



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 284/2019

In the matter between:

LUCERNE TRANSPORT

Applicant

and

TAWUSA

First Respondent

DAVID TAZARURWA

Second

Respondent

HASSINA DOCRAT N.O.

Third Respondent

NBCRFLI

Fourth Respondent

Heard: 30 January 2020

Order: 30 January 2020

Date of reasons: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 07 May 2020

JUDGMENT-REASONS FOR ORDER

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award dated 24 January 2019 and issued under case number RFBC 50814 wherein the Third Respondent (the arbitrator) found that the Second Respondent's (the Respondent) dismissal was procedurally fair and substantively unfair and that he be re-instated retrospectively.
- [2] On 30 January 2020 this matter served before Court as an unopposed review application.
- [3] After considering the merits of the application and the submissions made by the Applicant's counsel, I granted the following order on 30 January 2020:
- '1. The review application is dismissed.'
- [4] On 3 February 2020, the Applicant requested reasons for the order so granted. The transmission of this judgment to the parties had unfortunately been delayed by the national lock down due to Covid-19.

The evidence adduced

- [5] The Respondent was employed by the Applicant since September 2009 as a long distance driver. He was dismissed on 27 March 2018 after he was found guilty of misconduct. The charges of misconduct levelled against the Respondent were as follows:
- '1. Inciting violence by displaying gruesome and murderous activity on your personal WhatsApp profile;
2. Behaviour which caused the company name to come into disrepute as this was brought to the company's attention by an anonymous caller;
3. Acting in bad faith.'
- [6] The issue to be decided by the arbitrator was whether the Respondent's dismissal was substantively and procedurally fair.
- [7] In order to assess the arbitrator's findings and the grounds for review raised by the Applicant, it is necessary to consider the evidence adduced at the arbitration proceedings as well as the charges which the Respondent faced.
- [8] No issue is taken with the arbitrator's finding that the disciplinary hearing was

procedurally fair and there is no need to consider any aspect of procedural fairness.

The Applicant's case

- [9] The Applicant's first witness, Mr Henery, testified that he is the operations manager. He testified about the disciplinary hearing and explained that Mr Parsons was a witness at the disciplinary hearing. Mr Henery gave a statement at the disciplinary hearing to the effect that the Applicant had received an anonymous call regarding violence and gruesome activity on the Respondent's phone. The caller did not want to be involved in the matter. The Applicant checked the Respondent's WhatsApp status and found two gruesome videos. The first video clip was of two people, the one decapitating the other and in the second video a person was cutting up another person, whilst still alive. Mr Henery stated that as a Lucerne driver, the Respondent represents the Applicant and he is the face of the Applicant. Anyone who had the Respondent's number, would be able to view these video clips and it violated everything the Applicant stood for. The video clips were extremely offensive.
- [10] Mr Henery explained that it was a condition for drivers to have a device on which the Applicant could communicate with them and these video clips were totally unacceptable. He testified that he had an interview with the Respondent and the Respondent had informed him that he had received the video clips from the 'Sadex driver WhatsApp group'.
- [11] Mr Henery explained that the violent and murderous video clips displayed on the Respondent's WhatsApp status had been reported to the Human Rights Commission for further investigation as the Applicant had believed that a murder was committed. No response was received from the Human Rights Commission.
- [12] In respect of the charges, Mr Henery testified that the Respondent's conduct brought the company name into disrepute because it was brought to the Applicant's attention by an anonymous caller. Mr Henery did not adduce any evidence on the remaining charges levelled against the Respondent.
- [13] Mr Henery did not know who the caller was and he did not know if it was a

client of the Applicant. He testified that a driver is the face of the Applicant and is the image of the Applicant out there.

[14] In cross-examination Mr Henery reiterated that the caller was anonymous and that the call so received was not recorded.

[15] It was expected of drivers to have a device on which the Applicant via its controllers could communicate with them. The device is the personal property of the driver. Mr Henery testified that the controllers who viewed the video clips were shocked. He explained that what an employee puts up in social media can have a direct impact on the working relationship with his / her employer.

[16] In cross-examination Mr Henery explained that the agreement was that the drivers must have a device that works and on which the Applicant could communicate with them to give them instructions. He conceded that the only arrangement was for the driver to have a device that would enable the Applicant to communicate with him, there were no rules or conditions to prescribe the use of the device. Mr Henery conceded that WhatsApp communication is used as it is cheaper but the device is that of the driver which he could utilize as he wished and the Applicant has no control over that. In the Respondent's case, his WhatsApp status was brought to the Applicant's attention and even if it was his private phone, it reflected on the Applicant and the Applicant must protect other drivers and other employees from *'things like this'*.

[17] Mr Henery was asked in cross-examination to explain how the Respondent incited violence and he responded that the video clip was violent and gruesome and having such a video clip on ones WhatsApp status where other people could view it *'you don't know if it can lead to violence'*.

[18] It is evident from the record that Mr Henery was unable to explain how, having the video clip on his WhatsApp status, the Respondent in fact incited violence. His answers were speculative and evasive and at best his evidence was that it was not normal to have video clips like the ones the Respondent had on a platform where anybody could see it.

[19] The Applicant's second witness was Ms Rutenberg who testified as to the

procedural aspects of the disciplinary enquiry. As already alluded to, the arbitrator's findings on procedural fairness are not challenged on review and the evidence adduced on procedural fairness is not relevant for purposes of this review application.

- [20] The Applicant's last witness was Mr Parsons, a logistics planner. He testified that the Applicant's managing director requested him to investigate after he received a phone call from an anonymous caller about the video clips. He investigated and saw the video clips and felt disturbed as it was not something he expected to see on someone's phone he was communicating with. Mr Parsons confirmed that the drivers use their own personal phones to communicate with the Applicant and that WhatsApp is used as a tool to communicate with the drivers. He further testified that some clients also have the telephone numbers of the drivers. In cross-examination Mr Parsons conceded that the statement that some clients had access to the video clips on the Respondent's phone was just an assumed statement and that it does not carry weight.
- [21] Mr Parsons testified that the video clip was very gruesome and not an image that the Applicant wanted to display.
- [22] In cross-examination Mr Parsons confirmed that there are no terms and conditions attached to the use of a driver's phone, the only condition is that the driver must have a phone to stay in contact with the Applicant. The Applicant does not provide the drivers with phones.
- [23] It is evident from the transcribed record that Mr Parsons did not testify regarding the charge of inciting violence and acting in bad faith.
- [24] The Respondent testified that he never posted the video clips to anybody, it was on his personal phone that he did not use for work purposes. If the Applicant at any point raised the issue about his personal WhatsApp status with him and informed him that it was not acceptable and had to be removed, he would have complied. The Respondent explained that the clip was from a movie and that it had the potential of being viewed by many others.
- [25] In cross-examination no specific questions regarding the charges of misconduct were posed to the Respondent and his version that the video clip

was from a movie, was undisputed. The Respondent was asked why he would put a clip like that from a movie on his phone and the purpose of the question was to understand the Respondent's mindset.

Analysis of the arbitrator's findings and the grounds for review

The test on review

[26] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ (*Sidumo*) as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[27] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*² affirmed the test to be applied in review proceedings and held that:

‘In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.’

[28] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make³.

[29] It is within the context of this test that I have to decide this application for review.

The difficulties in the Applicant's case

¹ 2007 28 ILJ 2405 (CC) at para 110.

² (2014) 35 ILJ 943 (LAC).

³ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

- [30] Considering the test that I have to apply, there is an obvious difficulty with the Applicant's case in that the Applicant seeks to attack each and every finding of the arbitrator on every piece of evidence. In fact, the issues raised by the Applicant and the purported grounds for review relied on are rather grounds for appeal, disguised as a review. The Applicant has taken a microscopic approach and has dissected and set out every piece of evidence and facts that it believes were not considered by the arbitrator.
- [31] The test on review and the context within which it is to be applied is that the review Court is not required to take into account every factor individually but must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make based on the facts placed before him/her⁴.
- [32] The LAC has confirmed that to do it differently or to evaluate every factor individually and independently is to defeat the very requirement of section 138 of the Labour Relations Act⁵ (LRA) which requires the arbitrator to deal with the substantial merits of the case and to do so expeditiously and fairly.
- [33] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before her. To consider each piece of evidence separately, will constitute a piecemeal approach which is an approach that this Court has to avoid. I have to consider the totality of the evidence placed before the arbitrator.
- [34] Another difficulty in the Applicant's case is the heads of argument filed in support of this application. The Applicant had filed founding and supplementary affidavits, setting out the purported grounds for review, with the difficulty of a microscopic approach that I have already alluded to, and unfortunately the heads of argument filed by the Applicant is no more than an almost verbatim repetition of what is contained in the aforesaid affidavits, with the addition of reference to the record.
- [35] The heads of arguments did no more than to repeat the content of the affidavits and refer to specific pages of the transcript. In fact, so little effort was

⁴ (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

⁵ Act 66 of 1995, as amended.

put in the preparation of the 'cut and paste' heads of argument that the heads of argument contains phrases such as "*my evidence was also that...*", clearly an averment made in an affidavit and not a legal submission as one would expect in heads of argument.

[36] In *Early Bird Farm (Pty) Ltd v Food and Allied Workers Union and Others*⁶ the LAC held that:

'In this appeal the respondents' attorney was required to file heads of argument succinctly setting out the points to be argued at the hearing of the appeal. A document purporting to be heads of argument was timeously filed on behalf of the respondents. However, it was of such poor quality that it can hardly be described as heads of argument. This court could not derive any assistance from that document nor was the attorney helpful to the court at the hearing of the appeal. Properly prepared heads of argument play an important role in the adjudication of a matter - especially in an appeal court. Useful heads of argument cannot be prepared unless the person preparing them has taken the trouble to study the record and has done such research on the legal issues raised by the matter or appeal as may be necessary. Where heads of argument are drawn without the necessary understanding of the facts or the evidence in the record and/or without doing the necessary research on the legal issues that arise in the appeal, such heads - and it is very easy to recognize this in heads of argument - are bound to be of no assistance to the court hearing the appeal. That kind of conduct on the part of a practitioner is unacceptable. A practitioner should not accept instructions or a brief in a matter if he does not have the time to do justice to a client's case. It is inexcusable for a practitioner to file heads of argument the contents of which bear no relation to the issues raised.

In this case the document purporting to be heads of argument filed by the respondents' attorney was totally unacceptable.'

[37] In *Minister of Safety and Security v Mashego and Others*⁷ it was held that

'Its is not acceptable that practitioners should merely send up heads which

⁶ (2004) 25 ILJ 2135 (LAC) para 50.

⁷ (2003) 24 ILJ 1690 (LC).

are not helpful, which do not cite authorities and which suggest hurriedness of preparation. Counsel draw heads for the purpose of assisting the court.'

- [38] *In casu* the heads of argument prepared by the Applicant's legal representatives failed to succinctly set out legal points, it shows that no effort was put in to substantiate the grounds for review as it merely repeated the content of the affidavit filed and it contained no legal argument supported by authority and as such the heads of argument were of little or no assistance to this Court. I have already alluded to the fact that the Applicant's review application was drafted in a manner that made it difficult to comprehend what the material grounds for review were as issue is taken with each and every aspect and this is a case where the heads of argument should have assisted this Court in focusing, analyzing and addressing the material grounds for review. This the Applicant dismally failed to do.

The arbitrator's findings on the charges of misconduct

- [39] The review test to be applied *in casu* is a stringent and conservative test of reasonableness. The Applicant has to show that the arbitrator arrived at an unreasonable result.
- [40] In *Bestel v Astral Operations Ltd and Others*⁸ the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator's finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held 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.'

⁸ [2011] 2 BLLR 129 (LAC) at para 18.

- [41] *In casu* the arbitrator had to determine whether the Respondent's dismissal was substantively fair. The arbitrator referred to section 188(1) of the LRA and found that the Respondent's dismissal was substantively unfair because the Applicant has failed to prove on a balance of probabilities that there was a fair reason for his dismissal.
- [42] The arbitrator found that the Applicant failed to produce sufficient evidence to justify the reason why the Respondent was dismissed. The Applicant took issue with this finding. The gist of the Applicant's case is that the arbitrator failed to apply her mind to the evidence and made findings that a reasonable decision maker would not have made.
- [43] The Applicant's case is that the arbitrator's decision is not one that a reasonable decision maker could make as the Applicant produced overwhelming evidence relating to the misconduct.
- [44] The question which leaps out is whether the Applicant produced evidence to support the charges of misconduct for which the Respondent was dismissed and whether the arbitrator made an unreasonable finding when she found that the Applicant had failed to do so.
- [45] It is trite and has been accepted by this Court that an employer has the right to discipline its employees, of course in a lawful and fair manner. In fact, the disciplining of employees is the duty and the prerogative of the employer and an employer remains *dominis litis* in deciding whether an employee is to be charged for misconduct and if so, what the nature of the charges would be.
- [46] In the event that an employee is dismissed for reasons related to misconduct, the employer is bound by the election it has made, as was confirmed in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*⁹ where the LAC held that:

'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.'

⁹ (2008) 29 ILJ 964 (LAC).

- [47] The point of departure is the charges of misconduct that the Respondent was found guilty of and dismissed for. The Respondent faced three counts of misconduct and the Applicant's case is that it produced overwhelming evidence relating to the misconduct, which the arbitrator failed to consider. I will consider the charge, the evidence and the arbitrator's finding in respect of each of the charges in turn.
- [48] The first count of misconduct that the Respondent faced was that he had incited violence by displaying gruesome and murderous activity on his personal WhatsApp profile.
- [49] To support this charge as a fair reason to dismiss the Respondent, the Applicant had to adduce evidence to show that the Respondent indeed incited violence and that he had done so by displaying the gruesome and murderous activity on his personal WhatsApp profile.
- [50] The arbitrator found that the Applicant was unable to establish that the Respondent threatened or caused any violence in the workplace or to any staff members. The arbitrator further found that the phone was the Respondent's private phone and absent any policy or agreement entered into in respect of the use of his personal mobile phone, the Applicant could not interfere in that regard.
- [51] The arbitrator considered the Applicant's case that other employees were shocked and disturbed after viewing the video clips, but she did not attach much weight to it as no grievance was lodged by any staff member and no material witness was called to corroborate this version.
- [52] The arbitrator found that the Respondent's version was not challenged.
- [53] The question is whether these findings were supported by the evidence placed before the arbitrator. The Applicant's case is that overwhelming evidence was produced relating to the misconduct and in the founding affidavit the 'overwhelming evidence' is listed as *"the gruesome content of the video, viewing such content is not normal, the report to the Human Rights Commission, an anonymous call was received about the gruesome and violence showing the slaughtering of a person whilst still alive, other individuals have the Respondent's number and could see the video, the*

drivers are the face of the company, the controllers communicate through the phone and the controllers who viewed the video were shocked, the WhatsApp disclaimer set out certain rules and the witness felt sick.”

- [54] The ‘overwhelming evidence’ listed by the Applicant is indeed evidence that was presented at the arbitration proceedings, but was not in support of the charges the Respondent was found guilty on and dismissed for. The Applicant had to show that the Respondent indeed incited violence by displaying the gruesome and murderous activity on his personal WhatsApp profile.
- [55] There was not a shred of evidence adduced to show that the Respondent incited violence, which was the charge that the Applicant elected to formulate and to proceed with in the internal disciplinary hearing. The evidence that *inter alia* viewing of such content is not normal, that it was reported to the Human Rights Commission or that drivers are the face of the company is not evidence to prove the charge.
- [56] In his evidence Mr Parsons conceded that his statement that other individuals had the Respondent’s number and could view the video clips was an assumption and it was not supported or corroborated by any evidence.
- [57] The Respondent’s version that the video clips were received from a drivers’ WhatsApp group and that they were clips from a movie that could be viewed by any person, was not disputed.
- [58] It is evident from the transcript that the Applicant had failed to adduce evidence to support the charge and the arbitrator’s finding to that effect, is not unreasonable and is not disconnected from the evidence that was placed before her.
- [59] The second charge faced by the Respondent was ‘behaviour which caused the company name to come into disrepute as this was brought to the company’s attention by an anonymous caller’.
- [60] The arbitrator once again found that the Applicant failed to produce evidence to support this charge as the only evidence that was adduced was that it was reported by an anonymous person, who could or could not be a client and this brought disrepute to the Applicant.

- [61] I fail to see how this finding is unreasonable as there was no more evidence adduced to support the charge. Not one of the witnesses of the Applicant knew who the anonymous caller was, they did not even know whether it was indeed a client of the Applicant and no evidence was adduced to show how the name of the Applicant was brought into disrepute.
- [62] The Applicant should have adduced evidence to show that its name was brought into disrepute by showing a sufficiently close link between the misconduct and the business and the impact of the conduct on the Applicant's business must be sufficiently serious. One would look in vain for any evidence to show the impact of the Respondent's conduct on the Applicant's business and an allegation that a call was received from an anonymous caller is not sufficient to prove that the Applicant's name was indeed brought into disrepute.
- [63] The last charge levelled against the Respondent was that he acted in bad faith. It is evident from the transcribed record that not a single witness called by the Applicant adduced any evidence in support of this charge.
- [64] The Applicant dismally failed to show that the arbitrator arrived at an unreasonable result in that her findings were unsupported by any evidence or were disconnected from the evidence. On the contrary, the arbitrator's findings were supported by evidence that is sufficiently reasonable to justify the ultimate decision.
- [65] It is not for this Court to interfere on review in circumstances where the Applicant cannot escape the consequences of its choice of charges in the charge sheet and the failure to adduce evidence to support and prove those charges.
- [66] Considering the evidence before the arbitrator holistically, the arbitrator's findings are not disconnected from the evidence, but in fact they are based on the evidence presented (or the lack thereof) and her findings fall within a range of reasonable findings.

Conclusion

- [67] In short: I must ascertain whether the arbitrator considered the principal issue

before her, evaluated the facts presented and came to a conclusion that is reasonable. I have considered this question after perusal of the transcribed record, the arbitration award and the grounds for review raised by the Applicant. The arbitrator's findings fall within a band of reasonableness based on the evidence that was placed before her and there is no basis for this Court to interfere with it on review.

[68] It was for these reasons that the order was granted on 30 January 2020.

Connie Prinsloo

Judge of the Labour Court of South Africa