

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR1689/17

In the matter between:

ELIZABETH GOLOLO

Applicant

and

SIMBA (PTY) LTD

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

JUSTICE SANTJIE MTHOMBENI N.O.

Third Respondent

Heard: 17 January 2019

Delivered: 29 March 2019

JUDGMENT

SCHENSEMA, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the third respondent (the Commissioner) under the auspices of the second respondent (the CCMA) on 16 July 2017.

- [2] The application for review is brought in terms of s145 of the Labour Relations Act¹ (the LRA). The review application was filed with this Court on 28 August 2017. The application is opposed by the first respondent.
- [3] The review application was originally set down for 15 January 2019, however the applicant was not present in Court. As a result thereof, arrangements were made by the first respondent's attorneys of record to make contact with the applicant and it was agreed that the matter would stand down until Thursday 17 January 2019.
- [4] On 17 January 2019, the applicant appeared in Court and sought a postponement due to her attorneys of record having withdrawn on 9 April 2018. The applicant further advised that she had approached the Legal Aid Board for assistance, who had advised her sometime in August 2018 that they were not able to assist. Thereafter, the applicant approached the Legal Practice Council (LPC) to report the withdrawal of her attorneys of record.
- [5] The applicant further informed me that she had been advised by the LPC to approach the *pro bono* office, which the applicant advised she had done on 15 October 2018 and was advised by the *pro bono* clinic in Pretoria to return on 17 February 2019. The applicant however was unable to provide me with any proof that she had approached the *pro bono* office in October 2018, however did provide me with a letter dated 16 January 2019 from the LPC in which the LPC confirmed that the applicant had applied for *pro bono* assistance and requested that the matter be postponed.
- [6] With regards to the letter, once again this letter provides no details as to when the applicant had applied for *pro bono* assistance and merely states that the applicant's application is being processed. The letter does not provide any indication as to whether the application for *pro bono* assistance will be granted and further emphasises that the LPC does not intend to interfere with the court process.

¹ 66 of 1995, as amended.

- [7] The postponement request was opposed by the first respondent which opposition was supported by an affidavit in which the first respondent's attorneys of record set out the various steps it had taken to alert the applicant. Furthermore it was submitted by Counsel that the postponement would serve no purpose as there were no prospects of success.
- [8] In response to these submissions, the applicant confirmed having received the correspondence referred to in the first respondent's affidavit, however could provide me with no explanation as to why no further steps were taken upon the withdrawal of her attorneys of record. In light of the aforementioned, I therefore did not grant the applicant's request for a postponement.

Factual Background

- [9] I do not intend to repeat the evidence in great detail. It is sufficient for present purposes to record that the applicant was employed by the first respondent as a Tuck Shop Assistant reporting to Ms Jennifer Dookie. The applicant's role required her to manage the till and to attend to other ancillary duties at the tuckshop.
- [10] As a result of three separate incidences during which the applicant misconducted herself by engaging in insolent and/or insubordinate behaviour towards her supervisor, the applicant was charged on 8 December 2016, which disciplinary enquiry resulted in the dismissal of the applicant. It is further common cause that the applicant has a lengthy history of insolent and insubordinate behaviour which has been addressed by the first respondent in the form of a final written warning which had been issued to the applicant on 4 January 2016. The final written warning was therefore still valid on 8 December 2016. As aforementioned the applicant was dismissed and aggrieved with the outcome referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

CCMA Proceedings

- [11] The applicant was represented by her union UCIMESHAW during the arbitration proceedings. The first respondent called three witnesses to testify namely Mr Stephen David, Mrs Jennifer Dookie and Mrs Juliana Chiya. Messrs David and Dookie both testified in respect of the applicant's insolent and disrespectful behaviour and Mrs Chiya, the first respondent's Quality and Food Safety Manager testified in relation to the importance of the tuckshop in respect of the first respondent's business. Mrs Chiya further confirmed that there had been numerous complaints in respect of the applicant's behaviour and despite the lengthy years of service, such behaviour could not be condoned.
- [12] In response to the aforementioned, the applicant testified that she had not shouted at her supervisor and that the perception that she had shouted at Mrs Dookie may have been as a result of her loud voice. The applicant was further of the view that Mrs Dookie was inconsiderate of the fact that many of the first respondent's employees relied on public transport and it is for this reason that the tuckshop needed to close at a certain time.

The Commissioner's award

- [13] The Commissioner in the arbitration award had considered that the applicant had been progressively disciplined for insolent and disrespectful behaviour and that at the time the alleged misconduct had been committed, the applicant was on a final written warning. Furthermore, that the applicant had confirmed that she had closed the tuckshop before closing time and based on the evidence submitted was of the view that the applicant's dismissal was substantively fair.
- [14] The Commissioner further made reference to the Labour Appeal Court case of *De Beers Consolidated Mines Ltd v CCMA*² in which the Court held that long service cannot in itself provide a basis for rendering a dismissal unfair. Long service only creates a *prima facie* impression of reliability, its weight will be offset if it is apparent from other considerations, in particular the employee's

² (2000) 21 ILJ 1051 (LAC).

lack of remorse and the nature of the offence. In this regard, the Commissioner was of the view that the applicant had disregarded the final written warning and persisted with her misconduct.

- [15] In conclusion the Commissioner was of the view that given the evidence there was no basis to interfere with the first respondent's sanction of dismissal and found that the applicant's dismissal was substantively fair.

The Review Application

- [16] Upon receipt of the arbitration award, the applicant launched a review application. The grounds of review are set out in the applicant's founding and supplementary affidavits.
- [17] In respect of the applicant's founding affidavit, the applicant *inter alia* submits that the award is susceptible to review as the Commissioner allegedly failed to consider the conflicting versions in a balanced and proper manner and that the sanction of dismissal was too harsh. In respect of the supplementary affidavit, the applicant added additional grounds of review.
- [18] In response to the applicants' founding affidavit, an answering affidavit was filed by the first respondent. In summary the first respondent provided a background to the matter in order to contextualise the applicant's misconduct and the seriousness thereof. The first respondent further made reference to several acts of insolent and insubordinate behaviour and that ultimately this had resulted in the applicant receiving a final written warning. Despite the final written warning, the applicant persisted with her inappropriate behaviour on 24 November 2016, 1 December 2016 and 5 December 2016.
- [19] During the arbitration proceedings, the applicant did not deny that she had received a final written warning for similar misconduct and attempted during the arbitration proceedings to evade its application by suggesting that the final written warning was not valid at the time that the notification was issued.

However, given the date of the notification, it is clear from the evidence submitted that the final written warning was valid at the time.

- [20] The first respondent has further submitted that the attempt at progressive discipline has not been successful in that the applicant has refused to accept the wrongfulness of her actions. The record makes reference to numerous incidences of past acts of insolent and disrespectful misconduct as well as the attempts made by the first respondent to rectify the applicant's behaviour. It is clear from the record that prior to imposing the final written warning, that attempts were made by the first respondent to engage with the applicant for purposes of guiding her to improve her behaviour. Despite these efforts, the applicant failed to recognise the assistance offered and persisted with her misconduct.
- [21] Of significance is that despite the applicant's criticism of the Commissioner's award, the applicant had conceded during the arbitration proceedings that she was guilty of the misconduct and tendered an apology. Accordingly the first respondent has submitted that in light of this concession there is no basis for the submissions made by the applicant that the Commissioner had erred in his findings that the applicant had committed misconduct.
- [22] In conclusion the first respondent has submitted that the award is clearly one that a reasonable decision maker could make and that given the evidence led at the arbitration, that the Commissioner's award clearly falls within the band of reasonableness and does not warrant any interference by this Court.

Analysis

- [23] Section 145 of the LRA provides as follows:

‘145. Review of arbitration awards –

- (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

...

- (2) A defect referred to in subsection (1), means –
 - (a) that the Commissioner;
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers...'

[24] The general principle is that a gross irregularity should concern the conduct of the proceedings rather than the merits of the decision.³ When a commissioner fails to have regard to material facts, this may constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner may have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved party from having his/her case fully and fairly determined.⁴ A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA.

[25] For a defect in the conduct of the proceedings to amount to a gross irregularity, as contemplated in section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. The result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.⁵ Material errors of fact, as well the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, and are only of any consequence if their effect is to render the outcome unreasonable.⁶

[26] My analysis commences with a review of the record and the evidence that was submitted during the arbitration proceedings. It is common cause that the applicant had previously received a final written warning for similar misconduct. In respect of the evidence submitted by the first respondent's

³ *Herholdt v Nedbank Limited (COSATU as Amicus Curiae)* 2013 (6) SA 224 (SCA) at para 10.

⁴ *Id* fn 3 at para 16.

⁵ *Id* fn 3 at para 25.

⁶ *Id* fn 3.

witnesses, it is clear that the first respondent went to great lengths to engage with the applicant in respect of her inappropriate conduct and did not immediately impose a final written warning, in instances where in all likelihood such a sanction was warranted. The applicant however, despite this assistance, failed and/or refused to accept the assistance given in order to alter her conduct and instead elected to continue conducting herself in a highly inappropriate manner.

- [27] It is further trite that in certain instances, the length of service may not be a mitigating factor but an aggravating one. I am of the view that given the applicant's length of service and the numerous attempts by the first respondent to engage with the applicant in respect of her misconduct, that the applicant's years of service cannot be seen to be a mitigating factor. The first respondent in its numerous attempts, clearly took into consideration the applicant's years of service as it did not immediately impose a sanction of a final written warning with reference to the previous similar misconduct committed by the applicant.
- [28] At issue in the proceedings under review is whether the applicant has laid any justifiable and valid basis for the setting aside of the award.
- [29] It is my view that for an employee's conduct to constitute gross insubordination the evidence is required to demonstrate a persistent and wilful refusal to comply with an instruction. Our Courts have described insubordination as "*a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to the employer's authority.*"⁷
- [30] The Labour Court has distinguished between insolence (repudiation by an employee of his duty to show respect) and insubordination (refusal to obey an employer's instructions).⁸ Both forms of misconduct are properly embraced by

⁷ See: *Commercial Catering & Allied Workers Union of South Africa & Another v Wooltru Ltd t/a Woolworths* (Randburg) (1989) 10 ILJ (IC) at 314 H-J.

⁸ Grogan Workplace Law 11th Edition (Juta, 2014) at pages 251-255.

the terms of 'insubordination' as used in Schedule 8 – Code of good practice: dismissal of the LRA (the Code).

[31] Insubordination is possibly a more serious offence because it presupposes an intentional breach by the employee of the duty to obey the employer's instructions. The Code requires that defiance must be 'gross' to justify dismissal. This means that the insubordination must be serious, persistent and deliberate, and that the employer should adduce proof that the employee was guilty of defying an instruction.⁹

[32] Grogan, in Workplace Law, states the following:¹⁰

'The best measure of the gravity of insubordination and/or 'insolence' is the effect it has on the employment relationship. Other things being equal, an isolated refusal to carry out an instruction is less likely to destroy the relationship between the employer and the employee than sustained and deliberate defiance of authority. The latter form of insubordination is well illustrated by *Theewaterskloof Municipality v SALGBC* (Western Cape Division). The Labour Court held that a senior manager who accepted payment of an allowance well knowing that he was not entitled to it, then offered to repay the amounts in derisory instalments, had deliberately breached the trust relationship. Given the destruction of the employment relationship and his total lack of remorse, the employee could not rely on either the general right to progressive discipline or on his long and previously unblemished service record. The court upheld the employee's dismissal.'

[33] In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,¹¹ the Labour Appeal Court held that '*[t]he offence of insubordination in the workplace has, in this regard, been described by the Courts as a wilful and serious refusal by an employee to obey a lawful and reasonable instruction or where the conduct of an employee poses a deliberate (wilful) and serious challenge to an employers' authority*' and in that regard, the Labour Appeal Court referred to the decision of *Commercial Catering and Allied Workers' Union of SA and*

⁹ *City of Johannesburg v Swanepoel N.O. and Others* (2016) 37 ILJ 1400 (LC).

¹⁰ *Id* fn 8 at page 253.

¹¹ (2015) 5 BLLR 484 (LAC) at para 19

Another v Wooltru Ltd t/a Woolworths (Randburg).¹² In that matter the Industrial Court held that:

"the offence of insubordination is constituted by the following: When the employee refuses to obey a lawful and reasonable command or request and the refusal is wilful and serious (wilful disobedience), or when the employee's conduct poses a deliberate (wilful) and serious challenge to the employer's authority."¹³

[35] This view has been endorsed by Grogan who, citing the above authorities, noted that '*employees are obliged to respect and obey their employers because lack of respect renders the employment relationship intolerable and disobedience undermines the employer's authority*'.¹⁴

[36] It is trite that by its very nature the employment relationship places certain obligations upon the employee, two aspects of which are generic duties of the employee to maintain a harmonious relationship and to co-operate with the employer¹⁵. Brassey has further noted that the employee's obligation to ensure a harmonious relationship with the employer and other staff requires that s/he should do nothing to undermine it.¹⁶

[37] I have further considered the matter of *Head of Department of Education v Mofokeng and Others*¹⁷ which has stated that the first enquiry is whether the facts or considerations ignored were material, which will be the case if a consideration of them would have caused the commissioner to come to a different result. If this is established, the result arrived at by the commissioner is *prima facie* unreasonable. A second enquiry must then be embarked upon, to determine whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness and if the answer to this enquiry is

¹² [1989] 10 ILJ 311 (IC).

¹³ Id fn 12 at 314H – I

¹⁴ Grogan Workplace Law 10th Edition (Juta, 2009) at page 51.

¹⁵ *Public Servants Association of South Africa obo Khan v Tsabadi NO and Others* (2012) 33 ILJ 2117 (LC).

¹⁶ Brassey, Employment and Labour Law (Juta,1999) Volume 1 at §D2: 31

¹⁷ (2015) 36 ILJ 2802 (LAC).

in the negative, then the decision stands to be set aside on the basis of unreasonableness.

[38] In applying the above to the current matter, I am of the view that the Commissioner's award is one that a reasonable decision maker could make, given the evidence. It is clear that the applicant has failed to take into consideration her behaviour and the impact this behaviour has had on the employment relationship. It is further obvious from the evidence, that the applicant's misconduct is both persistent and deliberate and is further a serious challenge to the authority of the employer. I am therefore of the view that the applicant has failed to demonstrate a basis for the review of the Commissioner's arbitration award.

Costs

[39] In regards to costs, even though I am of the view that this review application was ill-considered, upon a consideration of the requirements of law and fairness, I am of the view that each party must be burdened with its own costs.

[40] In the premises, I make the following order:

Order

1. The applicant's review application is dismissed;
2. Each party is to pay its own costs.

H. Schensema

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Self-represented

For the First Respondent:

Advocate Viljoen

Instructed by:

Cowan-Harper-Madikizela Attorneys

LABOUR COURT