
SOUTH AFRICA / JUDGMENT

Friends Bakery CC v Commission for Conciliation Mediation And Arbitration and Others (JR1637/10) [2014] ZALCJHB 369 (30 September 2014) [2014] ZALCJHB 369

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhemaje

CASE / FILE NUMBER

JR1637/10

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1637/10

THE FRIENDS BAKERY CC

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION

First Respondent

NEMUSHUNGA THOMAS NO

Second Respondent

SIBANDA KING

Third Respondent

Heard: 11 October 2013

Delivered: 30 September 2014

TLHOTLHALEMAJE, AJ

Introduction:

- [1] This is an application brought in terms of section 145 (1) read with section 145 (2) (b) and section 158 (1) (g) of the Labour Relations Act. The Applicant sought an order to review and set aside an award issued by the Second Respondent (Commissioner) on 16 June 2010 under case number GAJB39542-09. In his award, the Commissioner found that the dismissal of the Third Respondent was substantively fair but procedurally unfair. The Applicant was ordered to pay to the Third Respondent, compensation in the amount of R55 200.00. The Third Respondent opposed the application.
- [2] Subsequent to the review application being launched, the Third Respondent brought an application in terms of Rule 11 of the Rules of this Court, to seek an order that the main application be dismissed. That application was also opposed. A further point in limine was raised by the Third Respondent to the effect that the founding affidavit in respect of the main application was not properly deposed to and as such fell to be struck out. This preliminary point was however abandoned .

The Rule 11 application:

- [3] The award was issued on 16 June 2010. The Applicant filed its Notice of Motion in terms of section 145 of the LRA on or about 28 June
2010. The founding affidavit in respect of the review application was filed on 2 August 2010 whilst the Rule 7A (6) Notice was filed on 1 July 2011. The basis for the application to dismiss was that the Applicant had failed to make available the transcripts and record of the arbitration proceedings, and that the delay of 237 days between when the review application and the Rule 7A (2) (b), 7A (3) & 7
- (9) of the Rules was filed was excessive.
- [4] The Third Respondent further contended that there was a period of 105 days from the date on which the review was launched to the day on which the application to compel the CCMA to file a record was made. It was further contended that the Applicant failed to show what steps it took in between the filing of the review application and the Application to compel in order to procure the record of proceedings. The Third Respondent further pointed out that there was a delay of 118 days between the Notice to compel and the application to dismiss. To this end, it was submitted that the delay had the effect of reducing the time period within which the review can be heard, and that the Applicant never had serious intentions of pursuing the matter, and had merely lodged the review application to frustrate the Third Respondent.

- [5] The Applicant's response was that the review application was filed timeously and that the CCMA had only served and filed the audio record of the arbitration proceedings in or around January 2011 after an application to compel was brought by the Applicant on 3 January
2011. The transcribed record and notice in terms of Rule 7A (8) (b) was filed on 1 July 2011. The Applicant further submitted that the delay was not of its own making and that the Third Respondent had not suffered any prejudice as a result of the delay.
- [6] In considering whether to dismiss an application in terms of Rule 11 of the Rules of this Court, the Court in exercising its discretion will take into account the prejudice caused as a result of the delay and the desirability of expeditiously finalising a matter[1]. Furthermore, the Court will be guided by considerations of interests of justice, the fairness to dismiss the application, and the merits of the main application sought to be dismissed[2].
- [7] Taking the above principles into account, it is acknowledged that the Applicant had timeously filed its review application. However, the Applicant has not explained the delay of about 200 days between the filing of the review application and the ultimate filing of the record and notice in terms of Rule 7A (8) (b) of the Rules of this Court. The delay is indeed excessive. Further taking into account that the Applicant had indeed taken steps to secure the audio recording and the transcript by way of an application to compel, it should be concluded that the delay in prosecuting the review application was clearly not caused solely by the Applicant and in this respect, there is a reasonable explanation for the delay. I have further taken into account the prejudice to be suffered by the Applicant is its main application was to be dismissed. In the light of these considerations, the importance of the main application to the parties and the merits of that application, it is my view that it would not be in the interests of justice to grant the Rule 11 application.

The review application: Background:

- [8] The Third Respondent was employed as a sales and marketing personnel and driver with effect from 1987. He was dismissed on 23 November 2009 following upon a disciplinary enquiry into allegations of gross insubordination and threatening behaviour towards management. Aggrieved at the sanction, the Third Respondent referred a dispute to the CCMA. Following the non-resolution of the dispute at conciliation, the matter came before the Commissioner for arbitration.

The arbitration proceedings:

- [9] The evidence of the Third Respondent as summarised by the Commissioner was that on 11 November 2009, he was sent to make deliveries to a customer. Upon reaching the customer's premises in Bedfordview, he had discovered that he had the wrong order and was

sent back. When he arrived at the Applicant's premises, the Applicant's Director and his superior, Joseph Senanis accused

him and his colleague in a shouting manner of wasting diesel and had referred to him repeatedly as a 'monkey'. In a fit of anger, the Third Respondent had told Senanis that he would 'break his teeth and nose' for calling him a 'monkey'.

Senanis had then laid a criminal charge at the local police station. The Third Respondent had handed himself to the police when he knocked off and was informed to appear in court on 16 November 2009.

[10] The Third Respondent had appeared in court as instructed, and it appeared that the criminal case against him was not pursued. He had then reported for duty and was subsequently subjected to a disciplinary enquiry leading to this dispute. Senanis during the arbitration proceedings had denied calling the Third Respondent a 'monkey'.

The arbitration award:

[11] With regards to procedural unfairness, which is the main issue in the review application, the Commissioner concluded that the evidence of the Third Respondent to the effect that he was only notified on the date of the hearing being 17 November 2009 that the enquiry would take place on that day was not disputed. The Third Respondent was accordingly only given notice of about two hours of the intended disciplinary hearing. The Commissioner had further taken into account that the Third Respondent was a lay person and was not aware of his rights. Had the Third Respondent been aware of his rights, the Commissioner had reasoned, he would have raised the issue of not being afforded sufficient time to prepare his defence. The Commissioner concluded this issue by stating that[3]:

"It is my view that the procedure was defective and the defects compromised the applicant's right to prepare his defence properly. I do not believe that the applicant could be expected to prepare his defence within a space of about two hours in a case of allegations of this magnitude. I therefore find that the dismissal of the applicant was procedurally unfair."

[12] In coming to the conclusion that the Third Respondent was entitled to six months' compensation, the Commissioner took into account the fact that he was 59 years old and about to reach retirement age; that he would be unemployable, and that the sanction of dismissal was harsh.

The grounds of review and evaluation:

[13] It is now accepted that a reviewing Court faced with an application in terms of section 145 of the Labour Relations Act, and where a defect in arbitration proceedings is alleged, is required to decide whether the Commissioner committed misconduct, gross irregularity or exceeded his powers within the meaning of section 145 (2) (a) of the LRA. In examining the role of the reviewing court faced with such applications, the Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*[4] held:

“In a review conducted under s145 (2)(a)(c) (ii)[5] of the LRA, 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 one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator’s award is improper as the review court must necessarily 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.”

[14] The only issue for determination in the absence of a cross-review is whether the decision of the Commissioner that the dismissal was procedurally unfair, and the relief he had granted, is one that a reasonable decision maker could have come to on the material placed before him[6]. As is apparent from his award, the Commissioner’s conclusions on procedural unfairness were based mainly on one consideration, i.e, that the Third Respondent was not given sufficient notice to attend the disciplinary enquiry. The consequences of such short notice were that the Third Respondent as a lay person was not aware of his rights and as such did not have sufficient time to prepare for his defense. Furthermore, the Commissioner had lamented the fact that even though the issue of representation was raised, it did not appear from the internal disciplinary proceedings that the Third Respondent was asked whether he needed representation.

[15] Section 188 (2) of the LRA enjoins any person considering whether or not the reason for a dismissal is fair or whether or not the dismissal was effected in accordance with a fair procedure to take into account Schedule 8 - Code of Good Practice: Dismissal.

Item 4 (1) of the Code provides guidelines which a Commissioner should take into account in considering procedural fairness of the dismissal[7]. The requirement that an employee should be given sufficient notice of a disciplinary enquiry serves a number of purposes, including to enable the employee to fully prepare for the enquiry, to formulate a proper defense against allegations, and to get representation. The issue of representation is even more pertinent in circumstances where the employee facing serious allegations of misconduct is a lay person and is clearly not familiar with disciplinary processes. It follows therefore that unless an employee is afforded a reasonable period of time to consider the accusations against him, to obtain assistance if required, and to prepare his defence, the employee will have been denied the right to a fair procedure.

[16] In its grounds of review, the Applicant submitted that the Third Respondent at no stage during the proceedings raised the issue of time to prepare for the internal enquiry, and that the Commissioner was not entitled to mero moto, pronounce on that matter as it was not raised by the parties. In further contending that the Commissioner had erred in his findings, the Applicant had made reference to the fact that in the internal disciplinary enquiry, the Third Respondent had indicated that he was ready to carry on with the enquiry and speak for himself.

- [17] Central to the Commissioner's finding was that the Third Respondent was given notice of less than two hours to appear at the enquiry. This fact was not placed in dispute. As already indicated above, short notice to attend a disciplinary enquiry invariably deprives an employee of a fair hearing, especially in circumstances identified by the Commissioner which included that the Third Respondent was a lay person[8] and not aware of his rights. Further consequences that flowed from this short notice and the fact that the Third Respondent was a lay person were that the latter could not have raised the issue of notice or lack of sufficient time to prepare as a complaint.
- [18] The Applicant contended that these issues were never raised during the arbitration proceedings. This contention is erroneous if not misleading in that the Third Respondent raised the issue about the non-presence of an interpreter and representative at the enquiry[9] In my view, the conclusion reached by the Commissioner that this procedural defect had compromised the Third Respondent's right to prepare his defence properly in the face of the serious allegations against him is unassailable.
- [19] Given the circumstances of this case, once it was established that the Third Respondent was not given sufficient notice, it is the consequences of that procedural defect that are important. It is immaterial in such circumstances that an employee once in a disciplinary hearing can state that he is ready to proceed unrepresented. An employee, faced with such serious allegations as in this case, was clearly entitled to more than two hour's notice of the enquiry.
- [20] The above conclusion is based on the fact that the Third Respondent, by virtue of the short notice, had not had time to properly consider his options and the implications of agreeing to carry on with the enquiry under those circumstances. The Third Respondent was a lay person as pointed out by the Commissioner, and did not have an interpreter in the internal enquiry. It was also common cause that the Third Respondent had never participated in a disciplinary enquiry before. In these circumstances, notwithstanding the fact that the Third Respondent had not raised these issues at the internal enquiry, it cannot be concluded that the Third Respondent could possibly have been accorded a fair hearing or that the Commissioner had erred in coming to the conclusion that the dismissal was procedurally unfair.
- [21] A point raised by both parties albeit for different reasons was that in considering the amount of compensation, the Commissioner had come to the conclusion that the sanction of dismissal was harsh given the Third Respondent's 22 years of service, his clean disciplinary record and the fact that he may have been provoked. Significantly, these issues were dealt with by the Commissioner within the context of his analysis surrounding substantive fairness.
- [22] In the light of the above, one of the grounds of review was that the Commissioner had erred in bringing the severity of sanction imposed under the heading of procedural fairness. Guidance in regards to substantive fairness of the dismissal is found in Item 7 of the Court.

More appropriately in regards to the issue of sanction, item 7 (iv) includes a consideration of whether a dismissal was an appropriate sanction for the contravention of the rule or standard. In these circumstances, it is apparent that the Commissioner clearly misconstrued the test for determining procedural fairness, and it follows that his conclusions in regards to the amount of compensation cannot be reasonable as he took into account factors not pertinent for the purposes of awarding compensation for procedural unfairness.

[23] Section 194 of the LRA provides:

‘Limits on compensation.- (1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.’

[24] In the light of the above provision, Commissioners have a discretion to award an amount of compensation that is "just and equitable in all the circumstances" within the limit. "Just and equitable" within the context of procedurally unfair dismissals imply a fair amount of compensation considering the fact that such compensation is nothing more than a solatium or solace for being deprived of a procedural right to a fair hearing. In further considering the quantum of compensation, it should always be borne in mind that any such quantum should not be punitive[10].

[25] The Labour Appeal Court in *Kemp t/a Centralmed v Rawlings*[11] has considered how a reviewing court should deal with the discretion exercised by an arbitrator in terms of section 194(1) of the LRA, as follows:

“When the discretion that is challenged is a discretion such as the one exercised in terms of s 194(1) the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision maker adopted an incorrect approach.”

[26] As already indicated elsewhere in this judgment, the Commissioner adopted the wrong approach in considering the amount of compensation

as he had clearly blurred the distinction between the factors to be taken into account in exercising a discretion to award a specific

amount of compensation in terms of section 194(1) of the LRA, and those mitigating factors normally taken into consideration when

deciding on the appropriateness of the sanction.

[27] The question however remains whether the review court should by necessity interfere with the amount awarded. It is my view that other factors to be taken into account in awarding compensation for procedural unfairness entails the gross nature of the procedural defect complained of. As already stated, a failure to afford an employee sufficient notice in respect of a disciplinary enquiry invariably results in the employee being deprived of a fair hearing. In this case as was correctly pointed out on behalf of the Third Respondent, the enquiry was implemented with inappropriate haste. The consequences of the haste with which the Applicant intended to dispense of the hearing were pointed out on behalf of the Third Respondent as follows:

27.1 The Third Respondent was not represented nor did he have an opportunity to prepare or consult with a representative of his choice. Despite the Applicant's contentions that the Third Respondent had not raised this issue in the arbitration proceedings, it is apparent from the record of the internal enquiry that he had in fact raised the issue of representation.

27.2 He was not afforded the services of an interpreter nor did the chairperson of the enquiry consider the necessity of an interpreter, and the record of the disciplinary proceedings indicates that the Third Respondent was faced with a language barrier.

[28] In the light of the above, it follows that the procedural defect complained of was indeed gross. In the circumstances, the

conclusion

of the Commissioner that the dismissal of the Third Respondent was procedurally unfair, and his conclusions in respect of the amount of compensation in that regard bar other irrelevant considerations he took into account, they cannot be said to be conclusions that a reasonable decision maker could not have arrived at based on the material before him. To this end, the following order is deemed to be appropriate:

Order:

- i. The Third Respondent application in terms of Rule 11 of the Rules of this Court is dismissed.
- ii. The application to review and set aside the award issued by the Second Respondent under case number GAJB39542-09 is dismissed.
- iii. There is no order as to costs.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv. AJ Nel

Instructed by:

Lindeque Van Heerden

For the Third Respondent: Mr JD Crawford of Crawford and Associates Attorneys (Pro Bono)

[1] BP Southern Africa (Pty) Ltd v National Bargaining Council for the Chemical Industry & Others

(2010) 31 ILJ 1337 (LC); Radebe v Government of the Republic of South Africa 1995 (3) SA 787 (N)

[2] Moraka v National Bargaining Council for the Chemical Industry and Others

(2011) 32 ILJ 667 (LC) At para 21.

[3] At para 13 of the award

[4]

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC) at para 18

[5] The correct provision is section 145 (2) (a) of the LRA

[6] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC)

[7] Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

[8] A fact confirmed by the Applicant's representative at arbitration proceedings. See p81 line 15 of the Record of proceedings

[9] P82 line 5 of the record of proceedings

[10] Fose v Minister of Safety and Security 1997 3 SA 786 (CC).

[11] (2009) 30 ILJ 2677 (LAC) at para 55

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