

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR1498/17

In the matter between:

BIDVEST STEINER

Applicant

and

COMMISSIONER GCOBISA GOSA N.O.

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

MANTAKE MAMOEPA

Third Respondent

Heard: 11 January 2019

Delivered: 12 July 2019

Summary: Review of an award made in respect of an alleged unfair labour practice in terms of section 186(2)(b) of the Labour Relations Act 66 of 1995. Commissioner failing to consider the evidence adequately. Test on review restated. Review granted.

JUDGMENT

SNIDER AJ

[1] This is an unopposed application for the review of an award in relation to an unfair labour practice allegedly perpetrated by the Applicant against the Third Respondent. The award is dated 30 June 2017.¹ The unfair labour practice dispute was referred by the third Respondent in terms of section 186(2)(b) of

¹ Page 13 of the pleadings.

the Labour Relations Act² (“the LRA”).

- [2] It was common cause between the parties that the Third Respondent was issued with a written warning by the Applicant, valid for a period of 12 months, on 9 March 2017.
- [3] The relief afforded to the Third Respondent by the First Respondent was the setting aside of the written warning and ordering the Applicant to pay the Third Respondent compensation in the amount R78 000. The Third Respondent’s salary at the time was R13 000 per month thus the award represented 6 months of salary.

Background facts

- [4] Briefly, the facts behind this matter are that the Third Respondent was employed by the Applicant and one of his duties was, *inter alia*, to install air fresheners at the Applicant’s clients and in so doing, when necessary, to make use of stepladders. The Applicant has standing instructions in place in relation to the use of stepladders in order to protect its employee’s safety and comply with Health and Safety Regulations.
- [5] The rule, relevant for the purposes hereof, is that the Third Respondent was not allowed to use a stepladder unless it was secured at the top and / or held by a second person. This appears to be common cause if one has regard to the allegations made by the Applicant³ together with a conspectus of the award as a whole, particularly when the First Respondent appears to use, as a point of departure for his reasoning, a rule that the Third Respondent could only use a stepladder in the abovementioned circumstances. He never makes a finding to the contrary.
- [6] The First Respondent states as follows:

“I therefore find that the Applicant did not commit any misconduct by using a ladder without a second person holding it as the Respondent failed to provide

² Act 66 of 1995, as amended.

him with an assistant”

- [7] It can only be assumed that had the First Respondent intended to say that there was no rule to this effect he would have said so. In addition, although it is unclear, it appears that the Third Respondent also concedes that there was such a rule but attempts to exculpate himself from his conduct in not following it.⁴
- [8] The Third Respondent attended at a client of the Applicant, being a Church in Hillbrow. In order to do his work he utilised a stepladder belonging to the client and was assisted by one Mr Dube, by all accounts an employee of the Applicant’s client.
- [9] At a point in time Mr Dube left the premises and left the Third Respondent to his own devices. At this point, contrary to the work instruction in respect of the utilisation of stepladders, the Third Respondent continued using the stepladder and fell from it, thereby harming himself.
- [10] As a result of the Third Respondent’s conduct in utilising the ladder contrary to the safety instruction referred to above, the Applicant disciplined him and gave him a written warning valid for 12 months. It must be noted that this was not a final written warning and, in addition thereto, there were no negative financial implications for the Third Respondent at all.
- [11] As set out above the First Respondent found that the conduct of the Applicant had been unfair, set aside the warning, and awarded the Third Respondent R78 000 in compensation.

Grounds of review

- [12] The essence of the Applicant’s complaint is that the Commissioner blatantly erred in respect of the evidence, overlooked certain evidence and made errors in relation to other evidence.

³ Page 7 of the pleadings at para 12.

[13] The Applicant also advances the case that the award which was made by the First Respondent, showed a lack of judicial exercise of discretion.

Analysis

[14] The award made by the First Respondent demonstrates a number of defects which are difficult to reconcile with the standard of reasonableness which is required of a commissioner.

[15] In the first instance because, as set out above, it was common cause that there was a rule in place that ought to have prevented the Third Respondent from conducting himself as he did, there is no basis upon which the First Respondent could have found to the contrary. The First Respondent's statement that "*the Applicant did not commit misconduct by using a ladder without a second person holding it as the Respondent failed to provide him with an assistant*" is, with respect, a *non sequitur*.

[16] The Applicant's failure to provide the Third Respondent with an assistant, even if this was in some way culpable, did not excuse the Third Respondent's conduct. At best for the Third Respondent it may have mitigated in his favour to be given a lesser sanction than the 12 month written warning. The severity of the sanction is not an issue which was dealt with at all by the First Respondent. He could have enquired into whether a lesser sanction would have been appropriate but did not, and continued to the unwarranted conclusion that there was no misconduct on the part of the Third Respondent.

[17] The clear truth of the matter is that had the Third Respondent not taken it upon himself to work on, what he himself states to be an unusually long stepladder, he would not have experienced the misfortune which he did.

Lack of judicial exercise of discretion in relation to the compensation award

[18] It must be borne in mind that the Third Respondent was not dismissed, he did not suffer any loss of salary, his written warning was not a final written

⁴ Page 7 of the transcript at line 19 onwards.

warning and there was no suggestion that the trust relationship between him and the Applicant had broken down. The written warning was purely for the purposes of maintaining discipline and health and safety at the Applicant.

[19] In these circumstances it is grossly unreasonable for the First Respondent to order the Applicant to pay an amount of six months compensation, even if he had been correct in respect of the unfair labour practice.

[20] In respect of both the manner in which he dealt with the evidence as set out above and the award he made, I find, as set out in *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*⁵ and as more recently restated in *Goldfields Mining SA (Pty) (Kloof Goldmine) v Commission for Conciliation, Mediation and Others*⁶ that the decision that the Commissioner arrived at is one that falls outside the band of decisions to which a reasonable decision maker could come on the available material.

[21] Accordingly I make the following order:

Order

1. The award is reviewed and set aside;
2. There was no unfair labour practice perpetrated by the Applicant in this matter;
3. I make no order as to costs.

Snider, A J

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Beckenstrater

Instructed by: Moodie and Robertson Attorneys

⁵ [2007] 12 BLLR 1097 CC.

⁶ (2014) 35 ILJ 943 (LAC) at para 14.