

SOUTH AFRICA / JUDGMENT

Mbelu v Molapo NO and Others (JR1725/17) [2021] ZALCJHB 38 (5 February 2021) [2021] ZALCJHB 38

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JR1725/17

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1725/17

In
the matter

between: YANGA
 THEO MBELU
 Applicant
 and
 COMMISSIONER
 STEPHENS SHEMA MOLAPO N.O
 First Respondent
 COMMISSION
 FOR CONCILIATION MEDIATION
 AND
 ARBITRATION
 Second Respondent
 WOOLWORTHS
 (PTY) LTD
 Third
 Respondent

Heard: 03
 December 2020

Delivered:	This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 05 February 2021.
Summary:	Review application – refusal to grant legal representation – the commissioner exercised his discretion judiciously. Misconduct – manager involved in a brawl in front of customers – dismissal is an appropriate sanction.

JUDGMENT

NKUTHA – NKONTWANA, J

Introduction

- [1] This judgment deals with a review application by the applicant, Mr Yanga Theo Mbelu (Mr Mbelu) in terms of section 145 of the Labour Relations Act[1] (LRA) against the arbitration award rendered by the first respondent, Mr Stephens Shema Molapo (Commissioner) on 2 July 2017, under case number GATW3843-17 and under the auspices of the second respondent, Commission for Conciliation Mediation and Arbitration (CCMA). In the award subject to review the Commissioner found that the dismissal of Mr Mbelu was substantively fair.
- [2] The third respondent, Woolworths (Pty) Ltd (Woolworths) is defending the award and in limine, opposes the grant of condonation for the later filing of the supplementary affidavit.
- [3] I deal first with Mr Mbelu's condonation applications. The first condonation application pertains to the late delivery of the review application by 3 days and is not opposed by Woolworths. There is no reason not grant condonation in this regard as the degree of lateness is negligible and the explanation is reasonable.
- [4] The second condonation application pertains to the late filing of Mr Mbelu's supplementary affidavit. The degree of lateness is almost 7 months and Mr Mbelu concedes that it is excessive. The reason proffered for the delay is mainly that his attorneys of record had been moving offices. As a result, files were misplaced and when they were ultimately located, there was a backlog

in terms of attending to them. I find it ill-considered of Mr Mbelu's attorneys to prioritise the office relocation at the expense of his review application which is inherently urgent. Still, I deem it superfluous to be arrested by this issue as it is not dispositive of the matter in the light of my decision to condone the late delivery of the review application. The founding affidavit still stands and thus I proceed with the review application on the basis that it is properly before the court.

Pertinent

facts

- [5] Before I turn to examine the impugned award and the grounds advanced in support of the review application, I propose to briefly set out some of the background to the dismissal of Mr Mbelu.
- [6] Mr Mbelu was in the employ of Woolworths since August 2002 as a till operator. He was promoted to the position of Food Manager in June 2004 to 13 March 2017 when his employment was terminated by the respondent. The termination of Mr Mbelu's employment was a result of an incident on 16 January 2017 between him and Mr Alson Malatse (Mr Malatse), a security guard employed by Stallion Security, company contracted by Woolworths.
- [7] On 16 January 2017, Mr Malatse was posted at Woolworths' store in Castle Walk where Mr Mbelu was a Food Manager, reporting to Mr Simon Malahlela (Mr Malahlela), the Store Manager. The store closed its doors for business at 20h00. However, Mr Malahlela seemingly used to allow customers into the store after 20h00. On the night in question, Mr Malatse opened the door for the customer couple after 20h00. This he did without seeking permission from Mr Mbelu, who was the manager in charge.
- [8] Mr Mbelu, who was busy with the tellers assisting them to knock off was incensed by Mr Malatse's conduct. He approached Mr Malatse next to the door, angrily shouting at him for opening the door after 20h00. Mr Malatse responded by informing him that he had been given permission by Mr Malahlela to open the door for customers after 20h00. At that point it is alleged that Mr Mbelu referred to Mr Malatse as useless and stupid and that infuriated Mr Malatse. An exchange followed during which both were shouting at each other whilst the customers were still in the store.
- [9] A fight ensued during which Mr Malatse head butted Mr Mbelu and he (Mr Mbelu) retaliated by slapping him. This was the uncontroverted evidence of Ms Shenarc Smith (Ms Smith), a till operator that assisted the customers that were allowed to shop after business hours. Mr Emmanuel Mothupi (Mr Mothupi), a trolley collector, intervened and separated Messrs Mbelu and Malatse who were shouting and pushing each other. At some stage Mr Mbelu grabbed a basket and pushed Mr Malatse with it.

[10] The brawl was captured by one of the store's closed-circuit television (CCTV) cameras and the video clip was led as evidence during the arbitration proceedings. Even though the clip had no sound, the depiction of what had transpired was confirmed by the three of Woolworth's witnesses, Mr Mothupi, Ms Smith and Ms Refilwe Phadu (Ms Phadu), a cleaner and Mr Sabelo Mawonga (Mr Mawonga), a coffee barista who was employed by Tribeca and stationed at Castle Walk.

[11] Mr Mbelu was charged as follow:

'Gross Misconduct in that on 16 Jan 2017 you reached company procedures when you behaved in an inappropriate manner on the sales floor in the presence of customers, when you verbally and physically assaulted a security guard and when you made inappropriate comments towards customers that entered your store. Your actions impacted negatively on the workplace and could have impacted negatively to sales of the store'

[12] He was found guilty as charged and dismissed. Unhappy with his dismissal, Mr Mbelu referred a dispute to the CCMA which was arbitrated after a failed conciliation. The Commissioner issued the award which is the subject of review.

Grounds of review

[13] Mr Mbelu impugns the award on various grounds which can be summarised as follows:

13.1. The Commissioner failed to properly apply his mind when he refused him legal representation;

13.2. The Commissioner made number of reviewable irregularities when he conducted the arbitration;

13.3. The Commissioner made number of mistakes when he evaluated the evidence; and

13.4. The Commissioner committed an error in terms of the penalty.

[14] In essence, Mr Mbelu challenges the correctness of the decision not to grant him legal representation and reasonableness of the conclusion reached by the Commissioner on the merits.

Failure to allow legal representation

[15] Mr Mbelu's main ground of review is that Commissioner ought to have allowed him legal representation and by failing to do so, he deprived him a fair trial. However, as correctly submitted by Woolworths, the Commissioner was not convinced that legal representation should be granted on the basis of two considerations. Firstly, as manager, Mr Mbelu had investigated case of misconduct and participated in in-house disciplinary hearings as an initiator. Secondly, the matter involved no complexities or serious legal question.

- [16] The is no merit in Mr Mbelu's submission that Commissioner's decision was out of kilter with the evidence and the nature of the enquiry. It is evident from the transcript that Mr Mbelu was conversant with the allegations against him and was in a position to cross examine the witnesses of Woolworths with the Commissioner's necessary succour. Nothing much turns on the use of the term 'procurator' to refer to Mr Mbelu's comparative ability as it must be understood within the context of the matter. The Commissioner was obviously emphasising Mr Mbelu's experience based on his constant participation in disciplinary hearings as a manager.
- [17] I am accordingly persuaded that the discretion with regard to the decision not to grant legal representation was judiciously exercised. As such, there exists no basis for this Court's interference.

Reviewable irregularities

- [18] As mentioned above, the main thrust of Mr Mbelu's impugn is the Commissioner's decision not to grant him legal representation. In the light of its demise, the ancillary grounds of review are moribund.
- [19] The review test is trite and there is no need to lay it on with a trowel. Save to remind us that the enquiry on the reasonableness of the outcome is undertaken on basis of the totality of the evidence on record and that a material error of fact as well as the weight and relevance to be given to any particular fact is not a sole justification for an award to be set aside on review.[2]
- [20] In the present case, Mr Mbelu concedes that he was involved in a brawl but contends that he acted in self-defence. The Commissioner rejected this contention on the basis of the evidence that he (Mr Mbelu) provoked Mr Malatse when he called him stupid. Even though Mr Mbelu denied calling Mr Malatse stupid, Commissioner accepted the evidence of Woolworths' witnesses who heard him and had no reason to tall tale on what transpired on the day in question.
- [21] Tellingly, the brawl took place on the sales floor and in the presence of the customers and other junior staff members. Even though, Mr Malatse was equally wrong to fight with Mr Mbelu, he was a junior employee. On the other hand, Mr Mbelu was the most senior employee in the store that evening. Hence it was incumbent upon him to display restraint even if he was provoked. In fact, I debated this issue with Mr Mbelu's counsel in court and he was contained to concede that Mr Mbelu should have availed himself to his managerial power and reprimanded Mr Malatse in a private instead of engaging in a brawl.

[22] Mr Mbelu did not dispute the evidence of his junior colleagues who witnesses the brawl that his behaviour frightened them as well as the customers. In fact, Ms Smith was adamant during her cross examination that the customers were scared and kept on apologising because they thought they were the cause of the brawl because they were allowed to shop after business hours. Mr Mbelu himself testified that he had to explain to the customers that he was not angry at them but Mr Malatse who opened the door without alerting him.

[23] To the extent that Mr Mbelu takes issue with the Commissioner's credibility findings, it is well accepted that this Court is disinclined to interfere with those findings except in instances where the transcript obviously shows that the credibility findings

are entirely at odds with or completely out of kilter with the probabilities and overall evidence on the record.[3] In the present case, the converse is true. The record shows that the Commissioner properly analysed the evidence that was before him and, as such, his findings are beyond reproach.

Appropriateness of the of the penalty

[24] Mr Mbelu's impugn against the sanction of dismissal is baseless. Without regard to his position as a manager, he initiated a confrontation that turned into a fight in full view of the customers and other staff members. Oddly, he still expects to be entrusted with the same authority that he impenitently abused.

[25] I therefore do not discern any irrationality in the manner in which the Commissioner approached this issue that may justly interference with his finding.

[26] Overall, the nit-picking approach undertaken by Mr Mbelu in challenging the award cannot be countenanced as blurs the line between review and appeal.[4]

Conclusion

[27] In all the circumstances, I am satisfied the Commissioner properly conceived the enquiry and reached a conclusion that is reasonable. Put otherwise, the award is beyond reproach and must stand.

Costs

[28] I am not persuaded that costs should follow the result as it would offend the requirements of the law and fairness. This application may be ill-advised but it is not frivolous or brought in bad faith.

[29] I, accordingly, make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr R Kuhn of Rudolf Kuhn Attorneys

For the Third Respondent

Ms Q Majam of MacGregor Erasmus Attorneys

[1] Act 66 of 1995

[2] See: SA Rugby Union v Watson and Others (2019) 40 ILJ 1052 (LAC) at paras 25'26; Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others (Gold Fields)

(2014) 35 ILJ 943 (LAC) at para 21; Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)

2013) 34 ILJ 2795 (SCA); Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

(2007) 28 ILJ 2405 (CC).

[3] National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others (2013) 34 ILJ 945 (LC) para 31.

[4] See supra n 2.

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Prepared on 10 October 2026 · Esheria