IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable

CASE NO: PR 78/18

In the matter between:

MERVYN WALTON TERBLANCHE — Applicant

and

COMMMISION FOR CONCILIATION

MEDIATION AND ARBITRATION — First Respondent

COMMISSIONER BOTHA DU PLESSIS N. O — Second Respondent

PARMALAT SA (PTY) LTD — Third Respondent

Heard: 01 August 2024

Delivered: This judgment was handed down electronically by circulation to the Applicant's and Third Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 15h00 on 01 November 2024.

JUDGMENT

LALLIE, J

[1] The applicant was employed by the third respondent as a filler operator at its dairy products manufacturing business. On 4 September 2017, while working night shift, the applicant was instructed by his supervisor, Mr. Radasi (Radasi) who was a production controller to take his lunch break at 01h00. The purpose of the instruction was to maintain the smooth running of production. The applicant refused and insisted on taking his lunch break 02h00 as originally planned. Radasi responded to the applicant's refusal by saying *"no fuck there's nothing special about you"*. The applicant felt provoked and belittled. He aggressively told Radasi that he would throw the spanner he was holding at him. Radasi felt threatened and intimidated. He called Mr. Julius (Julius) an acting supervisor, to observe the applicant's behavior. Julius corroborated Radasi's evidence that the applicant threatened them both with the spanner and called them puppets.

[2] As a result of the incident of 4 September 2017, the third respondent charged the applicant with intimidating and threatening Radasi. A disciplinary enquiry was instituted against the applicant, he was found guilty of the allegations against him and dismissed. He challenged the fairness of his dismissal at the first respondent, the Commission for Conciliation Mediation and Arbitration (the CCMA). His dispute against the third respondent was arbitrated by the second respondent (the commissioner) who found his dismissal fair. In this application the applicant seeks an order reviewing and setting the arbitration award aside.

[3] The applicant's main ground for review is that the commissioner misconceived the dispute before him. He failed to consider his relevant evidence that the

conduct which resulted in his dismissal was provoked by Radasi who swore at him when he refused to have his lunch break changed. The third respondent denied that the applicant established valid grounds for review. It was submitted on behalf of the third respondent that the totality of the evidence tendered at arbitration supports the commissioner's award that the applicant's dismissal was fair. For that reason, the third respondent sought a dismissal of the review application.

[4] At arbitration the applicant testified that his aggressive conduct was a reaction to being sworn at by Radasi. He also testified that foul language was generally used at the third respondent. Radasi's use of foul language when instructing the applicant to take his lunch break earlier is consistent with the applicant's version. The commissioner disregarded the evidence. Section 138 (7) of the Labour Relations Act[1] (the LRA) requires commissioners to give brief reasons for their decisions. However, section 138 (1) of the LRA enjoins commissioners to deal with the substantial merits of the dispute when conducting arbitrations. The defence of provocation the applicant raised at arbitration and his evidence on the use of foul language at the third respondent form part of the substantial merits of the dispute before the commissioner. The commissioner therefore had an obligation to deal with it.

[5] The consequences of a commissioner's failure to consider relevant evidence in respect of review applications are couched in the following words in *Head of the Department of Education v Mofokeng and others*[2]:

> "To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material

[1] Act 66 of 1995 as amended.
[2] *[2015] 1 BLLR 50 [LAC] at para 32.*

factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision- maker could reach on all the material that was before him or her."

[6] In determining the fairness of the applicant's dismissal, the commissioner undertook the inquiry in the wrong manner in that he omitted to consider his defence of provocation and the evidence that the third respondent tolerated foul language. The omission constituted a material error and a defect as envisaged in section 145 (1) of the LRA. Had the commissioner considered that Radasi's position as a supervisor did not give him the right to swear at the applicant, he would have found that the applicant's aggressive conduct was a direct consequence of Radasi's swearing at him. The finding would have influenced his decision on the fairness of the applicant's dismissal. The commissioner's omission therefore had a distorting effect on his decision and rendered it unreasonable.

[7] It was argued on behalf of the applicant that the matter should be remitted to the CCMA to be properly ventilated before a different commissioner. The third respondent differed and argued that I should invoke the provisions of section 145 (4)(a) of the LRA and determine the dispute. The papers filed ofP record do not contain sufficient information that will place me in a position to exercise the discretion provided for in section 145 (4) (a) of the LRA. Remitting the dispute to the CCMA will be appropriate.

[8] The applicant did not seek a cost order against the third respondent.

[9] In the premises the following order is made:

1. The arbitration award issued by the second respondent under case number EC PE 6719 – 17 and dated 13 March 2018 is reviewed and set aside.
2. The matter is remitted to the first respondent to be arbitrated *de novo* by a commissioner other than at the second respondent.
3. There is no order as to costs.

[redacted]

MZN Lallie

Judge of the Labour Court of South Africa

APPREARANCES:

For the Applicant: Mr Jessop of Brown, Braude and Vlok Inc.

For the Third Respondent: Mr Cokile of Siya Cokile Inc.