



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

Reportable

Case no: JR610/2015

In the matter between:

BOLD MOVES 1991

Applicant

and

MUZI ABEL MDLULI

First Respondent

COMMISSION FOR CONCILIATION

Second Respondent

MEDIATION AND ARBITRATION

HH MATHEBULA N.O.

Third Respondent

Heard: 13 September 2016

Delivered: 20 April 2017

Summary: A commissioner who fails to consider all the evidence before him and reaches a conclusion which is not supported by the totality of the evidence as captured in the record of the proceedings commits gross misconduct.

JUDGMENT

MTHOMBENI AJ

Introduction

- [1] This is an application for the reviewing and setting aside of an arbitration award (the award) dated 1 March 2015, issued by the third respondent (the commissioner) under case number MP 9378/14, issued under the auspices of the second respondent, and the staying of the award, pending the outcome of the review application. The application is unopposed.

Background

- [2] The applicant carries on business which comprises three divisions; namely, a Sasol filling station, a convenient store and Gallito's which is a restaurant.
- [3] On 1 September 2013, the applicant employed the first respondent as a n Operational Manager in charge of the restaurant.
- [4] During 2014, the applicant incurred financial loss amounting to R 297 000.00, including cash sales in excess of R 300 000.00.
- [5] Consequently, during November 2014 the applicant commissioned an outside company to conduct a full investigation into the losses.
- [6] The outcome of the investigation revealed that the losses were emanating from the restaurant only.
- [7] This, coupled with other complaints of alleged misconduct by the first respondent culminated in the applicant charging the first respondent with acts of misconduct concerning the losses.
- [8] The applicant held a disciplinary enquiry where the first respondent was found guilty and dismissed.
- [9] Aggrieved by his dismissal, the first respondent approached the second respondent and referred a dispute, claiming unfair dismissal.
- [10] Following a conciliation meeting where the dispute remained unresolved, the third respondent assigned the commissioner to arbitrate over the dispute.

[11] The commissioner concluded that the dismissal was substantively unfair and ordered the applicant to pay the first respondent as follows:

11.1 R 5 940.00 x 4 months = R 23 760.00;

11.2 R 5 940.00 on November outstanding salary; and

11.3 R 2 682.00 on 14 days leave pay.

Grounds of review

[12] The applicant submitted that the commissioner committed a gross irregularity in the conduct of the proceedings and/or exceeded his powers in that he:

12.1 made a finding in which he ignored the evidence before him, alternatively misunderstood the evidence before him as the award does not reflect such evidence.

12.2 did not allow the applicant's witness to use further statements which he had in his possession and would have assisted the applicant to discharge its burden of proof.

12.3 ignored the applicant's cross-examination of the first respondent, as it does not constitute part of the award.

12.4 misunderstood the legal principles.

12.5 misunderstood the legal principles regulating compensation and how quantum ought to be determined.

12.6 refused to allow the applicant to present evidence which would have assisted the applicant in discharging its burden of proof.

[13] While the applicant has set out the grounds of review it has, however, failed to refer in its founding or supplementary affidavits to specific sections in the commissioner's award or record of the arbitration proceedings which this

application seeks to impugn. The applicant's heads of argument, albeit not a pleading, do not also refer to specific portions in the award or evidence¹.

- [14] In my view, it is incumbent upon the applicant to draw the court's attention to the relevant sections of the award or record which demonstrate the alleged irregularities to facilitate the determination of the review application.
- [15] Be that as it may, I shall consider the award and record to determine the merits of the applicant's grounds of the review.

The award

- [16] The applicant called Hans Jacob Terblanche ("Terblanche") and Arthur Myeni ("Myeni") as witnesses.
- [17] It was Terblanche's evidence that the first respondent had deleted invoices, took money and did not put it in the till. He added that the first respondent also deleted stock from the system, thereby manipulating the gross profit to reflect a figure that is higher than it should be.
- [18] In essence, Myeni's evidence was to the effect that the first respondent had inflated the amount on invoices brought for vegetables and took the difference and his family and friends would come and have meals at the restaurant without payment.
- [19] In his evaluation of evidence, the commissioner stated:
- "36 Mr Myeni's evidence lacks substance and credibility. He could not explain as to why he failed to report the applicant when taking cash and erased slips although he was ill-treated by the applicant.

- [20] However, the record reflects that Myeni stated the following:

¹ (See: *Naidoo v National Bargaining Council for the Chemical Industry and Others* [2012] 9 BLLR 915 (LC), *Hamandawana v Dispute Resolution Centre* (2014) 35 ILJ 1312 (LC), *Communication Workers Union v SA Post Office Ltd* [2013] 34 ILJ 626 (LC)).

“25 Arthur you were in probation, you were in probation meaning you also you were to supervise me if I do something to you also you were to report me if I do something wrong. I repeat again the question what made you not report me on that first three months when you see that? ---This thing it takes place when we were taken into the detector test. It is whereby I have mentioned everything, because you gave me couple of written warnings that I did not deserve. So I was not having a chance to speak to Mr Hanco because he was angry with to me because of the things Muzi wrote there as warnings as that I am not doing my job properly...”

[21] The commissioner disregarded Myeni’s explanation and concluded as he did, contrary to what the record reflects. Moreover, there is no analysis of the extensive evidence of Terblanche on which the applicant’s version was based.

[22] The commissioner concluded that the applicant explained the applicant’s bundle, while Terblanche failed to do so. The record does not support such a conclusion which defies logic.

[23] From this perspective, in my view, the commissioner failed to apply his mind to the evidence before him and denied the applicant a fair hearing.

[24] The commissioner found that:

“33 In essence, the respondent through its witnesses indicated that the applicant stole money or committed gross negligence but such evidence was countered by the applicant. The respondent failed to discharge such onus.

39 From the evidence presented, I could not find any causal link between the alleged stock loss and the applicant. It is evident that the applicant was merely dismissed because of his position as a manager.

40. From the evidence presented by both parties, taking into (sic) supporting documents as adduced in this matter, the respondent failed to prove on a balance of probabilities that the applicant broke the company rule and the rule was known to him.

43. Having duly applied my mind to the facts and merits of the case before me on balance of probabilities, I come to the conclusion that the dismissal was substantively unfair.”

[25] The commissioner’s findings are at variance with the record. Instead, he concluded that the applicant had failed to discharge its burden of proof, without a clear analysis of the factual dispute, proper assessment of the credibility of the witnesses and the critical weighing up of the evidence.

[26] It is trite that, while Section 138 (1) of the Labour Relations Act² (the LRA) allows a commissioner a discretion to conduct an arbitration so as to determine the dispute fairly and quickly, it does not exempt the commissioner from properly resolving disputes of fact. It is still incumbent upon the commissioner to properly assess the credibility of the witnesses and critically weigh up the evidence. In my view, in this regard the commissioner erred in that his conclusion bears no relationship to the evidence led by the applicant. The commissioner failed to accord full and unbiased attention to the entire evidence before him.³ [27] In *Lukhanji Municipality v Nonxuba NO and Others*⁴, the Court referred to *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others*⁵ where the Court stated that:

“...To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’s candour and demeanour in the witness box.(ii) his bias, latent and blatant.(iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his

² Act 66,1995

³ (See: *Sasol Mining v Commissioner Ngqeleni and Others* [2011] 4 BLLR 404 (LC).

⁴ [2007] 2 BLLR 130 (LC) at par 27.

⁵ 2003 (1) SA 11 (SCA)

performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to(c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail".

- [28] In my view, the above dictum applies equally to commissioners as triers of fact, for they are enjoined with effectively undertaking a proper analysis of the evidence.
- [29] I now turn to the applicant's grounds of review.
- [30] As alluded to above, the third respondent ignored the evidence before him and made findings that are inconsistent with the record.
- [31] Mr Olivier, the applicant's representative at the arbitration proceedings, cross-examined the first respondent extensively. In the process, Mr Venter put the applicant's version to the first respondent. This notwithstanding, the commissioner ignored this aspect in his summation or analysis of the evidence, while he misinterpreted the cross-examination of the applicant's witnesses. Thus, the commissioner acted inconsistently and failed to give the applicant a fair hearing.
- [32] I could not find any indication in the record that the commissioner refused the applicant's witnesses to use further statements which would have assisted the applicant to discharge its burden of proof. As indicated above, the applicant failed to highlight this aspect in the record.
- [33] Furthermore, the applicant failed to illustrate how the third respondent had misunderstood the legal principles regulating compensation and how quantum ought to be determined.

[34] In this regard, I reiterate that it is incumbent on the applicants to make out a proper case in the founding and supplementary affidavits and establish the grounds of review on which they intend relying with reference to the award and the record⁶

[35] In my view, the commissioner failed to give complete and impartial attention to the totality of the evidence before him prior to drawing his conclusion which is not supported by the evidence led as reflected in the record. This constitutes a failure to apply his mind which is gross misconduct and constitutes a reviewable irregularity.

[36] In the circumstances, it cannot be said that the commissioner reached a decision that a reasonable decision-maker could reach.

[37] I am not in a position as the commissioner to determine the matter.

[38] In the result, I make the following order:

Order

1. The arbitration award, dated 1 March 2015, issued by the third respondent under case number MP 9378/14, is reviewed and set aside;
2. The matter is remitted to the second respondent for the dispute to be heard afresh by a commissioner other than the third respondent; and
3. I make no order costs order.

M Mthombeni

Acting Judge of the Labour Court

⁶ (See: *Naidoo v National Bargaining Council for the Chemical Industry* above).

Appearances

For the Applicant : Advocate Andries Van Wyk

Instructed by : Seymour Du Toit Basson

No appearance for the Respondents