



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR1670/21

In the matter between:

MICHAEL MYENZI NGOMANE

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE ROAD
FREIGHT AND LOGISTICS INDUSTRY**

First Respondent

COMMISSIONER SOMAN NO

Second Respondent

P MUNRO TRANSPORT

Third Respondent

Heard: 19 February 2025

Delivered: 2 May 2025

Summary: Application to review and set aside the arbitration award. Outcome reasonable. Application dismissed.

JUDGMENT

DANIELS J

Introduction

[1] This is an application brought to review and set aside the arbitration award issued by the second respondent (hereafter the “commissioner”). The commissioner found that the dismissal of the applicant by the third respondent (hereafter “the employer”) was substantively fair.

Background facts

[2] At the time of his dismissal, the applicant was employed as a security guard, and head of security, for the employer.

[3] Following the COVID19 outbreak, during March 2020, the employer secured “essential service” permits for his security team and, to avoid reliance on public transport, offered them the use of one of the employer’s vehicles to transport them to and from work.

[4] The incident, or the misconduct, which led to the applicant’s dismissal occurred on 7 June 2020 (the “incident”).

[5] On that day, 7th June, the applicant and the rest of the security, who were on duty at the time, failed to arrive at work. The owner of the employer, Mr Munro, was telephoned by the head of operations who informed him that security had not arrived. Mr Munro telephoned the applicant who informed him that the company vehicle, which he had been using to get to and from work, was not starting. The applicant also informed Mr Munro that public transport was not available. An alternative arrangement was made to bring the applicant, and the other security guards, to work.

[6] Later that evening, an altercation occurred between the applicant and Mr Munro. There are two conflicting versions of the altercation.

6.1 Mr Munro testified that he had an argument with the applicant at approximately 22h30. The applicant was upset that the vehicle he was using battles to start and he demanded a newer vehicle which he (Mr Munro) refused to agree to. The applicant was upset with Mr Munro's response and, at approximately 02h00, left the premises with two other security guards.

6.2 The applicant testified that after his altercation with Mr Munro, he was instructed (by Mr Munro) to leave the premises. He left the premises with two other guards. They slept on the pavement until the next morning. Because there was no transport available, they attempted to flag down a police vehicle, with no success. The applicant testified that he would not have left at 02h00 if he had not been instructed to leave, because there was a curfew in effect, there was no available transport, and the area was unsafe.

[7] The applicant did not return to work during the next few days. However, during that period, Mr Munro received a letter from an Advocate Mtetwa stating that he acted for the applicant and another employee, Mr Sibusiso Shabangu. The letter made serious allegations about Mr Munro, among other things indicating that he used vulgar and racist language when communicating with employees. The letter demanded that Mr Munro pay an amount equal to R85 000, 00 to the applicant and Mr Shabangu. The letter included information relevant to the applicant's employment. Mr Munro took the view that the letter constituted blackmail and extortion.

[8] Mr Munro hired a private investigator, Mr Booker, to investigate the origins of the letter. Mr Booker advised him that the Advocate Mtetwa did not exist and the address on the letterhead was that of an abandoned building. Mr Booker advised Mr Munro that he should lay charges with the South African Police Services ("SAPS") – which he did.

[9] The employer initiated disciplinary charges against the applicant. The four charges may be summarized as follows: (1) leaving the workplace without permission, (2) absence without leave, (3) intimidation, and (4) extortion.

[10] The charge sheet was delivered to the home of the applicant by Mr Booker and members of the SAPS. The applicant alleges that he was intimidated by these individuals because they were armed. He testified that Mr Booker and the SAPS told him to plead guilty to leaving the workplace without permission, and to being absent without leave.

[11] A disciplinary hearing was held on 17 June 2020. The applicant pleaded guilty to charges 1 and 2; but not guilty to charges 3 and 4. The minutes reflect that the applicant testified that, although the letter came from Advocate Mtetwa and Mr Shabangu, he was contacted by Mr Shabangu who asked him certain questions. The minutes reflect the applicant's testimony that, on 7 June 2020, he told Mr Munro that he was leaving.

[12] At arbitration, when confronted with his testimony at the disciplinary hearing, the applicant did not deny that he had said to Mr Munro, on 7 June, that he was leaving.¹ Nor did he deny that he had been contacted by Mr Shabangu to seek information, which was included in the letter from Advocate Mtetwa.²

[13] When asked why he had pleaded guilty (at the disciplinary hearing) to charges 1 and 2, and failed to inform the chairperson that he had been intimidated, all the applicant could muster was that he did not do so because the chairperson was talking to Mr Booker.

The Arbitration Award

[14] The commissioner found that:

¹ Record: Transcript p43 (line 6) to p44 (line 22)

² Record: Transcript p45 (line 9)

14.1 There were numerous contradictions in the applicant's version as to the events on 7 June 2020. First, the minutes of the disciplinary hearing, which were not disputed, reflected that the applicant informed Mr Munro that he was leaving. It is, of course, improbable that the applicant would have said that, if he had been asked to leave. Second, at his hearing, the applicant did not testify that he was dismissed on 7 June.

14.2 The employer's version as to the events on 7 June, were more probable than that of the applicant because it was essential for the employer to have security for his property. The employer would not dismiss the applicant at 02h00, because this would compromise security. Furthermore, it was unlikely the employer would dismiss the applicant at 02h00 when there was a curfew in effect, and there was no transport available.

14.3 The applicant was not a credible witness because he made sweeping statements unsupported by the evidence, for example - Mr Munro always threatened to shoot him when they argued. Despite this, the applicant has never laid criminal charges against Mr Munro.

14.4 The applicant's claim that he had been intimidated into pleading guilty to two of the charges, lacked credibility. The commissioner reasoned that, first, this was not brought to the attention of the chairperson. Second, at arbitration, the procedural fairness of the dismissal was not in dispute.

14.5 The applicant's version that he had no knowledge of the letter from Advocate Mtetwa was improbable because the letter contained details of his employment. Furthermore, the author professed to represent the applicant and Mr Shabangu. Finally, the letter arrived a few days after the altercation between Mr Munro and the applicant.

Review applications in general

[15] The arbitration process and the resulting arbitration award both constitute administrative action. Accordingly, section 33(1) of the Constitution requires that the process and the outcome must be lawful, reasonable, and procedurally fair.

[16] It is in this context that the review test³ applicable to arbitration awards issued by the CCMA and Bargaining Councils, was formulated, as follows: *is the arbitration award one which no reasonable commissioner could reach on the material before him or her?* It is known as the “reasonableness test.”

[17] As to what is reasonable, this must be determined by the circumstances of each case. The court must consider factors such as the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.⁴

[18] In *Bestel v Astral Operations Ltd & others*⁵ the court considered the narrow scope of review and accepted that an arbitrator’s finding would be unreasonable if it is unsupported by any evidence, based on speculation, disconnected from the evidence, supported only by evidence that is insufficiently to justify the decision, or if it was made in ignorance of evidence that was uncontradicted. The Court 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*

³ *Sidumo and another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para [110]

⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at para [45]

⁵ [2011] 2 BLLR 129 (LAC) at para [18]

distinction, however difficult it is to always maintain, is respected.' (own emphasis)

[19] It is important to remember that reasonableness embraces a wide range of outcomes several of which may be reasonable.⁶ The courts have warned that the award, or outcome, must not be evaluated on a piecemeal basis, but on the totality of all the evidence.

[20] Where a commissioner fails to apply his mind to the material issues, this will usually indicate that the outcome is unreasonable or that the nature of the enquiry was misconceived. However, when a mistake of fact or law does occur, what matters is its materiality – and whether it had a distorting effect on the outcome.⁷

Analysis of the grounds of review

[21] The applicant alleges that the award is unreasonable because it is not grounded in the evidence. In brief, the applicant states:

21.1 The commissioner allegedly failed to evaluate the probabilities because she failed to consider his (the applicant's) testimony that he would not voluntarily have left work on 7 June at 02h00 because it was unsafe, and there was no public transport available. I cannot accept the submission. The commissioner found that the applicant's testimony lacked credibility⁸ and his evidence contained numerous discrepancies.⁹ It was in this context that the commissioner preferred the version of the employer. It is uncommon place for any employee to leave his or her work in the middle of a shift, at 02h00 but it is also uncommon for an employer to dismiss an employee at 02h00. This was clearly an

⁶ *Goldfields Mining SA (Pty) Ltd v CCMA and others* (2014) 35 ILJ 943 (LAC) at para [14]

⁷ *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at para [33]

⁸ Arbitration Award at para 39, p20 of Pleadings Bundle

⁹ Arbitration Award at para 37, p19 of Pleadings Bundle

exceptional situation. Here, the commissioner accepted the version of the employer, based on the related criteria of the probabilities, and credibility of the witness. This is not improper.¹⁰ It is trite that credibility of witnesses, and the probabilities, should not be treated as separate but are a single investigation into whether a witness's version is acceptable.¹¹

21.2 The commissioner allegedly failed to appreciate that it was common cause that there was an altercation between Mr Munro and the applicant, before the applicant left the premises of the employer. According to the applicant this common cause fact demonstrated that his version was more probable than that of the employer. I do not accept the submission. The mere fact of the altercation does not support one or another version. In the heat of the moment, an employer may be moved to dismiss an employee without a fair procedure. In the heat of the moment, an employee could be moved to act impulsively and walk out.

21.3 The commissioner allegedly failed to consider the applicant's testimony that he had been intimidated by Mr Booker and the SAPS. This submission is factually incorrect. The commissioner did consider this testimony, but rejected it. The commissioner considered that this version was improbable. This has already discussed in para 14.4 above.

21.4 The commissioner allegedly erred by making certain findings, which were allegedly unsupported by the evidence, such as:

21.4.1 The employer informed the applicant he would have to return the company vehicle once taxi services resumed,

¹⁰ *HAL obo MML v MEC for Health, Free State* 2022 (3) SA 571 (SCA) at para [66] "There are conceptual differences between credibility and reliability, which should not be conflated. Credibility has to do with a witness's veracity. Reliability, on the other hand, concerns the accuracy of the witness's testimony. Accuracy relates to the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point."

¹¹ *Ibid* at para [91]

21.4.2 The SAPS gave the applicant a lift on 7 June.

[22] The findings made by the commissioner, referenced in para 21.4.1 and 21.4.2 above, are unrelated to the outcome. Thus, these errors of fact could have had no distorting effect on the outcome, and do not operate to render the outcome unreasonable.

[23] In his supplementary affidavit, the applicant quotes a number of extracts from the transcript, which he alleges were ignored by the commissioner. In my view, the award itself suggests that this evidence was considered. The LRA requires that commissioners render awards with brief reasons.¹² This must be respected. Commissioners are not required to, mechanically, repeat the full extent of the testimony given by each witness. In this case, I am satisfied that the commissioner captured the important and relevant evidence, and gave sufficient reasons for preferring the employer's version over that of the applicant. The approach in this review is a piecemeal one, which is improper. This court is required to consider whether the outcome is reasonable, on the totality of the evidence before the commissioner. I do not believe that the outcome is unreasonable, based on the totality of all the evidence.

[24] In my view, this application more closely resembles an appeal than a review. The courts must be careful to avoid treating reviews as appeals and therefore, inadvertently, undermining the policy decisions taken by our Legislature.¹³

Costs

[25] In labour disputes costs do not follow the result. There are no special circumstances which warrant a cost order, based on the dual considerations of law and fairness. Accordingly, no cost order will be made.

Conclusion

¹² See section 138(7)(a) of the LRA

¹³ *Booi v Amathole District Municipality and others* (2002) 43 ILJ 91 (CC) at para [51]

[26] In the circumstances, I make the following order:

26.1 The application to review the arbitration award, dated 22 June 2021, issued by the second respondent under case reference GPRFBC 63318, is dismissed;

26.2 There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv Simon Kunene

Msikinya Attorneys

For the Third Respondent:

Adv L Froneman

De Witt Martinson Attorneys