

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN BRAAMFONTEIN

CASE NO: JR 2987/05

In the matter between:

NORMAN MBELENGWA

APPLICANT

And

NORMAN MBELENWA

1ST RESPONDENT

THE CCMA

2ND RESPONDENT

PHILLEMONT TSHABALALA

3RD RESPONDENT

JUDGEMENT

CELE AJ

INTRODUCTION

- [1] The applicant seeks to have an arbitration award dated 15 September 2005, issued by the first respondent who was acting under the auspices of the second respondent, reviewed and set aside, in terms of section 145 of Act 66 of 1995 (“the Act”). The third respondent, Mr Tshabalala, in whose favour the award was issued, opposed the application.

BACKGROUND FACTS

- [2] Mr Tshabalala commenced employment with the applicant on 11 May 1999 as a driver and messenger.
- [3] On or about 2 June 2005 Mr Tshabalala reported to Mr Jooste, the owner of the applicant, that he was not feeling well. He asked for permission to go to the Eastern Province where he would consult with a traditional healer to help him cure a stomach pain he had. Permission was granted to him by Mr Jooste. There is however a dispute about the period of absence which was granted to him. It is beyond dispute though that his absence on 3 June 2005, a Friday was authorised.
- [4] Mr Tshabalala did not report for work on Monday 6 June 2005. On the next day, 7 June 2005. Mr Tshabalala received a telephone call either from Mr Jooste or one Gladness with whom he worked, enquiring on when Mr Tshabalala would come back to work. Mr Tshabalala undertook to return on the following Monday, the 13th June 2005, which he then did. He worked as usual on that day and took applicant's van to a car wash. A number of documents which were in the van got torn while the van had been taken for a wash. Mr Jooste reprimanded Mr Tshabalala for that and when Mr Tshabalala apologised, he was given a verbal warning.
- [5] On the 14th and 15th June 2005 Mr Tshabalala reported for work but did not perform any of his regular tasks. That led to one of his co-workers, Constance, complaining that she was doing work which ought to have been done by Mr Tshabalala who at the time

was doing nothing. She then lodged a grievance with Mr Jooste that Mr Tshabalala was intimidating her. He denied any such acts being done by him when Mr Jooste confronted him.

- [6] On 17 June 2005 an altercation ensued between Mr Tshabalala and Mr Jooste. It culminated with Mr Tshabalala leaving the premises of the applicant and he never came back to work. Instead, he referred a dispute about an unfair dismissal to the second respondent for conciliation and when it failed to resolve the dispute, he referred it for arbitration. The first respondent found that Mr Jooste had dismissed Mr Tshabalala and that such was procedurally and substantively unfair. A compensatory award was issued against the applicant. It is this award which the applicant seeks to have reviewed and set aside.

ARBITRATION PROCEEDINGS

The issues to be resolved

- 1) Whether the applicant dismissed Mr Tshabalala.
- 2) If so dismissed, whether such was procedurally and substantively fair.

Mr Tshabalala's version

- [7] It was due to a persistent stomach pain that he had to seek treatment from a traditional healer in the Eastern Province, Mr Jooste had given him leave from 3 to 10 June 2005. on 7 June 2005 one co employee, Gladness telephoned him and said that she had been asked by Mr Jooste to enquire when he would return to work.

He was unable to give her a firm response. Mr Jooste then telephoned him on the same day, asking when he would return to work. He told him that he would return on the following Monday, the 13th June 2005. In a screaming voice, Mr Jooste asked who it was that would do his job as he was away. Mr Jooste told him that he was to know that he was fired if he did not report for work on Monday, 13 June 2005.

- [8] It was towards the end of the day on 14 June 2005 that another co-worker one Hendrieta told him that Mr Jooste had telephoned to say that he was not to do any work in the office. He then stopped working on that day and on the next day, 15 June 2005, he reported at work but did nothing, as instructed. He met Constance, another co-employee, who asked why she had to do his tasks when he was around. He told her that he had been instructed not to do anything. Soon thereafter, Mr Jooste called him in and told him not to act as a boss in the office as he was not. He was not given any chance to explain his position and was instructed to return to his desk. The following day, a Thursday, was a holiday.

- [9] In the morning of 17 June 2005 Mr Jooste called him to his office and asked what it was that was going on with him. He said that his company was going down and that it was because customers were complaining about him. Customers had said that he was not expressing himself clearly on the telephone. Mr Jooste told him that if he could not keep his customers happy, he had to leave his premises. Mr Jooste further said that he could go to the CCMA 20

times, but they would sort him out with his attorneys and thereafter give him three months' (pay) for that. In all of that exchange Mr Jooste did not give him a chance as he enquired what he had done.

[10] When Mr Tshabalala asked Mr Jooste to give him pay slips and the UIF documents, Mr Jooste said he would send them by post and refused to hand the documents over. He believed he had been dismissed and therefore left the premises of the applicant and thereafter referred the dismissal dispute to the CCMA.

[11] On 23 June 2005 he then received a letter from Mr Jooste through the post. It was a letter headed: Absent from work without leave. It informed him that he was absent from work without leave from the 17th June 2005. It called on him to return to work immediately. It was dated 21 June 2005. He did not return to work because he had been chased away after being subjected to harassment. When he received the letter, he had already sent a CCMA referral to Mr Jooste.

The applicant's version

[12] The only day on which Mr Tshabalala was excused from work was on 3 June 2005. It was a surprise to Mr Jooste when Mr Tshabalala did not arrive at work on the 6th and 7th June. A telephone call was made to establish when he would come back to work.

[13] On 15 June 2005 Mr Jooste received a report that Mr Tshabalala had been intimidating the staff. On 17 June 2005 he had a discussion in his office with Mr Tshabalala about staff

intimidation. It was on that occasion that Mr Tshabalala said that Mr Jooste could fire or retrench him. Mr Jooste said that he would not fire him. Mr Tshabalala demanded his payslips and the UIF forms but Mr Jooste could not remember the exact date when such a demand was made.

[14] Mr Tshabalala left work on 17 June 2005 on his own and he was not dismissed. On the basis of an advice given to him by an employer organisation, SEESA, Mr Jooste paid Mr Tshabalala his salary for June on 17 June 2005. SEESA also advised him to write a letter to Mr Tshabalala to say that as Mr Tshabalala had absconded on 17 June 2005, he had to return to work immediately. After the issue of that letter, Mr Jooste did not correspond with Mr Tshabalala but waited for the CCMA to deal with the matter.

[15] Ms Ferns, a clerk of the applicant said that on 17 June 2005 Mr Jooste called a staff meeting at about 7h30, in his office. She could not recall why the meeting was called but remembered that it lasted for about five to ten minutes. She could not recall if there was a discussion about staff intimidation. All she remembered well was Mr Tshabalala uttering the words: “you can fire me because I am not going to go on my own”. She heard Mr Jooste responding by saying: “I am not going to”. When the meeting ended all staff went to their offices, including Mr Tshabalala who later left the work place and did not come back to work.

GROUND FOR REVIEW

[16] The applicant's attack on the award was premised on the following grounds:

- The first respondent's finding that Mr Tshabalala was dismissed was not justifiable on the evidence presented.
- The first respondent committed a gross irregularity in that the letter that was sent to Mr Tshabalala enquiring about his absence was never discussed during the hearing.
- First respondent's view of what constituted fairness was too stringent. In holding that the witnesses were unable to indicate what could have led to the situation occurring, the first respondent came to an unjustifiable conclusion and committed a gross irregularity.
- The first respondent did not take the evidence of Ms Ferns in consideration, when such evidence was crucial in indicating that the applicant warned Mr Tshabalala to go to his desk and to do his work. Mr Tshabalala went back to his desk but later got up and walked away without returning.
- The compensatory amount was too high.

SUBMISSION BY PARTIES

[17] The bulk of the submissions by Ms Roeloffs, for the applicant involved setting out facts as testified to by each party. She said that the actions of Mr Tshabalala, since his return from his leave, implied his repudiation of the employment contract. That was

manifested by him being at logger heads with Mr Jooste and other employees to the extent that he had to be called to a staff meeting.

[18] She said that if any dismissal were to be found, it would exist on the basis of the applicant's right to act in accordance with Mr Tshabalala's action. According to her, the applicant was entitled to accept Mr Tshabalala's repudiation of the employment contract.

[19] She pointed out that Ms Ferns' testimony was that Mr Tshabalala said that Mr Jooste could fire him but he would not leave. Mr Jooste then said that he would not fire him. Instead, he instructed him to go to his desk and do his work, which he did but later walked out. In respect of the letter Mr Jooste sent to Mr Tshabalala, Ms Roeloffs was critical of the first respondent's consideration that such letter was only sent after the dispute was referred to the CCMA. She said that the purpose for sending the letter was never canvassed. She submitted that Mr Tshabalala knew very well the consequences of his absence from work and did not need any advice from Mr Jooste.

[20] In his submissions, Mr Magano for the third respondent set out the principles underlying a review application both at common law and in terms of section 145 of the Act. He pointed out that the application was ambiguous in suggesting that dismissal was based on strained relations while denying the fact of such dismissal. He said that the review grounds pleaded were seriously bad in law for their ambiguity.

[21] He submitted that the applicant and Mr Tshabalala had strained relations due to:

- The hot exchanges made telephonically on 7 June 2005 where Mr Tshabalala was threatened with dismissal.
- The order given by Mr Jooste on 14 June 2005 that Mr Tshabalala was not to do any work.
- The confrontation Constance had with Mr Tshabalala when she was given tasks normally executed by Mr Tshabalala.
- False accusations that Mr Tshabalala was recklessly causing the company serious loss and not giving Mr Tshabalala to respond and state his case.
- The hot exchange wherein there was talk of Mr Tshabalala having to leave his work place, where upon he demanded his employment benefits.

[22] He said that it was then reasonable in the circumstances of the strained relations, to conclude that Mr Tshabalala was dismissed expressly or constructively.

[23] He pointed out that Mr Jooste only wrote a letter to Mr Tshabalala after he had received the CCMA referral. Mr Jooste had a telephone number of Mr Tshabalala and yet did not telephone him to enquire about his desertion from 17 June 2005. He argued that the salary payment of Mr Tshabalala on 17 June 2005 and up to that date, showed that the applicant wrongly repudiated the contract of employment. If not, the company would have continued to pay Mr Tshabalala, the argument said. He submitted that the decision of the first respondent that the dismissal was substantively

unfair was justifiable.

[24] Mr Magaro argued that the facts on which the review grounds were based were neither here nor there and incorrect for review purposes. He said that the evidence of Mr Jooste and Ms Ferns was not reliable and was inconsistent. He said that the attack of the compensation awarded, was based on ignorance of the provisions of section 194 of the Act.

ANALYSIS

[25] The notice of motion has not set out the legal basis on which this application for review is premised. The application was filed timeously and therefore the applicant did not have to have recourse to section 158(1) (g) of the Act. The application is, in my view either based on common law or on section 145 of the Act. The decision in *Hira and Another V Booysen and Another 1992 (4) SA 69 (A)* sets out important principles pertaining to common law grounds for review. The applicant did not see it fit to succinctly set out its grounds for review in line with the guidance in the *Hira* decision.

[26] The applicant submitted that the first respondent did not reason the evidence away in arriving at the conclusion that on a balance of probability, Mr Tshabalala was dismissed. The submission is far from the truth. The first respondent set out the facts of the case and compared the two versions. Once that was done, a conclusion was then stated. The fact that the conclusion stands alone in a paragraph of its own does not justify the criticism levelled by the applicant. The evidence led by Mr Tshabalala on the events of 17 June 2005 is very clear. He stated that he was called to the office by Mr Jooste who thereafter made a number of accusations against him and a dismissal option. That of the applicant was marred by contradictions and uncertainties in the evidence of Mr Jooste and a lack of details in the evidence of Ms Ferns. Mr Jooste's memory

appears to have let him down when particulars of events of 17 June 2005 were called for. When the first respondent concluded that on the balance of probabilities, Mr Tshabalala was dismissed, he in my view, arrived at a conclusion which was therefore rational.

[27] The applicant alleges that no opportunity was given to it to deal with the letter which it sent to Mr Tshabalala. For this allegation to have merits, it needed to have been shown where in the record of the proceedings such denial of the opportunity was done. I have been unable myself to find any such reference in the record. The record of the arbitration proceedings does not show that the first respondent was interfering with the manner in which parties presented their evidence. The applicant was free to lead the evidence it sought to bring to the first respondent. The failure of the applicant to adduce any evidence or to address any of its concerns lies therefore at its door.

[28] In holding that the witnesses were unable to indicate what could have led to the situation occurring, the first respondent had weighed the probabilities of the case. As already pointed out, he arrived at a rational and therefore a justifiable conclusion.

[29] On the evidence of Ms Ferns that Mr Jooste told Mr Tshabalala to go to his desk and work, the first respondent had to weigh the probabilities of the two conflicting versions. He had the advantage of seeing and hearing witnesses. That he did not deal with each and every piece of evidence does not mean that he did not consider it. In my view, the conclusion reached is justifiable.

[30] The applicant submitted that the compensation amount was too high. This is a bold statement without support. The first respondent

awarded 10 months' salary compensation where the maximum permissible compensation is 12 months' salary compensation. He added an amount for accumulated leave days. I am unable to agree that the amount of compensation is too high. Even if it were to be said it was too high, I would legally not be able to find this as a reviewable ground – See the unreported decision of the Labour Appeal Court in, *Engen Petroleum Limited v CCMA* case number JA12/05 dated 04/05/07 and *Rustenburg Platinum Mines Ltd v CCMA 2007 (1) SA 578 (SCA)*.

[31] In my view, none of the review grounds set out in section 145 of the Act finds applicability which justifies the review and setting aside of the award issued by the first respondent in this case.

[32] Accordingly, the application is dismissed with costs.

Cele AJ