IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 52/15

In the matter between

JDG TRADING PTY LTD T/A BARNETTS
Applicant

and

MTHUKWANE, J *N.O* **First Respondent**

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

MAPHALLE, J **Third Respondent**

Heard: 19 July 2017

Delivered: 25 October 2017

Summary: The Review application: The Third Respondent assaulted a member of public in the Applicant's shop. The Second Respondent found that the Third

Respondent acted in self-defence. The award set aside as the Second Respondent misapplied the principle of self-defence. However, Self-Defence can still be successfully pleaded in the employment context and should not be equated with a brawl.

JUDGMENT

MOLEBALOA**.** AJ.

Introduction

[1] This is a review application in terms of Section 145 of the Labour Relations Act[1], (the LRA). The Applicant is seeking an order for the review and setting aside of the arbitration award in case GATW 9003-14 dated 27 November 2014. The award was issued by the First Respondent, Mthukwane J, (hereinafter referred to as 'the commissioner') who acted under the auspices of the Second Respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). The ultimate order sought by the Applicant is an order that the dismissal of the Third Respondent, J Maphalle, be found to be substantively fair, alternatively that the matter be remitted to the CCMA to be determined afresh by a commissioner other than the First Respondent.

Background Facts

[2] The Third Respondent was dismissed for assaulting a customer on 09 July 2014 at the Applicant's premises during working hours and for disrespectful and abusive behaviour towards her manager on 07 July 2014 and 09 July 2014.

[1] Act 66 of 1995 as amended.

[3] The brief anecdote is as follows: The Third Respondent consumed by what seemed like an uncontrollable determination to monitor calls made to her husband's cellphone, started calling the numbers appearing on her husband call list asking her recipients the reasons they called her husband. Shortly after such calls were made, one Cynthia, accompanied by her mother, arrived at the shop to confront the Third Respondent about her persistent calls and why she was accusing her of having a love affair with her husband. The two were received by one Ms. Seloi, the Third Respondent's colleague. She then left the Third Respondent with them following Cynthia's indication that they came in to see the Third Respondent. On her way to the bathroom, Ms Seloi heard a bang. When she turned around, she noticed that the Third Respondent and Cynthia were fighting. Cynthia was already on the floor and the Third Respondent was on top of her beating her. A colleague and Cynthia's mother tried to separate them by dragging the Third Respondent from the top of Cynthia. They could not. A security officer had to be called to remove the Third Respondent from the top of Cynthia.

[4] The Third Respondent however contended that she acted in self-defence as Cynthia started assaulting her when she attempted to call the police upon realising that Cynthia was in the shop. She indicated that she calmly told Cynthia to sit down when Cynthia started assaulting her. She did not hit back.

[5] In respect of a charge of disrespectful and abusive behaviour, the Third Respondent, having screened her husband's cellphone, came across a phone number which later emerged to be of one Ida, a colleague working in the same shop with the Third Respondent. She dialled the number. The Third Respondent was overheard saying over the phone: "Sies why are you calling my husband telling him to pray". The Third Respondent indicated that at the time of making the call she was not aware that she was speaking to Ida. She also denied making such utterances over the phone. She however confirmed saying over the phone "you are a fool" as according to her it was foolish for the caller, who happened to be Ida, to suggest that her husband was not praying when they were a prayerful family.

[6] The Third respondent was charged and dismissed for the two incidents. Unhappy with the dismissal, she referred a dispute with the Second Respondent. The First Respondent, sitting as an arbitrator, found the dismissal substantively unfair and ordered the Applicant to reinstate the Third Respondent with back pay.

The Arbitration Award

[7] The nub of the commissioner's decision in respect of the charge of disrespectful and abusive behaviour was that the comment was fair. He rejected the Applicant's version that the Third Respondent said "sies" to Ida. The basis of his rejection is that Ida was not called to corroborate Ms Seloi's version. He however accepted that the Third Respondent called Ida a fool but because it is a fair comment as it was said to dispel the notion from Ida that they were not praying. The commissioner continued to indicate that even if he were to find the Third Respondent guilty of disrespecting Ida, he would still found the sanction of dismissal inappropriate in the circumstances.

[8] In respect of the assault charge, the commissioner found that the Third Respondent acted in self-defence. She was attacked by Cynthia and her mother and acted in response to the attack. He found that the Third Respondent did not exceed the bounds of self-defence.

[9] Having found that the Third Respondent's dismissal was unfair, the commissioner ordered her reinstatement with back-pay. It is this award that is the subject of review.

The Review Application

[10] The Applicant cited numerous grounds in its attack of the award. A careful analysis however shows that the Applicant contended that the award was unreasonable as the commissioner committed misconduct and / or irregularity for arriving at the following conclusion which was not supported by the material evidence properly before him:

10.1 First Respondent's conclusion that the evidence of Ms Seloi who overheard the Third Respondent uttering disrespectful and / or abusive utterances as hearsay.

10.2 First Respondent's conclusion that the utterances of the Third Respondent constituted a fair comment.

10.3 First Respondent's conclusion that even if he were to find that the Third Respondent was disrespectful, the sanction of dismissal would still be inappropriate.

10.4 First Respondent concluded that the Third Respondent did not assault Cynthia but acted in self-defence.

The Legal Principles

[11] For the Applicant to succeed, it had to demonstrate that the decision reached by the commissioner is one that a reasonable decision maker could not reach. This is an applicable test to the review applications.

[12] *In Sidumo and Another v Rustenburg Platinum Mines Limited and Others*[2] the Constitutional Court held that the review grounds set out in section 145 of the LRA have been suffused by the standard of reasonableness, and that an

[2] 2008 (2) SA 24 (CC).

arbitration award of the CCMA / a bargaining council is reviewable if the decision reached by the commissioner was one that a reasonable decision maker could not reach.

[13] In *Andre Herholdt v Nedbank Limited, (Congress of South African Trade Unions as amicus curiae)*[3] the Supreme Court of Appeal (the SCA) had an occasion to interpret the grounds of review set out in section 145 of the LRA as developed in the *Sidumo* Case. The SCA described the standard of review as follows:

> "In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one grounds in section 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 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 unreasonable if it is one that a reasonable arbitrator could not reach on all material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[14] Accordingly, the SCA, in effect, held that in order to establish the existence of a gross irregularity as a basis for succeeding with a review application, it is necessary to demonstrate that either of the following circumstances exist:

1. The Commissioner misconceived the nature of the enquiry; or

2. The result ultimately arrived at by the Commissioner was unreasonable.

[3] [2013] 11 BLLR 1074 (SCA).

[15] In *Gold Fields Mining South Africa (PTY) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and other*[4] the court introduced a two stage test for review. First there must be an irregularity and second that irregularity must be material to the outcome.

[16] The Court in *Gold Fields* also said the following at paragraphs 15 and

> "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 insulated from or standing independent of the *Sidumo* test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process review.
>
> In short: A reviewing court must ascertain whether the arbitrator considered the principle issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[17] In *Head of the Department of Education v Mofokeng and others*[5] (*Mofokeng*), the Court stated the following at paragraph 33:

> "Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determine with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issue to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesis be material to the determination of the dispute. A material error of this order would point to at

[4] [2014] 1 BLLR 20 (LAC).
[5] [2015] 1 BLLR 50 (LAC).

least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision, the nature of competing interest impacted upon by the decision, and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on the grounds alone. The arbitrator however must be shown to have diverted from correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[18] In interpreting this case, the court in *Shoprite Checkers v Commission for Conciliation, Mediation and Arbitration and others*[6] stated the following at paragraphs 9 and 10:

"[9] This dictum in *Mofokeng* says many important things about the review test. But for present purposes, consideration need only be given to the guidance that it provides for determining when the failure by a Commissioner to consider facts will be reviewable. The dictum provides for the following mode of analysis:

(a) The first enquiry is whether the facts ignored were material, which will be the case if a consideration of them would (on probabilities) have caused the Commissioner to come to a different result;

(b) If this is established, the (objectively wrong) result arrived at by the Commissioner is prima facie unreasonable;

(c) a second enquiry must then be embarked upon-it being whether there exist a basis in the evidence overall to displace the prima facie case of unreasonableness, and

[6] [2015) 10 BLLR 1052 (LC).

(d) If the answer to this enquiry is in the negative, then the award stands to be set aside on review on the grounds of unreasonableness (and vice versa).

[10] The shorthand for all of this is the following: where a Commissioner misdirects him or herself by ignoring materials facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable."

[19] Having considered the above cases, it is axiomatic that it is the reasonableness of the award that becomes a focal point of the enquiry. There must be an error or irregularity as envisaged in section 145 of the LRA. It is however not any error that vitiates the award. The error must be material enough to influence the result and must therefore not be displaced even if the overall evidence is taken into account.

Evaluation

[20] Coming back to the facts of this case, I intend for now to zero in on the ground relating to assault. I will decide later if there will still be a need to traverse other grounds of review. The reason for this approach is that my finding on this assault incident might be dispositive to the whole award.

[21] The Applicant dismissed the Third Respondent, among others, for assault. The Third Respondent contended that she acted in self-defence. I therefore have to determine whether or not the commissioner applied the correct approach to evaluate the self-defence justification as pleaded by the Third Respondent. I am afraid he did not.

[22] Mr. Snyman argued that while it may be an appropriate basis to exonerate an accused on the basis of self-defence in criminal basis, it was not entirely

appropriate to exonerate an employee at the workplace on the basis of self-defence. As he continued to argue, he indicated that an employee who acts in self-defence is still involved in a brawl which is also a serious offence in the employment law context.

[23] I disagree. Self-defence once proven constitutes a basis of exonerating an employee at the work place. It is a complete defence. Such a defence is still applicable in our labour jurisprudence. Exonerating an employee on self-defence but continue finding him guilty for being involved of a brawl negates the very protection of self-defence available to an attacked employee. Regard should be had that if the defence could have been avoided, then such would no longer constitute self-defence but an attack. The requirements of self-defence are trite. I intend not dissect the rest of the requirements that must be proven for self-defence to be sustainable.

[24] In this case I deliberately started the focus on whether or not the Third Respondent exceeded the bounds of self-defence. Obviously to start at this level means I have given, only for purposes of this argument, a benefit to the Third Respondent that Cynthia started the fight. It will come to the fore somewhere in this judgment that such a benefit was also quite generous.

[25] Self-defence can be exceeded and it is on this aspect that I need to find out if the commissioner properly dealt with. It is trite law that where a defender uses more force that is reasonably necessary to repel an attack, the defender would be guilty of assault on the attacker and the defender would not be able to rely on self-defence[7]. Such was quoted with approval in the unreported case of *Rustenburg Platinum Mines Limited v Mwachanda*[8]**.**

[26] Even though it was not clear as to how the incident started, it is axiomatic that the Third Respondent exceeded the bounds of self-defence. The unchallenged evidence is that she continued to beat Cynthia who was lying on

[7] *S v Ntuli* 1975 (1) SA 429 (A) at 437
[8] JR 2283/09, Delivered 10 April 2014 (Wilken AJ)

the floor. The Third Respondent sat on top of her. First set of people could not drag her from Cynthia. It was through the security officer's intervention that the Third Respondent was finally dragged from the top of a helpless Cynthia. She threatened to beat Cynthia even after she was dragged off her. The commissioner was expected to apply the test of self-defence to this continual beating of Cynthia more so that Cynthia was lying on the floor while the Third Respondent was on top of her. Nowhere in his award is the commissioner seen dealing with this aspect. It does not appear from the reading of this award that the commissioner was aware that self-defence can be exceeded. He failed to apply the principle of self-defence to the set of facts before him. This failure was material as he could have found that the Third Respondent's action amounted to assault had he properly applied the legal principle relating to self-defence. Once the bounds of self-defence are exceeded, assault is committed. This was a material misinterpretation and misapplication of the law relating to self-defence. The irregularity is material enough to warrant the reviewing and the setting aside of this award.

[27] I started by giving the Third Respondent a benefit that it was Cynthia who started assaulting the Third Respondent. I did so to demonstrate that even if I were to work on the Third Respondent's version alone, the award would still be unsustainable. I am now tempted even to withdraw the benefit I have earlier given to the Third Respondent.

[28] The explanation proffered by the Third Respondent on how she was attacked by Cynthia is improbable. She indicated that she was assaulted while making a call. She, in response, calmly told Cynthia to sit down. In her explanation she never asked why Cynthia was assaulting her. She only said she must sit down. I find this explanation problematic. Under normal circumstances, she would have asked Cynthia why she was assaulting her. The Third Respondent was thus economical on how the fight started. This is exacerbated by the fact that Ms Seloi who was in the shop with the Third Respondent testified that the fight or assault started when she was on her way to the bathroom. She heard a bang and when she turned the Third

Respondent was on top of Cynthia. The commissioner did not provide a plausible explanation why he did not accept Ms Seloi's evidence. It was not enough to allude that Ms Seloi did not protect the Third Respondent. There was no cogent reasons why Ms Seloi had to lie about the incident. On a balance of probability, the Third Respondent started the assault and the bang was caused when Cynthia was falling down. Even if I am wrong on this, I am however convinced that I am correct in my finding that the bounds of self-defence, if there was one, was exceeded.

[29] I was tempted to look into further grounds of review as raised by the Applicant. Having found in the preceding paragraph that the First Respondent committed a material irregularity in the assessment of self-defence justification, I rest here. Further evaluation would not salvage this award.

Costs

[30] The Third Respondent argued her own case. In her own view the award needed to be defended. She was passionate about the matter. I do not find this to be a case where costs should follow suit.

[31] Accordingly, I make the following order:

Order

1. The arbitration award issued by the First Respondent under case number GATW 9002-14 dated 27 November 2014 is hereby reviewed and set aside and replaced with an order that;.

    1.1 The dismissal of the Third Respondent by the Applicant was substantively fair.

2. There is no order as to costs.

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Molebaloa M.S

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Snyman of Snyman Attorneys.

For the Third Respondent: In Person.