



REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no: D401/2011

In the matter between:

HULAMIN LIMITED

Applicant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

COMMISSIONER R MAHARAJ N. O.

Second Respondent

ARATH HARRIBARAN

Third Respondent

Heard: 27 August 2013

Delivered: 18 February 2014

Summary: Application to review arbitration award. Application dismissed.

JUDGMENT

GUSH J

- [1] The applicant in this matter is a company that conducts business as a manufacturer of aluminium products and aluminium by-products. The third respondent was employed by the applicant as a section leader in the finishing area of its coil coating line operation.

- [2] It was reported to the applicant that during the nightshift of 16/17 October 2009, the third respondent had exposed his penis to employees of the applicant. The third respondent had allegedly walked around the area where he was employed and at various times had unzipped his fly and allowed his penis to protrude from his trousers. This resulted in the applicant investigating the incident which investigation included an examination of the company computer supplied to the third respondent for the purposes of performing his duties. This investigation revealed that stored on this computer and accessible by using the third respondent's password was a one-hour 58 minutes pornographic video depicting various explicit sexual acts.
- [3] Arising from this investigation and the report, the applicant charged the third respondent with the following misconduct:

1. It is alleged that on or about 16/17 October 2009 and was whilst employed by the company at Finishing Area of its Coil Coating Line operation as a section leader, you misconduct of yourself by:

- (a) exposing your private parts to fellow employees working on the line with new and/or

- (b) engaging in inappropriate conduct and sexual harassment in that you sought to expose your private parts to fellow employees working on the Coil Coating Line with you,

2. it is further alleged that you have violated company information technology (IT) and Internet policy and that during working hours whilst employed in the company as a shift leader, who had been receiving, storing, watching and/or downloading and/or disseminating prohibited pornographic material to other employees in the company, using a company computer which was supplied to you for the performance of official business.

As a result of your conduct, you have reached the relationship of trust and good faith existing between yourself and the company.

- [4] At the conclusion of the disciplinary enquiry, the applicant found the third respondent to be guilty of the misconduct with which he was charged and terminated his employment.
- [5] The third respondent dissatisfied with his dismissal referred a dispute to the first respondent who in turn appointed the second respondent to arbitrate the dispute. The arbitration apparently took place on 14 April 2010, 1 June 2010, 3 August 2010, 13 October 2010 26 January 2011 and 24 February 2011.
- [6] The record filed by the applicant comprises a number of volumes including three volumes relating to transcript of the evidence led at the arbitration on 14 April 2010, 1 June 2010 and 26 January 2011. These volumes are volumes 1, 2 and 4 respectively. A further three volumes were filed under the heading "Commissioners Notes" numbered volumes 3, 4, 5a and one volume headed "Commissioner Summary".
- [7] It appears from the record that the parties prior to the commencing with the leading of the evidence presented opening statements to the second respondent. There is unfortunately no record of these opening statements other than that recorded in volume 3 of the Commissioners notes.
- [8] From the second respondent's award, it is apparent that the arbitration was adjourned to 3 August 2010 at which hearing, further witnesses gave evidence on behalf of the applicant and, in particular, the applicant's witness who dealt with the evidence regarding the second charge of misconduct. The record of the proceedings of 3 August is contained in volume 4 of the "Commissioners Notes". It appears as if the arbitration was adjourned to 13 October 2010 when the last witness for the applicant gave evidence. This evidence is recorded in volume 5a of the "Commissioners Notes".
- [9] The third respondent and his two witnesses gave evidence at the arbitration on 26 January 2011 and this evidence is recorded in volume 4 of the transcript of the evidence. It appears that the matter was adjourned to 24 February for closing arguments. There is no record of what transpired on 24 February 2011. The second respondent issued the award on 31 March 2011.

[10] The second respondent in the award concluded that the applicant had not discharged the *onus* of establishing that the third respondent was guilty of either charge of misconduct and ordered that the applicant reinstates the third respondent.

[11] The applicant sets out its grounds of review in its founding affidavit as follows:

'The applicant is unhappy with the award handed down by the second respondent and is respectfully of the view that the award is reviewable because the second respondent inter-alia

Conducted yourself in a manner that constitutes a gross irregularity; and/or

Misconceived of and exceeded her powers and functions as contemplated by the constitution of the bargaining Council, its dispute resolution procedures, the Labour Relations Act and the law; and/or

Acted unreasonable in the execution of the duties and responsibilities as an arbitrator; and/or

Failed to properly apply her mind to the established facts and evidence placed before her to the extent that there is no rational nexus between a finding, the fact that were established during the arbitration process and the conclusion that she ultimately derived in regard to this matter; and/or

Arrived at the finding that no reasonable decision maker could have reached having regard to the facts and evidence placed before her.' (sic)¹

[12] Although the applicant expanded on its grounds of review under the headings: "grossly irregular conduct"; "exceeded her powers" and "unreasonable finding", the essence of the applicant's challenge to the arbitration award is that the second respondent's finding that the applicant had not established on the balance of probabilities that the third respondent was guilty of sexual harassment or of contravening the applicant's IT policy was not supported by the evidence adduced at the arbitration.

¹ Founding affidavit pages 7 and 8.

- [13] There can be no doubt that the misconduct with which the third respondent was charged was serious misconduct and in the event of the third respondent being found guilty of either charge, dismissal was the appropriate sanction.
- [14] The conclusion drawn by the second respondent that the applicant had failed to prove on a balance of probabilities that the third respondent was guilty of misconduct is based on the second respondent's detailed summary and analysis of the evidence of the witnesses called on behalf of the applicant, the evidence of the third respondent and his witnesses. In the analysis the second respondent made a number of credibility findings regarding the evidence particularly with regard to the charge of sexual harassment. With regard to the second charge of misconduct namely the breach of the IT policy, the second respondent in her analysis concluded that the applicant had not established that the third respondent was guilty of the specific misconduct with which he was charged.
- [15] In the light of this and on a careful consideration of the applicant's grounds of review and complaints regarding the second respondent's conclusions based on her analysis of the evidence, the challenge to the second respondents award is more akin to an appeal than a review. This is the situation with regard to the both counts of misconduct.
- [16] In essence, the applicant's grounds of review are simply that the second respondent should have but did not accept the evidence of its witnesses and should have but did not reject the evidence of the third respondent's witnesses.
- [17] The test on review is set out in the matter of *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*² namely "whether the award was one that a reasonable decision-maker could not reach". The process in determining whether the award is reviewable is described by the Supreme Court of Appeal in the matter of *Nedbank and Herholdt*.³

² 2008 (2) SA 24 (CC).

³ [2013] 11 BLLR 1074 (SCA).

'That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence. ... And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that ... awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. The *Sidumo* test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner.'⁴ [Footnote omitted]

- [18] In this matter, in applying this test it is clear that whilst the misconduct that the third respondent was accused with was serious and that the over robust cross-examination of the applicant's witnesses by the third respondent's representative was disturbing it cannot be said that the decision is "entirely disconnected with the evidence or unsupported by any evidence and involves speculation by the Commissioner".
- [19] In this matter, it is not the applicant's complaint that the second respondent did not take into account the evidence. The applicant argued that the award was reviewable based on the second respondent's analysis of that evidence and her finding, based on the fact that they were two contradictory versions,

⁴ At paras 12 and 13.

that the applicant had not established on a balance of probabilities that the third respondent was guilty of misconduct.

- [1] Whilst the applicant might disagree with the second respondent's conclusions and findings of credibility these are aspects that are relevant in an appeal as opposed to a review. It is incumbent upon the applicant to establish that the award is reviewable taking into account what was held in *Edcon Ltd v Pillemer NO and Others*⁵ as follows:

'Reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him'.⁶

- [20] I am not persuaded that the applicant has established this.
- [21] It might well be argued that, in the circumstances of this matter, the probabilities that the allegations of misconduct were completely groundless are unlikely and that the misconduct was particularly egregious. This, however, is not sufficient to review and set aside the award. Accordingly, in determining whether the second respondent's award is reviewable, I am particularly mindful of what was said by the Supreme Court of Appeal:

And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'.

- [22] In the circumstances, I am not satisfied that the applicant has established that the award of the second respondent is reviewable and accordingly I make the following order:

- a. The applicant's application is dismissed
- b. There is no order as to costs.

⁵ (2009) 30 ILJ 2642 (SCA).

⁶ at page 2650E para 15.

D H Gush

Judge

APPEARANCES

FOR THE APPLICANT:

I Lawrence; ENS Attorneys

FOR THE THIRD RESPONDENT:

C Nel

Instructed by Austen Smith Attorneys