



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 152/14

In the matter between:

KHATHUTHELO MAVHUNGU

Applicant

and

COMMISSIONER R. HUYSER N.O

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

SOUTH AFRICAN AIRWAYS (PROPRIETARY) LTD

Third Respondent

Heard: 2 May 2018

Delivered: 10 October 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

- [1] The applicant, (Mr Mavhungu), was employed by the third respondent (SAA) as its Airways Customer Services Agent with effect from September 2001. He was dismissed on 17 May 2013 on allegations of misconduct. Having referred a dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA), the matter came before the first respondent (Commissioner) for arbitration, who had found that the dismissal of Mavhungu was substantively and procedurally fair. With this application,

Mavhungu seeks an order reviewing and setting aside the Commissioner's award dated 10 November 2013. The application is opposed by SAA.

[2] The allegations levelled against Mavhungu leading to his dismissal were;

1. 'Displaying aggressive and disrespectful behaviour.'

In that on 14 November 2012 whilst representing a fellow employee Lebohang Makwanyane (Makwanyane) in a disciplinary hearing, the applicant insulted and undermined the Presiding Officer, Willem Grobler (Mr Grobler) with threats that violence of a similar nature to that which took place in Marikana in August 2012 could occur.

2. Assault

In that on 14 November 2012 whilst representing Lebohang in a disciplinary hearing, the Applicant assaulted the Chairperson with a disciplinary code and procedure booklet on the face.'

[3] At the internal disciplinary hearing, Mavhungu was found guilty of the above charges. He was not found guilty on a third charge related to absenteeism. It was further common cause that Mavhungu was formerly a shop steward of SATAWU. He had left SATAWU and joined the rival union National Transport Movement (NTM), and was also its shop steward. NTM and SAA did not have a formal recognition agreement.

The evidence at arbitration proceedings:

[4] At the arbitration proceedings, SAA had led the evidence of its Project Manager, Mr Willem Grobler (Grobler), who was appointed as the chairperson of a disciplinary enquiry convened on 14 November 2012 in respect of another employee, Ms Lebogang Makwanyane. The incident leading to Mavhungu's dismissal was triggered when the latter attended the said hearing and introduced himself as a NTM representative.

[5] Grobler advised Mavhungu that he was not permitted to represent Makwanyane in his capacity as NTM representative, as that union was not recognised by SAA, but that he could represent her in his capacity as a fellow

employee. According to Grobler, Mavhungu did not receive his ruling well, had an outburst, lost his temper and said to him; *'white boy...you are less than nothing... who do you think you are... you are less than nothing'*. Mavhungu then threw a booklet at Grobler's face area and the latter had managed to shield himself. Mavhungu continued to mention the name of Marikana, saying to him; *"What would it take for us to get recognised, would another 35 people need to get killed in order for us to get recognised?"* At that stage, Grobler in view of the utterances made and out of concern for the safety of people gathered at the hearing, wanted to have the proceedings adjourned. Makwanyane had however requested that the hearing should continue with Mavhungu representing him in his capacity as a fellow employee. Mavhungu having left the proceedings had at some stage returned and the hearing had proceeded. Grobler described the incident, especially the booklet throwing as demeaning and insulting. Even though Grobler expected Mavhungu to apologise, no apology was forthcoming.

[6] Under cross-examination, Grobler testified that Mavhungu could not represent Makwanyane as an NTM shop steward as the union was not recognised, and further since SAA's HR had issued a directive that non-recognised unions could not represent employees in disciplinary hearings. Grobler rejected the version put to him that the booklet was merely tossed towards him and that it did not land on his face or body. He testified that his character was demeaned as a result of the incident, and that due to the incitement of violence and the throwing of the booklet, a dismissal was a fair sanction. In regards to Mavhungu's reference to 'Marikana', Grobler testified that the incident involved a national tragedy and it was unprofessional and insensitive to refer to that tragedy, coupled with the behaviour exhibited by Mavhungu. He denied when it was put to him that he had misconstrued the reference to Marikana, and reiterated that Mavhungu had called him a 'white boy'

[7] Another witness, Ms Fatima Choonara (incorrectly referred to as Chinara in the transcribed record), had attended the said disciplinary hearing as an observer. She testified that after Grobler had refused Mavhungu permission to represent Makwanyane as an NTM representative, it came to a stage where

things got out of hand with voices being raised. She testified that Mavhungu, who was upset and heated up made some comments about Marikana as a result of his union not being recognised. Mavhungu further made insulting comments towards Grobler, telling him that he was a new comer, did not know what he was doing and was just a white boy. Mavhungu according to Choonara also banged on the table a few times whilst standing, and threw a booklet at Grobler, which hit the latter between the nose and the shoulder area as he tried to shield himself from its impact. Grobler had asked Mavhungu to leave the proceedings as his behaviour was uncalled for.

- [8] Under cross-examination, Choonara denied when it was put to her that the booklet was simply tossed towards Grobler on the table, and insisted that it was flung unto Grobler's body, and had landed on the floor. She reiterated that Mavhungu had made the insulting comments towards Grobler.
- [9] Mavhungu's testimony was that prior to the hearing before Grobler, he had represented other employees in his capacity as an NTM representative. When Grobler refused to let him represent Makwanyane, he merely sought to convince him to give him an opportunity to explain his reasons for seeking to be allowed as NTM representative. Grobler however refused to give him an opportunity.
- [10] He (Mavhungu) got angry and again tried to refer Grobler to some law books, further asking him to recuse himself. Grobler had refused. He then took the booklet that he had referred, swung and flipped it towards Grobler for him to look at. He then advised Grobler that he was going to leave and it was at that stage that Grobler had informed him that he was going to ask him to leave in any event. He then left the hearing room with Makwanyane and advised her that she should get another person to represent her. He later on got a phone call from Makwanyane who informed him that Grobler had agreed that he should proceed with the hearing.
- [11] Mavhungu went back to the hearing and was advised by Grobler that he could represent Makwanyane as a colleague. He nonetheless continued to point out to Grobler that what was happening was unfair, and moreso immediately after

the events at Marikana, from which lessons should have been learnt. He informed Grobler he should not be involved in the rivalry between unions. Mavhungu testified that he could recall that he had mentioned Marikana twice, and it was at that point that Grobler got angry and again said the hearing could not continue. Mavhungu had again excused himself, and asked another person, Reggie, to represent Makwanyane. He denied that he had at any stage referred to Grobler as a 'white boy'. He denied that he ever stood up as he addressed Grobler.

- [12] Under cross-examination, Mavhungu confirmed that he did not have a problem in representing Makwanyane as a colleague at the hearing. He had introduced himself to Grobler as NTM representative as to distinguish himself from representatives from SATAWU. He testified that Choorana lied in her testimony as she was a team leader and reported to the manager who had initiated the disciplinary proceedings against him. He contended that she would say whatever her managers want her to say.

The award:

- [13] The Commissioner was not persuaded by Mavhungu's version and concluded that the evidence of Grobler as verified by Choonara was acceptable. The Commissioner commented that Mavhungu's case was not about discrimination as an NTM official, and it was accepted that the evidence indicated that he was at the time of the incident, significantly disruptive and disrespectful. In regards to the assault, the Commissioner accepted that Mavhungu had tossed the booklet with an intention to either do harm to Grobler or to aggravate the situation, leading to the hearing being aborted. On the evidence of Choonara, Mavhungu had also banged on the table.
- [14] According to the Commissioner, the sanction of dismissal was appropriate in that Mavhungu as a shop steward was not absolved from the fact that he remained an employee and had certain obligations and duties, and that he had committed the misconduct related to disrespectful/aggressive behaviour.

The grounds of review and evaluation:

- [15] Mavhungu contends that the Commissioner's arbitration award is reviewable, as she had committed gross irregularities with regard to the arbitration proceedings and/or exceeded her powers, and arrived at unreasoned and unreasonable conclusions. It was further submitted that the Commissioner's findings are not those a reasonable decision maker could have arrived at considering the facts of the matter and the evidence presented. In this regard, it was further submitted that;
- a) Any reasonable Commissioner would have found that in the circumstances of the case, the dismissal was unfair;
 - b) There was a detrimental failure to consider material facts, with the result that the award was susceptible to review, and such failure resulted in not having a fair trial.
- [16] Mavhungu essentially takes issue with the approach of the Commissioner in arriving at her decision, and contends that despite being aware of what was expected of her and the range of factors she had to take into account in assessing whether the dismissal was fair or not, she had failed to do what was required of her by failing to state what informed her decision and conclusions; misconstruing the issues before her; disregarding the contradictory evidence of Grobler, which was also in conflict with that of Choonara; failing to consider that Grobler had conceded under cross-examination that he was never threatened with harm; failing to consider the materiality of contradictions in the arriving at her conclusions, failing to deliberate on her findings, and failing to state what evidence indicated that Mavhungu was disruptive and disrespectful.
- [17] The test on review is that of a reasonable decision maker, and the enquiry is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach¹. A glance at the Commissioner's analysis

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

clearly indicates that it is not clear as to how she had arrived at her conclusions.

- [18] In accordance with Commissioner's Guidelines, it is required of Commissioners to issue written awards with brief reasons. This involves an assessment of the facts based on various considerations including the credibility and probability of the versions presented, and where appropriate, an assessment of the applicable rules. What this in a nutshell implies is that from the award, the reasoning of the Commissioner should be apparent and the conclusions reached ought to be justified. 'Brief reasons' does not imply that Commissioners are excused from outlining the reasons for their decisions.
- [19] In instances where it is not apparent from the arbitration award as to how the Commissioner had arrived at a decision, does this however make that award reviewable? Guidance in this regard is to be found in *Head of Department of Education v Mofokeng & Others*², where it was held that;

"[32] Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] 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 enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and

² (2015) 36 ILJ 2802 (LAC) at 2812-3

determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, 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 enquiry 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.³

- [20] Thus, in determining whether the award is reviewable, the question to be asked is whether absent the defect, a reasonable decision-maker could have come to the conclusion reached in the award on the same material⁴.
- [21] The starting point in this matter is that the two charges of misconduct which led to the dismissal if proven, are interrelated and indeed serious, necessitating a severe sanction. As it was correctly pointed out on behalf of SAA, there are limits to the language employees are permitted to use in the workplace in order to express their views, and that swearing and/or invective language is generally considered misconduct, which may result in dismissal even for the first offence. This is particularly so where the use of the abusive language impairs the dignity and reasonable sensibility of those against whom the abuse is directed, which had the effect of impacting on the employment relationship.

³ *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at 2812-3

⁴ See also *Belloord 28 CC v CCMA Johannesburg and Another* [2018] ZALCJHB 112 (15 March 2018) at paragraph [10]

[22] In this case, Mavhungu had denied having uttered the comments about Grobler in the manner attributed to him. The Commissioner accepted the version of Grobler and Choonara on the grounds that the evidence presented at the time indicated that Mavhungu was disruptive and disrespectful during a 'formal meeting'. As correctly pointed out on behalf of Mavhungu, the Commissioner hardly made any attempt to indicate how and/or on what basis Mavhungu's denials were not persuasive. No attempt was made to deal with the substance of the allegation in relation to the evidence led at the proceedings, nor was it indicated as to the reason the one version was preferred over the other.

[23] Having had regard to the record of the arbitration proceedings, the Commissioner's arbitration award, the pleadings and the parties' heads of argument, it is my view that in line with what was said in *Mofokeng* as indicated above, the defects, irregularities or errors in relation to the facts or issues pointed out, are not sufficient to have the arbitration award set aside. It can hardly in my view, be said that such defects or irregularities led to an unreasonable outcome or provided a compelling indication that the Commissioner misconceived the nature of the enquiry she was obliged to undertake, or undertook that enquiry in an incorrect manner. My conclusions in this regard are fortified by the following;

23.1 On Mavhungu's own version, and without the benefit of the recording of the hearing before Grobler, he was angry at having been refused permission to represent Makwanyane in his capacity as NTM representative. Even though he alleged to have respected Grobler's ruling, he had persisted in attempting to influence Grobler to change his mind, and in the process had on no less than two occasions made reference to Marikana.

23.2 Choonara had testified that at the time, things were getting out of hand with voices being raised, and that Mavhungu, who was then standing, had banged on the table as he argued with Grobler. Mavhungu had however testified that he was always calm and denied having raised his voice. His version that he was the only one that was calm and had

not raised his voice, when his earlier version was that he was angered by Grobler's decision is clearly improbable, particularly since on his own version, he was angered by Grobler's ruling, who according to him, appeared to refuse to listen to anything he wanted to say.

23.3 Mavhungu had denied having called Grobler a white boy amongst other things he had said, and also throwing the booklet on Grobler's body. I have already indicated that the two charges leading to the dismissal are intrinsically linked as they emanated from one chain of events. Clearly Mavhungu's concessions were selective in an attempt to suit his case.

23.4 Grobler and Choonara had persistently testified that indeed Mavhungu uttered the verbal abuse and had thrown the booklet at Grobler's body. Mavhungu's denials were clearly bare. His explanation that Choonara confirmed Grobler's version because she reported to the manager who had initiated the disciplinary proceedings and was therefore under instructions to say whatever the manager told her to say is an issue that was not put to her under cross-examination, but which on its own lacked merit. It was never put to Grobler that he had made the allegations for nefarious motives, and any suggestion by Mavhungu that action might have been taken against him in the light of the rivalry between SATAWU and NTM fell flat when it was pointed to him that the Commissioner would not have jurisdiction to deal with the matter if it was his case that he was victimised.

23.5 In the circumstances, there was no evidence placed before the Commissioner to persuade her why the allegations were trumped up. Given the fact that Mavhungu had conceded that he was angry at being denied the right to represent Makwanyane in the hearing as an NTM representative, there was no reason for the Commissioner not to conclude that indeed Mavhungu was disruptive and disrespectful, in the sense that he had called Grobler a white boy, made reference to Marikana, and threw the booklet at Grobler's body. It is irrelevant whether the booklet when thrown at Grobler landed between his nose

and should as testified by Choonara, or hit Grobler in the face area as he had testified. The fact of the matter is that the booklet was indeed thrown at Grobler's body, as opposed to Mavhungu's version that he had simply flung the booklet towards him. For Mavhungu to have called Grobler a 'white boy' was demeaning and insulting in the extreme, and Mavhungu's bare denials in that regard are outweighed by the consistent and corroborating versions of Grobler and Choonara.

23.6 The alleged contradictions between Grobler's and Choonara's versions as correctly pointed out on behalf of SAA do not reveal incompatibility of events as narrated by them. These contradictions do not go to the substance of the issues to be determined, in that the two witnesses were consistent in their versions that Mavhungu was disruptive and disrespectful, had uttered the abuse attributed to him, had (even on his own version) made references to Marikana, and further that he had thrown the booklet at Grobler's body. To this end, it is my view that based on a totality of the facts before the Commissioner, there was no other conclusion to be reached other than that Mavhungu had committed the misconduct in question.

[24] The allegations in regard to procedural unfairness before the Commissioner equally lacked merit. Mavhungu's case was that there was a tape recording of the proceedings before Grobler, which would have exonerated him from the allegations made against him. SAA's contention was that copies of the tape recordings went missing after the person who was in possession of them, was involved in a vehicle hijacking incident.

[25] It is my view that it was not the function of the Commissioner to enquire where the tape recordings were and why they were not produced. There was nothing that prevented Mavhungu, who was ably represented at the arbitration proceedings, to either seek a discovery of those tapes and/or to subpoena the individual involved, to explain the circumstances under which the copies went missing. Furthermore, as the Commissioner had pointed out, the issue was what prejudice did Mavhungu suffer as a result of the unavailability of the tape recording. In the absence of the recordings, the Commissioner could only deal

with what was before her and come to an informed decision. As also correctly pointed out, the issue of the missing recordings cannot on its own lead to a conclusion of procedural unfairness, moreso since it has nothing to do with whether the disciplinary proceedings were conducted fairly or not.

- [26] A further factor in this case was that Makwanyane was in the hearing before Grobler, and no explanation was proffered as to the reason she was not called as a witness at the arbitration proceedings, to confirm Mavhungu's version of events. It cannot therefore be said that the Commissioner simply denied Mavhungu an opportunity to present evidence or denied Mavhungu a fair trial of the issues.
- [27] What remains is whether the sanction of dismissal was fair. It is trite that in considering the appropriate sanction, regard must be had to a variety of factors pointed out in *Sidumo*⁵. Mavhungu takes issue with the fact that the Commissioner in considering the appropriateness of the sanction, merely took regard of the submissions made on behalf of the parties and the fact that he (Mavhungu) remained an employee first before being a shop steward, and that he had certain obligations and duties.
- [28] It was common cause that Mavhungu had a clean disciplinary record, with a service of about thirteen years at SAA. Ordinarily, these would be compelling factors to be taken into account when considering whether the sanction of dismissal was fair. However, these factors on their own do not make a sanction of dismissal inappropriate, as the issue remains whether the

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC), where it was held that;

"78. In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

79. To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances."

misconduct in question was serious and the impact it had on the employment relationship. I have already indicated that the offences in question if proven, are indeed serious, warranting a dismissal, even if Mavhungu was a first offender.

- [29] The starting point as correctly pointed out by the Commissioner is that a shop steward is an employee first, and there is a fine line between what a shop steward can do or say at the workplace, without a conclusion necessarily being drawn that an individual was disciplined for carrying out his or her shop steward's obligations and duties towards union members. In this case however, SAA and NTM at the time did not have a recognition agreement, and thus for all intents and purposes, Mavhungu was an ordinary employee at the time that he represented Makwanyane. His conduct in my view, of verbally abusing, demeaning and belittling Grobler is inexcusable. Grobler was merely carrying out his duties as a chairperson of the enquiry, and it was incumbent upon him to follow SAA's instructions that only recognised union shop stewards or fellow employees could represent other employees in disciplinary enquiries. Mavhungu therefore had no reason to vent out his frustrations at the lack of recognition of NTM on Grobler, let alone in the abusive manner he had done.
- [30] The throwing of the booklet was not only a sign of disrespect of Grobler's authority in the hearing but also a challenge to that authority. Mavhungu's reference to Marikana, in whatever context he intended was indeed shameless in the extreme. The Marikana tragedy is well documented, and will forever remain an unforgettable stain on our relatively new democracy. For it to be used therefore, for whatever purpose in making a point, is inexcusable.
- [31] Aligned to any consideration of the appropriateness of a sanction of dismissal is whether an employee has atoned for his or her conduct. In my view this factor ought to be aligned to a further consideration of whether progressive discipline ought to be considered. In this case, Grobler's testimony was that when the disciplinary enquiry resumed, and after he had allowed Mavhungu to represent Makwanyane as a fellow colleague, he had expected him to apologise. This was however was not to be so, as Mavhungu had persisted in

arguing with Grobler, with a view of amongst other things, to convince him that the non-recognition of NTM was unfair. Mavhungu's frustrations with NTM's non-recognition clearly had nothing to do with the disciplinary process, and even if it had, that was not the appropriate forum to raise the issue. In my view, the lack of a show of contrition under the circumstances, is indicative that a less severe sanction would not have yielded any positive results. In the end, the Commissioner's conclusions in regards to the appropriateness of the sanction cannot be faulted.

[32] In conclusion, there is no merit in the contention that the Commissioner's award is reviewable on any of the grounds advanced on behalf of Mavhungu. The Commissioner was indeed alive to the issues she was required to determine, and had in doing so, afforded the parties an opportunity of a fair trial of those issues. Even if the reasoning of the Commissioner can be criticised, her decision in regard to the substantive and procedural fairness of the dismissal, ultimately fell within a band of reasonableness. In the end, Mavhungu failed to make out a case why the arbitration award should be set aside. I have further had regard to the requirements of law and fairness and hold the view that a cost order in this case is not warranted.

[33] Accordingly, the following order is made;

Order:

1. The application to review and set aside the arbitration award issued by the first respondent under case number GAEK4716-13 is dismissed
2. There is no order as to costs.

E Tlhotlhamajje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. DZ Kela

Instructed by:

Ndumiso Voyi INC

For the 3rd Respondent:
INC

F Malan of Edward Nathan Sonnenbergs

LABOUR COURT