

SOUTH AFRICA / JUDGMENT

Madzunye v Maila NO and Others (JR762/15) [2017] ZALCJHB 334 (14 September 2017)

[2017] ZALCJHB 334

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR 762/15

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no: JR 762/15

In

the matter between:

NTHATHENI

SOLLY MADZUNYE

Applicant

and

DAVIS

MAILA N.O

First

Respondent

COMMISSION

FOR CONCILIATION, MEDIATION

AND

ARBITRATION (CCMA)

Second Respondent

NBC

COAL

Third

Respondent

Heard:

31 August 2017

Delivered:	14 September 2017
Summary:	Review application. Applicant's case is that the arbitrator ignored a material fact and did not weigh the probabilities. Award is reasonable. Award is not reviewed and set aside.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 21 September 2014 wherein the First Respondent (the arbitrator) found his dismissal substantively fair.
- [2] The Third Respondent (NBC or the employer) opposed the application.

Background

facts

- [3] The background facts are briefly as follows:
- [4] NBC employed the Applicant on 16 March 2009 as an artisan boilermaker. In March 2014 the Applicant faced a charge of assault and the charge sheet reflected that the charge related to an incident of 13 February 2014 where the Applicant assaulted or attempted to assault another employee in the tea room. The Applicant was dismissed on 14 April 2014 after he was found guilty of misconduct.
- [5] The Applicant, represented by the National Union of Mineworkers (NUM), referred an unfair dismissal dispute to the Second Respondent (CCMA) and only the substantive fairness of his dismissal was challenged.

The arbitration proceedings:

- [6] During the arbitration proceedings the employer called five witnesses and the Applicant testified and called one witness. The assessment of the merits of the grounds for the review raised by the Applicant calls for a consideration of the evidence that was adduced.

The evidence adduced

- [7] The employer's first witness was its risk control officer, Mr Paul Coetzer (Coetzer) who conducts investigations and compile reports on the findings and conclusions of such investigations. He testified that in terms of NBC's disciplinary code and procedure the appropriate sanction for assault or attempted assault is dismissal, even for a first offence.

- [8] Coetzer testified that he investigated the incident of 13 February 2014 and he compiled a report with his findings. Coetzer summarised his findings during his testimony and stated that another employee, Mr Dumisani Jele (Jele) lost his cellular phone, whilst it was in fact retrieved by his fellow workers, and after Jele went through a lot of trouble to cancel his sim card to ensure that his phone could not be used, the said phone was given back to him in the tea room or kitchen area during the lunch break. This is where the trouble started as Jele then attacked and slapped another employee, Balanganani Munzhelele (Bala), whilst he was sitting. The Applicant attacked Jele and in the end NBC dismissed Jele and the Applicant for assault.
- [9] Coetzer referred to photographs during his testimony and explained that the one photograph depicted Bala where he was slapped on the right ear by Jele, other photographs depicted the Applicant's shirt as it was torn by Jele and the injuries he sustained on his left elbow and left upper eyelid. Other photographs showed the injuries sustained by Jele when he was attacked by the Applicant and those included an injury to Jele's left elbow, his back and his neck, which showed that Jele was strangled with force.
- [10] In cross-examination Coetzer explained that on 13 February 2014 three people were assaulted namely Bala, Jele and the Applicant and they were all sent for medical examination at the Arnot Medical Station and they were examined by Dr Mako. The South African Police Services (SAPS) however took Jele to another hospital to obtain a J88. Coetzer received Jele's medical report and it
- showed that he was assaulted on his back, his elbow and that his neck was strangled. Jele assaulted the Applicant by hitting him on his left eye and scratching his elbow but according to the medical report there were no visible injuries on Bala and the Applicant.
- [11] Coetzer was asked how he found that the Applicant started to assault Jele, as stated in his investigation report, and he explained that Jele told him so and it was confirmed by witnesses who saw the incident. He further compiled the report based on the statements made to the SAPS and the medical reports. Coetzer explained that although Jele sustained some of his injuries at the sink, he did not sustain it by himself as he sustained those injuries whilst in a fight with the Applicant.
- [12] Jele was the employer's second witness and he testified that on 13 February 2014 his cellular phone disappeared and after he called his phone number, somebody answered and said that he was Mr van der Merwe in Middelburg and that he would not return Jele's phone. After Jele struggled to block his sim card, Bala called him and he went to the kitchen where Bala was and he found his missing cellular phone on the table where Bala was sitting. At that point he did not know that it was his cellular phone

and Bala asked Jele if he wanted his phone, upon which Jele responded that he thought his phone was with Mr van der Merwe in Middelburg.

Jele asked Bala if he was Mr van der Merwe and why he was making a fool of him. Bala responded that Jele was a fool and in turn he slapped Bala twice. Jele testified that as he was looking at his phone the Applicant slapped him from behind and pushed him towards the wall. Jele explained that he was upset by the fact that Bala called him a fool and testified that he was not upset in respect of the Applicant. Jele slapped Bala because they made him go up and down looking for his phone when they should have told him where his phone was.

[13] Jele testified that he defended himself and that the Applicant grabbed him by the throat and punched him in the face. Ben intervened and he stopped the fight.

[14] In cross-examination Jele testified that the Applicant slapped him in his face, grabbed and choked him on his throat and hit him from behind. Jele conceded that he hit the Applicant and explained that he wanted to escape and when he could not, he defended himself and hit the Applicant when he realised that the Applicant was seriously fighting with him. The Applicant called Jele a fool before the fight started. Jele conceded that he slapped Bala and explained that he did so as he wanted his phone, which was

with Bala and he had no reason or intention to hit the Applicant. Jele conceded that he hit the Applicant with a fist whilst the

Applicant pushed him towards the wall.

[15] Jele testified that there were six people inside the kitchen area when the fight started. He explained that Phindi went with him to the kitchen and she was standing at the sink when the fight started and she observed the entire fight.

[16] Jele went to see a medical doctor after the fight and the doctor gave him a letter to show where he got injured. He testified that the Applicant pushed him to the sink and it was put to Jele that he injured himself on his back and elbow while he was fighting with the Applicant. Jele responded that if the Applicant did not push him to the sink he would not have been injured.

[17] During Jele's cross-examination the arbitrator observed that Jele did not deny that he assaulted Bala and that there were no further consequences for Jele to admit this as he had been dismissed for that.

[18] It was put to Jele that the Applicant grabbed him as he refused to stop the fight and to stop him from slapping Bala. Jele denied this and testified that he fought with the Applicant because the Applicant was the one fighting with him. He explained that if the Applicant's intention was to stop the fight and to separate Jele and Bala, the Applicant would not have slapped him and pushed him to the wall and if the Applicant wanted to separate them, he would have stopped the fight as it happened when Ben separated them.

- [19] The employer's third witness, Mr Lekwa (Lekwa), is a plant maintenance supervisor and the Applicant reported directly to him. He testified that on 13 February 2014 the Applicant and Bala came into his supervisor's office to report that they had been attacked by Jele. When Lekwa enquired from the Applicant as to what happened, the Applicant said he was not there to talk to him, he was only there to notify Lekwa's supervisor that they were going to report the matter to the human resources department.
- [20] Lekwa subsequently spoke to Rose, Phindi, Nathi and Aaron Kekana to ascertain what happened and Rose told him that the Applicant and Jele were fighting and that Bala was sitting whilst the fighting took place. Phindi told him that she was warming food and there was a conversation between the Applicant, Jele and Bala and that Jele slapped Bala and that the Applicant moved from the sink to punch Jele and that they wrestled all over the place. Nathi's version was the same as Phindi's.
- [21] Lekwa explained that Bala was not dismissed as the investigation showed that Bala was beaten but he did not respond and did not get into the fight.
- [22] Lekwa testified that fighting and assault are not allowed in the workplace. The Applicant cannot work for the employer again as he cannot be trusted. He was an employee representative and leader and he should be the creator of peace and stability in the workplace and he acted contrary to the example that he should be setting to employees.
- [23] In cross-examination it was put to Lekwa that much of his evidence was hearsay evidence as he was not present when the fight broke out and Lekwa conceded this.
- [24] Bala testified on behalf of the Applicant and explained that on 13 February 2014 he called Jele to pick up his phone and Jele came to him where he was sitting at the table and he showed Jele his phone. Jele started talking but Bala did not respond, instead the Applicant responded and told Jele where his phone was and what happened. Jele slapped him whilst he was sitting and after the third slap the Applicant moved from the sink and grabbed Jele so that he could stop hitting him. The Applicant grabbed Jele and pushed him to the wall and Jele hit the Applicant with his fist. Jele and the Applicant were holding each other and Bala called Ben to separate them. Jele and the Applicant pushed each other from the wall to the sink where Ben finally separated them. Ben separated them by grabbing and holding the Applicant. Bala testified that the Applicant did not hit Jele.
- [25] Bala testified that Jele was angry when he came to him and he was not interested in the explanation the Applicant was giving him. Bala said that the Applicant helped him as he did not know how many times Jele would have hit him and when he was going to stop.
- [26] In respect of the scratches on Jele's body Bala explained that the scratches might have been caused by the Applicant when he grabbed Jele by his neck and pushed him to the wall or when they pushed each other to the sink.

- [27] In cross-examination it was put to Bala that his testimony was purely to defend the Applicant as he was unable to explain why Ben held the Applicant instead of Jele and why the Applicant strangled Jele instead of holding him if he was intending to stop the fight.
- [28] The Applicant testified that on 13 February 2014 they finished eating and he was washing the dishes whilst Bala and Aaron were sitting at the table. Bala said to Jele “here is your phone” and Jele asked him if he was Mr van der Merwe and explained that he had been looking for his phone for a long time and had blocked his sim card. The Applicant tried to explain to Jele what happened to his phone and that he could unblock his sim card. He was facing the sink and washing dishes when he heard a slap. When the Applicant looked, he saw Jele slapping Bala for the second time and he rushed from the sink to Bala when Jele slapped him for a third time. When the Applicant tried to intervene to stop the fight, Jele hit him with a fist on his eye and he decided to grab Jele as Jele

was fighting with him.

- [29] The Applicant testified that he was unable to see Jele because he was hit on his eye and he tried to grab Jele but it was difficult as he could not see and Jele has pulled his t-shirt over his head. He managed to grab Jele and they wrestled and went from the wall to the sink. Ben came to separate them by holding the Applicant.
- [30] The Applicant testified that he did not assault anyone, instead he was assaulted when he tried to help and to stop the fight. In respect of the scratches Jele had on his body, the Applicant explained that Jele could have sustained those injuries when he tried to stop him to fight with Bala and they ended up wrestling around the kitchen as Jele wanted to fight with him.
- [31] In cross-examination the Applicant explained that he grabbed Jele after Jele had hit him on the eye and he then rushed towards Jele and grabbed him, but insisted that he did not know on which part of the body did he grab Jele. The Applicant testified that he did not know the difference between grabbing somebody around his shoulders, neck or arm and he insisted that he cannot feel the difference between a person’s neck or shoulders. It was put to the Applicant that his own witness, Bala, testified that Jele sustained the scratches because the Applicant grabbed him around his neck.

The arbitrator’s findings

- [32] In the arbitration award the arbitrator has set out the evidence adduced by the witnesses in great detail. In his analysis of the evidence and arguments, the arbitrator identified the issue to be decided as whether the Applicant’s dismissal was substantively fair as procedural fairness was not in dispute.

- [33] The Applicant was dismissed for assault and/or fighting at the workplace on 13 February 2014. The arbitrator considered the evidence and recorded that the Applicant's version is that he intervened to stop Jele from assaulting Bala, that he did not assault or fight with Jele but instead he was the victim as Jele also assaulted him. The arbitrator accepted that Jele started the fight by assaulting Bala and Jele was dismissed for that. Bala did not fight back when assaulted by Jele.
- [34] The arbitrator identified the key issue as whether the Applicant assaulted or fought with Jele or whether he did not fight or assault Jele but was rather the victim of Jele's assault.
- [35] The arbitrator rejected the Applicant's case that he was a victim of assault and he based this finding on the evidence of Jele, as corroborated by photographs and the J88 medical report, which were consistent with Jele's version that the Applicant grabbed him by the throat and pushed him to the wall, hence Jele's injuries on his back, neck and left elbow. The arbitrator further found that the injuries sustained by the Applicant on his left eyebrow is also consistent with Jele's testimony that he hit the Applicant in defending himself.
- [36] The arbitrator analysed the facts and found that it is not clear why the Applicant joined the fight as the dispute was between Jele and Bala. The medical reports indicated that both Jele and the Applicant sustained injuries consistent with people who were fighting. The evidence indicated that Jele and the Applicant assaulted each other and therefore they fought in the workplace, which is in terms of the employer's disciplinary code, a dismissible offence.
- [37] The arbitrator found the Applicant's dismissal substantively fair and in line with the employer's disciplinary code.

Analysis

of the arbitrator's findings and grounds for review

- [38] The Applicant filed a founding affidavit of 46 pages, of which 27 pages dealt with the evidence adduced during the arbitration proceedings, which is unnecessary as the arbitration award and the transcribed record would reflect the evidence adduced. The grounds for review as raised by the Applicant in his founding affidavit, are that the arbitrator committed a gross irregularity in the arbitration proceedings and that he made a decision that a reasonable decision maker would not have made based on all the material evidence placed before him.
- [39] I have to deal with the merits of the review application within the context of the test that this Court must apply in deciding whether

the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision

maker could make.

[40] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA*[2] affirmed the test to be applied in review proceedings and held that a piecemeal approach should not be followed. It was held that:

'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.

..... In a review conducted under s 145(2)(a)(ii) of the LRA, the reviewing 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 reviewing 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.

To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in s 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly.'

[41] This Court, sitting as a review Court, should not follow a piecemeal approach but should consider whether the arbitrator dealt with the substantial merits of the case and whether holistically viewed, the decision was reasonable based on the evidence that was adduced.

[42] It is in this context that the grounds for review raised by the Applicant must be decided.

[43] The Applicant's case is that the arbitrator did not apply his mind to the issues before him, thus rendering the outcome unreasonable. This is so, according to the Applicant, as he did not assault and / or fight with Jele, he only pushed Jele back in order to prevent him from assaulting Bala, who was not fighting back, he was the chairperson of the union in the plant and as a reasonable and responsible shop steward, he simply wanted to stop the fight, instead he was assaulted. The Applicant's case is that the arbitrator failed to have regard to relevant evidence and over emphasized the wording of the employer's code of conduct.

- [44] In the heads of argument filed on behalf of the Applicant it is argued that the arbitrator misconceived the true nature of the enquiry as the true issue was whether the Applicant grabbed Jele before or after Jele had hit the Applicant on his eye. The Applicant's argument is that he intended to come between Jele and Bala at which stage Jele hit him on his eye and he then proceeded to grab Jele to restrain him. Jele's evidence on the other hand was that he had hit Bala and recovered his phone where after the Applicant grabbed him by his throat and in response, Jele hit the Applicant on his eye.
- [45] The Applicant's case is that the arbitrator failed to consider a material fact when he failed to consider that the Applicant fended off the assault of Jele. The arbitrator did not weigh up the probabilities, which is fatal to the award. The Applicant submitted that the general probabilities favoured his version.
- [46] In summary the Applicant's case is that the arbitrator misconceived the true nature of the enquiry, that he failed to consider that the Applicant did not fight with or assault Jele and that he did not weigh up the probabilities.
- [47] The arbitrator identified the question he had to consider as whether the Applicant assaulted or fought with Jele or whether he did not fight or assault Jele but was rather the victim of Jele's assault. In my view the arbitrator correctly identified the key question to be decided and there is no merit in the allegation that the arbitrator misconceived the true nature of the enquiry.
- [48] The arbitrator asked the right question in deciding the substantive fairness of the Applicant's dismissal.
- [49] The evidence shows that the Applicant grabbed Jele around the throat with considerable force and pushed him to the wall. This was confirmed by witnesses and the J88 medical report. The arbitrator considered all this evidence and concluded that the Applicant was not the victim of an assault, but that Jele and the Applicant sustained injuries consistent with people who were fighting, that they both assaulted each other and that it is a dismissible offence in terms of the employer's disciplinary code.
- [50] There is no merit in the Applicant's ground for review that the arbitrator failed to consider a material fact when he failed to consider that the Applicant did not fight with or assault Jele, but was the victim of assault. It is evident from the arbitration award and the arbitrator's findings that he indeed considered this and made a finding based on the evidence rejecting the Applicant's version.
- [51] The last ground for review is that the arbitrator did not weigh up the probabilities. It is evident from the arbitration award that the arbitrator identified the two conflicting versions namely whether the Applicant assaulted or fought with Jele or whether he was the victim of Jele's assault and provided reasons why he rejected the version that the Applicant was the victim of assault. The arbitrator rejected the victim scenario because photos, the J88 report and evidence showed that the Applicant grabbed Jele by the throat and pushed him to the

wall and they both sustained injuries consistent with people assaulting each other.

- [52] It may be so that the arbitrator could have dealt with the inherent probabilities in more detail, but it is not for this Court to take a piecemeal approach and evaluate every factor and every piece of evidence and to consider how the arbitrator dealt with it. It is rather to consider whether the arbitrator dealt with the substantial merits of the case and whether holistically viewed, the decision was reasonable based on the evidence that was adduced. Brevity in the reasons provided by the arbitrator does not per se render the award unreasonable or reviewable.
- [53] The ultimate question is whether holistically viewed, the decision taken by the arbitrator was reasonable based on the evidence placed before him.
- [54] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the grounds for review as raised by the Applicant, I cannot find that the arbitrator failed to apply his mind to the evidence or ignored material facts or evidence or that he failed to weigh up the probabilities that presented themselves in the versions before him.
- [55] The arbitrator's findings and conclusion fall within a range of decisions that a reasonable decision maker could make based on the evidence adduced and the Applicant failed to make out a case for the review of the arbitration award.
- [56] The award and the findings contained therein are reasonable and are not to be interfered with on review.
- [57] I canvassed the issue of costs with Mr Molotsi appearing for the Applicant and Mr Maeso appearing for the Third Respondent. They both argued that the costs should follow the result and I can see no reason to disagree.
- [58] In the premises I make the following order:

Order

1. The application is dismissed with costs.

Connie Prinsloo

Judge of the Labour Court

Appearances:

Applicant:

Advocate H Molotsi

Instructed by:

Mvundlela Attorneys

Third Respondent: Mr M G Maeso of Shepstone Wylie Attorneys

[1]

(2007) 28 ILJ 2405 (CC) at para 110.

[2]

(2014) 35 ILJ 943 (LAC).

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