**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case no: JA01/14

In the matter between:

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| **FIRST GARMENT RENTAL (PTY) LTD** | **Appellant** |
| And | |
| **COMMISION FOR CONCILIATION, MEDIATION** | |
| **AND ARBITRATION** | **First Respondent** |
| **COMMISSIONER SETLAGO MORWA** | **Second Respondent** |
| **SOUTH AFRICAN TRANSPORT AND** | |
| **ALLIED WORKERS UNION** | **Third Respondent** |
| **WILLIAM MLANGENI** | **Fourth Respondent** |
| **MAKI MARY MORARE** | **Fifth Respondent** |

**Heard:** **17 March 2015**

**Delivered:** **09 September 2015**

**Summary: Review of arbitration award – employees dismissed for allegedly assaulting manager during violent strike – video tape recording assaults adduced as evidence – video recording no evincing that employees assaulted manager – commissioner finding dismissal substantively unfair – award reasonable – Labour Court's judgment upheld – appeal dismissed.**

**Coram: Landman JA, Sutherland JA, and Mngqibisa-Thusi AJA**

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**JUDGMENT**

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MNGQIBISA-THUSI, AJA

[1] The appellant is appealing against the whole judgment of the Labour Court (Bruinders AJ) handed down on 23 October 2013, dismissing appellant's application to review and set aside the award issued by Mr Setlago Morwa (the arbitrator), acting under the auspices of the Commission for Conciliation, Mediation and Arbitration (the CCMA), in which it was held that the dismissal of the fourth and fifth respondents was substantively unfair. The appeal is with the leave of the Labour Court.

Factual background

[2] During August 2011, there was a strike organised by South African Transport and Allied Workers Union (SATAWU) at the appellant's Spartan plant in which some of its employees did not join. The strike became violent, intimidation and assault of non-striking employees took place. On 15 August 2015, the appellant obtained an interdict against SATAWU and its members who were involved in the strike as a result of the intimidation and interference with non-striking workers. Furthermore, during the course of the strike, some of the strikers allegedly assaulted one of the appellant's managers, Mr Tshepo Thipe (Thipe). Mr Dennis Hoy (Hoy), the appellant's general manager, took video footage of the conduct of the strikers. Based on the video footage, the fourth respondent (Mlangeni) and fifth respondent (Morare) were identified as having assaulted Thipe. As a result, Mlangeni and Morare were charged with the alleged assault of Thipe, who it is alleged sustained some injuries.

[3] At a disciplinary hearing scheduled by the appellant, Mlangeni and Morare were found guilty as charged and were dismissed.

Arbitration

[4] SATAWU, acting on behalf of Mlangeni and Morare, referred an unfair dismissal dispute to the CCMA. When conciliation failed, the dispute was referred to arbitration for determination of whether the dismissal of Mlangeni and Morare was substantively unfair.

[5] At the arbitration hearing, both Hoy and Thipe identified Mlangeni and Morare as having assaulted Thipe. Further, Hoy and Thipe testified that on the day of the assault, Thipe had tried to lay a charge of assault with the police but the police discouraged him from doing so as he did not have visible injuries. During cross-examination and when confronted with the video footage taken for identifying strikers who misconducted themselves, which did not have photos of either Mlangeni or Morare assaulting Thipe, Hoy testified that he did not capture the alleged assaults, as he was too shocked to see an assault on a manager. Thipe could not explain why, despite having gone to the police station several times on the day in question to depose to affidavits relating to the application for an interdict, he did not lay a criminal charge against Mlangeni and Morare. The appellant's third witness, Amon Mohamme, testified that he did see Thipe being assaulted but could not identify his assailants. Both Mlangeni and Morare denied assaulting Thipe. Mlangeni admitted carrying a stick, which he described as a traditional weapon but denied using it to assault Thipe.

[6] The arbitrator, faced with two mutually destructive versions, concluded that Mlangeni and Morare's dismissal was substantively unfair, and went on to state that:

> '17.The charge against the applicants is that they assaulted the manager and caused injuries to him. The respondent produced a bundle of documents in which photos of strikers were included. There is no single photo that sought to deal with the charges against the applicant (*sic*). The photographer stated that he was shocked by the assault and therefore failed to take the photos. It is my view that the respondent's photos are irrelevant, as they do not assist in proving any charge against the applicants. The photos were taken to show that the applicants were violent during the strike, and to freeze when the

> actual reason for which you are taking the photos is before you, is not convincing. The assault on the manager is viewed as a serious issue, and the reason for failure to capture such evidence is shocking in itself.'

[7] Further, the arbitrator concluded that the failure by Thipe to report the assault to the police in spite of the fact that he had visited the police station more than 10 times on the day of the assault and the failure to provide evidence on injuries sustained is not consistent with the facts proving the assault. The arbitrator further concluded that the appellant had failed to discharge the *onus* of proving the assault and therefore found the dismissal of Mlangeni and Morare to be substantively unfair.

[8] The arbitrator ordered the reinstatement of Mlangeni and Morare and further ordered that they report at work on 3 December 2011. Furthermore, the arbitrator ordered the appellant to pay Mlangeni and Morare arrear wages equivalent to two months' salary.

Labour Court

[9] The appellant brought a review application in terms of section 145 of the Labour Relations Act[1] (LRA) in the court *a quo* for the review and setting aside of the arbitrator's award on the grounds that:

9.1 the arbitrator committed a gross irregularity by failing to apply his mind to the relevant issues and facts; and

9.2 the award is not reasonable in that it is not supported by the facts.

[10] In dismissing the review application, the court *a quo* found that there was no evidence that the arbitrator misconceived his duties by failing to appreciate what issues had to be determined. With regard to the reasonableness of the arbitrator's award, the court *a quo* concluded that the arbitrator, faced with two mutually destructive versions, found the employees' versions more probable as the appellant did not provide any objective evidence in support of the allegation of an assault on Thipe. The court *a quo* also concluded that, besides failing to provide photos depicting the assault on Thipe (even though

[1] 66 of 1995.

he had footage of other assaults not committed by Mlangeni and Morare), the appellant did not give an explanation as to why the assaults by Mlangeni and Morare were not reported to the police officers who were present at the place where the alleged misconduct took place.

Appeal

[11] The appellant is appealing the court *a quo*'s judgment and order mainly on the ground that the court *a quo* erred in finding that the arbitrator properly assessed the probabilities of the two mutually destructive versions of the appellant and the fourth and fifth respondents.[2] Further, it is the appellant's contention that the court *a quo* erred in finding that the arbitrator's award was reasonable taking into account the material before him.

[12] In terms of section 138(1) of the LRA, an arbitrator is entitled to conduct the arbitration proceedings in a manner that he or she considers appropriate to determine the dispute fairly and quickly, as long as he or she deals with the substantial merits of the dispute with the minimum of legal formalities.

[13] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others,*[3] this Court held that:

> '[18] In a review conducted under s145(2)(a)(ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.
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> [19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the

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[2] In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* 2003 (1) SA 11 (SCA) at 14J-15E, the court in setting out how a court should deal with two mutually destructive versions held that the court has to weigh the evidence tendered by the parties and apply the probability test and if necessary take into account the credibility of the witnesses.

[3] [2014] 1 BLLR 20 (LAC) at paras 18-19.

LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries.'*[4]

[14] From a reading of the arbitrator's award, it is clear that the arbitrator was alive to the fact that in dealing with mutually destructive versions, he had to determine the probabilities of the parties' versions. The *onus* of proving the guilt of the fourth and fifth respondents' misconduct was on the employer. The appellant's version was that the fourth and fifth respondents had assaulted Thipe during the course of the strike. However, although video footage of other violent and intimidation scenes was taken, this particular incident was not recorded. Further, although Thipe had visited the police station on the relevant day and there were police officers at the place where the strikers were picketing, Thipe did not lay a charge against the fourth and fifth respondents nor was the alleged assault reported to the police who were present. Furthermore, although the charge sheet referred to injuries sustained by Thipe in the assault, the appellant did not, during the arbitration hearing adduce any evidence relating to the injuries. Consequently, after weighing all the evidence before him, the arbitrator concluded that the fourth and fifth respondents' version was more probable than that of the appellant. The fact that the award was not as detailed as the appellant would have liked does not imply that the arbitrator did not apply his mind to the facts before him and that he did not take into account the credibility of the witnesses. I am of the view that the arbitrator correctly found that the probabilities favoured the version of Mlangeni and Morare and that the appellant's complaint in this regard has not basis.

[15] Having concluded that the appellant did not prove the assault on Thipe by Mlangeni and/or Morare, the arbitrator reached a conclusion that the dismissal of Mlangeni and Morare was substantively unfair. In my view and in the absence of a guilt finding of Mlangeni and Morare, the decision reached by the arbitrator with regard to the dismissal of Mlangeni and Morare is one

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[4] [2009] 1 BLLR 1 (CC); (2009) SA 24 (CC).

which falls within the band of reasonableness as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[5]

[16] Accordingly the following order is made:

The appeal is dismissed with costs.

Mngqibisa-ThusI AJA

Landman and Sutherland JJA concur in the judgment of Mngqibisa-ThusI AJA

APPEARANCES:

FOR THE APPELLANT: Adv G Fourie

Instructed by Brian Bleazard Attorneys

FOR THE FOURTH AND FIFTH RESPONDENTS: Mr S Mabaso

Instructed by Mabaso Attorneys

[5] 2008 (2) SA 24 (CC); [2007] 12 BLLR 1097 (CC) where the Constitutional Court held at para 110 that "To summarise, *Carephone (Pty) Ltd v Marcus NO and Others* [1998] 11 BLLR 1117 (LAC) held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star (Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC*)*. Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to a fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair".