

SOUTH AFRICA / JUDGMENT

Ndlela and Others v Smith and Others (JR935/15) [2017] ZALCJHB 315 (29 August 2017)

[2017] ZALCJHB 315

COURT

Labour Court Johannesburg

BEFORE

M Mthombeni

CASE / FILE NUMBER

JR935/15

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**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR935/15

In the matter between:

NAMBA
NDLELA AND OTHERS
Applicant
and
COMMISSIONER
DAVE SMITH
First
Respondent
COMMISSION FOR
CONCILIATION
MEDIATION AND
ARBITRATION
Second Respondent
P.I.C.M
RANDFONTEIN
Third Respondent

Heard: 15 September 2016

Delivered: 29 August 2017

Summary: An application for the review of an arbitration award with grounds of review which are not supported by the evidence as captured in the record of the arbitration proceedings cannot succeed.

JUDGMENT

MTHOMBENI AJ;

Introduction.

[1] This is an application to review and set aside an arbitration award (the award), dated 5 May 2015, made by the first respondent (the commissioner) and issued under the auspices of the second respondent the Commission for Conciliation, Mediation and Arbitration (the CCMA). The application is opposed.

Background facts.

- [2] The applicants had been employed at the third respondent, a provider of civil engineering and related services to mines, and were stationed at Rustenburg.
- [3] On 28 November 2014, the third respondent dismissed the applicants for alleged misconduct.
- [4] Aggrieved by their dismissal, the applicants approached the CCMA and referred a dispute, claiming unfair dismissal.
- [5] Following an unsuccessful conciliation, the CCMA appointed the commissioner to arbitrate. At the conclusion of the arbitration, the commissioner found that the applicants' dismissal was procedurally and substantively fair.

Grounds of review.

- [6] The applicants submit that the commissioner committed gross irregularity in the conduct of the arbitration proceedings and exceeded his powers.
- [7] They submit, further, in amplification that the commissioner:
 - 7.1 failed to apply his mind before arriving at his decision;
 - 7.2 was biased in that he prevented the applicants' representative from cross-examining the third respondent's witnesses and refused to recuse himself; and
 - 7.3 made a decision which was not supported by any evidence that was before him.

The award.

- [8] At the arbitration hearing, the third respondent led the evidence of Dmitri Stavridis (Stavridis) and Johan Thompson (Thompson).
- [9] Stavridis is employed at SA Labour Dynamics (Pty) Ltd. He chaired the disciplinary enquiry, held on 28 November 2014, which resulted in the dismissal of the applicants. Thompson is employed at the third respondent as a Project Manager and is responsible for civil work at all the sites.
- [10] Stavridis testified that on 23 and 24 November 2014, Thompson had issued the applicants with notices to attend a disciplinary enquiry. The applicants were present at the disciplinary enquiry where they were handed out an attendance register, but they refused to sign it. Thereafter, he went through every notice to attend the disciplinary enquiry and marked all those who were present.
- [11] Stavridis testified, further, that the applicants brought an application to secure representation by their own trade union, but he made a ruling that external representation was not allowed as none of the applicants were shop stewards.
- [12] Stavridis advised the applicants to state their version, but they walked out. He advised them that he would proceed and continued with the disciplinary enquiry in absentia.
- [13] On the strength of the evidence led by Thompson, Stavridis found the applicants guilty. He accordingly, ordered the parties to submit aggravating and mitigating factors by 7 November 2014. The third respondent duly complied, but the applicants failed to do so.
- [14] On 25 November 2014, Stavridis recommended to the third respondent that dismissal of the applicants was the most appropriate sanction.
- [15] Thompson testified that on 19 October 2014 he received time sheets from Sipho Mbuyane (Mbuyane) and Petrus Monoketsi (Monoketsi), the supervisors. The applicants and the supervisors had signed the timesheets. When payroll alerted Thompson to some irregularities in the timesheets, he realized that the applicants have claimed for overtime which they had not worked because some of them were on induction training. Moreover, he had not authorized overtime work.
- [16] Thereupon, he approached the applicants, including the supervisors, and asked for an explanation. They advised him that they had made an error and apologized. Subsequently, the applicants and the supervisors submitted new timesheets, less the hours they had claimed for overtime.
- [17] Thomson was not convinced that the applicant had claimed overtime by mistake. He concluded that they should be charged for misconduct. Consequently, he approached the applicants and issued them with notices to attend a disciplinary enquiry, but they refused to sign. However, Thompson and Mbuyane signed as witnesses to the applicants' refusal to sign.

- [18] Thompson testified, further, that on 28 November 2014 he arranged transport for the applicants to attend the disciplinary enquiry at which they were present. He read out and marked the names of all the applicants who were present.
- [19] Monoketsi testified on behalf of the applicants. His evidence is to the effect that during the week 11 to 17 August 2014 the applicants had worked from 16h00 to 18h00, instead of the normal working hours, that is 07h00 to 17h00, because concrete was delivered late.
- [20] Mokonetsi denied that most of the applicants were on induction training during the week in question.
- [21] On the strength of the evidence of the third respondent's witnesses, the commissioner found that the applicants had been notified of their disciplinary enquiry in that Mbuyane's signature as a witness that the applicants had refused to sign appeared on all the notices for the applicants and that the applicants failed to call Mbuyane to rebut Thompson's testimony in this respect.
- [22] To fortify his finding, the commissioner stated that Thomson had arranged for applicants to be transported to the hearing venue. Thus, they were aware of the purpose of their presence there. Moreover, their names were recorded in an attendance register.
- [23] The commissioner also found that the applicants had walked out of the hearing, despite advice that they should present their version, because Stravidis had refused to grant them their request for external representation as none of them was a shop steward. After they were found guilty, Stravidis invited the applicants to submit mitigating factors, but they failed to do so. The applicants failed to challenge the testimony of Sravidis and Thompson.
- [24] The commissioner concluded that, in the circumstances, the third respondent had followed a fair procedure.
- [25] Concerning the allegation of fraud for which the applicants were dismissed, the commissioner found that third respondent's version was more probable and the applicants had defrauded the third respondent, irrespective of the non-payment for the claimed overtime, in that they had submitted timesheets claiming overtime payment they had not worked for and, subsequently, submitted timesheets less overtime. In this regard, the commissioner opined that had the discrepancy not been detected, the applicants would in all likelihood have been paid.
- [26] For all these reasons, the commissioner concluded that the applicants' conduct fell within the ambit of dishonesty and their dismissal was, therefore, substantively fair.

- [27] The record of the arbitration proceedings reflect that, during the cross-examination of Thompson by Ephraim Luthuli (Luthuli), a trade union representative for the applicants, Stravidis interjected saying “asked and answered”. The commissioner considered his interjection as constituting an objection. Thereupon, Luthuli stood up raising his voice at the commissioner and demanding him to recuse himself as he was biased for allowing Stravidis to interject without prefacing his comment with the word “objection”.
- [28] The commissioner ruled that he would not recuse himself as there was no basis for such. Luthuli, thereafter, proceeded under protest threatening that he would take the commissioner’s award on review.
- [29] I hold a firm view that the decision reached by the commissioner is one that a reasonable decision-maker could reach and, hence, there is no basis to disturb the award.
- [30] In the result, I make the following order:

Order

1. The application is dismissed;
2. I make no costs order.

M Mthombeni

Acting judge of the Labour Court of South Africa

Appearances

For Applicants: Mr E Luthuli

Instructed by: Inqubela Phambili Trade Union (ITU)

For Respondent: Advocate S Bekker

Instructed by: Nothnagel Attorneys

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