

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1657/14

In the matter between:

GERSON NETSWERA

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER FRANCIOS
VAN DER MERWE N.O.**

Second Respondent

**SOUTH AFRICAN CONTAINER
DEPOTS (PTY) LTD**

Third Respondent

Heard: 14 March 2019

Delivered: 02 April 2019

Summary: Review of arbitration award

JUDGMENT

PHEHANE, AJ

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award by the Second Respondent dated 30 June 2014 which found his dismissal to be both procedurally and substantively fair. The review application is brought in terms of section 145(2) of the Labour Relations Act¹ (LRA).
- [2] The Third Respondent opposes the application on the basis that the Applicant has failed to advance any valid ground for the review of the arbitration award and as such, the arbitration award is reasonable. The Third Respondent accordingly seeks a dismissal of the application for review.

Background

- [3] The Applicant was employed as a forklift driver by the Third Respondent. The Applicant was charged for misconduct. The allegations of misconduct that were levelled against the Applicant were the following:
- i. Assault with an intent to cause grievous bodily harm/pain;
 - ii. Fighting – physical attack to a fellow employee;
 - iii. Insolence and Rebelliousness towards superior – gross misconduct.’
- [4] The Applicant was dismissed on 8 June 2012 pursuant to a disciplinary hearing.
- [5] A dispute was subsequently referred to the Commission for Conciliation Mediation and Arbitration (CCMA). The arbitration award that was issued by the CCMA was reviewed and set aside by this Court. The matter was remitted to the CCMA to be heard *de novo*.

¹ Act 66 of 1995, as amended.

- [6] The Second Respondent presided over the *de novo* hearing. It is his arbitration award that the Applicant seeks to review.

Ground of review

- [7] The Applicant raises a single ground of review in his founding affidavit, which is the following:

'21. The arbitrator committed a gross irregularity in the conduct of the arbitration proceedings in that he failed to determine whether the company applied its policy in respect of discipline consistently between Rasiruthe and myself in that we were involved in a fight in the office of Metherell. The Arbitrator's failure to determine the consistent application amongst the Company's employees prejudiced me in that I was unfairly treated and the Company did not lead evidence to justify the unfair treatment. Therefore, the Arbitrator's award is unreasonable based on the totality of the evidence presented during the arbitration proceedings'.

- [8] It is trite that a litigant stands or falls by his founding affidavit². In *Naidoo v National Bargaining Council for the Chemical Industry and Others*³ the court held as follows at paragraphs 13 and 19:

"It is incumbent upon the applicant in his founding or supplementary affidavit to establish with reference to the arbitrator's award and the record (and the material placed before the arbitrator), the grounds upon which the applicant relies in seeking to have the award reviewed and set aside ... In the heads of argument filed by the applicant's counsel, the applicant attempts to make out a case justifying the review and setting aside of the award... Heads of argument, however, do not constitute pleadings and the court is left with only the

² *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D)

³ [2012] 9 BLLR 915 (LC) at para 13 and 19. See also: *Moroka v National Bargaining Council for the Chemical Industry & others* [2010] JOL 26406 (LC) and the unreported Labour Appeal Case mentioned in paragraph 22 of: *Comtech (Pty) Ltd v Commissioner Shaun Molony N. O. & others* (case DA 12/05 dated 21 December 2007).

applicant's founding and replying affidavits to determine the reviewability or otherwise of the ... award."

- [9] Despite reserving his right to supplement his founding affidavit upon receipt of the record⁴, no supplementary affidavit⁵ was delivered by the Applicant to augment his ground of review subsequent to the delivery of the transcribed record and two reconstructions of the record dated 9 December 2014 and 25 January 2018, which were handed up by the parties during oral argument.
- [10] Paragraph 12 of the Applicant's replying affidavit contains an allegation that he was charged on a supposition that the employer singled him out because he is a shop steward. This allegation is raised for the first time in the replying affidavit.
- [11] In the premises, this Court only has the founding affidavit to determine whether a case is made out for the review and setting aside of the arbitration award.
- [12] The Applicant's representative requested the Court to give a wide interpretation to paragraph 21 of the founding affidavit and to consider the founding affidavit as a whole.
- [13] His submission in essence was that the arbitrator ought to have found that there was a fight between two parties, being the Applicant and Mr Raseruthe; that the ground of review based on inconsistency refers to only one party having been disciplined for misconduct, whereas both parties committed an act of misconduct in fighting with each other.
- [14] In my view, it is not the role of this Court to sift through founding papers, *in casu* to find grounds of review under section 145(2) of the Labour

⁴ Pleadings bundle, founding affidavit, para 22, p 14.

⁵ As contemplated in Rule 7A(8)(a) of the Rules of this Court.

Relations Act. It is incumbent on the Applicant to set out the grounds of review on which he relies and to set out a factual basis therefore.

- [15] The submissions by the representative for the Respondent is that firstly, there are two distinct incidents; the first took place outside at the forklift; the second, inside the office of Mr Metherell. Secondly, that there is a single and narrow ground of review contained in paragraph 21 of the founding affidavit. Thirdly, the Applicant's single ground of review in paragraph 21 is confined to the arbitrator's finding as to what transpired in the office of Mr Metherell.

Legal Principles:

- [16] The legal principles in review applications have been emphasized in the decisions of this Court and higher Courts⁶.
- [17] The onus is on an applicant to deal fully with the factual and legal grounds upon which the applicant relies to review and set aside the arbitration award⁷, with reference to the award and evidence. It is glaringly evident that the Applicant in *casu* has failed to do so on the papers before this Court.
- [18] The Applicant's version before the Second Respondent is that he was assaulted by his superior, Mr Raseruthe outside and on the forklift that he was driving. He contended that Mr Rasesuthe smacked him in his face outside, at the forklift. The Applicant immediately went to report the assault to his superior, Mr Metherell, who was in his office at the time. Mr Metherell called Mr Raseruthe to his office. While seated, Mr Metherell asked Mr Raseruthe if he assaulted the Applicant. He denied doing so.

⁶*Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC); *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others* (2014) 35 ILJ 943 (LAC); *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA).

⁷Rule 7A(2)(c).

- [19] An argument ensued and Mr Raseruthe hit the Applicant with a fist on his shoulder. The Applicant defended himself with fists. Mr Metherell arose from his seat to separate them. The Applicant pushed Mr Metherell aside, causing papers to fall off his desk. Mr Raseruthe threw a dustbin which hit Mr Metherell. The Applicant left Mr Metherell's office. When he was called by Mr Metherell, he did not respond nor turn back, as he felt pain and unprotected. He went to report the matter to a senior shop steward. He returned to Mr Metherell's office with the senior shop-steward, was suspended from work and was ultimately dismissed.
- [20] The Third Respondent's version presented to the Second Respondent was evidenced by the testimony of Messrs Metherell and Raseruthe. Mr Raseruthe's evidence was that he was using the forklift, had parked it outside his office when the Applicant climbed into it. A scuffle ensued between the two as Mr Raseruthe tried to remove the key from the ignition. The Applicant pushed his hand in an upward movement which caused Mr Raseruthe's hand to touch the Applicant's face. Mr Raseruthe was called to Mr Metherell's office.
- [21] Inside Mr Metherell's office, while seated, Mr Metherell asked him if he had assaulted the Applicant. The Applicant started raining fists on him. Mr Raseruthe did not return the fists, but protected himself as he was being hit from behind. Mr Metherell arose from his seat to separate them. The Applicant pushed Mr Metherell causing papers to fall off his desk. The Applicant continued to hit Mr Raseruthe with fists. Mr Metherell tried to stop the Applicant for the second time, but the Applicant continued hitting Mr Raseruthe. The Applicant then left the office, was called back by Mr Metherell, but waved his hand and he did not return. Mr Metherell asked Mr Raseruthe if he was fine, to which he responded that he was not fine as he had sustained injuries on his head, neck and hands. Mr Raseruthe left, went to the chemist as he

was in pain. The following day, he went to the doctor and went to open up a case of assault against the Applicant at a police station.

- [22] Mr Metherell's evidence before the Second Respondent corroborates that of Mr Raseruthe with respect to what transpired in his office⁸ i.e. that the Applicant assaulted Mr Raseruthe unprovoked⁹.
- [23] The evidence before the Second Respondent was that Mr Metherell requested the Applicant, in the presence of the shop steward, to write a statement regarding the alleged assault on him by Mr Raseruthe at the forklift¹⁰. The Applicant refused to provide such statement. As a consequence, Mr Raseruthe was not charged for misconduct.
- [24] The Second Respondent was to determine who started the assault and whether there was provocation.¹¹ In so doing, I find that he considered the evidence before him in totality¹² when he found that the Applicant assaulted Mr Raseruthe in Mr Metherell's office and that he was not provoked. The evidence before him was that Mr Raseruthe did not assault the Applicant in Mr Metherell's office.
- [25] In respect to the determination of whether there was any inconsistency in the application of discipline, the Second Respondent found that the Applicant's refusal and failure to produce a statement on the alleged assault outside and at the forklift, was the reason why Mr Raseruthe was not charged for misconduct. The totality of evidence placed before him was that Raseruthe's hand touched the face of the Applicant during the scuffle to retrieve the keys of the forklift. This does not, in my view, constitute assault or a beating as alleged by the Applicant.¹³ The

⁸ Pleadings bundle, arbitration award, para 10, pp 18 – 19.

⁹ Reconstructed record dated 25 January 2018, p 2, lines 6 to 10.

¹⁰ Reconstructed record dated 25 January 2018, p 2, lines 18 to 24.

¹¹ Pleadings bundle, arbitration award, para 9, p 18.

¹² Pleadings bundle, arbitration award, paras 14 to 16, pp 21 to 22.

¹³ Transcribed record, p 167, lines 1 to 3.

evidence before the Second Respondent was that the Applicant assaulted Mr Raseruthe in the office of Mr Metherell such that he sustained injuries and sought medical attention.

[26] Although not crafted as a ground of review, but an averment mentioned in paragraph 16 of the founding affidavit, I find that the Second Respondent dealt with the complaint that the Applicant was not afforded an opportunity to furnish the chairperson of the disciplinary hearing with mitigating factors. On the totality of evidence before him, being the evidence of Mr Kruger who chaired the disciplinary hearing as well as the documentary evidence before him, the Second Respondent considered and found, correctly so, that the mitigating factors were taken into consideration.

[27] In view of the foregoing, I find that the single ground of review raised by the Applicant lacks merit. I find no basis to interfere with the Second Respondent's arbitration award¹⁴.

[28] In the premises, I make the following order:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

MTM Phehane
Acting Judge of the Labour Court of South Africa

Appearances:

¹⁴ *Edcon Ltd v Pillemer N.O. and others* [2009] ILJ 2642 SCA.

For the Applicant: A.P. Landman

Instructed by: SASLAW Pro Bono Office

For the Respondent: D. Short from Fairbridges Attorneys

LABOUR COURT