

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1899/16

In the matter between:

SUNBAKE BAKERY RUSTENBURG

Applicant

And

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER KENNETH DLAMINI

Second Respondent

NUFBWSAW

Third Respondent

KUMO SEHUNOE

Fourth Respondent

Heard: 27 September 2019

Delivered: 14 November 2019

JUDGMENT

RABKIN-NAICKER, J

- [1] This is an opposed application to review and set aside an arbitration award under case number NWRB92-16. The Second Respondent (the Commissioner) found that the dismissal of the fourth respondent was procedurally and substantively unfair and ordered that she be reinstated with back-pay.
- [2] The charges leading to her dismissal were the following:
- “Gross Insolence: in that you were disrespectful, rude and abusive towards your direct superior;
 - Insubordination – failed to give feedback/action tasks given to you by your direct superior;
 - Gross Negligence – failed to action payroll input accurately and timeously.”
- [3] It was undisputed that the fourth respondent had laid a grievance against her direct superior, Mrs Stapelberg, on 23 November 2015 and that this was not addressed by the applicant (the Company). On 27 November 2015, the fourth respondent was suspended and charged with the infractions above.
- [4] The Commissioner stated the following in his Award in relation to the Charge of Gross Insolence and Insubordination:
- “37. It is the version of the Respondent’s first witness that the Applicant screamed at her in the presence of other staff members. The Applicant threatened her by saying she had to treat everyone the same and that she felt insulted by the Applicant’s failure of not sending an e-mail and as such the Applicant disregarded her authority.

38. The version of the Respondent's second witness was that she heard the Applicant screaming at the first witness, despite of the noise of the invoice printing machine in her office nothing else.
39. It is the version of the Respondent's third witness that there was an argument. After leaving the office she heard the first witness cautioning the Applicant to stop talking to her like that. The respondent's first witness has a louder voice than the Applicant. But she heard the Applicant screaming at the Respondent's first witness. The Applicant screamed at the first witness.
40. It is the Applicant's version that she raised her voice during the altercation in retaliation and that she was charged and dismissed for having lodged a grievance.
41. The Respondent's first witness admitted having raised her voice during the altercation, but the second and third witnesses decided to selectively listen. No evidence was presented establishing that the Applicant's grievance was accordingly dealt with. I am therefore of the view that it will not be prudent to consider these allegations at all as they are linked to the grievance lodged by the Applicant prior to the disciplinary action being taken against the Applicant...."

[5] The applicant submits that the approach taken by the Commissioner in paragraph 41 of his Award makes the Award susceptible to review. I agree. This is an example of a Commissioner misconceiving the nature of the enquiry before him.¹ The enquiry before him required the Commissioner to consider whether on all the evidence, in what was a *de novo* hearing, the employer was able to prove on a balance of probabilities that the employee was guilty of the charges for which she was dismissed. He declined to evaluate the evidence relating to the first two charges. It appears that this was on the basis of a value judgment about the failure of the employer to hold a grievance process. As a result, he failed to properly apply his mind to these material considerations which led him to misconceive the nature of the enquiry by failing to address the question for determination as revealed by the evidence,

¹ Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae) 2013 (6) SA 224 (SCA) at paragraph 25

namely whether the dismissal of the first respondent for those charges was fair.²

[6] In my view, the dispute needs to be remitted back to the first respondent for re-hearing. It cannot be substituted given the importance of credibility findings that will have to be made. Further, given that the applicant has taken issue with the manner in which the Commissioner questioned the parties, reliance on the record would be inappropriate. I do not intend to award costs in this matter given the fact that the fourth respondent is an individual defending the award.

[7] I make the following order:

Order

1. The arbitration award under case number NWRB92-16 is reviewed and set aside.
2. The dispute is remitted to the first respondent for re-hearing before a Commissioner other than second respondent.
3. There is no order as to costs

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances: _____

For the Applicant:

Macgregor Erasmus

² See for example Palluci Home Depot (Pty) Ltd v Herskowitz & others (2015) 36 ILJ 1511 (LAC) para 42

For the Fourth Respondent: Haffegge Roskam Savage Attorneys

LABOUR COURT