THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO. JR 906/13

In the matter between:

CASH PAYMASTER SERVICES (PROPRIETARY) LIMITED **Applicant**

and

HELLEN HLATSWAKO *N.O* **First Respondent**

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

LEONARD NTSOKO **Third Respondent**

Heard : 4 MAY 2017

Delivered : 6 June 2017

Summary: Review application, Commissioner entering the arena in a manner consistent with cross examination and embarked on

personal attacks on witnesses sufficient to find *bias.* Commissioner awarding relief that is outside her powers. Arbitration award reviewed and set aside.

JUDGMENT

BALOYI AJ

Introduction

[1] The arbitration award sought to be reviewed and set aside was issued by the Third Respondent sitting as Commission for Conciliation Mediation and Arbitration (CCMA) arbitrator. The Third Respondent's dismissal was in terms of the award found to be unfair and relief of reinstatement with back pay was awarded. The leading contention within the Applicant's grounds happened to be *bias.* The Third Respondent's opposition of the review application is accompanied by some concessions on the issue of *bias.* However, the Third Respondent viewed the *bias* complained about as not having major effect to render the award reviewable. More on this appear fully hereunder.

Factual background

[2] The Applicant dismissed the Third Respondent on 29 October 2012 for late coming with a further sanction of final written warning in respect of other charges he was found guilty on. The charge of late coming was the main issue for discussion in the arbitration proceedings. It came to record that the Third Respondent was at the time of his dismissal sitting

on a final written warning that was still valid. On 19 August 2012 the Third Respondent arrived some three hours late without notifying his manager prior to the starting time that he would not arrive on time. He was supposed to commence his shift at 06h00 on that particular day. The Third Respondent's explanation for such lateness was that he was on the night of 18 August 2012 arrested for driving under the influence of alcohol. He was as a result detained at Diepkloof police station in Soweto. The explanation turned out not to be satisfactory to the Applicant and the disciplinary proceedings were instituted against him. The explanation was according to the Applicant not truthful as he failed to provide proof that he was indeed arrested.

[3] As the Applicant persisted with demand for proof and the relevant case number, the Third Respondent eventually stated that he was only detained with the sole purpose of having him to sleep the alcohol off in his system. There was no case recorded against him and he used an incorrect name. Some two months after the incident, the Third Respondent deposed to an affidavit on the understanding that it would constitute proof of his detention. The affidavit showing that oath was administered by an officer at Diepkloof Police Station read as follows:

> "This is to certify that I Leonard Ntsoko was detained at diepkloof police station on the night of 18 August and released on 19 August for public drankness. There were no charges made. Therefore no charge sheet was filled. Hence there was no case issued" (sic*)*

[4] The Applicant found the explanation to be lacking in honesty hence the disciplinary steps were taken. The Third Respondent contended that he did contact the Respondent's standby number at 07h00 and left a message with his colleague Mr Mpupu that he would be arriving late. It became apparent that Mpupu did not dispute receiving the Third

Respondent's call however he was not specifically advised to inform the Manager. It came to record that the Applicant had as a result of the Third Respondent's conduct lost trust in him.

The arbitration proceedings and award

[5] The First Respondent came to conclusion that the dismissal was both substantively and procedurally unfair. Her conclusion that there was no fair reason for dismissal was firstly wholly rested on the rule which she found not to be existent regarding late coming. Secondly that the contract of employment only provides for absenteeism rather than late coming. Her finding on non-existence of the rule was rooted on the Applicant's failure to produce the disciplinary code. She found it odd that the final written warning was issued without prior written warnings. She equated the status of the officer who administered oath in the Third Respondent's affidavit to that of a witness regarding the detention. According to the First Respondent the officer would not have administered such oath if the Third Respondent was never detained. With regard to the procedure she found the dismissal unfair on the basis that the Third Respondent was told prior to the disciplinary hearing sitting that legal representation was not allowed. She held that the Third Respondent should have been informed that the representative must appear and make an application for legal representation on his behalf.

[6] When awarding relief to the Third Respondent, she summoned up her award in paragraph 20 as follows;

> "20 When a dismissal is substantively unfair I am required to reinstate. However, the Applicant has submitted in his closing argument that he requires compensation. I am reluctant to compensate the Applicant in that should I award compensation his employment

> records will not be amended and dismissal will hang like a sword on his head when he will be looking for employment. However, if I reinstate his record of employment will be amended and he will be paid retrospective pay which would amount to the same as compensation and he can still resign if indeed he no longer wants to be in the employment of the Respondent.*"*

The review application

[7] *Bias* on the part of the First Respondent appeared to be a dominant factor on the Applicant's grounds in relation to conduct of arbitration proceedings. Firstly, she was cross-examining and tormenting the Applicant's witnesses while she remained lenient on the Third Respondent. Secondly, for criticizing the Applicant about existence of the rule while she in fact denied the Applicant an opportunity to produce the disciplinary code. Thirdly, chastising the Applicant's witness for not considering case law when making a disciplinary hearing outcome. The Applicant brought the following episodes of misconduct on the part of the First Respondent:

7.1 During cross-examination of the Applicant's witness who was also a chairperson of the disciplinary hearing the First Respondent constantly took over cross-examination from the Third Respondent's representative in this fashion;

"COMMISSIONER: Because those are the rules. Remember you have to prove that there is a rule.

MS MC DONALD: Yes I am aware of that.

COMMISSIONER: Now if you did not bring the document how do you prove that there is a rule?

MS MC DONALD: There are many other ways to prove a rule besides the Disciplinary Code and Procedure.

COMMISSIONER: Name me one??

MS MC DONALD: *The fact that he had previously been informed and disciplined for the rule, which means that there has to be a rule, which means that he was also aware of the rule.*

COMMISSIONER: *No but Madam they are disputing these (inaudible).*

MS MC DONALD: *But I mean he has got a final written warning for the same thing which confirms the fact that there is a rule.*

COMMISSIONER: *You are supposed to bring the rule if they are disputing the rule.*

MS MC DONALD: *Yes but I did not know they were disputing the rule. I do not… Our manuals are huge unfortunately.*

COMMISSIONER: *Madam have you seen them in the court? They will drive trolleys of Arch Lever files to come and prove a case. They will bring a whole library… (intervenes)*

MS MC DONALD: *But this is not a court. This is not a court.*

COMMISSIONER: *Even if it is not a court… (intervenes)*

MS MC DONALD: *It is not… (intervenes).*

COMMISSIONER: *Then how do you prove that there is a rule if you did not bring the Code?*

MS MC DONALD: *Through leading evidence.*

COMMISSIONER: *What evidence Madam?*

MS MC DONALD: *Well… (intervenes)*

COMMISSIONER: *Because they are obviously going to dispute it now and then what are you going to… (intervenes)*

MS MC DONALD: *So they are going to dispute that there is a rule that you have to be at work on time essentially.*

7.2 The First Respondent further entered the arena on the very same subject of the disciplinary code and procedures. She showed no interest in the Applicant's witness' offer to bring same as she had another case to deal with:

COMMISSIONER: *And if I decide to use a page out of this book right - I cannot tear it out. I will give you a photocopy now. I have got a copy of that. Let us just say this is a copy of that page right. Now when I come back to you*

this book is gone now. When I show you this book will you believe that this is a page of that particular book?

MS MC DONALD: *Considering the fact that (inaudible) my case and this has been presented like this and no one has ever told me that they now want to see the whole Staff Manual.*

COMMISSIONER: *Look Madam because it was presented maybe it was not disputed at that point in time but in this particular case obviously when they… (intervenes)*

MS MC DONALD: *Well can I say … (intervenes)*

COMMISSIONER: *It means they are disputing it.*

MS MC DONALD: *I can arrange to bring the whole file here but I do not carry it around with me. We have got three manuals that are this thick for this one specific, for Cash Paymaster Services.*

COMMISSIONER: *But Madam you are supposed to bring it because it could be disputed.*

MS MC DONALD: *Okay well I am now saying I can bring it if you want to see it.*

COMMISSIONER: *When? Because… (intervenes)*

MS MC DONALD: *I can arrange to have it delivered now.*

COMMISSIONER: *Because I have got another case.*

MS MC DONALD: *I can phone and I can arrange that the driver bring it.*

COMMISSIONER: *Now we should stop these proceedings and wait for the book?*

MS MC DONALD: *No (inaudible) continue testifying and I will arrange… (intervenes)*

COMMISSIONER: *(Inaudible) (intervenes)"*

7.3 The First Respondent's attack on the witness under cross-examination went on further as follows;

COMMISSIONER: *Now tell me after reading that how am I supposed to make a decision on that when you did not put this as part of evidence?*

MS MC DONALD: *Okay but madam I am here to testify on my recommendation.*

COMMISSIONER: *I am asking you how – where would I have that Grogan for because you were supposed to have included it in your outcome.*

MS MC DONALD: *Okay Madam I have never before been made aware of the fact that I would have to do such a thing because we have never done that for any of our recommendations. As I have said in the past our*

recommendations had been accepted by the CCMA as it is now without any case law.

COMMISSIONER: Because now you are reading from a book unless you are going to submit that book as evidence and you are going to give me a copy and you are going to give him a copy?

MS MC DONALD: Okay well this is my only copy. I do not… But Madam you are asking me how did I come to my decision. I am telling you based on my experience with reading Grogan, of reading all this case law you know. You know when you read certain cases you are constantly updating and you are constantly reading cases.

COMMISSIONER: Now we are supposed or be magicians is that what you are insinuating?

MS MC DONALD: No I am insinuating that.

COMMISSIONER: What are you saying because you are not giving us that information?

MS MC DONALD: Yes but I am verbally telling you this information.

COMMISSIONER: You are constantly referring to information that is not here. You refer to a procedure which is not here. Now you are referring to Grogan and you did not even submit it as evidence"

7.4 When the Applicant's representative/witness indicated her intention to apply for the First Respondent's recusal, her responses demonstrated unwillingness to listen to the Applicant's submissions and diverted to a completely different issue.

"MS MC DONALD: Okay you now what? I am actually going to raise an objection and lodging a request for your recusal because you are… I have never ever had a Commissioner ask so many questions of a witness along the lines and further to that the Representative is currently asking me questions. I am not being given an opportunity to answer his questions. I am busy explaining why I have done what I have done. Then you keep attacking me with the way you think I should have done it. I have explained to you that in the past the CCMA has accepted it but you are continuously attacking me.

COMMISSIONER: I am not the CCMA. I am Commissioner Hellen Hlatswako.

MS MC DONALD: I am aware of that.

COMMISSIONER: And I am sitting here…(intervenes)

MS MC DONALD: And I am now lodging a request for your recusal.

COMMISSIONER: 1 – I am sitting here trying to determine this case. You are not giving me… You are not putting all your evidence on the table as you are supposed to – number 1. Number 2 you are not answering questions that you are supposed to answer. I keep on asking clarifying questions…(intervenes)"

7.5 The First Respondent kept on avoiding the recusal issue, instead she decided to go personal on the Applicant's witness about her qualifications and experience. She immediately thereafter directed the Third Respondent's representative to proceed with cross-examination without entertaining the recusal:

"COMMISSIONER: Madam what position do you hold?

MS MC DONALD: I am the IR Manager.

COMMISSIONER: And what qualifications do you have?

MS MC DONALD: I have got a law degree.

COMMISSIONER: What law degree?

MS MC DONALD: An LLB.

COMMISSIONER: LLB?

MS MC DONALD: Yes.

COMMISSIONER: What else?

MS MC DONALD: That is it

COMMISSIONER: That is it?

MS MC DONALD: Yes.

COMMISSIONER: And what experience do you have in IR?

MS MC DONALD: I have been in IR for the last couple of years.

COMMISSIONER: Can you give me what those couple of years are? Do you see how you answer questions…(intervenes)

MS MC DONALD: I cannot say …(intervenes)

COMMISSIONER: I am asking how long, you say a couple of years. Now I am supposed to know what a couple of years mean? You see the way you answer questions?

MS MC DONALD: Well it should be around since 2008.

COMMISSIONER: And tell me have you done any qualification on Labour Relations?

MS MC DONALD: No I have got my law degree (inaudible)

COMMISSIONER: But have you done anything on Labour Relations?
MS MC DONALD: No I just got my LLB.
COMMISSIONER: Proceed Ntate?"

7.6 The First Respondent had to be told for the third time about the application for recusal, the record without doubt shows that she did not take the move kindly:

MS MC DONALD: Thank you Commissioner but I would like a response to my request for recusal. I have made an application.
COMMISSIONER: If you want to?? Make a proper application we will stop and make an application. The Respondent is going to make an application for ***(FIDDLING NOISE)*** *Proceed.*
MS MC DONALD: Are we proceeding right now (inaudible) going off record or…?
COMMISSIONER: Yes we are proceeding.
MS MC DONALD: Alright well as I have previously stated you are coming across as excessively biased.
COMMISSIONER: You are not saying you are making an application. Make an application. Tell this recorder that you are making an application for what and for what reasons.
MS MC DONALD: Okay well I am making an application for your recusal
COMMISSIONER: Proceed?"

7.7 The First Respondent's reasoning on the ruling to the recusal application glaringly left more questions than resolution of the issue placed before her;

> *"… The reason at this point in time I am taking the inquisitorial route is because the very Representative of the Respondent is the witness. Now how am I supposed to take an adversarial route when the Representative is not there? So I am bound to ask clarifying questions. That is the first thing. Second thing some of the things you are saying madam really for a person that is holding the position that you are holding really because you should know that when a matter you cannot decide on hearsay evidence. I mean really. I am supposed to as a*

Commissioner to decide whether you applied you mind or not and if you are answering questions on a general tine and you are not giving me specifics how am I supposed to ask?

Should I just leave it like that and not ask clarifying questions? Is that what you are asking me? Because I am asking you how long? You answer a couple of, I am not sure. That is what you answered. How did you come to that is the question I would ask you and you would go on and on and on on irrelevant things. You would even bring documents which are not submitted as evidence.

We asked you where is the procedure if you are relying on the procedure? You did not bring it. I asked you when you are saying gross how did you get to gross? You tell me you consulted Grogan. You did not eve include it in your outcome. You did not even consult it because you are saying to me look madam Commissioner as I have read it wherever I read it when I read it. I knew it from when I read it. Number 2 you are also referring to a Grogan I do not know what. Not even the latest Grogan. I mean really you know if you are going to bring Grogan in is it not prudent that you give the other side a copy, giving me a copy so that I can see what you are reading and it can be tested?

MY RULING THEREFORE I AM PROCEEDING WITH THIS MATTER"

[8] After the application for recusal the attacks continued on other points ranging from the witness' failure to bring her notes in spite of the transcript of disciplinary hearing being made available as well as failure to include case law in her outcome. The Applicant's other witness Megashen Moodley was also not spared of these continuous attacks from the First Respondent. For the sake of prolixity, I deem it not necessary to record many more extracts of the record.

[9] The Applicant's further attack on the award is that the First Respondent exceeded her powers in awarding relief of reinstatement in a situation where the Third Respondent made it clear that he was looking at compensation only.

[10] The Third Respondent's contentions in defending the First Respondent's award are that he did call the Applicant to report that he would arrive late. Furthermore, there was no specific rule that the Third Respondent had a duty to inform his manager about lateness.

Evaluation

[11] Section 138 of the Labour Relations Act[1] (the LRA) gives statutory force to the legal principles as to parameters within which Arbitrators should conduct arbitration proceedings. In *Naraindath v Commission for Conciliation Mediation and Arbitration and Others*[2] the Arbitrator's role was summed up in paragraph 27 as follows:

> "[27] In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings (see section 145(2)(a)(i) and (ii) of the LRA; *McKenzie The law of Building and Engineering Contracts and Arbitration 5ed at 188-189).*"

[12] The Court has on countless occasions warned that the Commissioner's active participation has to be evenly balanced in order to eradicate any

[1] Act 66 of 1995 as amended
[2] (2000) 6 BLLR 716 (LC).

perception of *bias.* In *Vodacom Service Provider (Pty) Ltd v Phala*[3] the court had this to say on this point at paragraph 13

> *"13* A commissioner has a discretion about how the arbitration should be conducted. A commissioner may decide to adopt an adversarial approach or an inquisitorial approach. In an inquisitorial approach the commissioner is in control of the process. The commissioner plays a more active role in the hearing, calling witnesses and interrogating them to ascertain the truth. The commissioner cannot abandon the well-established rules of natural justice and must be careful to guard against creating a suspicion of bias. In this regard see *Mutual and Federal Insurance Co Ltd v CCMA and Others* [1997] 12 BLLR 1610 (LC) at 1619 20 and *County Fair Foods (Pty) Ltd v Theron NO and Others* (2000) 21 ILJ 2649 (LC).

[13] The court further went on at paragraph 15 to hold that;

> *"15* A commissioner is required to conduct the proceedings in a fair, consistent and even handed manner. A commissioner cannot assist or be seen to assist, one party to the detriment of the other. A commissioner cannot put to witnesses his propositions, should not interrupt the witnesses' answers, challenge the consistency of a witness with his own evidence, indicate that he doubted the witness's credibility, or make submissions regarding the construction of evidence".

[14] Given the First Respondent's continuous hard approach on Applicant's witnesses as against the softest on the Third Respondent, her unequivocal intentions to assist the Third Respondent at Applicant's expense is demonstrable. A simple matter to be considered on its substance rather than form ended up being escalated to a most legalistic duel as the First Respondent showed no regard to considering

[3] 2007 28 IJL 1335 LC

the merits of the matter with minimum of legal formalities. Her experiences of having seen parties with trollies loaded with library material in court and criticism towards the disciplinary hearing chairperson for not referring to case law is indicative of her failures, horribly so, to act in accordance with the mandate conferred to her in terms of section (138(2). Ironically the First Respondent herself did not refer to any case law for the findings she made in the award. The only conclusion to be drawn from this is that her conduct of arbitration proceedings was not aimed at evenly resolving the dispute within her powers but to unduly assist the Third Respondent.

[15] I must on the other hand not ignore the challenge the First Respondent was facing in dealing with a matter where the chairperson of the disciplinary hearing came into arbitration as representative of the employer and then as a witness.

[16] This often leads to some compromise in one way or another particularly when it comes to observance of rules of evidence. It would seem that the First Respondent had a dilemma about allowing a witness who was already under cross examination to leave the stand and secure a document to support her case. The simple approach was rather to make a determination whether any weight should be attached to the evidence submitted late in the proceedings. This was surely not the First Respondent's scope as she was, firstly focused on the next case she had to deal with. Secondly the unavailability of the document simply implied that it did not exist, therefore there was no rule in place. This was despite a request to make it available which in is undoubtedly equivalent to setting a party to failure.

[17] The representative's additional role of a witness is not a forbidden practice but should be discouraged. The chairperson is naturally viewed as an impartial decision maker who is not serving the interest of any party but with a duty to ensure that fairness prevails. It becomes extremely inappropriate that a chairperson who should testify before the arbitrator on procedural issues happens to find himself sunken into the merits of the dispute in both representative and witness capacities. This creates difficulties for the arbitrator to draw a line on what is placed before himself by the representative/witness partly under oath and otherwise. Legally speaking representation in labour disputes is not reserved. This type of practice if adopted by representatives who happen to be officers of the court ethical questions are likely to arise.

[18] In so far as the relief, the First Respondent had certainly exceeded her powers by blatantly awarding reinstatement where the Third Respondent had asked for compensation. This award of relief is in contrast to provisions of section 193(2) of the LRA and untenable.

[19] When considering that the hearing was conducted in such an extremely unbalanced manner coupled with incompetent relief awarded, a conclusion that parties did not have a fair hearing in the hands of the First Respondent is the most appropriate. The Court in applying its supervisory role over the CCMA or Councils puts the matter to finality by determining the matter itself where the complete record is placed before the Court. In this instant case I am not inclined to do so as the record is premised on proceedings riddled with irregularities. By doing so, gross injustice may prevail.

[20] The Third Respondent has conceded that the Second Respondent's conduct was consistent with *bias*. On the other hand he saw it

necessary to cling onto the award which its outcome is questionably beneficial to him. It is regrettable that the dispute between parties will remain in a farther position from finality as the only appropriate order is to refer the matter back to the CCMA for arbitration *de novo*. I have no willingness to consider awarding of costs as the litigation between the parties is still on going. I have also taken into account that the circumstances leading to the review of the award did not come as fault attributable to the parties. No cost order was asked for against the First and Second Respondents, I will therefore not entertain this subject beyond this point.

Order

[21] The following order is therefore made;

1. The arbitration award issued by the First Respondent is reviewed and set aside.

2. The dispute is referred back to the Second Respondent for arbitration *de novo* before any other Arbitrator than the First Respondent.

3. There is no order as to costs

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M Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate. W Hutchinson

Instructed by : Fluxmans Incorporated

For the Third

Respondent: Mr A Goldberg of Goldberg Attorneys