
SOUTH AFRICA / JUDGMENT

Communications Workers Union and Another v Commission for Conciliation and Others (JR1482/11) [2014] ZALCJHB 329 (22 August 2014) [2014] ZALCJHB 329

COURT

Labour Court Johannesburg

BEFORE

Leppan

CASE / FILE NUMBER

JR1482/11

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JR 1482/11

In the matter between:

COMMUNICATIONS WORKERS UNION

First Applicant

I KHALA

Second Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

ADV A H SWANEPOEL N.O.

Second Respondent

TELKOM SA LIMITED

Third Respondent

Heard: 10 JULY 2014

Delivered: 22 AUGUST 2014

Summary: Review application; substantive and procedural fairness; interpretation of employer's disciplinary code; conduct of employee subsequent to dismissal may have a bearing on the outcome of an arbitration award.

LEPPAN, AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 ("LRA") to review and set aside the arbitration award dated 3 May 2011, issued by the Second Respondent, under case number GAJB 2276-11 ("the Award"). The application is opposed by the Third Respondent.

[2] The grounds of review raised by the Second Applicant relate to both substantive and procedural issues. I shall address the former grounds of review, subsequent to which I shall address the procedural issues.

[3] The essential substantive issues in dispute are the following:

3.1 whether the Second Respondent failed to appreciate and apply her mind to the fact that the disciplinary code of the Third Respondent imposed a primary sanction of a final warning as opposed to a dismissal for the misconduct that is the subject of this review application; and

3.2 whether the Second Respondent failed to take account of the evidence of the Applicant regarding a permission request for leave to attend to Shop-Steward-related duties.

[4] The procedural grounds of review raised by the Second Applicant are as follows:

4.1 that the Second Respondent committed an irregularity by allowing the Third Respondent's representative to testify for the Third Respondent at the arbitration hearing;

4.2 that the matter was set down for conciliation and the Second Respondent committed an irregularity by proceeding to arbitrate the dispute;

4.3 that the Second Respondent failed to keep a proper record of the proceedings.

[5] I will address the substantive grounds of review prior to the procedural issues raised by the Second Applicant.

[6] I am also aware of two further ancillary factors, namely:

6.1 the demeanour and behaviour of the Second Applicant throughout the arbitration proceedings; and

6.2 the alleged misjoinder of the Communications Workers Union ("CWU") as party to these proceedings.

The review

[7] The Second Applicant instituted its review application on 30 June 2011, in which the Second Applicant requested the following relief:

7.1 the Award issued by the Third Respondent be reviewed and corrected or set aside;

7.2 that this Court deal with this matter in a manner it is empowered to do so by section 158 of the LRA;

7.3 in the alternative, referring the dispute back to the First Respondent to be placed before a different Commissioner for an arbitration de novo;

7.4 directing that the Respondents who chose to oppose this application pay the costs of this application; and

7.5 further and/or alternative relief.

Findings by the Second Respondent

[8] The Second Respondent, who was required to determine the substantive and procedural fairness of the dismissal, issued an award which found that the dismissal of the Second Applicant was in both respects fair.

[9] This Court must determine whether the Second Respondent maintained a procedural standard and reached a substantive conclusion that a reasonable decision maker would reach in casu.

Brief Background

[10] The Second Applicant was employed as a Technician Officer and was a shop steward of the First Applicant. He was dismissed after being found guilty of the following charge in terms of clause 2.17 of the Third Respondent's disciplinary code:

‘Insubordination by the refusal of an employee to obey reasonable and/or lawful instruction (note 4).’[1]

[11] This charge indicates that it must be read in conjunction with "note 4"[2] of the Third Respondent's disciplinary code, which further stipulates that:

‘if the offence is of a serious nature then dismissal for a first offence may be an appropriate sanction.’[3]

[12] Furthermore, the Third Respondent's actual charge was couched in a manner which implied the severity of the offence, namely:

'Misconduct: Insubordination in that on 2010/07/30 you were told not to attend a workshop for 2-6/08/2010 and 10-13/08/2010 and 17-20/08/2010 but you defied that and attended.'[4]

[13] On 16 September 2010, the Second Applicant was handed a charge sheet reflecting the charge stated at paragraph [12] above.[5] The disciplinary hearing commenced, subsequent to several postponements,[6] on 18 November 2010 and was concluded after a further postponement on 10 January 2011.

[14] After the Second Applicant was dismissed, he was granted an opportunity to review the decision in terms of the Third Respondent's internal disciplinary procedure; instead the Second Applicant referred the dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA") on 11 January 2011.[7]

[15] The dispute was set down for con/arb on 28 March 2011 and was combined with another pending dispute in which a certificate of outcome had already been issued.

The arbitration hearing and the Award

[16] It is apposite to acknowledge the detail and length to which the Second Respondent applied her mind in determining the matter:

16.1 there was a detailed account of the evidence and arguments made by both the Third Respondent and the Second Applicant;

16.2 the Second Respondent detailed the issues that needed to be considered, both from a procedural and substantive perspective;

16.3 there was a clear analysis of the evidence, which the Second Respondent addressed holistically; and

16.4 lastly, the Second Applicant made reasonable factual findings and applied sound legal arguments.

[17] The Second Respondent also had the benefit, which I do not, of observing the examination-in-chief and cross-examination of each witness and making credibility and probability findings particular to the demeanour of each witnesses' testimony and the consistency thereof.

The appropriate test for review

[18] In terms of a review application, one must have regard to both the statutory and jurisprudentially established tenets of reviews of awards to determine whether the Second Respondent's decision fell short of the 'reasonable standard'.

[19] The current test for review was laid down by the Constitutional Court in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[8] where the test formulated was one based on the question: '[i]s the decision reached by the commissioner one that a reasonable

decision-maker could not reach?'. This test led to the coalescence of the grounds of review contained in section 145 (2) of the LRA and the Constitutionally enshrined requirement of administrative action which is lawful, reasonable and procedurally

fair.

[20] In *Sidumo* at paragraph 79, it was concisely stated that:

'In terms of the LRA, a Commissioner has to determine whether a dismissal is fair or not. A Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair.' (own emphasis).

[21] The case of *Herholdt v Nedbank Ltd (Congress of South African Trade Unions Amicus Curiae)*,^[9] also makes mention of the legislature's intention of rejecting the possibility of appeals and selecting the narrowest possible grounds

of review as the basis for challenging arbitration awards.^[10] This extremely high standard for setting aside an award is to ensure the speedy and cost effective resolution of labour disputes. It is apt to mention that employees and employers alike need to realise that a review of an award is not to be taken lightly nor should such a legal avenue be regarded as a mere default step subsequent to an adverse award being issued by the CCMA or relevant accredited bargaining council. Further, employees should seek to exhaust internal remedies which exist through an employer's disciplinary

process prior to approaching the CCMA or this Court.

[22] *Herholdt* neatly summarises the test for review, as follows:

'A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator

must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be found to be unreasonable

if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.'^[11]

[23] The case of *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commissioner for Conciliation, Mediation and Arbitration and Others*,^[12] reinforces the notion emphasised in *Herholdt*, where *Waglay JP* held that:

'What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the

reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground of review. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and

reasonable – there is no room for conjecture and guesswork.’[13] (own emphasis).

[24] A reviewing Court must have regard to the evidence led at the arbitration hearing in order to probe whether the outcome of the arbitration award was reasonable. However, such reviewing Court must not stray into the realm of an appeal and seek to set aside an arbitration award because it differed with the outcome and could have determined a different result.

Conduct by Second Applicant post-disciplinary hearing

[25] A factor which has become relevant, of which commissioners may take account, relates to the conduct of an employee during arbitration proceedings. Where an employee does not show remorse for his or her actions or conducts himself or herself in an abrasive manner, such conduct may be considered by the commissioner and could impact a finding made.

[26] The case of *First National Bank, a Division of Firststrand Bank Ltd v Language and Others*[14] emphasises this legal principle where it held that the conduct of the employee throughout the litigious process was devoid of remorse and was aggressive and vexatious, the result being that the trust relationship had been shattered, and the employer could not be

expected to re-employ the employee.[15]

Analysis

[27] I wish to dispense with the contention of the Third Respondent that the First Applicant should not have been joined in these proceedings.[16] If a plea for misjoinder is called, it should be raised by way of a point in limine. Further, it is clear that the joinder of the First Applicant is one of justified convenience which, as the trade union to which the Second Applicant is a member and shop steward, had an interest in the outcome of the arbitration process and this review.

[28] I shall now address each ground of review, outlined at paragraphs [3] and [4] above separately and thereafter make an order as to the application before me.

Assessment of substantive grounds of review

[29] In assessing the substantive grounds of review raised in respect of paragraph 3.1 above, I must determine whether the rule contravened by the Second Applicant warranted dismissal notwithstanding that the disciplinary code, at first glance, indicates a final warning and not dismissal.

- [30] From a perusal of the award it is clear that due regard was had to the Second Applicant's contravention of the rules established by the Third Respondent and that, despite numerous interventions arranged at the expense of the Third Respondent, the Second Applicant failed to correct his behaviour. The Second Respondent also took into account that the Second Applicant showed "no remorse or insight into the wrongfulness of his behaviour".[17]
- [31] It is correctly highlighted in the Third Respondent's heads of argument at page 3, that the disciplinary code expressly warrants dismissal for insubordination where same is of a serious nature.
- [32] The charge lays bare a series of consecutive contraventions perpetrated by the Second Applicant, where it was alleged that he persistently did not follow the reasonable and lawful instructions issued by the Third Respondent. This indicates the severity of the allegations of breach of the Third Respondent's disciplinary code by the Second Applicant.
- [33] The evidence before the Second Respondent indicated that the Second Applicant was a serial offender over a period of almost 4 (four) years, which period was plagued by "chronic absenteeism". He simply defied instructions and became a "law unto himself", full knowing that he was not at liberty to determine when he could not take time off to attend to trade union duties. What is worse is that he was often counselled and was previously placed on a final written warning that was later modified because he undertook to give proper advanced notice of any pending trade union functions that he may need to perform in future. The latter evidence depicts how that undertaking was disregarded by the Second Applicant; worse still, he had no regard for the adverse consequences of his blatant decision not to come in line with his employer's requirements. His behaviour was prejudicial to the Third Respondent. What is troubling is that the Second Applicant's last spate of absence traversed a period of almost three weeks. His attorney sought to argue that because the final warning had expired, he should have received another final warning for his misconduct. This disregarded the Second Applicant's history of delinquent behaviour and, more importantly, there was no evidence to suggest he would reform and return to the workplace a responsible person.
- [34] From the above, it is clear that the sanction of dismissal imposed on the Second Applicant by the Third Respondent and the Second Respondent's decision to uphold such sanction is one that a reasonable decision-maker would have reached given all the available evidence before her.
- [35] In terms of the second ground of review, the Second Respondent is alleged to have failed to take account of the evidence of the Second Applicant regarding a permission request for leave to attend to shop-steward-related duties.

- [36] The Second Applicant conceded that a manager, Mr Scriven, requested that he wait until he received an official notification prior to attending a series of shop steward meetings. Furthermore, there exists, in the absence of any counter-evidence adduced by the Second Applicant, documentary evidence that the notice from the CWU was sent to the Third Applicant on 30 July 2010.[18]
- [37] One must also be cognisant of the email string between the employees of the Third Respondent, which indicated that the notice was received on 30 July 2010 and that such receipt was on short notice in terms of the Second Applicant's previous undertaking to his employer.
- [38] In the absence of any evidence to the contrary, the Second Respondent's decision to accept it as notice from the CWU requesting the Second Applicant's attendance at certain meetings in the period in question was reasonable and legally correct. Moreover, it must be emphasised that although a shop steward owes a duty to his or her union, the primary duty is owed to the employer.
- [39] With regard to the procedural grounds of review raised by the Second Applicant, I deal with such grounds below.
- [40] From its inception, CCMA proceedings encompass a relatively informal and accessible process.[19] Further, in the case of *C/K Alliance (Pty) Ltd t/a Greenland v Mosala*, [20] the Labour Court held that as a general rule, witnesses are required to wait outside Court until they have testified. The reason is to ensure that the version of a witness should not be influenced by what an earlier witness may have testified. This rule has not always applied in arbitration proceedings. Molahlehi J stated that:
- ‘... It seems to me the appropriate approach is that Commissioners are duty bound to warn potential witnesses or those that may have been identified as such of the possible consequences of their presence during the testimony of other witnesses... The danger of excluding a witness simply because he or she sat in during the testimony of others is that such an approach prejudices the testimony
- of such a witness. It may well turn out that such a witness would have testified on an issue which those before him or her have not testified on. It may also be that the witness is so honest that he or she is willing to go against those who are supposed to be on his or her side.’[21]
- [41] Witnesses ought not to be precluded from testifying merely because they have heard the earlier evidence tendered, especially, if they are called to testify on aspects not dealt with by earlier witnesses, as was the case in the arbitration proceedings before the Second Respondent. In appropriate cases, a trier of fact may assess the witness's evidence to ensure that his or her testimony is not influenced by the versions of earlier witnesses.

[42] The Second Applicant contended that the matter should not have been arbitrated as one of the two disputes had not yet been conciliated. In terms of the record before me, at pages 9 and 11, it is clear that the dispute joined with this matter had been conciliated and that a certificate of outcome of the non-resolution dispute was issued and same had been referred to arbitration.

[43] It is correct that an unfair dismissal dispute was set down for a con/arb on 15 February 2011. The Third Respondent objected and the matter was not arbitrated and a request for arbitration filed with the CCMA on that same date. On 28 February 2011, the parties were notified that another unfair dismissal dispute had been set down for a con/arb on 28 March 2011. This is the dispute to which the Second Respondent had been allocated. Again, the Third Respondent objected to con/arb. However, on 28 March 2011, it was found that both disputes concerned the Second Applicant's alleged unfair dismissal. I reiterate that one of those disputes had been conciliated, a certificate of non-resolution issued and a request for arbitration made. Accordingly, the parties agreed to consolidate these two disputes and the Third Respondent dropped the objection in order to proceed to arbitration. This much is evident from the record

of proceedings which stated:

‘The matter has been joined with the matter 1034/11... The matter is set down... but we have decided to continue with the arbitration since a certificate was already issued in the matter on 15 February 2011.’

[44] At the hearing before this Court, the Applicants' attorney tried to argue differently that the record was deficient to demonstrate the Second Applicant's consent and that he was prejudiced because the arbitration had gone ahead. However, the Second Applicant rejected the repeated invitations of the Third Respondent to proceed to further reconstruction of the transcript of evidence. The Applicants' attorney again recorded the refusal at the hearing before me. Accordingly, the Second Applicant made a conscious decision to proceed and cannot later seek to complain about any deficiency in respect thereof.

[45] Lastly, the Second Respondent had due regard to the need for the integrity of the proceedings and was amenable to the reconstruction of the record. In the case of *Fidelity Cash Management Services (Pty) Ltd v Muvhango NO and Others*,^[22] Stelzner AJ held that where a body on review fails to produce a complete record, an applicant must try to reconstruct the evidence and where the applicant fails to make a reasonable effort to do so, the matter may be decided on the basis of an incomplete record filed. Further, in the case of *Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and Others*,^[23] this Court held that an award should not be set aside or be remitted simply on the basis that the record of proceedings may be incomplete.^[24] I am of the view that the Third Respondent went to great lengths to ensure that the record was of a standard and detail that would allow this Court to make a considered decision on review. The Third Respondent's repeated invitations to proceed with further reconstruction fell upon deaf ears. The Third Respondent could not

be expected to do more.

- [46] The sentiments and precedential tenets outlined in paragraph [44] above also reflect the purpose and rationale underpinning reviews in terms of the overarching test of reasonableness laid down by Sidumo.

Concluding Remarks

- [47] The sanction of dismissal imposed by the Third Respondent and upheld by the Second Respondent was appropriate in the circumstances due to two factors. First, gross and severe insubordination is a serious offence which is fatally detrimental to the trust relationship between the Third Respondent and the Second Applicant. Second, the sanction of dismissal is expressly permitted by the Third Respondent's

disciplinary code.[25]

- [48] Further, the conduct of the Second Applicant subsequent to his dismissal and during the arbitration proceedings was destructive of the trust relationship between the parties.[26] The Second Applicant's conduct demonstrated a blatant disregard for the authority of the Third Respondent, and infringed upon its need to ensure that it has a workable relationship with its employees, and the fact that the Second Applicant's primary duty is owed to his employer.

- [49] The Second Respondent applied her mind to the relevant factors and made sound and reasonable conclusions based on the evidence before her. As a consequence, I make the following order.

Order

49.1 The application to review the decision in casu is dismissed with costs.

Leppan, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the First Applicant: Communications Workers Union ("CWU")

For the Second Applicant: I Khala

Instructed by:

Faku Attorneys

For the Third Respondent: Advocate G Hulley SC

Instructed by:

Muserumule Inc.

[1] Record at page 119.

[2] Record at page 122.

[3] Ibid.

[4] Record at page 109.

[5] Pleadings Record at page 9.

[6] Request further evidence as to why these postponements took place – the Third Applicant states that they are as a result of the Second Applicant.

[7] Record at page 8.

[8] 2008

(2) SA 24 (CC) at para 110.

[9] 2013

(6) SA 224 (SCA).

[10] Ibid at para 9.

[11] Ibid at para 25.

[12] (2014) 35 ILJ 943 (LAC).

[13] Ibid at para 15.

[14] [2012] 5 BLLR 478 (LC).

[15] Ibid at para 30. See also: Zilwa Cleaning and Gardening Services CC v CCMA and Others (2010) 31 ILJ 780 (LC).

[16] At paragraph 6.2 of the opposing affidavit the Third Respondent meant to state First Applicant and not First Respondent.

[17] Pleadings Record at page 21(m).

[18] pp. 22 – 23 of the Record.

[19] Explanatory Memorandum, Wallis AJ (as he was then) in the case of Shoprite Checkers (Pty) Ltd v Ramdaw 2001

(3) SA 68 (LC).

[20] 2009 1 BLLR 52 (LC).

[21] Ibid at para 10.

[22] [2005] 8 BLLR 783 (LC).

[23] (2004) ILJ 1286 (LC).

[24] Nathaniel v Northern Cleaners Kya Sands (Pty) Ltd and others, para 16.

[25] See para 10.1 and para 11.

[26] See paras 34–35.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2014/329.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/communications-workers-union-and-another-v-commission-unknown-topic-alcjhb-2014>

Prepared on 14 October 2026 · Esheria