

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO: P 146/98

In the matter between:

METRO CASH & CARRY LIMITED

Applicant

and

FRANCOIS LE ROUX N.O.

First respondent

SOUTH AFRICAN COMMERCIAL

CATERING & ALLIED WORKERS UNION

Second respondent

MR E THABA

Third respondent

JUDGMENT

BASSON, J:

[1] This is a review of an arbitration award in terms of sec 145 of the Labour Relations Act 66 of 1995 (“the Act”).

[2] The applicant, Metro Cash & Carry Limited, seeks to review the arbitration award issued under the auspices of the Commission for Conciliation Mediation and Arbitration (“the CCMA”) and made by the first respondent, a commissioner of the CCMA.

[3] The unfair dismissal dispute was referred to the CCMA for conciliation and after it

remained unresolved it was referred for arbitration before the first respondent.

[4] In essence, it would appear that the third respondent, the employee, Mr E Thamba, was dismissed for assault by the applicant.

[5] It is common cause between the parties that the third respondent assaulted a customer of the applicant, a Ms T Ngubo, on 23 October 1997 at Metro, Queenstown.

[6] The following facts as set out by the arbitrator are more or less common cause in this matter (see the papers at pages 15 to 16):

"... the employee remarked to Mr Ndata that every time there was a delivery to Ms Ngubo's store, she would allege that there was a shortage, and that he would find out from Chris (the driver of the delivery truck) what the situation was. Unfortunately for all concerned Ms Ngubo happened to overhear these remarks. She did not take kindly to them. She shouted at the employee, wanting to know whether he was overruling the branch manager's instructions. She proceeded to use foul language towards him in the course of the argument. The employee challenged her arguments and statements, himself using foul language in the process. Ms Ngubo proceeded to remove her spectacles, rolled up her sleeves, approached the employee, and gave him a sound slap. The employee retaliated by grabbing her by the front of her clothes and hitting her with the fist. They dragged each other to the floor, still

struggling. When he came up, the employee also kicked her, before the bystanders managed to separate the warring parties. Ms Ngubo was the worse for wear, with a blue eye, bruised cheek, and cut lip".

[7] The first respondent analyses this evidence as follows (at page 17 of the award):

"In considering how the employee should have reacted to the situation, the

employee's action should be considered in a very realistic manner. Certainly the employee was under an obligation to treat all customers courteously, even when the behaviour of certain customers left much to be desired. Undoubtedly it is fair to expect of employees to attempt to minimise conflict with customers, even if that means having to withdraw from an argument despite being in the right. It may also be that it was ill-advised of the employee not to withdraw from the situation at the earliest possible opportunity.

However, that is not the primary question. How should the employee have reacted to being slapped through the face? It is difficult to see how anyone would have been able to refrain from retaliating in self-defence. It is similarly difficult to see how the incident could have ended there and then, given that the parties grabbed each other and fell on the floor. It seems excessive for the employee to have kicked Ms Ngubo, and in doing so (only) he exceeded the boundaries of self-defence. On the whole, however, I find that the actions of the employee should be approached with due appreciation of the extreme provocation on the side of Ms Ngubo.

Against the background of that evaluation of the facts, I am of the view that the sanction of dismissal was excessive. I hasten to point out that I am by no means seeking to lay down a

general rule in terms of which assault on customers or fellow-employees (or anyone else for that matter) should be approached as something other than a dismissable offence. There would have to be very compelling circumstances to justify departure from that

approach. Such circumstances are present in the present matter.

As a result I propose to grant relief to the employee. That relief should take account of the seriousness of the offence, and it is not appropriate that the employee should suffer no loss at all pursuant to his actions. I therefore propose to make his reinstatement retrospective to 1 February 1998 only. That implies a loss of some six weeks' salary for the employee which implies quite a serious penalty for losing one's temper".

[8] In deciding whether to review and set aside this arbitration award I have to bear in mind that this is a review and not appeal.

[9] Both parties asked me to consider whether this award was justifiable in relation to the reasons given for it. This is the test expounded by the Labour Appeal Court in the matter of CAREPHONE (PTY) LIMITED v MARCUS N.O. AND OTHERS (Case No. JA52/1998) where it was held that an arbitrator would be exceeding his or her powers in terms of sec 145(2)(a)(iii) of the Act should an arbitrator make an award that is not justifiable in relation to the reasons given for it. These review powers are taken from the Administrative Justice section of the Republic of South Africa Constitution Act 108 of 1996 ("the Constitution").

[10] I quote from the forementioned judgment (at paragraph [36]):

"In determining whether administrative action is justifiable in terms of the reasons given for it value judgments will have to be made which will almost inevitably involve the consideration of the merits of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof but to determine whether the outcome is rationally justifiable the process will be in order".

[11] A test or a standard of review is then expounded as follows (at paragraph [37] of the said judgment):

"Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers such as reasonableness rationality, proportionality and the like. Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than in one way or another asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at. In time only judicial precedent will be able to give more specific content to the broad

concept of justifiability in the context of the review provisions of the LRA.”

[12] The conclusions reached by the first respondent, that is, the commissioner of the CCMA in the present matter, in making his arbitration award is such that I do not necessarily agree on the correctness of the outcome thereof.

[13] However, in reviewing arbitration awards of the CCMA the Labour Court must leave some room for differing opinions, as long as those opinions are justifiable in relation to the reasons given for it.

[14] This is no easy test but I believe that the Labour Court should heed the warning by the Labour Appeal Court and not enter the merits of such arbitration award with a view to substitute the Court's opinion on the correctness thereof.

[15] The reasoning by the arbitrator is rational in the sense that the arbitrator, based on facts which are largely common cause (in other words, these factual findings are not contested by either party) finds that the first respondent had exceeded the bounds of self-defence especially when he kicked the customer after they went down fighting in a struggle.

[16] In other words, the unlawful actions of an employee in assaulting a customer would generally be a dismissable offence.

[17] The arbitrator accepts this proposition. However, when it came to the sanction of

dismissal the arbitrator stated that mitigating factors such as the provocation on the part of the customer should be taken into account and therefore that dismissal as the ultimate sanction in labour relations terms should not be applied in the present matter.

[18] It is only in regard to this last-mentioned finding that the applicant appears to argue that the arbitrator made an unjustifiable award.

[19] In view of the fact that there was provocation in the present matter and in view of the fact that the arbitrator had warned himself that, as a general rule, assault will be held to be a dismissable offence, and in view of the fact that the arbitrator also sought to express his disdain for the actions of the employee or the third respondent by reinstating only from a later date, I cannot find that the award is not justifiable in relation to the reasons given for it.

[20] In the event the award must stand and the application is DISMISSED WITH COSTS

BASSON,J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

DATE OF HEARING : 2 December 1998

DATE OF JUDGMENT : *EX TEMPORE* (edited version)

ON BEHALF OF THE APPLICANT : MR. PRETORIUS

ON BEHALF OF THE RESPONDENT : MR. ZIBI

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BEFORE: THE HON. MR JUSTICE D A BASSON

ON BEHALF OF APPLICANT

MR D O PRETORIUS

ON BEHALF OF RESPONDENT

MR V ZIBI (SACCAWU)
