REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1180/08

In the matter between:

IEMAS (CO-OPERATIVE) LIMITED	**Applicant**
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER D NKADIMENG	**Second Respondent**
NUM obo A ROUX	**Third Respondent**

Heard: **27 October 2011**

Delivered: **10 November 2011**

JUDGMENT

SAVAGE AJ

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent ("the commissioner") on 29 April 2008 in which the

dismissal of the third respondent ("Ms Roux") was found to be both procedurally and substantively unfair.

[2] Ms Roux was employed by the applicant in the position of asset-based financing sales consultant at the time of her dismissal on 12 December 2007. She had been employed for approximately 12 years and was dismissed following having been found guilty of:

'Non-compliance with the quality of service requirements of Iemas' code of conduct (par 9.3) in that you on 23 October 2007, behaved unprofessionally and disrespectfully towards a business partner, Mr Don Emslie of Emslie Motors.'

Paragraph 9.3 of the code of conduct states the following:

'Members, colleagues and business partners are at all times handled courteously, professionally and with the greatest respect, regardless of the behaviour of the member, colleague or business partner. An injustice to a member, colleague or business partner is viewed as an injustice to Iemas and will be dealt with as such'

[3] Ms Roux lodged an appeal against her dismissal but did not attend the appeal hearing. The appeal was concluded in her absence and her dismissal was upheld.

Arbitration award

[4] The commissioner dismissed an application for legal representation made at the arbitration hearing. In his ruling the commissioner detailed the grounds on which the company sought legal representation and concluded that he was not persuaded that it would be unreasonable, considering CCMA rule 25, to disallow legal representation.

[5] In the award, the commissioner sets out a summary of the evidence of five witnesses three of whom, testified for the applicant and two for Ms Roux.

[6] The commissioner concluded that the applicant had not discharged the onus to prove the employee's alleged offensive conduct and that Ms Roux was not dismissed for a fair reason within the meaning of section 188 of the Labour

Relations Act.[1] The dismissal was found to be procedurally unfair in that the chairperson refused to hear the testimony of the employee's witness. Ms Roux was awarded compensation equivalent to eight months' salary given that she did not seek reinstatement.

Review test

[7] An arbitrator when considering a dismissal for misconduct, is required to determine whether the misconduct alleged has been shown on a balance of probabilities to exist. Section 138 (1) of the LRA permits commissioners to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. In undertaking their task, a commissioner is entitled to 'conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly'. Commissioners must be guided by at least three considerations: the resolution of the real dispute between the parties; as expeditiously as possible; and in a manner which is fair.[2]

[8] This Court, with reference to the grounds of review, is entitled to set aside an arbitration award if the commissioner's decision falls outside of a band of decisions to which a reasonable person could come on the available evidence (see *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others).*[3] It is accordingly not the correctness of the commissioner's decision which is relevant but whether the result of the arbitration proceedings is reasonable.

[9] In *Bestel v Astral Operations Ltd and Others,*[4] Davis JA emphasised:

'…that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected'.

[1] 66 of 1995.
[2] *CUSA v Tao Ying Metal Industries and Others* 2009 (1) BCLR 1.
[3] [2007] 12 BLLR 1097 (CC).
[4] [2011] 2 BLLR 129 (LAC) at para 18.

[10] The test in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent one that will ensure that awards are not lightly interfered with.[5]

[11] It follows therefore that it is only an award that is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable[6].

Grounds of review

[12] The applicant has raised a number of grounds of review in this application:

12.1 In making his ruling not to allow legal representation, the commissioner failed to apply his mind properly to the application and failed to give proper reasons for his decision;

12.2 The commissioner misconducted himself and/or committed a gross irregularity and/or exceeded his powers in the course of the arbitration proceedings in that he misconstrued relevant questions of law and fact in such proceedings by:

12.2.1 allowing the respondent to venture beyond the issues contained in the pre-arbitration minute (a ground which was not pursed at the hearing of the matter);

12.2.2 finding that Mr Emslie 'admitted' that he swore at Ms Roux when this was not the evidence of Mr Emslie;

12.2.3 failing to advise a lay person in respect of issues such as leading evidence and conducting cross-examination and failing to draw an adverse inference from the fact that the witnesses called by the respondent never put their versions to the applicant's witnesses and accordingly there was no opportunity given to answer to the respondent's version;

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* at para100.
[6] See A Myburgh 'Sidumo v Rusplats: How the Courts deal with it' (2009) 30 *ILJ* 1.

12.2.4 making a subjective finding in para 6.23 of his award relating to the motive for the dismissal which was not supported by evidence and was largely speculative;

12.2.5 finding that Ms Geyer had done everything in her power to prevent Ms Roux's witness from testifying, which was irrational and without any foundation when Ms Roux was not prevented from calling her witness and this issue was not put to Ms Geyer in cross-examination; and

12.2.6 Ms Roux abandoned her opportunity to appeal the finding, at which appeal any procedural or substantive irregularity.

Evaluation

[13] The third respondent submitted that the record filed was inadequate given that there were many inaudible parts which were incapable of transcription and that no reconstruction of the record had been undertaken. A record of proceedings is rarely a perfect image of all aspects of an arbitration hearing. What is required is that a record filed fairly and sufficiently reflects the relevant aspects of the evidence presented at the arbitration proceedings so as to place the court in a position that allows a review exercise to be undertaken. In addition to the transcript prepared, the commissioner's notes have been availed to this Court, as has additional documentary evidence relevant to the matter. I am satisfied therefore that, cognisant of the fact that there may be imperfections, the record filed in this matter allows this Court to perform its functions in terms of section 145 and is therefore adequate for the current purposes.

[14] The first ground of review raised by the applicant relates to the decision made by the commissioner to disallow legal representation at the arbitration hearing. In his written ruling on legal representation, the commissioner detailed the arguments of the parties, referred to rule 25 of the CCMA's rules and concluded that the dispute concerned misconduct and that he was not persuaded that it would be unreasonable to disallow legal representation. The

transcript of proceedings bears testimony to the commissioner's reasoning in this regard.

[15] The provisions of rule 25 are mandatory: parties to arbitration hearings may not be represented by a legal practitioner where the dispute being arbitrated concerns an employee's dismissal for alleged misconduct or incapacity. An application for legal representation may only be granted where the commissioner and all parties consent, or where the commissioner concludes that the nature of the questions of law raised in the dispute, the complexity of the dispute, the public interest and the comparative ability of the parties and/or their representatives to deal with the dispute justifies such a ruling.

[16] The applicant did not present the commissioner with an argument that there were questions of law raised in the dispute which justified legal representation or that the public interest required such representation. The application was founded rather on argument alone regarding the alleged complexity of the dispute and the comparative ability of the parties to deal with the dispute. In any application for legal representation, the applicant must make out a proper case in accordance with the provisions of rule 25. The grant of legal representation in misconduct and incapacity dismissals is not one just for the taking. What is required is that the appropriate facts be placed before a commissioner in support of such application. Consequently, the conclusion reached by the commissioner to disallow legal representation was not unreasonable in the face only of argument that a human resources manager lacks the experience and expertise required to represent the employer when compared to the union representative. No evidence was placed before the commissioner to justify the applicant's submission that the representatives were not comparatively able to represent the parties in the matter and the applicant took no steps to prove that this was indeed so. Furthermore, having studied the record and the commissioner's ruling, I am not persuaded that the applicant made out a case which proved that the matter was of a complexity which warranted legal representation. In the circumstances, the ruling was not an unreasonable one and was justified on the basis of the material placed before the commissioner.

[17] The applicant raises as a further ground of review that the commissioner misconstrued relevant questions of law and fact during the arbitration proceedings. It is the applicant's case that the commissioner found that Mr Emslie had 'admitted' that he swore at Ms Roux when this was not the evidence of Mr Emslie during the arbitration hearing. The evidence of Mr Emslie at the arbitration hearing was that when he had put down the phone he was looking at his salesman and told him 'well, fok dit, kry my haar baas se nommer'. He testified that he was 'never swearing at her'[7]. The commissioner recorded the evidence of Mr Emslie to be '(w)hen he put down the receiver, he said "Fok dit", not to the applicant but to his foreman who was standing close to him'[8]. It was Mr Reynders whose evidence is recorded by the commissioner as having been that Mr Emslie admitted that he swore at Ms Roux. The commissioner did not conclude that Mr Emslie swore at Ms Roux but rather that Mr Emslie admitted using the words "Fok dit" even though he denied that the words were addressed to Ms Roux[9]. The commissioner then found that '[c]oupled with Emslie's admission that he used the words "Fok dit", my finding is that Emslie was extremely rude to the applicant during their telephone discussion on 24 October 2007'[10]. I am therefore satisfied that the commissioner did not misconstrue the evidence before him in arriving at the finding that he did. The commissioner did not conclude that Mr Emslie had admitted that he had sworn at Ms Roux. The conclusions reached by the commissioner on this aspect are accordingly reasonable and justified based on the evidence before him.

[18] The next review ground relates to the observation of the commissioner that:

'Emslie commanded respect in the close-knit community of Lephalale because of his large business interests. Reynders expressed fear of losing Emslie's business to the competition. In my view, this fear played a role in the dismissal of the applicant. In the manner of speaking, the respondent chose the lesser of two evils'[11].

[7] Transcript page 83 lines 1-2.
[8] Arbitration award page 19 at para 4.2.10.
[9] Arbitration award, page 24 at para 6.13.
[10] Arbitration award, page 26 at para 6.28.
[11] Arbitration award, page 25 at para 6.23.

[19] The commissioner's observations are not contradicted by the record, nor by the probabilities. Mr Emslie was an important client of the applicant and this is borne out from the record. The applicant took the complaint made against Ms Roux seriously. This is recorded in an email sent by Mr Reynders and is evident from his testimony that a good relationship with the dealers in town is very important and that after receiving the complaint, he went to see the dealer personally in the interests of building a successful business. He testified in answer to a question regarding the decision to take disciplinary action against Ms Roux that he was very annoyed with what the dealer had told him and that Mr Emslie had said he would 'cancel your business' and that he would advertise in the newspaper 'that is the way you are doing business'[12]. Mr Reynders thereafter indicated that he was to investigate the matter and stated 'from there I am going to take it further. And I think on that moment [in] time I realise that I had to go further with the disciplinary hearing'[13]. Mr Reynders testified under cross-examination that 'if we don't attend to this problem he is going to …advertise to the public that this is the type of service he got from IEMAS'.[14] Having considered the evidence placed before the commissioner on this point, I find that the conclusion reached regarding the decision to discipline Ms Roux and the fact that fear with regards to losing business played into the decision to dismiss her, to be a reasonable one based on his assessment of the evidence before him. I do not find that this was 'wholly subjective, not supported by the evidence and largely speculative'.

[20] The applicant's next ground of review is that the applicant claims that the commissioner failed to guide and advise Ms Geyer as a lay person in conducting the case for the company *inter alia* with regards to the leading of witnesses and cross-examination. Section 138(1) of the LRA provides that a:

'commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities'.

[12] Transcript, page 60 line 18.
[13] Transcript, page 61 lines 1-3.
[14] Transcript page 69 lines 7-14.

The commissioner is accordingly afforded a discretion as to the manner in which the arbitration proceedings are conducted provided that the interest of justice and fairness are not compromised. It is apparent from the record that the commissioner did take steps to give assistance to the parties at the outset of the hearing[15]. The commissioner clarified the approach to documentary evidence[16] and to the fact that he was to determine whether the dismissal was correct and whether it was an appropriate sanction[17]. Both parties were provided with an adequate opportunity to present their respective cases, present evidence and cross-examine witnesses and the records bears this out. In performing his functions, the commissioner did not fail to resolve the real dispute between the parties, as expeditiously as possible and in a manner which is fair.[18] From the record there is no basis to support a conclusion that the commissioner did not act fairly in the manner he conducted proceedings.

[21] The applicant suggests the commissioner failed to draw an adverse inference from the fact that the version of Ms Roux's witnesses was not put to the applicant's witnesses who therefore had no opportunity to answer to such version. Ms Roux's representative did canvass with Mr Reynders under cross-examination whether he had heard the conversation and how he came to the conclusion that Ms Roux was unprofessional (and disrespectful). His response was that Mr Emslie had told him.[19] Mr Emslie's evidence that the conversation with Ms Roux was 'katterig snedig byterig' was not challenged under cross-examination by Ms Roux. What the commissioner's notes record is that what was put to Mr Emslie was whether he could prove that the conversation was unprofessional and rude. His response was that he could and that there are ethics that must be followed and that he received his money after complaining. It was then put to Mr Emslie that he 'uttered the words but she can't prove it'. He denied this. Mr Emslie was also asked in cross-examination if Ms Roux had provoked him and he said that she had. It was Ms Roux's case that she tried to calm Mr Emslie down and that he had sworn at her.

[15] Page 42 lines 9-10.
[16] Pages 44-45.
[17] Page 46 lines 19–23.
[18] *CUSA v Tao Ying Metal Industries & others* 2009 (1) BCLR 1.
[19] Transcript, page 70 at lines 18-20.

[22] I am satisfied that that all three of the applicant's witnesses were provided with an adequate opportunity in cross-examination to answer to the nub of Ms Roux's case. Having due regard to the facts and circumstances in this case, I am therefore satisfied that no reviewable irregularity arose by virtue of a failure to put a version to the applicant's witnesses in cross-examination.

[23] The commissioner was faced with two versions: that of the applicant that Ms Roux was 'katterig snedig byterig' but that Mr Emslie on his own admission swore (not at Ms Roux) as he put the telephone down; and the second being that of Ms Roux that Mr Emslie was rude, even to Ms Mabelebele, and that Ms Roux had tried to keep calm, stating that the conversation was being recorded.[20] Where there exists a factual dispute (see *SFW Group Ltd and Another v Martell et CIE and Others*[21] 2003 (1) SA 11 (SCA) per Nienaber JA) :

'...a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his *version,* (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the *onus* of proof has succeeded in discharging it.'[22]

[24] The commissioner's prime function was to determine the truth from the conflicting versions before him and in doing so to make some attempt to assess the credibility of the witnesses by reference to any internal and external

[20] Transcript, page 108 at line 16.
[21] 2003 (1) SA 11 (SCA).
[22] Op at para 5.

inconsistencies that might exist, to assess their reliability and to consider the probability or improbability of each party's version. (See *Isaacs v Education Labour Relations Council* (unreported) C460/2008).

[25] The commissioner's finding that the onus to prove Ms Roux's alleged offensive conduct on a balance of probabilities had not been discharged, was one made primarily on a credibility finding made against the applicant and its witnesses and an acceptance of the inherent probability of Ms Roux's version. This is apparent from the commissioner's evaluation of the evidence before him. The commissioner's conclusion that Mr Emslie had been rude to Ms Mabelebele and had used foul language led him to conclude that it was not difficult to believe that he would also have been rude to Ms Roux. This finding is one that is justified on the evidence before him and is not unreasonable in the circumstances. The additional findings of the commissioner indicate an attempt to assess the credibility of the witnesses by reference to the facts and circumstances before him, to assess their reliability and to consider the probability or improbability of each party's version.

[26] A review court should not interfere with a credibility finding given that the court, unlike the commissioner, lacks the advantage of first-hand observation of the witnesses and their demeanour, and where there is no apparent basis from the record to justify calling a commissioner's finding into question. (See *Isaacs v Education Labour Relations Council* (unreported) C460/2008 at para 24)

[27] As stated previously, it is not the correctness of the commissioner's decision that this Court must decide on review. In finding the dismissal of the applicant to be substantively unfair, I find that the result falls within the band of reasonable decisions which stood to be made by the commissioner based on the evidence before him and that there exists no basis on which to interfere with such decision.

[28] The last two grounds of review raised by the applicant relate in the first instance to the finding of procedural unfairness made against the applicant by virtue of the fact that Ms Roux was not permitted to call Ms Mabelebele as a witness at the disciplinary hearing; and secondly to the fact that Ms Roux failed to attend the appeal hearing at which, the applicant contends, any procedural or

substantive unfairness could have been remedied. The chairperson did not hear the testimony of Ms Mabelebele at the disciplinary hearing. The commissioner recorded in the arbitration award that the chairperson's stated reasons for disallowing the evidence as being that: it was for Ms Roux to ensure that her witnesses attended the hearing, if Ms Mabelebele was telephoned the whole process would start over again and that her evidence was only about what was said to her by Ms Roux and not about what was said to Ms Roux. The commissioner concluded that all three reasons were open to criticism. These criticisms were that in terms of the notice, the Secretary of the disciplinary hearing was to ensure the attendance of the witnesses; it was difficult to see how the whole hearing would have to start again if Ms Mabelebele testified; and it was incorrect that her evidence was only about what she heard from the applicant but would probably have influenced the outcome of the hearing. The commissioner concluded that '(o)verwhemingly, the evidence showed that Ms Geyer was doing everything in her power to stop Girly from testifying at the disciplinary hearing, and the chairperson was wrong in excluding Girly's evidence'. He found that the dismissal was procedurally unfair in that Ms Mabelebele was prevented from testifying.

[29] The disciplinary hearing notice stated that Ms Roux was to inform her witnesses to be present at the hearing and '(t)he Secretary will make arrangements for their presence during the hearing'. In terms of the disciplinary hearing notice, Ms Geyer was to ensure the attendance of witnesses. The minutes of the hearing record that Ms Roux indicated her intention to call Ms Mabelebele as a witness and requested at the hearing that Ms Mabelebele be allowed to testify over the phone given that it was Ms Geyer's role as the Secretary to ensure Ms Mabelebele was at the hearing. The chairperson refused this request and ruled that it was Ms Roux's responsibility to call witnesses and that she had had two opportunities to contact witnesses during the hearing. Ms Roux then asked 'for permission to phone Ms Mabelebele to hear if she could come in and testify'. The chair responded that if this was allowed, the process would have to start again and the witnesses had left already and could not be cross-examined. In the circumstances, it is clear that Ms Roux was not given the appropriate opportunity to call Ms Mabelebele as her witness at the disciplinary hearing. I find there to be nothing unreasonable in

the commissioner's conclusion that a procedural unfairness was accordingly committed in this regard. Furthermore, the commissioner's conclusion that Ms Mabelebele's evidence may have influenced the outcome of the disciplinary hearing, was clearly reasonable given the evidence before him.

[30] The last review relating to Ms Roux's failure to attend the appeal hearing does not appear to have been raised in these terms during the arbitration hearing, although reference was made in evidence to the failure to attend the appeal. The commissioner, during the course of proceedings, did not consider the issue to be relevant. For purposes of these proceedings, the applicant, despite Ms Roux's failure to attend, had the opportunity to revisit the decision made at the disciplinary hearing and arrive at a different decision on appeal had it seen fit to do so. It did not. The applicant has accordingly provided no substantive justification to this Court to take this ground of review any further.

[31] In conclusion, I find that the commissioner did not misconstrue relevant questions of law and fact during the course of the arbitration proceedings. There is nothing before this Court which indicates that the commissioner committed misconduct in relation to his duties as an arbitrator, nor did he commit a gross irregularity in the conduct of proceedings or exceed his powers. The findings of the commissioner fell within a band of decisions to which a reasonable person could come on the available evidence. On a consideration of the grounds of review raised by the applicant, this Court finds that the application to review and set aside the arbitration award must fail.

Costs

[32] The Court has a broad discretion, established by section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The fact that the applicant has not been successful in this application militates in favour of a costs order in favour of the third respondent. There are no reasons before me to suggest why costs in this matter should not follow the result.

Order

Accordingly, I make the following order:

[33] The application is dismissed with costs.

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K M Savage

Acting Judge

APPEARANCES

APPLICANT: B Roode

THIRD RESPONDENT: L Malan

Instructed by Finger Phukubje Inc, Johannesburg.