

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 241/2016

In the matter between:

NATIONAL UNION OF MINEWORKERS OBO

GEORGE KUPA & 7 OTHERS

Applicants

And

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER D. J. NGWENYA N.O

Second Respondent

JOHNSON TILES, a division of NORCROSS SA

(PTY) LTD

Fourth Respondent

Delivered: 5 March 2019

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

- [1] The applicants seek an order reviewing and setting aside the arbitration award rendered by the second respondent (Commissioner) dated 6 December 2015. In the award, the Commissioner dismissed the individual applicants' claim that their dismissal was procedurally and substantively unfair. The third respondent (Johnson Tiles) opposed the review application.
- [2] Aligned to the main application were preliminary points related to the late filing of the review application, the late filing of the supplementary affidavit and the applicant's Heads of Argument. Having considered the applications for condonation in that regard (other than in respect of the heads of argument), and further having considered the overall interests of justice, condonation ought to be granted in respect of all three instances where applicable time frames were not complied with.
- [3] The individual applicants as listed under paragraph 3 of the founding affidavit were in the employ of Johnson Tiles until 31 October 2014, when they were dismissed subsequent to a disciplinary enquiry into allegations of misconduct (assault and intimidation) during a protected strike. The individual applicants are alleged to have attacked two fellow employees (Ms Rose Mthombeni and Mr Jerry Mankga) during the course of the strike.

The arbitration proceedings:

- [4] Subsequent to their dismissals, the individual applicants as assisted by NUM referred an alleged unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). The dispute came before Commissioner for arbitration when attempts at conciliation failed.

[5] The evidence before the Commissioner was as follows;

4.1 NUM called upon its members to embark on a protected strike with effect from 16 May 2014. During the course of the protracted strike, reports were received by Johnson Tiles in regards to acts of intimidation aimed at non-striking employees, and in particular, of allegations of assault on Mthombeni and Mankga in the evening of 17 July 2014, which assaults took place in Tembisa. The attacks on the two were at different times but around the same area in Tembisa, leading to Johnson Tiles conclusions that it was one group that had perpetrated the attacks, as both Mankga and Mthombeni had in some instances identified the same perpetrators. The evidence of Mthombeni before the Commissioner was that;

4.1.1 She was a member of another union, BCAWU, which was not party to the strike. After her shift on the day in question, she took a taxi home, and had alighted at a Shell garage from where she was to walk home. She was confronted by the individual applicants about not supporting the strike. Her response was that her union was not on strike, but that she would not report for duty anymore with the hope the group would leave her be.

4.1.2 She identified her assailants as Messrs Petrus Makondele, Jan Mokhumane, Daniel Nchabe, George Kupa, Mashudu Muhuma and Joseph Modaka. Upon her giving reasons why she was not on strike, she was then attacked and assaulted with sticks until she fell to the ground. She was also threatened with death.

4.1.3 Following the attack, she managed to flee and found refuge inside a nearby house of a fellow employee, George Sekgobela, who told her to telephonically contact Johnson Tiles' general manager, Viljoen. Mthombeni and Sekgobela subsequently went to report the matter to the police and opened a criminal case

against her assailants. One of these, Mokhumane was arrested in the course of that evening.

4.1.4 Mthombeni had also checked herself into the Tembisa hospital for treatment as she suffered from abrasions, contusions on her knees, and body aches resulting from her assault. Whilst Mthombeni and Sekgobela were at the police station, they came across Mankga, who had also come to open a criminal case after he was assaulted.

4.1.5 Mankga's testimony was that he was also a member of BCAWU and was not on strike. He was on his way home in the same evening when he observed a group of his co-workers who were on strike approaching him. He attempted to run away from the group by entering a nearby supermarket, but the group had pursued him until they caught up with him in the supermarket. He was dragged outside and was severely assaulted with an assortment of objects, leading to him bleeding profusely from a head wound.

4.1.6 Mankga had also laid criminal charges against his assailants, whom he had identified as Phogole, Temane, Makondele and Mokhumane. He also required medical treatment at the hospital.

4.2 Mankga and Mthombeni's versions of their assault were corroborated by photographs depicting their injuries which were admitted as evidence at the arbitration proceedings. Sekgobela also confirmed Mthombeni's version of events insofar as they related to him.

4.3 The evidence of the individual applicants can collectively be summed up as '*they did not know anything*'. Kupa confirmed that he knew Mthombeni and there were no problems between the two of them. He denied having being involved in her assault and testified that he was at his home at the time of the alleged assault. He denied under cross-examination when it was put to him that Mthombeni had testified that he was the one who had during the assault, told her that '*now we kill*

you'. On being asked the reason Mthombeni would make such serious allegations against him, Kupa's response was that it could have been in her own imagination.

4.4 Phogole's testimony followed a similar pattern as that of Kupa. He confirmed that he knew Mankga for over twenty years and had never had problems with him. He denied any involvement in Mankga's assault, despite the latter having specifically identified him as the one who had grabbed him by his clothes in the front and dragged him from the supermarket.

4.5 Makonelele also knew Mthombeni. He stayed in Tembisa and testified that he knew nothing of the incident or assault of Mthombeni that took place near the Shell garage as he was at his house. He also denied he was involved in the assault of Mankga whom he also knew, despite the latter's evidence that he was the one that had pushed him from behind in the supermarket. He testified that at no stage in the evening was he ever in the company of the other individual applicants as they stayed far from each other. When it was put to him that both Mankge and Mthombeni had identified him as one of the assailants, and why they would make such allegations against him when he had no problems with them before, his response was that the two were involved a plot to have him and others dismissed, to ensure that NUM members decreased at the workplace.

4.6 Makhomane also did not know anything about the assault. He had 39 years of service with the company and was employed as a supervisor. He knew both Mankga and Mthombeni well and had no problems with them. He knew the latter for about 30 years and called him his 'homeboy'.

4.7 He denied ever being involved in the assault as he went straight home after he left the employer's premises following a union meeting. He confirmed that the police paid him a visit in that evening. He attributed the accusations made against him and others as a plot and further to

inter-union rivalry, as NUM was strong at the workplace. He contended that the employer was siding with BCAWU, and that they were being targeted as they were strong and influential members of NUM.

The award:

- [6] The Commissioner's analysis and conclusions were succinct. He rejected the applicants' various versions as they had offered nothing in rebuttal against the allegations against them save for a series of bare denials. He accepted that both Mankga and Mthombeni were assaulted by a group of striking employees comprising of the individual applicants.
- [7] He could not find any reason why the two would harbour any ill will against the individual applicants for them to have manufactured adverse evidence against them. He found that the conduct of the individual applicants during the strike action amounted to gross violent misconduct; that they had failed to demonstrate any remorse, and that their dismissal was justified.

Grounds of review and evaluation:

- [8] The applicants contend that the Commissioner's award is susceptible to a review on the basis that he made findings which were not supported by evidence presented before him, and further that he failed to make any credibility findings against Johnson Tiles' witnesses.

- [9] To the extent that the above represents the nub of the applicants' case, the Labour Appeal Court in *Head of the Department of Education v Mofokeng and Others*¹ held that;

'The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.'

- [10] Having had regard to the transcribed record of proceedings and the conclusions reached in regards to the material placed before the Commissioner, I struggle to appreciate the basis upon which it can be said that the Commissioner committed any irregularity or why the outcome can be considered as unreasonable.
- [11] The uncontested evidence was that in the course of a protracted strike, both Mthombeni and Mankga were violently assaulted by the striking employees when their union, BCWU had not joined the strike. They were assaulted in the evening on their way home in the same area in Tembisa *albeit* at different times and locations. There is no dispute that they were severely assaulted and had required medical treatment thereafter.
- [12] The only issue before the Commissioner was whether the individual applicants had been correctly identified as the perpetrators. It is significant to note that most employees at Johnson Tiles enjoyed long periods of service, with some having served for over thirty nine years. The employees knew each other and all of the individual applicants that had testified had confirmed that

¹ [2015] 1 BLLR 50 (LAC) at para [30]

they knew both Mankga and Mthombeni. The employees also stayed in or around the same areas, and in some instances referred to each other as 'homeboys'. In circumstances where this was the case, the issue is what were the probabilities that both Mankga and Mthombeni could have incorrectly or wrongly identified their assailants? An unequivocal answer should be none.

[13] Both Mankga and Mthombeni had described how they were assaulted. Mankga explained how Phogole was one of the individuals that he first saw before the assault and before he ran into the supermarket; Temane had grabbed his left arm whilst pushing him, and Makonelele was pushing him from behind; Makhomane also grabbed him from his right side; whilst Phogole was in front of him. Upon being dragged out of the supermarket, he was hit on his head and as he fell down, he was then assaulted by these individuals.

[14] Mthombeni's assailants had assaulted her even after she told them that she would no longer report for duty. She identified Makonelele, Mokomane, Dichabe, Kupa, Muhuma, Modaka as people that had assaulted her as they were holding her and could see their faces. She was traumatised by the incident and could not forget it. Even though it was put to her that the incident took place at about 18h00 or thereafter when it was dark, she testified that she could see their faces as it was lit in the area and further since she knew them.

[15] Too much time under her cross-examination was spent on little insignificant specifics as to who amongst her assailants had said or done what, or the size of the sticks they were holding. In circumstances where a mob is assaulting an individual, the likelihood of that individual recalling each minute details of the assault and who amongst the assailants had said or did what is remote. This however does not detract from the fact that the assault happened to the point where Mthombeni fell down and became dizzy from the assault, and she was adamant throughout her testimony that the assailants were properly identified.

- [16] In the light of Mthombeni and Mankga's testimonies, all that the individual applicants had proffered were bare denials, conspiracy theories of a plot or desire by management to diminish NUM membership at the workplace, and nothing else. At best, the individual applicants even suggested that Mankga and Mthombeni could have been assaulted by members of unions (NUMSA) who were also on a strike in another industry, or that Mthombeni despite her trauma, had imagined her assailants. None of the individual applicants could proffer a reasonable explanation as to the reason that the individuals they have worked with closely over protracted periods and with whom they had no quarrels would concoct versions of heinous assaults against them.
- [17] It needs to be stated that even though the right to strike is constitutionally entrenched, the nature of strike actions as we have come to know them and experience them as a country are characterised by wanton violence, in some instances, loss of life, destruction of property, intimidation and vicious assaults either on non-striking employees or even on other citizens going about their business. The loss of property, life, limb and general lawlessness have become the new normal whenever there is any form of industrial action in workplaces.
- [18] As in this case, employees who have known and worked with each other over the years and might even be neighbours in their places of residence turn against and maim each other in pursuit of their own interests, and in some instances, with the express knowledge and approval of their unions. In the *interim*, the rights of other people to go about their own business unhindered have become secondary. This cannot be something that was envisaged when the right to strike was entrenched in our Constitution, and it is apparent that the spectre of violence and the violation of the rights of others whenever a strike takes place has become part of our daily lives. This cannot be correct, justified nor normal in any civilised society or any democracy founded on constitutional values.

- [19] In circumstances where employees within a strike context perpetrate acts of violence either against property or life, employers are obliged to take appropriate action against the perpetrators. Where such acts of violence follows non-striking employees into their homes, townships, and hostels, an employer cannot merely fold its arms and pretend not to be affected. Those are its employees, and are entitled to some form of protection even if such attacks such as in this case took place after hours and/or off the employer's premises, as such acts clearly affects the employment environment. In a nutshell, the employer is obliged to act, and harshly so where misconduct involving its employees is proven, even if it took place off its premises.
- [20] The level and nature of violence perpetrated against Mthombeni and Mankga by people they had properly identified as colleagues whom they knew over a long period makes the facts of this case even more disconcerting if not revolting. The level of inhumanity and depravity displayed by the individual applicants towards their fellow employees is indeed beyond description.
- [21] As the Commissioner had correctly pointed out, none of the individual applications had shown any contrition, and none of them had appreciated the magnitude of their violent acts on their fellow employees. Counsel for the applicants had submitted that the individual applicants could not have shown any contrition as they were not involved in the misconduct. This might be so where misconduct was not proven. But where as in this case the vicious assaults were proven, and where the individual applicants' defence is found to be contrived, how then given the facts and circumstances of this case could it possibly have been expected of the Commissioner to come to any other conclusion other than that a dismissal was appropriate?
- [22] In the end, the grounds upon which a review of the Commissioner's arbitration award are based are without merit. In fact, it can safely be said that no legal or factual basis was set out to have the award reviewed. As further correctly

pointed out on behalf of Johnson Tiles, the applicants not only failed to make out a proper case in the pleadings, and instead sought to create one in the heads of arguments, which is impermissible.

[23] I am satisfied that the Commissioner fully considered all the evidence before him, and came to conclusions that are unassailable. Accordingly, the review application ought to be dismissed. I have had regards the requirements of law and fairness, and given the ill-considered nature of this review application, the applicants should be burdened with its costs.

Order:

[24] In the premises, the following order is made;

1. The late filing of the review application, the supplementary affidavit in terms of Rule 7A(8) (a) of the Rules of this Court, and the applicants' Heads of Argument is condoned.
2. The application to review and set aside the arbitration award issued by the second respondent dated 5 December 2014 is dismissed with costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicants: W Nyagiwe

Instructed by: BK Mismeki Attorneys

For the Respondent: N Braatvedt of Edward Nathan Sonnenbergs

LABOUR COURT