IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR 1193/19

In the matter between:

WILLEM VAN DER BANK **Applicant**

and

COMMISSIONER D E MATLATLE *N.O.* **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

BARLOWORLD SOUTH AFRICA(PTY) LTD

t/a BARLOWORLD EQUIPMENT **Third Respondent**

Heard: 21 April 2021, via Zoom

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 29 April 2021.

Summary: Review Application- Test for review application restated-Arbitrator misunderstood the inquiry before her- Arbitrators have to consider both aggravating and mitigating factors in determining fairness of sanction

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imposed by an employer- Utterances by the Applicant do not justify dismissal- Applicant is reinstated from the date of dismissal- no costs order.

JUDGMENT

MABASO, AJ

Introduction

[1] The Third Respondent (the Employer) dismissed the Applicant for saying the following statement to an auditor, not employed by it: ***"die auditeers as a STD jy kan net nie onslae raak van hulle nie."***[1] The First Respondent (the Arbitrator) confirmed the dismissal on the basis that the Applicant had failed to show remorse. The cardinal question is whether this conclusion is one that a reasonable decision-maker could have made considering the total circumstances of the dispute before the Arbitrator?[2]

[2] The Applicant is seeking an order reviewing and setting aside the arbitration award issued by the Arbitrator under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) dated 23 April 2019 under case number GAEK 1193-18 and that it be substituted with an order that his dismissal was unfair, and that he be reinstated in the employ of the Employer and that a costs order be made against any party opposing this application.

The grounds of review and applicable principles

[3] The Applicant asserts that (1) the Arbitrator exceeded her powers in considering the evidence presented during the arbitration and reached a decision that a reasonable decision-maker *would* not have reached; (2) that she misdirected herself by resorting to credibility finding based on the

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[1] In English, as stated in the papers: ***You and /or auditors are becoming like a bad STD that won't go away. I just can't get rid of you.***

[2] *CUSA v Tao Ying Metal Industries and Others* 2009 (2) SA 204 (CC); [2009] 1 BLLR 1 (CC); (2008) 29 ILJ 2461 (CC); 2009 (1) BCLR 1 (CC) at para 65.

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testimony of the parties without adequately assessing the probabilities of the case presented before her.

[4] Furthermore, he contends that the Arbitrator failed to take into account that there was no evidence of the breakdown of the trust relationship between him and the Employer, and the supporting factor herein is that whilst the disciplinary hearing was pending, he was rewarded for his good performance.[3]

[5] In deciding a review application, this Court has to remind itself of the distinction between an appeal and a review. In addition, that in a review application, a defect in arbitration proceedings may result in the setting aside of the award only if the alleged defect amounts to gross irregularity or if the Arbitrator misconceived the nature of the enquiry and/ or reached an unreasonable results; that material error of fact /law are not themselves sufficient to set aside an arbitration award unless their consequences render such an award unreasonable. Cf. *NUMSA and Another v SAMANCOR Ltd (Tubatse Ferrochrome) and Others*,[4] *DHL Supply Chain (SA) (Pty) Ltd v Serakala and others case number JA113/2019*.[5]

Was guilty finding reasonable?

[6] The Applicant was charged and dismissed following a verdict of guilty on allegations of sexual harassment alternatively inappropriate behaviour in the workplace. This was all based on his aforementioned utterances.[6] However, the Arbitrator concluded that the utterances "do not accord with the types or forms of sexual harassment as stated in the Code," therefore, the guilty confirmation was only in respect of inappropriate behaviour.

[7] Regarding the grounds of review associated with these findings: This Court has adequately considered these grounds advanced, read the transcripts together with the supporting documents. Consequently, the Court's

[3] Pleading bundle, p14, par 40.

[4] [2011] 11 BLLR 1041 (SCA), at para 5.

[5] Unreported LAC judgment, decided on 21 December 2020

[6] Bundle, p 569, paras 30 and 31.

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considered view is that the Arbitrator properly applied her mind and analysed the evidence presented before her, so her conclusion regarding the guilty finding that the Applicant made inappropriate comment in a workplace is consistent with the evidence placed adequately before her. Therefore, the award in respect of the guilty finding cannot be disturbed. If this Court were to disturb this finding, I am convinced that would mean it exceeds its powers in the review application.

Is dismissal an appropriate sanction?

[8] In paragraphs 40 and 42 of the founding affidavit, the Applicant is concerned about the sanction of dismissal, as he contends that there was no evidence of a break down of trust relationship. This Court proceeds to assess this ground of review, taking into account the totality of the circumstances of the case before the Arbitrator.

[9] In assessing this ground of review, this Court has to consider the six pillar requirements as introduced by the LAC in *Goldfields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v CCMA and Others*[7] which are:

> "(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, **did the process that the <u>Arbitrator employed give the parties a full opportunity to have their say in respect of the dispute</u>**?
>
> (ii) Did the Arbitrator **<u>identify</u>** 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 **<u>understand</u>** the nature of the dispute he or she was required to arbitrate?
>
> (iv) Did he or she deal with **<u>the substantial merits</u>** of the dispute? and

[7] [2013] ZALAC 28(www.saflii.org.za); [2014] 1 BLLR 20 (LAC) at para 20. (*Goldfields*)

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(v) Is the Arbitrator's decision one that **another decision-maker reasonably have arrived** at based on **the evidence.**" (Emphasis added.)

[10] The Applicant neither contends that the Arbitrator did not give the parties a full opportunity to have their say in respect of the dispute (pillar requirement 1) nor that she did not identify the dispute before her (pillar requirement 2).

[11] The Applicant's concern starts from that the Arbitrator alleged failure to understand the nature of the dispute before her (pillar requirement 3), consequently failed to deal with the substantial merits of the dispute (pillar requirement 4). Therefore, it would be up to this Court to determine if the decision reached is one that a reasonable arbitrator could have reached (pillar requirement 5) considering the totality of the evidence (pillar requirement 6). This inquiry requires this Court to delve into the arbitration records and supporting documents.

[12] From paragraph 9 to 66 of the arbitration award, the Arbitrator summarised the parties' evidence before her. Under the analysis of evidence and argument, from paragraph 67 to 110 of same, deals with the analysis of the evidence relating to whether the Applicant committed the misconduct or not.

[13] Between paragraph 111 to 114 deals with what she says is a question of whether the dismissal was warranted. She mentioned that the Applicant was not remorseful, that he was a senior employee of the Employer, then concluded that the dismissal was substantively fair.

[14] It is trite that once an arbitrator has confirmed the guilty verdict, the subsequent enquiry is the appropriateness of the sanction of dismissal. *In casu* the Arbitrator correctly identifies one of the issues that were supposed to be decided, which is an appropriate sanction. This enquiry required the Arbitrator to take into account all the aggravating and mitigating factors. The Constitutional Court, in *Sidumo v Rustenburg Platinum Mines Ltd*,[8] held as follows, regarding a role of an arbitrator in a dismissal dispute:

[8] 2008 (2) BCLR 158 (CC) at para 116 where it was held that:

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> *"However, the Commissioner was wrong to conclude that the relationship of trust may have not been breached. Mr Sidumo was employed to protect the Mine's valuable property which he did not do. However this is not the end of the inquiry.* ***It is still necessary to weigh all the relevant factors together in light of the seriousness of the breach." (****Own emphasis)*

[15] For an arbitrator to be said had understood and dealt with the substantial merits of the dispute before her, her arbitration award should not gloss over important issues before her as that might lead to a conclusion that she has committed reviewable irregularity, as the LAC[9] has signposted thus:

> *" The fact that the Commissioner glossed over and did not determine the primary question whether Ramapuputla was dishonest, as correctly found by the Court a quo, is problematic. That determination was central to the question whether the reason given for Ramapuputla's dismissal was fair. In County Fair Foods (Pty) Ltd v CCMA, this Court sounded a warning that failure to deal with an important facet* ***may****,* ***depending on the circumstances of the case, provide evidence that the Commissioner did not apply his/her mind to that facet****."(Own emphasis)*

[16] Considering the arbitration award, the Arbitrator did not understand that she was supposed to have assessed the mitigating circumstances as presented before her by the Applicant, as her conclusion is only based on the fact that the Applicant was not remorseful. In passing ,under summary of the evidence, paragraph 48, the Arbitrator states that the Applicant's personal circumstances are: he is married with two daughters, his wife depending on him and she relies on a temporary job,.

[17] Considering the Arbitrator analysis, it is my considered view that the Arbitrator did not deal with the mitigation circumstances in this matter, except

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" In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The Commissioner must of course consider the reason the Employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list." (Own emphasis)

[9] *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2017] ZALAC 4; (2017) 38 ILJ 860 (LAC) (10 January 2017)

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mentioning one thing in passing under the summary of evidence as highlighted in the preceding paragraph. This result to this Court to conclude that she did not understand one of the issues before her, and this resulted in her not taking into consideration, for example, the following mitigating factors:(a) The basis of the Employer's dismissal was that the Applicant had been, among other things, found guilty of violating Sexual Harassment Policy; however since the Arbitrator had concluded that the Applicant was not guilty of this charge but was gulity of an alternative charge;[10] (b)The Applicant had 10 years of service with the Employer;[11](c) with a clean disciplinary record.[12] (d) The Applicant's performance was rated high, and he even got a salary increase of 5.64% in the same year of the incident.[13] (e) Unable to get employment since dismissal due to his age,[14] (f) that the uttarances were jokingly made, (g) that the Applicant, few months after the incident, he assisted the Employer by correcting errors in cash flow forecast that had been signed off by his superior, Ms Nandipha Mankungu, submitted to the Employer's exucutive which could have had "very serious consequences" on the Employer.[15]

[18] Considering those described above, the Applicant made the utterances when he was approached by an auditor, employed by an external service provider (a person not employed by the Employer) when certain information was required from him, as was responsible for auditing the Employer's financials. The complainant was not working for the Employer; now, I struggle to understand how the trust would have been affected. Even if my conclusion regarding trust is wrong, as stated in *Sidumo*[16], dismissal, even where trust has been affected, does not automatically result in dismissal considering the circumstances of the matter.

[19] Therefore, as I have concluded that the Arbitrator did not weigh all relevant factors herein, which resulted in misunderstanding one of the issues before

[10] Bundle, p 569 -572.
[11] Id, p 804.
[12] Id, p 807and Transcripts, p 1229.
[13] Transcripts, p 1202.
[14] Transcripts, p 1263.
[15] Ibid, Ms Ganda's evidence, p 1099.
[16] *supra*

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her duty, I see no reason why the Applicant should not be reinstated. I take note that the Counsel for the Employer referred to a statement made by the Applicant during the arbitration process, my view about that such may not result to prevent reinstatement in that if such statement is incorrect, the Employer will still have a right to take necessary disciplinary hearing against the Applicant. I conclude that a final written warning will be appropriate.

Order

[20] Based on the above, the following order is made:

1. The arbitration award under case number GAEK 1193-18 dated 23 April 2019 issued by the first respondent under the auspices of the second respondent is reviewed and set aside and replaced with the following order :

> *" The dismissal of Mr Willem Van Der Bank by the BARLOWORLD SOUTH AFRICA(PTY) LTD t/a BARLOWORLD EQUIPMENT is declared procedurally fair, but substatively unfair. As a result, the BARLOWORLD SOUTH AFRICA(PTY) LTD t/a BARLOWORLD EQUIPMENT is directed to reinstate him from the date of dismissal.*

2. Each party to pay their own costs.

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S Mabaso

Acting Judge of the Labour Court of South Africa

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Appearances

For the Applicant:	Adv H P West
Instructed by:	Nolans Inc.
For the Respondent:	Adv T Govender
Instructed by:	Norton Rose Fulbright South Africa Inc.

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