HEADNOTE: DISMISSAL AND PORNOGRAPHIC MATERIAL

Labour – Dismissal – Sexual harassment – Manager sending pornographic material to junior employee – Had been asking employee on dates – Apology and claim that the material sent in error – Sexual harassment offending constitutionally guaranteed rights – Dismissal fair.

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1595/19

In the matter between:

SIPHO NGUNYULE	**Applicant**
and	
THE MEIBC	**First Respondent**
PANELLIST ARNE SJOLUND N. O	**Second Respondent**
DENEL LAND SYSTEMS	**Third Respondent**

Heard: **02 February 2023**

Delivered: **07 February 2023**

Summary: Application to review and set aside an arbitration award. The arbitration award falls within the bands of reasonableness and is

justifiable in law. The finding that the applicant is guilty of sexual harassment and that his dismissal was fair is one that a reasonable decision maker may reach. Held (1): The application for review is dismissed. Held (2): There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an opposed application seeking to review and set aside an arbitration award issued by Panellist Arne Sjolund (Sjolund) in terms of which she found that the dismissal of Mr. Sipho Ngunyule (Ngunyule) was both procedurally and substantively fair. Aggrieved by the arbitration award, Ngunyule launched the present application. Denel Land Systems (Denel) duly opposed the granting of the application.

Background facts

[2] The essential facts pertinent to the present review application are that Ngunyule was employed by Denel as a Senior Manager for Business Planning. At a point, one S [....] L [....] M [....] (M [....]) was employed in a department headed by Ngunyule. During a working relationship between Ngunyule (senior employee) and Ms. M [....] (junior employee) on the version of M [....], Ngunyule on multiple occasions asked her on dates which she politely rebuffed. Ngunyule gave her looks that will make her uncomfortable and would comment about her physical appearance.

[3] On one occasion, Ngunyule sent a pornographic material to M [....]. On the second day after having received the said offensive material, M [....] informed Ngunyule that she does not appreciate such material being sent to her.

Ngunyule apologized and alleged that the material was meant for a friend of his. When all of the above reached the ears of management, Ngunyule was charged with allegations of sexual harassment. At the internal hearing Ngunyule was found guilty and dismissed.

[4] Disenchanted by his dismissal, Ngunyule referred a dispute to the bargaining council and alleged an unfair dismissal. Having failed to resolve the dispute through conciliation, the Metal and Engineering Industries Bargaining Council (MEIBC) appointed Sjolund to resolve the dispute through arbitration. After hearing the parties, on 22 July 2019, Sjolund published the impugned arbitration award.

[5] Yet again, Ngunyule was chagrined by the outcome of the arbitration proceedings and he launched the present application.

Grounds of review.

[6] Ngunyule accuses Sjolund with bias, misconduct, misunderstanding of issues, reaching unjustifiable findings, ignoring crucial evidence, and above all that her arbitration award does not fall within the boundaries of reasonableness. Additionally, Ngunyule contends that Sjolund exceeded her powers by refusing to grant him a postponement on 25 April 2019. A further catalogue of complaints was raised by Ngunyule. For the sake of brevity, such complaints merit no repeat in this judgment owing to the solidified and trite test of review of arbitration awards in this Court.

Evaluation

[7] Before considering whether the impugned arbitration award meets the constitutional standard, this Court must take a moment and applaud Sjolund for having prepared and published a solid, unimpeachable and an impeccable arbitration award. Her award is logical, well-reasoned and supported by authorities of this Court, the Labour Appeal Court and the Constitutional Court.

If the applicable test was one of correctness, this Court would not hesitate to give the arbitration award such an imprimatur of correctness.

[8] The salvo by Ngunyule against the arbitration award is unjustified and actually amounts to an appeal disguised as a review

[9] It is worth mentioning that despite the fact that Ngunyule and his legal team were ready to move this archaic review application, Denel launched a substantive application, well over 200 paged document, seeking to have the review application postponed. The application was launched on the eleventh hour. Literally two days before the set down date. As the allocated judge, I informed the parties upfront that a postponement shall not be granted unless the Court is persuaded otherwise. Despite, this upfront view, counsel for Denel sought to move the postponement application nevertheless. Having debated the legal principles applicable to reviews and postponements with Mr. Mosime, the Denel counsel, he wisely jettisoned the doomed to fail postponement application.

[10] During the debate, with Mr Mosime, it became apparent to me that the real reason for the postponement sought was the absence of the counsel who held the brief before Mr Mosime, who happened to have been appointed as an acting justice of this Court. The reasons advanced in disguise were far from convincing and appeared to have been a recent manufacture. This Court must emphasise, absence of counsel is not a ground for postponement of a matter, more especially a labour dispute. This Court is enjoined by the Labour Relations Act (LRA)[1] to speedily resolve labour disputes. There seem to be a growing tendency for counsel to only accept a brief to seek a postponement. I have bad news for such a tendency. In my view, where counsel is informed during the brief that a matter is enrolled for argument in the motion Court, such counsel must accept a brief to either move or opposed such a motion. It is, in my considered view, inappropriate for counsel to only accept an instruction to move a postponement application. In reality, such a brief (postponement brief) does

[1] Act 66 of 1995 as amended.

not exist. It is indeed so that counsel may form a view after accepting a brief to move or oppose a motion that the motion is not ripe for hearing. Under those circumstances, he or she may prepare an application to postpone an application that is not ripe for hearing. However, counsel must symbiotically prepare to move or oppose the motion, in the event, the Court is not in agreement.

[11] It has long being held that a counsel who comes to Court with an instruction to seek a postponement must also come prepared in the event a postponement is refused[2]. In the Labour Court, more particularly in regard to a review application, postponement thereof is a rare occurrence unless strong and cogent reasons are provided why a ripe review application ought to be postponed. The practice manual in the Labour Court perspicuously label a review as an urgent application in nature. Accordingly, the message this judgment conveys is that practitioners in the Labour Court must sparingly to never accept a brief for postponement of a review application only. If the review is ripe for hearing, such an application shall be heard.

[12] The myth to be dispelled immediately and adequately so is that this Court has on countless occasions dismissed unopposed review applications. It does not follow axiomatically that if a review application is unopposed it shall succeed or if it is opposed it shall not succeed. If an arbitration award meets the constitutional standard it shall be affirmed by this Court. Equally if it fails to meet the constitutional standard it shall be reviewed and set aside. Hopefully, having outlined my views above, the Labour Court shall witness less of practitioners briefed only to move a postponement of a ripe review application.

[13] Having said that, this Court must applaud Mr Mosime for having made pitch-perfect submissions despite having been briefed barely few days before a set down date. Of course it is expected by this Court, as outlined above, for practitioners to accept a brief to either move or oppose a motion. Otherwise practitioners must not accept a brief.

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[2] See *National Police Services Union and others v Minister of Safety and Security and others* 2000 (4) SA 1110 (CC).

[14] Mr Kufa, who appeared for Ngunyule did his utmost best and steadfastly and forcefully argued that the arbitration award is impugnable in law. Principally, he argued that at arbitration Ngunyule successfully rebutted the evidence of M [....] that he perennially asked her out. With regard to the sending of the pornographic material, he submitted that such is not a gross form of sexual harassment and dismissal as a sanction was harsh when compared to the act of one Mr. Van der Merwe. All of these alluring submissions are oblivious of the approved test on review. A proper reading of the arbitration award reveals that Sjolund pitch-perfectly dealt with all those issues. The question is not whether she was correct or not but whether the decision she reached is one that a reasonable decision maker may reach.

[15] With regard to a decision to refuse an application for postponement of the arbitration proceedings, it ought to be recognised that in dealing with an application for postponement, an arbitrator exercises a discretion. A Court of review is loath to interfere with an exercise of discretion unless the exercise is injudicious; capricious; predicated on wrong legal principles; or actuated by malice. This Court is far from being persuaded that the exercise of discretion suffers from any of the above listed ills.

[16] Another argument pursued with sufficient vigour by Mr Kufa is that Sjolund dismissed an application to have M [....] recalled when a ‘competent’ counsel resurfaced at the arbitration proceedings. He argued that had M [....] been recalled to be cross-examined by a competent counsel, different evidence would have emerged which could have led to a different outcome. With considerable regret, this Court is not persuaded. Inasmuch as Ngunyule sparsely disputed the multiple ask for going out, it was common cause that he thereafter sent a pornographic material. His defence that the material was sent in error has hallmarks of fragility. He sends it a day before and only to be alerted to it by the person he allegedly had been asking out perennially. It is too much of a fortuity that a pornographic material is delusionally directed to a person who had been asked out countless times. As submitted by Mosime, the fact that Ngunyule apologized does not denude the fact that M [....] found the material to be offensive and hurtful. Knowing what she knew about the overt

intentions of Ngunyule, it is incongruent to accept the alleged delusion. Sjolund reasonably accepted the version of M [....] that the apology was a damage control measure.

[17] It is important to acknowledge that a decision regarding a recall of a witness involves an exercise of discretion. In arbitration proceedings, section 138 (1) of the LRA affords a commissioner a discretion to conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly. All the section enjoins him or she to do is to deal with the substantial merits of the dispute with the minimum of legal formalities.

[18] Accordingly, even if Sjolund had accepted the evidence of Ngunyule that he did not perennially ask M [....] out, what would stubbornly remain shrivel is the fact that a pornographic material was sent to M [....] and M [....] expressed discontent about that. It then must follow, like a night following a day that the recall of M [....] would have been fatuous. It would not carry the effect that Mr Kufa incessantly argued it would carry.

[19] Ngunyule profoundly and in a rather pronounced manner contended that he was treated inconsistently. He compared his misconduct to that of one Mr. Van der Merwe. In his ebullient view, the misconduct of Mr. Van der Merwe was so grisly as compared to his, yet Mr. Van der Merwe was not dismissed and he was. Sjolund appropriately dealt with this contention. Again she was spot on with regard to the approved legal principles relating to inconsistency.

[20] Although Mr Kufa attempted very hard to soil the reasoning that pervades the arbitration award, the decision remains justifiable and one that any reasonable decision maker may reach. Resultantly, the review applications fall to be dismissed.

[21] A frail attempt was made to the effect that dismissal for sexual harassment was inappropriate. In many judgments of this Court, the Labour Appeal Court and the Constitutional Court, sexual harassment was described as an utterly

odious form of misconduct at the workplace. Being so described, how can it not be serious enough to lead to a dismissal? Unlike any other forms workplace misconducts, sexual harassment also offends constitutionally guaranteed rights. The right to equality and dignity to mention but a few. An employer carries a legal obligation to protect employees from any form of harassment. An argument that it took Denel months to act after the incident is sadly a limping one too. The alleged political conspiracy remains unhelpful to the course of Ngunyule.

Conclusions

[22] In summary, the arbitration award is justifiable, unassailable and one that a reasonable decision maker may reach. Accordingly, the review applicable fall to be dismissed.

[23] In the results I make the following order:

Order

1. The review application is dismissed.

2. There is no order as to costs.

GN Moshoana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M Kufa

Instructed by: Machaba Attorneys, Johannesburg.

For the third Respondent: Mr K Mosime

(heads of argument prepared and submitted by Mr Matyolo)

Instructed by: Nkadimeng Attorneys, Johannesburg.