REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT



Not reportable

Case No: JR1364/11

In the matter between:

**MASS DISCOUNTERS (PTY) LTD t/a GAME STORES** **Applicant**

and

**COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** **First Respondent**

**WILFRED NKGOENG N.O.** **Second Respondent**

**ALFRED KENNETH DUBE** **Third Respondent**

**Heard: 9 January 2014**

**Delivered: 19 March 2014**

**Summary:** **Review application, commissioner ignoring hearsay evidence**

**JUDGMENT**

COOK, AJ

Introduction

[1] The Third Respondent ["the employee "] was employed on 1 March 1999 as a stock controller in the Applicant's employ. The Applicant operated a Game Store within the retail industry which sells products to the public.

[2] The employee was faced with the following allegation:

> 'Serious misconduct in that, on 28 August 2010, you were rude and disrespectful towards a customer. This was poor customer service and in direct conflict with your employer's interests'.[1]

[3] The employee was subjected to a disciplinary hearing and was found guilty. The employee unsuccessfully appealed the outcome of the disciplinary hearing. The employee earned R2062,00 per month when he was dismissed on 7 December 2010.[2] The employee referred the matter to the CCMA and sought reinstatement.

[4] The arbitration was held at the CCMA, Diederick Street, Witbank, on 24May 2011. Procedural fairness was not in issue.The Applicant submitted bundles of documents marked Annexure "A1" and "A2". The Applicant called Johan van Meersbergen and Lorraine Maseko, whilst the employee testified on his behalf.

The applicable legal principles

[5] The Supreme Court of Appeal in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[3] summarised the position of the test to be applied in reviews as follows:



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1 page 15 of the index to the CCMA records

2 paragraph 4, page 27 of the review pleadings

3 (2013) 34 ILJ 2795 (SCA)

'...A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)*(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the enquiry 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 the 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'.[4]

[6] The Labour Appeal Court in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*[5] stated:

'Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award, or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or consideration of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?(iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the



[4] Id at para 25

[5] (JA 2/2012) [2013] ZALAC 28 (4 November 2013) at paras 20-21.

arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork'.



Analysis of the award

[7] The Commissioner found that the employee's version was more probable than that of the Respondent. The Commissioner does not favour any proper explanation as to this conclusion. From the award, one cannot discern a proper basis as to why the Applicant's witnesses' versions were rejected.

[8] The customer says that Dube said that he was there to play. In the e-mail dated 18 October 2010[6] the customer states:

> 'On 15 October 2010 I was requested to come and testify on the disciplinary hearing after the attached complain (sic) about one of Game's salesperson (Kenneth Dube) who works at Game Witbank. On 16 October 2010 at 09:25 I received a call from Kenneth Dube treating (sic) to kill me and my family because of my testimony on 15-10-2010. He said 'I am calling to tell you that Game has fired me because you and Johan, you thing (sic) you are clever, I know where you live, I will kill you

[6] page 43 of the CCMA bundle

> and your family, you do not know me, I am Dube and you will see me.' I told him that this was a serious statement and I am going to take legal action. He then said 'I do not care, I do not mind the police or legal actions'.

[9] The customer gave evidence at the disciplinary hearing that the employee was unprofessional and said to him 'Do you know there is nothing for mohala now'[7]. The customer also said that the employee said in his language "Louzohlala" he is playing in reference to the customer. The customer also said that the employee said 'You can go and report I don't care'. He said that very loud.[8]

[10] The employee agreed that if any of the employees treat a customer badly it would be fair to dismiss. Lorraine Maseko testified that she agreed with the customer that the employee was unprofessional when he said the customer was here to play. The Commissioner fails to take into consideration the evidence of Meersbergen that this was not the first complaint by a customer against Kenneth.

[11] The employee admitted that he called the customer after the hearing and because some of the things she said were not true. 'I was angry at the time. I said to the customer that if I lose my job, I he going to find me another job'.[9] The employee also said 'I apologised and said that it may be because I had a death in the family'.[10]

[12] The commissioner states that:

> 'The said customer was not in attendance and therefore led no evidence that suggests the Applicant was rude and disrespectful. The e-mail alleged to have been sent by him, contradict what the second witness said[11]. The e-mail says that one of the ladies was helping the customer

[7] page 21 of the CCMA record

[8] page 22 of the CCMA bundle

[9] page 4 of the CCMA record

[10] page 4 of the CCMA record

[11] In terms of the e-mail dated 31st of August 2010 (page 42 of the CCMA bundle) Eugene Dludla ("the customer") states:

and Kenneth decided to assist while the

Respondent's second witness said Mr Dube was the first person to assist the customer. I therefore conclude that the Respondent has failed to prove that the Applicant was rude and disrespectful'.[12]

[13] It is clear from the above that the Commissioner places no reliance on the contents of the e-mails, yet in the same paragraph uses the e-mails to demonstrate a contradiction in the evidence of Maseko's testimony.

[14] Due to the succinct analysis of the evidence in the award, the Court has to look further than the articulated reasons with a view to establishing whether on the material before the commissioner, there were other reasons albeit not articulated which could render the award reasonable.

Hearsay evidence

[15] In the interests of justice, hearsay evidence may be admissible in terms of Section 31(c) of the Law of Evidence Amendment Act 45 of 1988. The factors to be considered are the following:

'(c) The court having regard to:

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) The probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

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'One of the ladies was helping me but Kenneth Dube decided to assist me and he was rude and unprofessional.

[12] page 31, paragraph 24

(vi) Prejudice to opponents;

(vii) any prejudice to a party to which the admission of such evidence might entail; and

(viii) any other factor which should in the opinion of the Court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice'.

[16] 'The nature of the arbitration proceedings is characterised *inter alia* by the fact that disputes are intended to be resolved quickly and through relatively simple and non-technical procedures'.[13]

[17] If one were to look at the criterion for the admission of hearsay evidence, there are factors that ought to have been considered by the commissioner. Due to the nature of the proceedings in the CCMA which requires less formality, this should have been a factor that should have inclined the allowing of the e-mails. From the e-mails it was patently clear why the evidence was not being given at the arbitration by the person upon whose credibility the probative value of such evidence depends, was stated. The e-mails clearly showed that the customer feared for her life and would therefore be reluctant to give evidence at the CCMA.

[18] The employee did not call into question the authenticity of the e-mails. The employee in fact admitted and corroborated certain elements of the e-mails by stating that he did call the customer after his dismissal.

[19] The e-mails themselves tend to be of high probative value as they are clear and succinct and would have been of assistance to the commissioner. The Court is of the view that in light of the nature of the hearsay evidence it would be more in the interests of justice to admit the hearsay evidence than it would be to exclude it.

Conclusion

[20] The commissioner rejected Maseko's evidence that the employee was

[13] *Edcon Ltd v Pillemer NO and Others* (2008) 29 ILJ 614 LAC at para 15

disrespectful towards a customer due to the fact that there were contradictions as to who was initially serving the customer. I am of the view that this is not a proper basis to have rejected Maseko's evidence on the material aspect of her evidence that in her view the employee was rude or disrespectful to the customer.

[21] In terms of the disciplinary enquiry, the employee did not dispute the Applicant's evidence which included the customer's complaint and the evidence of the customer. More so, the employee also apologised for his conduct and tried to explain that it was due to the fact that his sister and brother had passed away and that he was confused. In the disciplinary enquiry, the employee admitted that he raised his voice towards the customer.[14]

[22] The commissioner committed a reviewable act by failing to properly consider the e-mails of the customer. If the commissioner had properly considered the e-mails and their probative value, the commissioner would not have come to the finding that he arrived in his award. The commissioner does not provide any cogent grounds as to why the crucial e-mails were not admitted. The commissioner had on the other hand cogent grounds as to why the customer was not called as a witness.

[23] In this matter, the commissioner by not taking into consideration the e-mails of the customer, allowed the employee to benefit from intimidating the witness from testifying. I am of the view that this would be unfair. To ignore the hearsay evidence in this matter would have the effect of placing the employee back in the customer orientated environment of the Applicant. The court is of the view that to allow the employee to return after threatening the customer's life and that of her family would be intolerable.

[24] For these reasons, in my view, the commissioner's decision can be said to be one that a reasonable decision-maker could not have reached on all the available evidence. For this reason the review application stands to be

[14] page 23 of the CCMA records, last line

granted.

Costs

[25] The Court has a wide discretion when deciding to award costs. The Court is mindful of the fact that the employee was dismissed and breadwinner for his family. In light of these facts, the Court is not inclined to grant costs in this matter.

[26] I therefore, make the following order:

1. The review application is granted.
2. The arbitration award dated 29 May 2011 under case number MP192-11 is reviewed and is set aside.
3. The dismissal of the Third Respondent is substantively fair.
4. No order as to costs.



Cook AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

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| For the Applicant: | M G Maeso (Shepstone & Wylie Attorneys) |
| For the Respondent: | Advocate Nick Ferreira |
| | Attorney Chris Ferreira |