



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

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Not Reportable
Case no: JR1636/15

In the matter between:

BARLOWORLD EQUIPMENT SA

Applicant

And

NICK LOVE

Respondent

DATE HEARD: 23 March 2017

DATE DELIVERED: 23 March 2017

DATE EDITED: 17 May 2017

EX-TEMPORE J U D G M E N T

MOSHOANA, J: In this matter I am going to give judgment and if there are further reasons to be given I would provide the parties with such reasons upon request.

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This is an application in terms of Section 145 of the Labour Relations Act in terms of which the applicant before me Barloworld Equipment is seeking to review and set aside an award issued by the 2nd respondent in favour of the 3rd respondent. The review application is opposed by the 3rd respondent only.

The facts relevant to this matter can be summarized as follows.

The 3rd respondent was employed as a Commercial Manager as at the

time of his dismissal. On the 4th of December 2014 an incident had occurred which led to a picture being taken by the 3rd respondent using a cell phone camera. The dispute as it will become apparent later in this judgment was whether the picture that was taken was that of the backside of a fellow employee or as Mr Love, the 3rd respondent had indicated, was intended to take two other employees as well.

Nonetheless the fellow employee, Ms Mhinga was apparently aggrieved by the conduct and lodged a grievance. Owing to the fact that there was no apology, the 3rd respondent was then arraigned for sexual
10 harassment.

The charge that the 3rd respondent faced reads as follows,

“Sexual harassment in that on or about the 4th of December 2014 you allegedly captured a photo of your colleague namely Pengentani Mhinga’s backside on your phone in the presence of two other colleagues without permission and/or consent thereby humiliating her and failing to respect the rights of others in the workplace.” [Emphasis added]

The 3rd respondent was charged as such found guilty and dismissed.
20 Aggrieved by his dismissal he then referred a dispute of unfair dismissal to the 1st respondent.

The 1st respondent appointed the 2nd respondent to resolve the dispute through arbitration. As pointed out earlier a favourable award was then issued for the 3rd respondent.

The applicant before me was then aggrieved by the award and

launched the present application. The grounds of the review application before me can be summarized as follows as it is apparent from the founding papers. The 2nd respondent had misdirected himself, he took a narrow definition of sexual impropriety or sexual misconduct. He misdirected himself by making inferences. He overlooked the evidence of Nokwanda that the picture of the three employees as alleged by Mr Love was impossible given the angle. For full and proper recordal of the grounds regard should be had to the founding affidavit.

Before I deal with the review itself it is important to reflect on the following, which appears to be the accepted principles relating to reviews in this court. A review is not an appeal, what the court considers in a review application is whether a decision arrived at is one that a Commissioner would have arrived at given the evidence that was before the Commissioner.

A further consideration is the following. When a Commissioner considers the fairness of the dismissal other than looking at dismissal as a sanction itself would have to determine the guilt of the employee. In other words if the employee is being charged and dismissed for a specific offence, the employer, if challenged, would have to show that the said offence has been committed and in that manner it is justifying as it were the decision to dismiss. Such was confirmed by the Constitutional Court in the matter of *Toyota SA Motors (Pty) Ltd v CCMA and others*¹.

The applicant before me was challenged to show the fairness

¹ 2016 (3) BCLR 217 (CC)

of its dismissal. One of the issues that was placed before the Commissioner was the following. At page 441 of the transcript Mr Soldatis, who represented the applicant at arbitration stated the following,

“The fundamental issue in debate over here is whether the, in fact the applicant took the photograph in respect of which the charge was formulated against him and in respect of which it resulted in him being dismissed.”

Clearly and correctly so Mr Soldatis was stating to the Commissioner
10 that the applicant was going to show that the employee was actually guilty as charged and therefore substantively it had the reason to have the employee dismissed.

It is common cause and it was common cause before the Commissioner that the picture that is reflecting the backside as alleged was never presented as part of evidence. Accordingly the 2nd respondent was faced with two conflicting versions as there was no picture that would have clearly reflected that the backside was taken.

To my mind the only evidence that could have possibly led to a conclusion that the conduct was an unwarranted conduct of a sexual
20 nature was the photograph itself. Unfortunately such piece of evidence was not there.

The law is very clear that when a trier of facts is faced with two conflicting versions, the trier of facts must weigh the evidence that is before him or her with a view to arrive at a probable version. Contradictions are one of the issues that would arise in that process of

weighing up. I must point out that once a credibility finding is made it does not necessarily follow that such evidence would be rejected.

However in this matter, the arbitrator made it very clear that he is not rejecting any of the versions and that much is clear from his award but in the course of trying to find the probabilities he then considered all the material that was before him and picked up that certain pieces of evidence that reflects that the backside was taken was improbable.

The onus to show that a dismissal is fair lies on the employer,
10 the applicant before me. Section 192 of the Labour Relations Act is very clear in that regard. Now it was for the applicant to prove on a balance of probabilities that firstly Mr Love is guilty as charged and therefore he was supposed to be dismissed.

To my mind there is nothing wrong in the Commissioner faced with the difficulty of weighing up evidence comparing some evidence that was presented elsewhere with what was before him with the sole purpose of determining what the possible truth is. It is the duty of the Commissioner to determine the fairness of a dismissal. Section 138 does provide that he ought to do so fairly and quickly.

20 The issue relating to the manner in which the court of review should deal with reviews has been clearly defined in the *Goldfield's* judgment and that is whether the principal issue to be determined was determined and the parties were given an opportunity to present their evidence in order for the Commissioner to arrive at a decision that falls within the bounds of reasonableness. It is not that the Commissioner

must issue a correct award, the test is very simple, a decision ought to fall within the bounds of reasonableness given the evidence that was before the Commissioner.

Such suggests that there could be other decisions for an example as a court of review, I could have arrived at a different conclusion on certain aspects, but that is not the test because that goes to the wrongfulness or the rightness of the decision. That is, if on the evidence that was before the arbitrator a conclusion that is arrived at falls within the bounds of reasonableness then my hands are tied. In an
10 appeal situation one would have probably been given the leeway to interfere as much as he could.

Accordingly in my mind with the evidence that was before the Commissioner there is nothing that I could do or there is nothing that could lead me to the conclusion that the decision does not fall within the bounds of reasonableness. In the result I come to the following conclusion.

The review application is dismissed. The applicant is to pay the costs.

TRANSCRIBER'S CERTIFICATE

This is to certify that, **insofar as it is audible**, the foregoing is a true and correct transcript of the proceedings recorded by means of a mechanical recorder in the matter of:

BARLOWORLD EQUIPMENT SA v NICK LOVE

CASE NUMBER: JR1636/2015

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REPORT ON RECORDING

I hereby declare that all witnesses/accused in these proceedings have been dully sworn in (d.s.s) by the prosecute or court, before testifying before court.

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