

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C 698/00

In the matter between:

TRUDY BETTY RABIE

Applicant

and

P VAN STADEN

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION (CCMA)

Second Respondent

PROVINCIAL ADMINISTRATION, WESTERN CAPE

(HEALTH DEPARTMENT)

Third Respondent

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

[1] The Applicant, Ms Rabie (“Rabie”), through her lawyers, filed an application in September 2000 in which she applied for the following order:

“1. An order correcting or setting aside First Respondent’s arbitration award in terms of section 145 of the Labour Relations Act of 1995;

2. *An order for costs in terms of Section 158 (1)(a)(vii) of the Labour Relations Act of 1995, only in the event of this application being opposed;*
3. *An order for further or alternative relief.”*

[2] The First Respondent, whose award Rabie seeks to have corrected or set aside, is Mr van Staden. He was appointed under the auspices of the Commission for Conciliation, Mediation and Arbitration, the Second Respondent (“the CCMA”) to arbitrate a dispute that had arisen between Rabie and her employer, the Department of Health in the Western Cape, the Third Respondent (“the employer”).

[3] The dispute had been referred to the CCMA by Rabie pursuant to a disciplinary hearing held by her employer, the Third Respondent, as a result whereof, she had been dismissed. Van Staden, in his official capacity, arbitrated the matter and upheld the employer’s decision to dismiss Rabie. It is that award that Rabie purports to challenge by her application filed in September 2000.

[4] Argument started on 24 February 2003, on which day I heard only Mr Fisher, Rabie’s legal representative. The matter was postponed to the 14th April 2003, when Mr Fisher continued with his argument. Mr Van der Schyff, for the Department, presented his arguments on that day as well, with Mr Fisher replying in a fair amount of detail. I reserved judgment. I

now hand it down.

BACKGROUND FACTS

[5] Most facts are common cause. Rabie was in the employ of the Third Respondent, having commenced as a student nurse in 1976 and ending up as senior professional nurse at Somerset Hospital at the time of her dismissal. These facts, and others I will deal with hereinbelow, appear from Rabie's founding papers and in the employer's answering affidavit, deposed to by one David Labuschagne, an Assistant Labour Relations Director in the office of the employer in Cape Town.

[6] Incidentally, from my perusal of the application by Rabie, I have found that despite the contentious character of the responses by the employer in Labuschagne's affidavit, there is no replying affidavit in the file. I do not know if any was filed, but on the index (drawn obviously by Rabie's lawyers), there is no provision for a replying affidavit. I therefore proceed on the basis that none was filed.

[7] I mention this because it has implications. Where, as appeared in argument, some dispute of fact was an issue between the parties, the law as commended by **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) 623 (A) will apply. This is one case where my decision, on any disputed factual issue will be guided by my acceptance of all averments made by the Applicant, not disputed by the Respondent,

together with those facts made by the Respondent.

[8] On the above approach, the facts are that on 21 January 1998, Rabie refused to speak to a member of the public, one Strydom. She ultimately put the telephone down whilst Strydom was still speaking to her. Strydom laid a formal complaint against Rabie and her conduct constituted the first charge against her in terms of which the employer charged her for improper and unbecoming conduct.

[9] About a fortnight from this episode, Rabie had an altercation with her senior, Mrs Henkeman, who had lawfully instructed her to return a patient's file. She became argumentative with Mrs Henkeman. Rabie's conduct towards Henkeman, according to Mr Labuschagne's uncontested evidence on affidavit, *"degenerated during the course of the day on 4 February 1998 to the extent that [she] unceremoniously entered Henkeman's office, and, in the presence of colleagues, displayed gross insolence towards Henkeman"*.

[10] Labuschagne's sworn affidavit goes on to state that Rabie's *"unacceptable conduct towards Henkeman continued on 4 February 1998 when she followed Henkeman and publicly verbally challenged the latter in an insolent manner at the place of their employ"*.

This conduct led to two more charges, namely, insubordination insofar as Rabie argued with Henkeman before returning the patient's file (the

second charge) and a further charge of disgraceful conduct – bursting into Henkeman’s office while she was in a meeting, banging on the door while addressing Henkeman, and publicly adopting a challenging attitude.

[11] Rabie was informed of the charges against her. Three dates were initially allocated for the hearing, namely 5 February 1999, 15 April 1999 and 12 May 1999. On 4 February 1999, Rabie objected to the short notice of the enquiry. She advised that she would not be able to attend since she needed time to arrange for legal representation. She advised that her attorney would get in touch with the employer to arrange a mutually convenient date. She/he never did. The enquiry was postponed to 15 April 1999.

[12] This time around, and again a day before the scheduled enquiry, Rabie advised she would not be able to attend on the following day due to ill health – high blood pressure. The enquiry was postponed to 12 May 1999, *inter alia*, because Rabie tendered a medical certificate.

[13] Once again, a day before the scheduled date, and on 11 May 1999, Rabie submitted a medical certificate for the period approximating the duration of the inquiry. Once again the certificate stated that she would be unable to attend due to ill health. All endeavours to call her at the flat by one Ms Louw, who was to place the evidence before the inquiry, came to nought. There was no response from her flat. The inquiry was scheduled to proceed in the same block as where she resided.

[14]The presiding officer at the inquiry, after weighing all the facts at his disposal, including the coincidence of Rabie's medical certificates with the dates of the inquiry hearings, decided to proceed in Rabie's absence. Of five (5) original charges that had been preferred against Rabie, only three (3) were proceeded with, on all three (3) of which Rabie was found guilty as charged.

[15]Thereafter, after hearing evidence in mitigation and aggravation; the presiding officer recommended a dismissal to the Director General in the employer's Administration Department who effected the dismissal sanction. Rabie, it appears, refused to note an appeal. She referred the matter to the CCMA for arbitration on the only basis that her dismissal was substantively unfair. The arbitration commenced on 9 March 2000, before Van Staden, and ended on 13 June 2000. Rabie was represented by Mr David at the arbitration, after her bid to be represented by Mr Fisher failed, having been turned down by Stander.

[16]Stander, it appears, took the attitude that the matter before him would be dealt with ***de novo***, and, in consequence, the employer called seven (7) witnesses, each of whom was cross-examined by the Applicant's representative. Most of the evidence was direct evidence, except the evidence of Mr Olivier, the presiding officer at the disciplinary inquiry, who testified in detail about Strydom's evidence, the impression he made as a witness and why he found as he did. It must be borne in mind that this

hearsay evidence, about which later, related only to one of the charges. Insofar as the other two charges were concerned, Van Staden had the benefit of Henkeman's evidence, and that of Rabie herself.

[17] Van Staden, having heard all evidence, took time to consider his award which he handed down on 10 August 2000 in thirty (30) pages of a detailed analysis of the background to the case that came before him, the evidence that was led, the arguments that were advanced, the legal principles he considered were applicable, a consideration of the law of evidence with regard to hearsay evidence and a consideration of case law he considered was applicable. His conclusion was that Rabie was fairly dismissed and was not entitled to any relief. His award, which Rabie wants me to review and set aside, was that her dismissal on 1 August 1999 was not unfair.

RELIEF SOUGHT

[18] I have recently, in the case of **Moodley v Illovo Gledhow and Others** 2004 (1) BLLR 150 (LC) para. 4 had to recall the provisions of s 145 of the Labour Relations Act 66 of 1995 ("LRA") which read 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 –

(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).

(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 of the arbitration proceedings; or

(iii) exceeded the Commissioner's powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside the Labour Court may –

(a) detain the dispute in the manner it considers appropriate; or

(b) *make any order it considers appropriate about the procedures to be followed to determine the dispute.*"

[19] I find that it is important to restate the position here as well, particularly because that is the section relied upon by Rabie for her review application and, yet, with great respect, the articulation of the basis of review by Rabie's lawyers is very imprecisely and widely stated. It is confused and confusing. It has become necessary once again for me to state the legal principles for a s 145 review application.

[20] On the basis of heads of argument submitted on behalf of Rabie (apparently drawn by one S J Kleynhans), it was argued that I must, as far as possible, seek to uphold the purpose and the values that underlie the system of dispute resolution established by the LRA. *"When it is necessary,"* so go the heads of argument, *"to adopt a critical view of the commissioner's performance, it is because that would be justifiable both in the interests of the CCMA as an institution, and of the broader public who utilise its services. The parties to dispute resolution under the auspices of the CCMA are parties to what amounts to a system of 'compulsory arbitration'".*

[21] The Heads further state that in exercising my review powers I am required to uphold constitutional imperatives for compulsory arbitration, namely, that the process must be fair and equitable; the Arbitrator must be impartial and unbiased, the proceedings must be lawful and procedurally fair; the reasons for the award must be given publicly and in writing; the

award must be justifiable in terms of those reasons; *“and the award must be consistent with the fundamental right to fair labour practices”*, it was argued.

[22] Although there was reference to the usual authorities, presumably in support of these generalised statements, I found extreme difficulty in relating, for example, these arguments to the issue for my consideration. For example, having chosen to arbitrate the dispute on the basis that the issue was whether the dismissal had been substantively fair or not, I do not see how far these Heads are advancing that premise when they ramble about proceedings having to be *“lawful and procedurally fair”*.

[23] Further, and particularly in view of the fact that Rabie seeks a review in terms of s 145 of the LRA, I found it difficult to appreciate how these arguments – and a lot of them that came afterwards – addressed succinctly, the basis for a s 145 review, namely that I can only review an arbitrator’s (commissioner’s) finding if he/she:

- Misconducted him/herself in relation to his/her duties as commissioner/arbitrator;
- Committed a gross irregularity in the conduct of the arbitration proceedings;
- Exceeded the commissioner’s powers; or

- That the award had been improperly obtained.

[24] In my view, it is this articulation in precise terms that I did not seem to get from Mr Fisher's castigation of Van Staden's conduct. For example, he argued that Van Staden misconducted himself grossly irregularly or improperly by not investigating the matter afresh in order to ensure the procedural and substantive correctness of the dismissal. He seems to fault Van Staden by not having heard all the testimonies, including that of Olivier, Strydom, a Ms Bennett and other direct witnesses whom he lists, with regard to the insubordination charge.

[25] Mr Fisher also charged that Van Staden acted unjustifiably and unreasonably by dismissing Rabie by reason of a previous final written warning for insubordination. His argument was that the final warning dated back to 1995. Rabie had a long service with the employer of about twenty-three (23) years. In the course of his argument, which was initially directed at denying at all that a finding of guilt was appropriate for any of the three (3) charges, and which also addressed the sentence of dismissal as having been harsh, Mr Fisher, expressed himself as follows:-

"The sanction, unlike what the Commissioner found is not justified. It cannot be justified. How can a sanction of dismissal be justified in the circumstances of these actions, these supposed acts of misconduct?"

Ms Rabie is not being dishonest. Ms Rabie, at most, is said to have

been rude. No words M'Lord of any nature, and people can be very rude. She didn't swear at her, she didn't use the "f"- word. She didn't make personal remarks. She said come out, come out, your wings have been clipped. That's the worst. She said to Ms Henkeman also, on their version, you slammed the phone in my ear, you were childish, please write it down. She said to Mr Strydom, who we've heard by the way of hearsay evidence, why don't you write to Parliament.

What is being complained about here? M'Lord, are these people serious? I must ask the question. Are they saying that Ms Rabie must be ..."

[26] I repeatedly asked from Mr Fisher whether it was my function, sitting as a review judge, to substitute my own decision for that of Van Staden. The best answer I got was that I am vested with these powers if the evidence before me is "*competent enough for this court in any event to arrive at findings as to what should have been the finding of the commissioner*". The more I asked the question, the more I realised that Mr Fisher either has no basis that has any relevance to s 145 in attacking Van Staden's award, or he was giving me the best answer that he could.

[27] A correct statement of my function, sitting as a review judge, was made, in my respectful view, by Mr Van der Schyff who, relying on a number of cases in this Court and in the Labour Appeal Court, argued that s 145(2) (a) grounds, having been expanded by case law, envisage a successful review if an award lacks "*rationality*" and "*justifiability*" in relation to

evidence placed before a commissioner.

[See: **Shoprite Checkers (Pty) Ltd v Ramdaio NO & Others** [2000]
9 BLLR 1011 LAC at 1022 B and 1024 H.]

[28] Further, “*misconduct*” as in s 145(2)(a)(i) as a ground of review, not being defined in the LRA, has been held by Courts to relate to some form of ***mala fide*** conduct or conduct which is obviously wrong in the circumstances.

[See: **County Fair Foods (Pty) Ltd v CCMA & Others** (1999) 20 ILJ
2609 at 2617 E.]

With regard to gross irregularity, for me to upset Van Staden’s award, I must find that he misconducted himself so irregularly that it can clearly be said there was no proper hearing.

[See: **County Fair Foods (Pty) Ltd (supra); Maarten & Others v Rubin NO & Others** (2000) 21 ILJ 2656 (LC) at 2659 para. 4.]

[29] As I observed earlier, my sense is that Van Staden not only applied his mind to the evidence led before him. He applied the above legal principles. Firstly, he exercised his discretion judiciously – and referred to legal opinion and case law – for example as to whether he should admit the hearsay evidence of the presiding officer at the disciplinary inquiry with regard to Strydom. Whilst he may not have commented on each and every witness’s evidence – which is not a requirement – my reading of his

award, viewed against the record of proceedings before him, satisfies me that his decision was based on the evidence before him.

[See: **Cox v CCMA & Others** (2001) 22 ILJ 137 at 144 (C); **East Rand Gold and Uranium Co Ltd v CCMA & Others** (1999) 20 ILJ 2348 (LC).]

[30] Even if I think Van Staden is incorrect in his conclusions in the sense that I would have come to a different conclusion had I been sitting as a Commissioner, I cannot for that reason alone review his award when I am satisfied – as I am – that he considered all the facts and applied relevant legal principles.

[See: **Pep Stores v Laka** [1998] 9 BLLR 952 (LC); **Cox v CCMA (supra)**; **Carephone (supra)**.]

[31] I cannot review and set aside Van Staden's award, much less substitute it with my own, simply because I may have a different view, if the conclusion that Van Staden came to makes sense and is justifiable because it can be explained sensibly in the light of the evidence before him. Nor can I review and set aside his award on the basis contended for by Rabie.

[32] It is **not**, in my view, misconduct (certainly not one on the basis of which I can interfere with his award) that Van Staden did not investigate afresh

the evidence of Strydom for purposes of “*correcting*” alleged “*procedural and substantive defects*” in the disciplinary inquiry. Firstly, the review was never on the basis that procedural fairness was an issue. Rabie’s referral form to the CCMA clearly stated that the decision sought from the commissioner was for him to “*rule that the dismissal of Ms Rabie was substantively unfair and to reinstate her from date of her dismissal*”. In the light of this self limitation of what her parameters of relief are to be, Rabie’s endeavour to seek to persuade me to review Van Staden’s award on the basis that it was also procedurally unfair is mischievous.

[33] In any event, Van Staden had made it clear to the parties that the hearing before him was ***de novo***. In the circumstances it was his prerogative, as trier of fact, to receive whatever evidence, including hearsay evidence, if he was satisfied that, exercising judiciously his discretion, he was entitled to do so.

[34] This was, ***a fortiori***, the case because the accuracy of Olivier’s recollection of Strydom’s evidence at the disciplinary inquiry was not challenged by Rabie’s representative at the arbitration proceedings. Nor was it necessary, in my view, that Van Staden, in the circumstances, should have called the evidence of Strydom. Besides, if Rabie felt that justice would have been better served if Strydom, Bennett, Meyer, Paulser, Prins, Jacobs (all witnesses it was argued should have been called), she was quite at liberty to have subpoenaed them. She never did.

For all these reasons, Mr Fischer failed to persuade me that Van Staden misdirected himself in any of the senses contemplated by the provisions of s 145 of the LRA.

[35] Insofar as Mr Fisher's arguments on sanction are concerned, I respectfully hold that Mr Fisher has totally misperceived what the test for review of a sanction in terms of s 145 entails. As has been repeatedly held by this Court and the one above it, I would only interfere with Van Staden's dismissal sanction if I found he had so grossly misconducted himself with regard to what sanction he could properly impose that his sanction could not stand because it was not justified by the evidence, and was totally irrational in the light thereof.

[36] It is not for me to substitute a justifiable sanction imposed by an arbitrator, acting carefully and reasonably, who heard first hand all the evidence in mitigation and in aggravation, simply because I could have imposed a lesser sentence. If I am satisfied that the trier of fact, in imposing sentence, took into account the evidence before him and relevant legal principles, *cadit quaestio*.

[37] By all accounts, the evidence before Van Staden, viewed objectively, clearly shows that Rabie, in at least the events on 4 February 1998, conducted herself in a manner that makes her fall foul of the charges with which she was charged. A careful examination of the record demonstrates that Van Staden was right in finding her guilty of insubordination and

misconduct. On whatever version, what comes out clearly is a Rabie who is cantankerous and aggressive. She is argumentative and disputatious. She will not let go. She grabs a file from a patient and defies an order from her superior to hand the file back to the patient (one Bennett).

[38] Begrudgingly, she hands over the file, but thereafter storms to her superior's office - "*flinging the door open*" - whilst Mrs Henkeman is having a meeting. She addresses her in an aggressive tone. Though in her evidence she initially denies this, she does finally admit having uttered the words attributed to her. That afternoon, she confronts Henkeman, even though Henkeman tries to avoid her by getting into her office. Rabie, not content with what she did in the course of the day, goes to bang on Henkeman's door and challenges her to "*come out*". She taunts Henkeman by saying she has now "*clipped her wings*".

[39] This is evidence that Van Staden heard. To be sure, Rabie tried her best to deny most of it - as appears from the record - but this is evidence repeated by Labuschagne in his answering affidavit, which was not challenged. Van Staden believed the version of the employer and he found as he did. I can find nowhere in my assessment of the documents before me that shows Van Staden to have acted irregularly in terms of the LRA, particularly s 145 thereof. For all these reasons, Rabie's application cannot stand and I dismiss it accordingly.

[40] It remains for me to rule on a point ***in limine*** which Mr Van der Schyff lamely raised in February and in April. Although he never persisted in

arguing it, he never abandoned the point. He had called for the application to be dismissed on the basis that Rabie had failed to paginate the Court file. She had also not prepared an index. He claimed that his client, the employer, had consequently been prejudiced by this irregularity insofar as it did not know which documents Rabie would rely upon, an untenable situation which the Courts deplore. For this submission Mr Van der Schyff referred me to **Morgan Fashions SA (Pty) Ltd v CCMA & Others** [1999] 10 BLLR 1063 (LC).

[41]Mr Fischer's response was that "*the index of pagination [sic!]*" was faxed to a wrong address. That seemed to have put paid to the matter. Mr Van der Schyff did not resuscitate it at the end of his argument on the merits and that is where I also leave it.

[42]As for the rest, I dismiss the application with costs.

D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: 23 FEBRUARY 2003

Date of Judgment:

For the Applicant: **ADV E FISHER**

Instructed by: **N ALLEN ATTORNEYS**

For the Third Respondent: **ADV J VAN DER SCHYFF**

Instructed by: **STATE ATTORNEY**