

REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D 881/01

In the matter between:

RALLIE MOODLEY

Applicant

and

Illovo Gledhow and Others

Respondents

JUDGMENT

NTSEBEZA, AJ:

INTRODUCTION

[1] On the 8th of April 2003, Mr Purdon (for the Applicant), and Mr O'Connell (for the First Respondent), appeared before me, in a matter which, because of the strenuousness with which each case was argued, has necessitated the re-reading of a record that runs into some hundreds of pages. In the nature of things, when I heard them, I had not had the opportunity to study the record, it not being the only voluminous record, and an opposed matter that had been put on my roll of matters for that

day – and the same on subsequent days. Inevitably, I reserved judgment, indicating to the parties that I would take time to hand down the judgment. The following is my judgment.

[2] The Applicant, Moodley, was an employee of the First Respondent, Illovo, from 1983 before he was dismissed pursuant to a disciplinary enquiry (and a failed appeal) for offences which I will outline hereunder. Having failed to reverse his dismissal, Moodley approached Third Respondent, the Commissioner for Conciliation, Mediation and Arbitration (CCMA), for remedy. His contention was that Illovo had unfairly dismissed him. The dispute could not be conciliated.

[3] The CCMA duly appointed the Second Respondent, Sungaree Pather (the arbitrator) to adjudicate the dispute that had arisen between Moodley and Illovo. The arbitrator duly dealt with the matter on the 21st and 22nd of May 2001 and handed down an award on the 11th of June 2001 in which she found that by reason of the nature of the charges in relation to which Moodley had been charged and found guilty, the trust relationship between Moodley and Illovo had broken down. She consequently found that the dismissal had been procedurally and substantively fair and dismissed Moodley's application in the CCMA, effectively upholding his dismissal by Illovo. Moodley has approached this Court, and alleges, in paragraph 5 of his founding affidavit that the application is brought in terms of Section 145 of the Labour Relations Act No. 66 of 1995 (the LRA).

[4] Section 145 of the LRA reads 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.”

I will return to Section 145 later.

BACKGROUND

[5] The case against Moodley arose when Illovo’s General Manager received certain information alleging that there were irregularities in its stores. An investigator, Hughes, was called in to assist in the investigation in these allegations. Hughes, on the 8th of August 2000, visited one Logie Reddy (Logie) at her business, The Tool Trade. He confronted her with information that she was involved in illegal dealings with regard to grooving inserts with Moodley. Hughes told Logie that if she did not cooperate with him, she would be “*blacklisted*” inasmuch as her business, Tool Trade, would no longer be able to deal with Illovo. She was also told that she might go to jail. She cooperated with Hughes and even gave him a statement.

[6] A week thereafter, on 15 August 2000, the investigator confronted Moodley with the allegations that Logie had made as well as allegations

that certain suppliers had made to him in the process of investigation. It would appear that Moodley was soliciting or receiving various loans from the suppliers of Illovo, in that way seriously compromising his position of trust with the company. These were the allegations that Hughes put to him a week after he had met Logie. Insofar as his dealings with Logie are concerned, Moodley was confronted with the allegation that he had received cash or margins on the supply of sugar from Logie, conduct which was seen by Illovo as illicit dealing. As a consequence of this confrontation, Moodley provided Hughes with a statement and two letters.

[7] This cooperation by Moodley had been preceded by a measure of resistance, firstly in the form of a denial of any form of involvement with Logie in the manner alleged, or of him ever having received any cheques from her or from her business. However, when Hughes insisted on having his fingerprints so that he could compare those with prints on a cheque which had been cashed at Nedbank, Moodley conceded that he had handled one of the cheques, but persisted in denying ever having anything to do with two other cheques which had been mentioned in the context of the allegations against him by Hughes. Later, however, he accepted and admitted that he had received all three cheques from Logie.

[8] Insofar as the allegations of soliciting and/or receiving loans from suppliers are concerned, Moodley initially was so adamant in protesting his innocence that he agreed to undergo a polygraphy test, a commitment which he promptly thereafter reneged from, particularly when he was

confronted with facts regarding a loan from one Nair. He later conceded having received a loan from Mr Nair in April 2000 and having solicited various others. He argued that there was nothing wrong with taking loans, nor was there any rule in Illovo against that practice. As Mr O'Connell states it in his heads of argument, once again, when Moodley was confronted with a witness, one Naidoo, that he had been specifically forbidden to solicit or take loans from suppliers, Moodley engaged in an act of self deprecation, thereby seeking to convey an impression that he was feeling remorseful about his conduct.

[9] When the investigation process was complete, Moodley was charged, essentially with serious misconduct insofar as he had solicited or received various loans from suppliers of Illovo, thus compromising his position of trust with the company. He was further charged with dishonesty in that he had been involved in illicit dealings with Tool Trade where he had received cash or margins on the supply of sugar from Logie aforementioned. As has already been indicated, he was essentially convicted of these offences and was summarily dismissed, and his appeal failed. A similar endeavour to reverse his fortunes before the arbitrator met with similar failure. I must now decide whether to uphold Moodley's protestations of innocence on the basis alleged by him, canvassed by Mr Purdon in argument before me and which are dealt with further in Mr Purdon's heads of argument.

[10] The gravamen of Mr Purdon's attack on the arbitration award is that the arbitrator invoked what he calls the reasonable employer test, a test,

which, in his submission, was discredited by the Labour Appeal Court in **Toyota South African Motors v Radebe & Others** (2000) 9 BLLR 995. Mr Purdon further attacks the conclusion of the arbitrator by alleging that she totally ignored the evidence that the Applicant was in no position to influence which supplier would be used by Illovo. Further, particularly with regard to the second charge of misconduct insofar as Moodley is said to have acted dishonestly, Mr Purdon argues that the arbitrator's misdirection comes, if I understood him well, from the fact that she declared, in the course of her award, that because she accepted that there were conflicting versions between the evidence of Moodley and that of Logie, the issue must therefore be decided on the basis of the credibility of the witnesses. That declaration, according to Mr Purdon, is a grave misdirection and is a reviewable irregularity, and for that he referred me to the following authorities, **National Employers General Insurance Company v Jagers** 1984 (34) SA 434 (E at 440), Adv PJ Pretorius SC; Assessing Credibility in Labour Arbitrations, 1990 (unpublished paper). I note here that no copy of this "*unpublished paper*" was made available to the Court.

[11] Mr Purdon made the most of what he called the contradictions in the evidence of Logie, in an endeavour to demonstrate how dishonest Logie was, particularly insofar as she was quite ready to make false and perjurious statements in an endeavour to conceal her relationship with Moodley. Mr Purdon submitted that there must be credence lent to Moodley's version that he, Moodley, had had an illicit love affair with Logie, which would

explain the animus that existed between Logie and Moodley that led Logie to falsify facts to Illovo. I will deal, in context, with this evidence hereinbelow.

[12] In dealing with the evidence, Mr O'Connell argued that insofar as I should look to the evidence to determine the issues of whether I should review and set aside the arbitrator's award, it is really the evidence of Moodley and Logie that I must apply my mind to. He conceded that the versions are mutually destructive. Firstly, he submits, Logie claims to have received an order for grooving inserts in the presence of Moodley, knowing that to fill the order would be almost impossible through her conventional suppliers, who required six weeks and a minimum of twenty-four (24) inserts. She was offered a stock of these grooving inserts by Moodley from whom she later purchased some twenty-two (22) inserts on various occasions.

[13] Moodley on the other hand, denies any knowledge of these transactions, contending that they are a total fabrication borne of Logie's desire for revenge because he had terminated a sexual relationship with her. Mr O'Connell argued that I should be persuaded by the evidence of Logie because there is some logicity in the way her testimony finds some support from particularly the undisputed evidence of Hughes. It was not Logie who had initiated the complaint by Hughes. Logie herself had given the information because she had been confronted. Further, the termination of the relationship between Moodley and Logie occurred on

the evening of the 14th of August 2000, a week after Logie had been confronted, and had given the requisite information. Mr O'Connell therefore argues that it would be illogical to allege that Logie turned the tables on Moodley because Moodley had terminated the sexual relationship between the two of them. I agree.

[14] O'Connell further argued that even though it is clear on the evidence that Logie changed her version with regard to the delivery of the grooving inserts to her premises (as opposed to her later version that she had received those directly from Moodley), it should be borne in mind that at the time she gave evidence she was highly strung, having been confronted by the investigator and his assistant, Reyersbach; her child had been critically injured; she had just avoided being incarcerated for failing to turn up for a traffic fine, had been threatened by Reyersbach with jail and, in the light of all of this, so argued Mr O'Connell, it would not be surprising that her initial reaction would be to distance herself from the obvious and sinister feature of the transaction, namely the receipt of the grooving inserts from the Applicant directly.

[15] Mr O'Connell argued that it was noteworthy that she changed her version of her own accord despite the risk of exposing herself to statutory perjury, and with no apparent compulsion to do so. (If one looks at the conduct of Moodley, on the other hand, as indicated above, it was only when it was clear that he had no answer to facts put to him, or when it was clearly demonstrated that he was lying that Moodley would change his story.)

[16]In his analysis of the Applicant's version, Mr O'Connell submitted that there are inherent improbabilities in the version of Moodley. Not only did he lie on several occasions, by his own admission to the investigators; he failed dismally to explain why he raised the alleged sexual affair between him and Logie very late. He did not tell the investigators at the disciplinary enquiry or his General Manager about this alleged affair because, according to him, he was worried about his wife finding out.

[17]I find this explanation by Moodley very thin particularly in view of the fact that it should have been clear to him that if he was not able to give an explanation for his conduct, he was going to be dismissed, as indeed he was, because there was no explanation forthcoming. I agree with Mr O'Connell that his suggestion that he failed to provide an explanation because he thought he might get away only with a warning is risible.

[18]I am satisfied that there is really nothing to choose between the versions of Moodley and Logie. I am persuaded by Mr O'Connell's argument that where a version had to be preferred in the light of the probabilities, it is the version of Logie that should be preferred. The question, however, is whether there was anything irregular in the manner in which the arbitrator is accused of having approached the evidence. The allegation by Mr Purdon was that the arbitrator decided the conflict in the versions by first determining who of the two witnesses was credible whereas, apparently

on Mr Purdon's view, she ought to have had regard to the probability before doing so.

[19] I have tried to understand the criticism against the manner in which the trier of fact approached the evidence. I am finding difficulty in appreciating the critical difference that Mr Purdon was trying to outline. There does not seem to be a firm ground on which his conclusion can be based if one reads the plain language in which the award is written. How in the reading of the flow of that language a conclusion is drawn that the arbitrator first determined the credibility of witnesses before determining what the probabilities were, it seems to me, is to strain the language used by the arbitrator in her award.

[20] I would sooner go with the view that the Arbitrator determined both the credibility of the witnesses and the probabilities, together, in a manner that led her, faultlessly in my view, to the conclusion that the probabilities are such that the evidence of Logie must be preferred to the evidence of Moodley because Logie came across as the more credible witness than Moodley.

[21] 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. She was steeped in the atmosphere of the proceedings before her. I cannot see that I can interfere merely on an

assessment of whether she misdirected herself by reason of the fact that she considered whether the witnesses were credible before determining what the probabilities were in the light of their testimonies.

[See: **Rex v Dhlmayo and Another** 1948 SA 677 AD.]

[22]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 kilt 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. I have not been able to find that there is anything glaringly irregular in the manner in which she not only approached the evidence but also expressed the manner in which she made the assessment, and concluded that one of the two bad versions is to be preferred.

[23]In view of the fact that I am persuaded that the evidence of Logie was properly assessed by the arbitrator, I cannot fault her decision that the dismissal was procedurally and substantively fair. If, as the arbitrator did, the evidence of Logie demonstrated that Moodley was engaged in dishonest practices as an employee of Illovo, and it follows that the trust relationship between Moodley and Illovo could not prevail, it seems to follow, therefore, that the proper outcome, in the circumstances, would be the dismissal of Moodley. It therefore becomes unnecessary for me to determine whether the arbitrator did or did not rely on the so-called

reasonable employer test in coming to her conclusion about the sanction that was proper to be imposed.

[24] Whereas it has been strenuously argued on behalf of Moodley that there was nothing wrong with soliciting or receiving loans from suppliers, I am satisfied that the arbitrator properly applied her mind to the implications of an employee in the position of Moodley who would seek loans from suppliers. It is clear to me that this was an untenable position. When one regards the evidence of Nair, namely, that he believed that refusal to grant the loans would prejudice his position with Illovo, it is quite clear that this was conduct which was totally unacceptable and insofar as the arbitrator found it to be so, it is, in my considered view, a firm basis on which a conclusion could have been arrived at that that conduct, in and of itself, was conduct warranting the sanction of dismissal. This would be over and above the dismissal sanction based on her finding of dishonesty by Moodley in his dealings with Tool Trade as alleged already. I am stronger in this view when regard is further had to the evidence of Naidoo [see paragraph above].

[25] Moreover, in my reading of the record, I have not been persuaded that the arbitrator has committed any misconduct in relation to her duties as an arbitrator, nor were there instances indicated to me that gross irregularity has been committed insofar as she conducted the arbitration proceedings, nor did she exceed her powers as Arbitrator. These, as indicated in Section 145 of the LRA hereinabove, are the only grounds on

which I can interfere with the award.

[26] Since I have found that there is no argument that was placed before me that indicates violation of the provisions of this Section, I am also consequently unable to find that any proper grounds of review have been put before me on the basis of which I can interfere with the Arbitrator's award. I therefore decline Mr Purdon's invitation for me to do so. In the result, and for all the reasons articulated in this judgment, the application is dismissed with costs.

D B NTSEBEZA

Acting Judge of the Labour Court of South Africa

Date of Hearing: 8 APRIL 2003

Date of Judgment: 12 December 2003

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