THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JR 792/15

In the matter between:

MAIZEY (PTY) LTD **Applicant**

and

TSHEPO NORMAN MAFA **First Respondent**

TEBOGO SHADWICK MAFUJANE *N.O* **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Date heard : 25 May 2017

Date delivered : 8 June 2017

Summary: Review application. Mere averments that the arbitrator failed to apply his mind do not establish grounds to render the award reviewable. Application dismissed.

JUDGMENT

BALOYI AJ

Introduction

[1] The Applicant is seeking review and set aside of the arbitration award issued by the Second Respondent. In terms of the award a finding that the dismissal of the First Respondent was substantively unfair is made. The First Respondent was as result awarded compensation equivalent to 10 months' remuneration totalling R95 040-00. The First Respondent was dismissed for misconduct. The underlying issue being that he intimidated his subordinate by threatening to kill him for refusing to make a false statement about a colleague. The allegations were denied and the First Respondent opposed the application.

Factual background

[2] The Applicant dismissed the First Respondent on 20 October 2014. At the time of his dismissal he was holding a position of supervisor. The Applicant's case was basically that the First Respondent attempted to orchestrate the dismissal of a fellow supervisor, Paul Thithi. The Applicant's witnesses were Gerald Karl Pieterse who investigated the case against the First Respondent and Thomas Matome Mohale who was the First Respondent's surbordinate. The Applicant approached Mohale and asked him to make a false statement that Thithi had sexually harassed a female employee, Danisile Nompumelelo Mbele. The Applicant believed that the First Respondent concocted the story in order to get Thithi dismissed. One of the two supervisors, either the First Respondent or Thithi was likely to be retrenched due to the restructuring of Applicant's operations. The First Respondent stood to gain should the Applicant dismiss Thithi as the need for retrenchment would vanish.

[3] It came to record that Mohale, the threatened employee at some stage had an intimate relationship with Mbele, (the sexually harassment complainant). Mbele was at the time of the incident a

casual employee whose employment was managed by the labour broker. The First Respondent heard about the sexual harassment from Mohale and later Mbele confirmed by Mbele. This was after the expiry of Mbele's fixed term contract. Mbele was encouraged by the First Respondent to report the matter. The First Respondent also learnt from Mohale that Mbele's contract was not renewed because she refused to sleep with Thithi. The First Respondent further verified this allegation with Elias Kgantsi Mogoai, the Shopsteward who confirmed having heard about it from Mohale. Mohale testified in support of the Applicant's case, he denied any knowledge about the sexual harassment and that he told the First Respondent and Mogoai about it. He only knew about the sexual harassment allegations when the First Respondent forced him to make a statement.

[4] The First Respondent denied threatening Mohale with death. He called Mogoai and Mbele to testify in support of his case. Mogoai's version revealed that Mohale told him about the sexual harassment and later checked it with Mbele who confirmed that it had indeed happened. He advised her to report it to the management but was reluctant to do so for fear of losing her job. Mbele in her testimony confirmed the sexual harassment and that Mohale knew about it. The First Respondent also advised her to report it even after she was no longer in the Applicant's employment.

[5] The arbitrator found the restructuring and the purported competition between the First Respondent and Thithi for a position as not supported by evidence and uncorroborated. He found Pieterse's version as far-fetched regarding the First Respondent's motives to get Thithi dismissed. Mohale's version was found to be not credible as was not supported by evidence. He went on to accept evidence tendered in support of the First Respondent's case and referred to *Stellenbosch Farmer's Winery Group and Another v Martell Cie and*

Others[1] regarding the parties' versions on intimidation which he found mutual destructive.

[6] The Applicant's attack to the award is based on the Second Respondent's failure to apply his mind. Firstly, to the fact that the sexual harassment was reported some six to eight months after it had happened. Secondly that there was only one supervisor position to be occupied by either the First Respondent or Thithi after restructuring. Thirdly he misapplied the rules of evidence regarding the statements made by Mohale. Lastly that he did not give reasons for his finding that the sexual harassment did take place.

The arguments

[7] Mr Berry for the Applicant pointed that the Second Respondent's determination on whether sexual harassment took place demonstrated his failure to apply his mind. The evidence tendered for the Applicant was clear to the effect that the First Respondent plotted to have Thithi dismissed. Mr Berry attempted to rely on other issues which were neither part of the record nor were ever pleaded, that is bias, sexual harassment not being reported to the police as well as Mbele being part of the plot to get rid of Thithi.

[8] As placed by Mr Makka for the First Respondent what the Applicant pleaded happened to be an expression of dissatisfaction about the outcome of arbitration proceedings. Such complaints do not establish the grounds calling for review of the Second Respondent's award. Mbele whom it was alleged that her sexual harassment was fabrication, testified in confirmation of such incident and her evidence was never challenged. She also gave reason for not reporting the incident soon after it had happened and that remained unchallenged. Although the First Respondent was represented on *pro bono* basis

[1] (2003) 1 SA 11 (SCA)

the First Respondent sought a cost order against the Applicant for application being vexatious and frivolous.

Evaluation

[9] The Applicant's grounds are seemingly rested on the First Respondent's failure to apply his mind. This may authoritatively be classified under gross irregularity. What was required from the Second Respondent given the facts of this matter was to assess which of the parties' version was more probable squarely based on facts placed before him coupled with application of rules of evidence. I find it not surprising that the Applicant solely settled with the Second Respondent's failure to apply his mind to the issues brought before him. The Court has on many occasions cautioned about attempts to secure a review on advancement of what may look like grounds of appeal. In *Lekota v First National Bank of South Africa Ltd*[2], the Court per Basson J held as follows:

> "16 I pause here to state the law in regard to the review of arbitration awards. It is not the function of the reviewing court when reviewing an arbitration award in terms of section 145 of the Act to decide whether the commissioner acted correctly or (from the applicant's point of view) whether the decision by the commissioner was wrong. The defects that have to be shown in terms of section 145(2) of the Act (discussed above) is that either the commissioner (1) committed misconduct in relation to the duties of the commissioner as an arbitrator (this clearly would require a *mala fide* act on the part of the commissioner); (2) committed irregularity in the conduct of the arbitration proceedings (this clearly has to do with the conduct of the arbitration proceedings in terms of which a gross irregularity occurs); and (3) that the commissioner exceeded his or her powers."

[2] 1998 10 BLLR 1021 LC at para. 16.

[10] It is worth stating that the position has not changed in the life post the *Sidumo*[3] judgment. The expansion of the grounds go further to reasonableness. In *Super Group Auto Parts t/a as Auto Zone v Hlongwane and Others*[4] the Court had this to say per Ngalwana J:

> "10 In my respectful view the "constitutional standard" now propounded by the Constitutional Court in *Sidumo* bears a striking resemblance to the test usually applied in applications for leave to appeal, the only difference being the substitution of "a reasonable decision-maker" for the higher court or another court. The danger is thus the blurring of the line between an appeal on the merits, on the one hand, and a review based on the rationality and justifiability of the decision when regard is had to the evidence advanced on the other. It is hoped that the reasonableness standard now introduced by the constitutional court will in future be tightened to ensure there is no confusion as regards the extent to which reasonableness of the commissioner's decision may be tested."

[11] The upshot of this is that mere complaints that the arbitrator did not decide the matter as desired by the party bringing review application cannot be sufficient to render the award reviewable. It cannot be argued that the Court is vested with a duty to evaluate the merits of the dispute placed as before the Second Respondent. It is therefore imperative to look at what seems to be the cause of the dispute,that

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC)

[4] [2010] 4 BLLR 458 (LC); (2010) 31 ILJ 1248 (LC) at para 10

is sexual harassment[5]. The Applicant viewed this as fabrication by the First Respondent hence he was charged and dismissed under the circumstances. Pieterse relied on what Mohale told him, that is, sexual harassment was in fact a subject matter of intimidation leading to Mohale's refusal to make a false statement about Thithi. He also admitted that Mbele did report the sexual harassment to the Applicant though belated. The First Respondent brought Mogoai and Mbele to support his case that sexual harassment did occur.

[12] Assuming it was accepted that the First Respondent had a motive against Thithi based on Pieterse's allegations, the Applicant faced a steep challenge to rebut evidence that the sexual harassment indeed took place and deserved reporting. The insurmountable difficulty with the Applicant's case is that Mogoai had also independently advised Mbele to report the sexual harassment case to the Applicant long before the First Respondent became aware of it. His evidence remained unchallenged. The Second Respondent cannot be faulted for finding no reason to suggest that sexual harassment was the First Respondent's fabrication. Mr Berry also conceded that the record does not show that Pieterse in his investigations managed to source out evidence of the First Respondent's motive to escape retrenchment at Thithi's expense. The Second Respondent's decision to reject Mohale's evidence and the reasons provided for such rejection is the one that a reasonable decision maker could reach. The application under these circumstances stands to fail.

[13] The manner in which litigation was conducted by the Applicant in this application, is indicative of the Applicant's knowledge from day one or at least after transcription of the record that it had no prospects of successful prosecution of the review application. Mr Berry in his

[5] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and* Others (2009) 11 BLLR 1128 LC at paragraph 17 the Court restated its role that it is not precluded from scrutinizing the process in terms of which the decision was made when determining review applications.

arguments tried all means to distance himself from the pleadings and the record. He instead narrated outside issues as pointed above and this Court is disinclined to rule on them. His submissions were largely not based on what was before the Second Respondent. What can be drawn from the Applicant's case is unhappiness with the award. No sustainable ground has been put to the fore. It is now established that there is no bar to the First Respondent's asking for costs even when represented on *pro bono* basis. In *Zeman v Quickelberge and Another*[6] the Court held as follows on this aspect:

> "77 In my view, access to justice to indigent clients should be encouraged, especially in a court of equity such as this one. Should a successful pro bono litigant be awarded costs, the unsuccessful party is no worse off than would otherwise be the case. The obverse is also true: A pro bono litigant still runs the risk of an adverse costs order against him or her. The knowledge that a losing party - usually the employer - would never run the risk of an adverse costs order, would have a chilling effect on the willingness of legal practitioners to provide their services pro bono."

[14] In all fairness, I do not find any reason why this matter should not be determined alongside this principle. Under these circumstances no good reasons exist as to why the Applicant should not pay the costs.

Order

[15] The following order is therefore made;

1. The review application is dismissed with costs.

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M. Baloyi

Acting Judge of the Labour court of South Africa

[6] (2011) 32 ILJ 453 (LC)

Appearances:

For the Applicant: Mr Berry

Employers' Organization Official

For the Respondent: Advocate. A Makka

Instructed by : Bowman Gilfillan