IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2134/17

In the matter between

ADCOCK INGRAM HEALTHCARE PROPRIETARY LIMITED	**Applicant**
And	
GIWUSA OBO BONGANI KHUMALO	**First Respondent**
NATIONAL BARGAINING COUNCIL OF THE CHEMICAL INDUSTRY	**Second Respondent**
COMMISSIONER JOSEPH MPHAPHULI	**Third Respondent**

Heard: **7 August 2019**

Delivered: **7 November 2019**

JUDGMENT

MAHOSI. J

Introduction

[1] This is an application brought by the applicant in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award (award) issued by the third respondent (arbitrator) dated 18 August 2017, under case number GPCHEM 162-16/17 under the auspices of the second respondent (NBCCI). In his award, the arbitrator found that the dismissal of the first respondent's member, Mr Khumalo, was substantively unfair and ordered Adcock to reinstate him retrospectively.

[2] The applicant seeks that the award be replaced with an order that Mr Khumalo's dismissal was substantively fair, alternatively that the matter be referred back to the NBCCI to heard *de novo* before an arbitrator other than the third respondent.

[3] The key question is whether the arbitrator's decision is one that a reasonable decision-maker could not reach.[2]

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[1] Act 66 of 1995 as amended.
[2] See: *Sidumo and Another v Rustenburg Platinum Mine Ltd and Others* [2007] 12 BLLR 1097 (CC).

Background

[4] The applicant operates a division that it refers to as the Prescription Division. This division manufactures ARV's and certain prescription medication at its Wadeville premises. For housekeeping services, the applicant makes use of a number of service providers including Bidvest Prestige Cleaning Services (Bidvest).

[5] Mr Bongani Khumalo (Mr Khumalo) was appointed by the applicant in October 2010 as its Quality Control Sampler in the Prescription Division at its Wadeville Operations. In January 2015, Ms N[…] B[…] S[…] (Ms S[…]) was appointed by Bidvest to provide housekeeping services to the applicant's Wadeville Operations.

[6] In November 2016, Bidvest informed the applicant's management that it had received complaints of sexual harassment from its employees placed at Wadeville Operations. In particular, the complaints were that certain employees of the applicant who were based at the Wadeville Operations were sexually harassing certain of its employees.

[7] Following the complaints brought forward by Bidvest, the internal auditors of Adcock's Ingram Group Internal Audit Services were instructed to conduct an investigation, which was done. In conducting the investigation, various Bidvest employees were interviewed and three of the applicant's employees, one being Mr Khumalo, were identified as the alleged perpetrators. The investigation in respect of Mr Khumalo revealed that he allegedly sexually harassed Ms S[…]. A written statement was also obtained from Ms S[…].

[8] The applicant then placed three of its employees, including Mr Khumalo, on paid suspension. Subsequently, the applicant was satisfied that there was sufficient evidence of sexual harassment against Mr Khumalo and subjected him to a disciplinary hearing. Mr Khumalo was found guilty at the disciplinary hearing and dismissed on 29 November 2017.

[9] Dissatisfied with his dismissal, GIWUSA, his trade union referred an unfair dismissal dispute to the NBCCI for conciliation on his behalf. However, the parties failed to resolve the dispute during conciliation. The dispute was then referred to arbitration that was heard before the arbitrator on 7 August 2017. Subsequently, the arbitrator issued the award that is the subject matter of this application.

The arbitration

[10] The issue before the arbitrator was whether Mr Khumalo's dismissal was substantively and procedurally fair. The applicant led evidence through one witness, Ms. S[…] and Mr Khumalo testified in support of his case.

[11] Ms S[…] testified*, inter alia*, that when she began rendering services at the Wadeville Operations, she and Mr Khumalo had always been friendly towards each other and they would greet each other with a hug. During September 2016, the hugs began to feel too intimate and she advised Mr Khumalo to stop hugging her because she did not feel comfortable. On several occasions Ms Si[…] had pushed Mr Khumalo away and walked away from him, confirming that the hugs were unwelcomed.

[12] Under cross-examination, Ms S[…] denied that she had requested Mr Khumalo to stop hugging her because she had a boyfriend. Ms S[…] further testified that on one occasion, Mr Khumalo had explicitly stated that he wished to have sexual intercourse with her, while getting nearer to her. It was at this point that Ms S[…] had pushed Mr Khumalo away from her indicating that his conduct was unwelcomed.

[13] The next day, Mr Khumalo smacked Ms S[…] on her buttocks. In response, Ms S[…] told Mr Khumalo that she was not his wife. Mr Khumalo then told Ms S[…] that he wanted her. Ms S[…] testified that these incidents of sexual harassment made her feel small and disrespected, a result of which she tried to avoid Mr Khumalo as much as possible to limit their interactions and from that point, their relationship deteriorated significantly.

[14] Ms. S[…] brought the sexual harassment complaint to her team leader's attention, who advised her not to report it as it may lead to her removal from her services at the Wadeville Operations and/or losing her job with Bidvest. In November 2016, Bidvest called a meeting to advise employees that there may be certain employees who will be removed from the applicant. At this meeting, another employee started to cry and stated that she knew she was going to be removed. When asked why she felt this way, the employee stated that it was because she has been sexually harassed by the applicant's senior employee. Upon being informed of this, Bidvest's management approached its employees situated at the Wadeville Operations and requested that they come forward if they had any complaints of sexual harassment.

[15] In realisation that she was not alone in experiencing sexual harassment in the workplace, Ms S[…] informed a Bidvest Manager that Mr Khumalo had sexually harassed her. Ms S[…] testified that she felt safe to inform the manager at this time because of the opportunity afforded by Bidvest to come forward and she, Ms S[…], was then assisted in producing a written statement.

[16] Mr Khumalo testified, *inter alia*, that he used to greet Ms S[…] by hugging her. In September 2016, Ms S[…] had requested Mr Khumalo to stop hugging her as she had a boyfriend who works for the applicant and who was jealous. Mr Khumalo complied with Ms S[…]'s request.

[17] Mr Khumalo further testified that he had never inappropriately touched Ms S[…] and he had not tried to grab her private parts and/or smack her buttocks. He does not have a wife but rather a girlfriend, who is known to Ms S[…] and therefore the incident cannot be true. He and Ms S[…] continued to have a good relationship; and he did not know why Ms S[…] had reported allegations of sexual harassment against him as they are friends. Under cross-examination, Mr Khumalo testified that he did not know what Ms S[…] stood to gain by making false allegations against him.

[18] The arbitrator preferred Mr Khumalo's version on the basis of the findings that appear in his award as follows:

‘5.9 The fact that the respondent’s witness B[…] S[…] was the only witness in the respondent’s case invokes the cautionary approach to her testimony.

5.10 I find it rather strange that the respondent did not call the team leader and the manager to whom the witness complained about the applicant’s behaviour. In the second place the witness’s colleague who was given the same treatment, that is, intimate hugs when it was her turn to shift was equally not called to testify.

5.11 It boggles the mind as to why the applicant had the courage to put her job on the line, when all along she has had reservations about disclosing the harassment for fear of reprisals.

5.12 The fear did not prevent her from talking to the team leader and the manager, if at all. There was no evidence placed before me that this indeed was the case.

5.13 It also makes little sense, if any, for the witness to raise the matter with the manager in November 2016, if it is to be accepted that the matter was raised when in fact the alleged harassment ceased in September of the same year already.

5.14 I find favour with the applicant’s version that the respondent was a willing participant in the hugging affair. That hugging ceased in September and finally that the respondent's witness’ reason for bringing an end to the established practice was the coming of the boyfriend in the picture.

5.15 It remains a mystery as to what motivated the respondent’s witness to accuse the applicant of such offence.

5.16 It was however not the applicant’s place to prove that the dismissal was unfair. The respondent had it all to do. The respondent did not however discharge its onus to prove that the misconduct was committed.

5.17 Compared to the respondent's witness’ version I found the applicant's version to be more likely for reasons herein above illustrated.’

[19] Resultantly, the arbitrator found that the applicant had failed to prove that Mr Khumalo's dismissal was fair and ordered that Mr Khumalo be reinstated retrospectively. Aggrieved by the arbitrator's award, the applicant launched this application based on the grounds that are dealt with hereunder.

Grounds of review

[20] The applicant seeks to review the award on the basis that the arbitrator misdirected himself in terms of the nature of the enquiry and consequently committed a number of gross irregularities in that he failed to apply, alternatively incorrectly applied the cautionary rule of evidence; to resolve the conflicting versions of events as testified by Ms S[…] and Mr Khumalo and to provide any reasons as to why he gave preference to the testimony of Mr Khumalo and thereby rejecting Ms S[…]'s. It was the applicant's further contention that the arbitrator took into account immaterial and uncorroborated evidence in coming to his conclusions. Lastly, the applicant contended that the arbitrator was biased. It was in light of the above that the applicant argued that the arbitrator came to a conclusion, which renders the award unreasonable.

The first respondent's case

[21] In opposing this application, the first respondent defended the conduct of the arbitrator and his award on, *inter alia*, the basis that he did not only properly apply the cautionary rule but also conducted the arbitration in a manner that the commissioner should consider the dispute, i.e. fairly and quickly and that he further dealt with the substantial merits of the dispute with the minimum legal formalities. It was the first respondent's contention that the arbitrator did not decide the matter solely based on the cautionary rule

[22] The first respondent's contention was that the arbitrator conducted the arbitration impartially and that he did not engage in a conduct that might reasonably give rise to a party forming a perception of bias.

The Test for review

[23] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[3] is one of substantive reasonableness of the outcome or result of an arbitration award, which is an outcome based enquiry[4], entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.[5]

[24] In *Bestel v Astral Operations Ltd and Others*[6] the Court stated as follows:

> 'It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz***,** *supra,* that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[25] For the applicant to succeed with the review application, it must be established that the commissioner's decision fell outside the bounds of reasonableness based on all the material that was before the commissioner, including for the reasons not considered by the commissioner.[7]

Analysis

[26] The misconduct that Mr Khumalo was charged with, found guilty of, and dismissed for related to sexual harassment against Ms S[…]. The Minister of Labour, on the advice of the Commission for Employment Equity, in terms of section 54(1)(b) of the Employment Equity Act[8], issued the Code of Good Practice: Sexual Harassment Cases (the Code) which was later replaced by the Amended Code of Good Practice: Sexual Harassment Cases. Its objective is to

[3] [2007] 12 BLLR 1097 (CC).
[4] *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 *ILJ* 2899 (LAC) at 2906H-I.
[5] *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 13.
[6] [2011] 2 BLLR 129 (LAC) at para 18.
[7] See: *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.
[8] Act 55 of 1998.

eliminate sexual harassment in the workplace and it provides appropriate procedures to deal with sexual harassment and prevent its recurrence.

[27] The Code encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, as well as their privacy and their rights to equity in the workplace.

[28] The Item 4 of the Amended Code of Good Practice: Sexual Harassment Cases defines sexual harassment as:

> 'Unwelcome conduct of a sexual nature that it violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all the following factors:
>
> 4.1 whether their harassment is the prohibited grounds of sex and/or gender and/or sexual orientation;
>
> 4.2 whether the sexual conduct was unwelcomed;
>
> 4.3 nature and extent of the sexual conduct;
>
> 4.4 impact of sexual conduct on the employee.'

[29] In compliance with Item 7 of the Code, the applicant has adopted a Sexual Harassment Policy that defines sexual harassment as "unwanted conduct of sexual nature." It further states that sexual attention becomes sexual harassment if:

> '(a) The behaviour is persisted in, although a single incident of harassment can constitute harassment; and or
>
> (b) The recipient has made it clear that the behaviour is considered offensive; and/or
>
> (c) The perpetrator should have known behaviour is regarded as unacceptable.'

[30] The applicant took issue with the arbitrator's application of cautionary rule. [35] In *Satani v Educational Labour Relations Council and Others*[9], this Court considered the applicability of the cautionary rule in labour matters and stated as follows:

> '[34] … with regard to the "cautionary rule", that rule applies to criminal trials. As the learned authors comment in *Labour Law through the Cases*:
>
> "The cautionary rule relating to the evaluation of evidence of a single witness in criminal matters, that requires the evidence to be "clear and satisfactory in every respect" before it could be relied on, it was found in *Northam Platinum Mines v Shai NO*, has evolved significantly. An arbitrator should assess "the probabilities of the respective versions and, if necessary, make credibility findings to arrive at an outcome". In *casu* it was held that the "commissioner took the absence of independent corroboration of the employer's witnesses' versions to have been fatal, instead of applying a more nuanced evaluation of the evidence in keeping with the applicable legal principles'.
>
> [35] Barely two weeks after the judgment in *Naraindath* the Labour Appeal Court handed down judgment in *Blyvooruitzicht Gold Mining Co Ltd v Pretorius.* That Court pointed out that, in criminal cases, the evidence of a single witness is only treated with caution if it is contested by an accused. It did not deal with the applicability of that principle to arbitrations in any further detail.
>
> [36] In *Blue Ribbon Bakeries v Naicker* the court noted that the commissioner in that case "fail[ed] to apply the cautionary rules of evidence to the testimony of the first respondent who was a single witness"; but that was in the context where the commissioner failed altogether to make any credibility findings. In the case before me, the commissioner did make a credibility finding against the employee and in favour of the learner. In that context, the failure to apply the cautionary rule applicable to criminal cases does not, in my view, amount to a reviewable irregularity. To hold

[9] (C272/2014).

> otherwise would be contrary to the stated aims of the LRA to provide a quick, informal and non-legalistic method of dispute resolution.' [Footnotes omitted]

[31] The issue before the commissioner was whether the applicant committed the misconduct he was charged with. I agree with GIWUSA that the reading of the award does not support the contention that the arbitrator based his decision solely on the application of cautionary rule.

[32] It is apparent from the reading of the award and the record that Ms S[…] complained of three forms of sexual harassment, namely: unwelcome hugs that became intimate, Mr Khumalo's utterance that he wanted to touch her private parts and the smacking of her buttocks. The issue before the arbitrator was therefore, whether Mr Khumalo's dismissal was fair on not. To answer the question, the commissioner had to determine whether Mr Khumalo committed the offences he was charged with. In his award, the arbitrator recorded that Mr Khumalo denied ever using inappropriate language when addressing Ms S[…], touching her inappropriately or making unwelcome advances. In determining the issue, the commissioner was faced with two mutually destructive versions. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*[10] the Court had the following to say in regard to the way in which a decision-maker has to make a finding on disputed issues:

> 'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

[33] The reading of the award evidences that the arbitrator assessed the evidence of all the witnesses and preferred Mr Khumalo's version. The applicant could not sway the arbitrator to favour its version on the probabilities. It is not for this Court to interfere with the arbitrator's reasoning for choosing one version over another when there were conflicting versions unless the decision is so implausible as to render it unreasonable. The arbitrator had the advantage of being present at the

[10] (427/01) [2002] ZASCA 98 (6 September 2002).

proceedings, saw the conduct of the witnesses and then made a decision based on the probabilities. This approach was confirmed by the Court in *Moodley v Illovo Gledhow and Others*[11] as follows:

> 'Sitting as I do as a review judge, I fail to understand, in this case, how I could decide to set aside an award given by an arbitrator who sat at the hearing, observed the witnesses, their demeanour and the manner in which they came across … I should be extremely reluctant to upset the findings of the arbitrator unless I am persuaded that her approach to the evidence, and her assessment thereof, was so glaringly out of kilter with her functions as an arbitrator that her findings can only be considered to be so grossly irregular as to warrant interference from this court.'

[34] It is my view that the arbitrator was reasonable in his assessment of the evidence before him and reached a conclusion that any reasonable decision maker could have reached on the issue of the probabilities of the versions placed before him.

[35] The applicant's further contention is that the arbitrator, *inter alia,* committed gross irregularities in that he interrupted and intimidated Ms S[…]; aksed Mr Khumalo leading questions; and made sexist statements. In this regard, I find the quote from *Head of the Department of Education v Mofokeng and Others*[12] apposite:

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

[11] (2004) 25 ILJ 1462 (LC).
[12] [2015] 1 BLLR 50 (LAC) at para 33.

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.' [Footnotes omitted]

[36] In *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[13] the Labour Court said the following regarding what is required of the arbitrator in conducting arbitration proceedings:

'[27] In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in *the* conduct of the arbitration proceedings. (See sections 145(2)(a)(i) and (ii) of the LRA ; McKenzie, The Law of building and Engineering Contracts and Arbitration, 5th Ed. pp l88-189).'

[13] (2000) 6 BLLR 716 (LC).

[37] I have had the benefit of reading the pleadings and the record and I do not find merit in the complaints raised against the arbitrator and the award. As demonstrable from the record, the arbitrator introduced the first respondent's representative, Mr Nyembezi, as very famous. In fact he indicated that Ms S[…] was the only person who did not know him. At the end of the hearing when the arbitrator, Nyembezi and Mogale were discusing the date for the filing of the closing arguments, Nyembezi mentioned that he was going away on the Friday. The arbitrator responded by asking if he was going to Parliament. I do not agree with the applicant's contention that these statements created a reasonable apprehension of bias.

[38] It is correct that the record is replete with the arbitrator interrupting the witness and Mogale during chief examination. These incidents were submitted by the applicant in its supplementary affidavit and I do not intend burdening this judgment with the quotations thereof. There is no doubt that the arbitrator adopted an inquisitorial approach to the enquiry. However, it is my view that this did not have the effect of denying the applicant of a fair trial or creating an inference that he had already made his mind up without having full regard to the evidence before him.

[39] The applicant's further contention was that arbitrator was biased. The basis of this contention was that the arbitrator asked Mr Khumalo during his re-examination whether the relationship he had with Ms S[…] was a cordial working relationship and whether the hugs were brotherly and sisterly. There is no merit to this contention as both Mr Khumalo and Ms S[…] admitted that they had a hugging relationship, which speaks to having a cordial working relationship. There is further no merit to the applicant's contention that the arbitrator's comments during the arbitration proceedings and his findings relating to Ms S[…]'s boyfriend demonstrate latent gender bias.

Conclusion

[40] In light of the above, the applicant failed to make out a case that the arbitrator committed gross irregularities. The arbitrator did not fail to engage in matters, which required his decision-making in order to resolve the dispute between the parties. He further did not disregard material evidence nor conducted the arbitration proceedings in a manner that was procedurally irregular. Furthermore, he did not make statements that were sexist in nature. It is my view that the arbitrator's decision is one that a reasonable decision-maker could reach. Considering the test for review and case law cited herein above, the applicant has failed to pass the threshold to have the award reviewed and set aside and his application falls to be dismissed.

Costs

[41] With regards to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[42] In the premise, I make the following order:

Order

1. The application to review and set aside arbitration award issued by the third respondent dated 18 August 2017 under case number GPCHEM 162-16/17 is dismissed.

2. There is no order as to costs.

_____

D Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate MJ Van As
Instructed by:	Werksmans Attorneys
For the Respondent:	Mr. M Bayi of Bayi Attorneys