his wife's Facebook page and the Respondent explained that he did not even know Mr Visser's wife and he had to defend himself by punching Mr Visser.

[14] Ms Andrew testified that the feedback she received after the disciplinary hearing was that at the hearing, it was denied that there was a fight and that the Respondent's version was that Mr Visser fell and that the Respondent helped him up, but that there was no fight.

[15] Ms Andrew was referred to the outcome of the disciplinary hearing where the 'employee's version' was captured as follows:

"Casper Visser and Kobus du Toit alleged that Casper Visser uttered swear words to Kobus du Toit from the smoking area and also inside the office building. The two employees confronted each other inside the office building. Casper Visser was damaged from a motor bike accident on that day, Casper Visser's knee gave in and that Casper hit himself with the two mugs that he was carrying in his hand when he was falling or about to fall and that Kobus du Toit grabbed Casper Visser to pull him up from falling. The employees submitted that they were not involved in a physical fight and that Kobus never hit Casper with a fist. The employee's further submitted that Casper Visser never intimidated Kobus du Toit."

[16] Ms Andrew was asked to comment on the two versions presented. On the one hand the Respondent told her that he was involved in a fight and on the other hand the version that there was no fight, but rather assistance given to Mr Visser so that he did not fall. Ms Andrew responded by stating that the events the Respondent reported to her after the incident, were the true version and he never informed her that he assisted Mr Visser when he fell down. Ms Andrew found the two versions disturbing as the Respondent is a senior SARS official and integrity is extremely important. She found it disappointing that another version of the events was presented at the disciplinary hearing.

[17] The Respondent did not tell the truth, which is in direct conflict with the SARS code of conduct and the integrity that is required of its employees. The Respondent was not truthful, his integrity is questionable and it seriously compromised the trust relationship. Ms Andrew explained that where an employee cannot be truthful and trustworthy and where integrity is not intact, it would be very difficult to have such an employee in the department.

- [18] In cross-examination, Ms Andrew testified that she believed the Respondent's version as he conveyed it to her on the day of the incident, but she expected him to be truthful and keep to his version and to show remorse. If he had done that, she could have supported him, but in a case where he changed his version to something different, she was disappointed and the trust relationship had been compromised. Ms Andrew explained that she expected the Respondent to tell the truth and to show remorse for the way he reacted as he is a senior official and had to show maturity in dealing with matters in a way that is acceptable in workplace standards.
- [19] It was put to Ms Andrew that in the disciplinary hearing, the Respondent and Mr Visser were represented by a PSA representative and they were informed that as the employer did not have video footage of the incident and had no witnesses who could testify as to what transpired, they tried to keep their jobs by saying that there was no incident and by not adducing any testimony in the disciplinary hearing. Ms Andrew explained that the disciplinary hearing is part of the process where facts could be listened to and a determination could be made.
- [20] The Respondent testified that on 8 October 2015 at about 07:15 he was walking down the stairs towards the lobby when he saw Ms Steinman in the smoking area and he wanted to greet her. As he was walking toward the door of the smoking area, she stood up and came through the door and he greeted her and said that he would walk with her towards the lift. He turned around to walk to the lift and as they were about to walk, he heard swearing behind him and felt a push from behind and he reacted. He saw Mr Visser stumble towards the window and he collided with the window and his spectacles fell. Mr Visser went on his knees to pick them up and when he stood up, he tried to hit the Respondent with the flask he was carrying. They approached the lift and at the time had a discussion about Mr Visser's allegations that the Respondent was on his wife's Facebook page. Mr Mhlengane came to the scene and he asked Mr Visser what was going on and Mr Visser responded by saying that nothing had happened and Mr Mhlengane asked him as to why he was bleeding. The Respondent testified that he told Mr Mhlengane that

they had an altercation and at that point Mr Visser made further threats towards him and Mr Mhlengane took him to the other side and pushed him away from the Respondent. The Respondent walked closer to Mr Visser and said that he should execute his threat there and then. Mr Mhlengane then separated them and told them that they are grown-ups and that they should stop this behaviour. The Respondent went up the stairs looking for his supervisor but could not find him, where after he reported the incident to Ms Andrew. Ms Andrew told him to calm down as the employer would investigate the incident.

[21] In respect of the disciplinary enquiry, the Respondent testified that he was represented by Mr Herman Ras (Ras), a PSA representative, and he told Mr Ras his version of events. On the morning of the disciplinary hearing Mr Ras told him that it was an assault case and that the onus of proof was on the employer. Mr Ras said that the employer has not reported the matter to the police, did not provide medical evidence and that there was nothing on the video footage. Mr Ras said that the Respondent has the right to remain silent and that he would not testify. The Respondent's version is that he told Mr Ras that he wanted to testify, but Mr Ras indicated that he would damage his own case as the onus was on the employer and the employer had no video footage that showed the incident. At the commencement of the disciplinary hearing, Mr Ras made a statement and on advice of the PSA, the Respondent remained silent.

[22] In respect of Ms Andrew's testimony, the Respondent stated that he is not a dishonest person because he made a full disclosure to her shortly after the incident and if he had a disciplinary hearing, separate from Mr Visser, he would have testified what he testified in the arbitration and he would have called Ms Andrew as his witness. He testified that the fact that the two cases (his and Mr Visser's) were heard together, changed everything.

[23] The Respondent explained his understanding of self-defence and testified that in this instance it was not really an issue of self-defence, but rather a case of impulsive reaction.

- [24] On his version the trust relationship is not broken for the reason that the employer has not called any taxpayer or any other person to testify that there was havoc in the lobby. This testimony is indicative of the fact that the Respondent did not grasp the reasons why the Applicant stated that the trust relationship was compromised. It was not because of the events in the lobby, but because of what transpired in the subsequent disciplinary hearing.
- [25] In cross-examination, the Respondent confirmed that he elected Mr Ras to act on his behalf and that he gave him a mandate to represent him at the disciplinary hearing. He testified that he trusted Mr Ras with his life and accepted that he would act in good faith. He later realised that Mr Ras did not act in his best interest.
- [26] The Respondent conceded that he accepted the advice not to testify and that he did not dispute or counter an untrue version that was put on his behalf. He conceded that he had a choice to tell his side of the story, but elected to remain silent and accept the false version that was put forward. He testified that he acted on good advice when he remained silent.
- [27] The Respondent testified that if he had known the law at that point, he would have represented himself. He was confronted with the proposition that he did not need to know the law to tell the chairperson of a disciplinary hearing his version of events and only now that the outcome did not favour him, he wanted to change his version. The Respondent explained that when he told his version to his employer, they did not believe him, when he went to the prosecutor, he was told that there is only one sanction for assault and that is dismissal and the employer wanted to get rid of him, regardless and at no point has the Applicant indicated that if he had come forward and testified honestly, he would be forgiven. The Respondent said that everyone would remain silent knowing the Applicant's agenda and he kept quiet at the disciplinary hearing to protect himself against the said agenda.

The arbitrator's findings

- [28] The arbitrator found the Respondent's dismissal substantively unfair. He found that the only witness to the incident of the assault, Ms Mosoma,

presented a version that was not supported by the video footage or the evidence of Mr Mhlengane. The arbitrator found Ms Mosoma to be an incredible witness who tried to portray the Respondent as an aggressor who kept trying to punch Mr Visser.

[29] The arbitrator found the Respondent to be a more credible witness whose testimony about the primary incident and the further interactions at the lift was not in conflict with the video footage or the evidence of Mr Mhlengane. He found that Ms Steinman's evidence corroborated the Respondent's version that he had his back turned to Mr Visser when Mr Visser swore at him. The arbitrator accepted the Respondent's version of events and accepted that the Respondent's reaction during the incident on 8 October 2015 was an instinctive response to being attacked and that he did not go beyond defending himself.

[30] The arbitrator recorded that the incident where Mr Visser pushed the Respondent and where he responded in self-defence happened so quickly that no one had actually seen what had happened. The Respondent's actions in the incident could not be said to have prejudiced the Applicant's or the Respondent's image in any manner. The arbitrator found that the Respondent acted in self-defence and that he did not commit any misconduct, did not breach any rule relating to assault and therefore dismissal was not an appropriate sanction.

[31] In respect of the trust relationship, the arbitrator found that the Applicant's claim of a breach in the trust relationship, is misplaced and he could find no reason not to re-instate the Respondent retrospectively.

The grounds for review

[32] It is trite that a party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one qualification namely that the Court is obliged to deal with a point of law apparent from the papers¹.

¹ *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at paras 67 and 68.

[33] In *Northam Platinum Ltd v Fganyago NO and Others*² it was held that:

'In my view, the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit.

[34] *In casu*, the Applicant raised one main ground for review.

[35] The ground for review as set out in the Applicant's founding affidavit and repeated in the supplementary affidavit is that the arbitrator misconducted himself and committed a gross irregularity in reinstating the Respondent. It is evident from a perusal of the Applicant's papers that the review is directed at the unreasonableness of the remedy of reinstatement.

[36] The Applicant's complaints in this regard all relate to the fact that a continued employment relationship was intolerable due to the Respondent's dishonest conduct in the disciplinary hearing and the arbitrator's findings in this regard. Issue is taken with the arbitrator's finding that the Respondent exercised his right to remain silent when in fact he allowed a false version to be put on his behalf to the chairperson of the disciplinary hearing and in allowing this, he actively participated in the dishonest conduct.

[37] It is evident that in the Applicant's founding and supplementary affidavits no issue is taken with the arbitrator's findings on the substantive fairness of the Respondent's dismissal. In its heads of argument however, the Applicant raised and introduced arguments on the assessment of conflicting versions and the arbitrator's conduct in this regard and the fact that the misconduct in question constituted a dismissible offence and that the requirements of self-defence had not been met. These issues were not raised as grounds for review and the Applicant cannot be allowed to introduce those in argument. Even if there were merit in these issues, they were not raised and cannot be considered by this Court sitting as a review Court.

² (2010) 31 *ILJ* 713 (LC) at para 27.

- [38] The Applicant is bound by the ground for review as raised in its papers before Court.
- [39] I have to deal with the merits of the review application within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [40] The test is thus whether the decision reached by the arbitrator is one that a reasonable decision maker could have reached based on the material and evidence placed before him or her during the arbitration proceedings.
- [41] The gist of the Applicant's case is that the arbitrator disregarded material facts placed before him and if he had assessed the facts placed before him, the only reasonable conclusion he could have come to was that a continued employment relationship is intolerable. The arbitrator failed to properly consider whether reinstatement was an appropriate remedy, given the Applicant's evidence on the trust relationship.
- [42] The issue about the false version put forward during the disciplinary hearing is not relevant to the question whether the Respondent's dismissal was fair, it is only relevant to the issue of relief⁴, which is *in casu* in any event the only issue challenged on review.
- [43] In my view there is merit in the Applicant's ground for review.
- [44] I say so for a number of reasons: The evidence before the arbitrator was that the Respondent's representative put forward a false version on his behalf during the disciplinary hearing, that the Respondent mandated the representative to act on his behalf, that he accepted the advice he received and that he was present and kept quiet when the false version was put

³ 2007 28 ILJ 2405 (CC) at para 110.

⁴ *Maepe v CCMA and Another* (2008) 29 ILJ 2189 (LAC) at para 6.

forward. In fact, it was put on the Respondent's behalf that they were informed that the employer did not have video footage of the incident and had no witnesses who could testify as to what transpired and that the Respondent and Mr Visser tried to keep their jobs by saying that there was no incident.

[45] In response to this, the Applicant's case was that it found the two versions disturbing as the Respondent is a senior SARS official and integrity is extremely important. The Respondent did not tell the truth at his disciplinary hearing, which is in direct conflict with the SARS code of conduct and the integrity that is required of its employees. The Respondent was not truthful, his integrity is questionable and it seriously compromised the trust relationship. The Applicant was clear that it would be difficult to have such an individual in its employ.

[46] In considering this issue, the arbitrator found that the Applicant's claim of a breach in the trust relationship, is misplaced. This is so because the Respondent was never charged for being dishonest and to bring up his dishonesty after the fact, is inappropriate. The Respondent did not testify in his disciplinary hearing and he had no part in the concocted story that was relayed by a representative in an opening statement in an attempt to save his job. The Respondent exercised his right to remain silent on instruction from his representative, whom he trusted and obeyed. The arbitrator disagreed with the Applicant's position that the Respondent's failure to step in and correct the misconception created at the hearing, should be placed on his shoulders and should be judged as dishonest and untrustworthy because the representative spoke untruthfully on his behalf.

[47] The arbitrator could find no reason not to re-instate the Respondent retrospectively.

[48] The arbitrator indeed committed a gross irregularity when he failed to consider the facts presented to him in respect of the trust relationship and the continuation of an employment relationship.

[49] The Respondent was not an innocent bystander when the concocted story was presented at his disciplinary hearing in order to save his job. The

Respondent is a well-educated adult who mandated his representative to act on his behalf, he accepted the advice he received and he was present and kept quiet when the false version was put forward and the conduct of his representative, must be attributed to him⁵. This conduct clearly indicates a planned and premeditated stratagem akin to a 'catch me if you can' approach and showed the intention to mislead the employer. The arbitrator's finding that the Respondent had no part in the false version that was put forward, is not supported by the evidence and is wrong in law.

[50] The arbitrator's finding that as the Respondent was never charged for being dishonest, and therefore that it was inappropriate to bring it up after the fact, is disconnected with the evidence. The Respondent's dishonesty only occurred at the disciplinary hearing and to criticize the employer for not charging him for being dishonest, is in the circumstances, inappropriate and in total disregard of the evidence presented.

[51] The arbitrator misconstrued the issue he had to determine in this regard. The issue was not whether the Respondent was charged with dishonesty but rather whether the employer could reasonably be expected to employ a dishonest person. The fact that the Respondent was not charged for being dishonest, cannot exempt him from any consequences flowing from his dishonest conduct at the disciplinary hearing. I already alluded to the fact that the false version put forward during the disciplinary hearing is not relevant to the question whether the Respondent's dismissal was fair, but it is certainly relevant to the issue of relief.

[52] This was a factor to be considered by the arbitrator in deciding the appropriate relief and in applying section 193 of the Labour Relations Act⁶ (LRA), which he ignored and failed to consider on the basis that the Respondent was not charged with dishonesty.

[53] The arbitrator further found that Ms Andrew was not in a position to make a judgment call on the Respondent's trustworthiness solely on the basis of what

⁵ *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 4 All SA 866 (SCA) at para 20.

⁶ Act 66 of 1995 as amended.

she read about the disciplinary hearing, having not been present there at all and unaware of what was said. This finding is also disconnected from the facts placed before the arbitrator. Ms Andrew testified about the version the Respondent gave her shortly after the incident and she read from the outcome of the disciplinary hearing what the version at the disciplinary hearing was. The version presented at the hearing was not disputed and it is not clear why the arbitrator found that Ms Andrew was unable to express her view on the trustworthiness of the Respondent merely because she was not present at the disciplinary hearing in circumstances where it was not denied that the version she read, was the version presented at the hearing.

- [54] There were indeed valid reasons presented to the arbitrator that militated against the reinstatement of the Respondent and his finding that there were no reasons not to reinstate, is unreasonable.
- [55] The arbitrator found that the Respondent's dismissal was substantively unfair as he acted in self-defence and that dismissal was not appropriate. I have already alluded to the fact that there is no challenge to these findings in the application for review. In view of the unchallenged finding of substantive unfairness and the inappropriateness of the remedy of reinstatement, the Respondent should have been awarded compensation.
- [56] The Applicant prayed for the substitution of the arbitration award, alternatively for the matter to be remitted for a hearing *de novo*. The Respondent's dismissal dates back to February 2016 and in my view the interest of the parties and the expeditious resolution of this dispute would be best served by substituting the remedy of reinstatement with compensation.

Costs

- [57] The Court has a broad discretion to make orders for costs according to the requirements of the law and fairness.
- [58] In my view this is a matter where the interest of justice would be best served by making no order as to costs.

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

Order:

1. That part of the arbitration award issued by the Third Respondent which ordered the retrospective reinstatement of the First Respondent is hereby reviewed and set aside;
2. The part of the arbitration award referred to in paragraph 1 *supra* is replaced with the following order:

‘The Applicant is ordered to pay the First Respondent compensation equivalent to 12 months’ remuneration calculated at his rate of pay at the time of his dismissal within 14 calendar days.’
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Ms J Ewang of Hogan Lovells (South Africa)
Inc Attorneys

For the First Respondent:

Advocate J Campanella

Instructed by:

T C Hitge Inc Attorneys

LABOUR COURT