IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR 91/09

In the matter between:

SUPER GROUP AUTOPARTS t/a AUTOZONE	Applicant
and	
HLONGWANE NO, RAYMOND	First Respondent
DISPUTE RESOLUTION CENTRE OF THE MOTOR VEHICLE BARGAINING COUNCIL	Second Respondent
UMEWUSA obo ALLAN SIKHAKHANE	Third Respondent

JUDGEMENT

NGALWANA AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award made by the first respondent on 17 December 2006 under case number MINT 14156N and under the auspices of the second respondent.

[2] The first respondent found that Mr Sikhakhane had been substantively unfairly dismissed. The basis for this finding was that the applicant had failed to acquit itself of the onus to prove that the reason for which it had terminated Mr Sikhakhane's employment was a fair one.

[3] The applicant seeks the review and setting aside of that decision on numerous grounds which include that

[3.1] the first respondent ignored Sikhakhane's evidence in cross-examination that the applicant's only witness (Fouche) did not get on well with any of the drivers;

[3.2] the first respondent failed to take into account the heads of argument filed on behalf of the applicant in relation to the substantive aspects of the dismissal;

[3.3] the first respondent erred in accepting Sikhakhane's version over that of Fouche by reason only of Fouche not having put up corroborating evidence;

[3.4] the first respondent failed to consider the applicant's version as regards the time at which the instruction was given to Sikhakhane,

preferring Sikhakhane's version of 10h15 over that of Fouche's 12h45;

[3.5] the award of retrospective reinstatement in light of the seriousness of the charges preferred against Sikhakhane is "a harsh remedy";

[3.6] in deciding to accept Sikhakhane's version over that of Fouche by reason only of the absence of corroborating evidence for Fouche's version the first respondent committed a gross irregularity or reached an unreasonable and unjustifiable conclusion;

[3.7] the first respondent generally misapplied his mind, exceeded his powers, and reached unreasonable and irrational conclusions.

Common Cause Facts

[4] The following facts, to the extent immediately relevant, are common cause:

[4.1] Sikhakhane was employed by the applicant as a driver from October 2004 earning R2 500 per month;

[4.2] In October 2007 he was given a final written warning for reckless driving or speeding (or something of that sort) in the course and scope of his employment as a driver for the applicant;

[4.3] In May 2008 he was instructed by Fouche to retrieve a parcel from a company some 20km away from the applicant's premises where he was at the time;

[4.4] He refused to carry out the instruction and gave an explanation for his refusal;

[4.5] A disciplinary hearing was held in his absence and he was dismissed on 22 May 2008;

[4.6] He did not appeal against the finding and sanction.

Facts in Dispute

[5] The following are disputed facts between the parties (again, to the extent immediately relevant):

[5.1] that Sikhakhane assaulted or threatened to assault Fouche on 8 May 2008;

[5.2] that Sikhakhane used foul language toward Fouche on 8 May 2008;

[5.3] that Sikhakhane's reason for refusing to carry out Fouche's instruction was Fouche's refusal to give him a written undertaking that he (Sikhakhane) would not be in trouble if he were caught speeding again in an attempt to carry out Fouche's instruction (since Sikhakhane already had an existing final written warning for that offence);

[5.4] that Sikhakhane would have carried out the instruction if Fouche had given him a written undertaking that he (Fouche) would take accountability if Sikhakhane were caught speeding again in compliance with Fouche's instruction;

[5.5] that Fouche's instruction was given at 10h15 and not 12h45 (and vice versa);

[5.6] that the applicant refused to release a witness that could have testified for Sikhakhane at the arbitration proceedings and refused

to provide the forwarding details of those that had left the company.

The Review Standard

[5] Section 145 of the Labour Relations Act, 66 of 1995 ("the LRA") on which the applicant relies for this review application requires that it proves one of four grounds of review. These are

[5.1] misconduct on the arbitrator's part in relation to his duties as an arbitrator;

[5.2] gross irregularity in the conduct of arbitration proceedings;

[5.3] *ultra vires* conduct by the arbitrator in the exercise of his powers and

[5.4] an improper obtaining of the award.

[6] On a *conspectus* of all the cases, however, it seems to me the permissible grounds of review are wider than those set out in section 145 of the LRA and can perhaps be reduced to this: for the applicant to succeed the decision must be shown to be irrational (in the sense that it

does not accord with the reasoning on which it is premised or the reasoning is so flawed as to elicit a sense of incredulity) and unjustifiable in relation to the reasons given for it (*Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp NO* (2002) 23 *ILJ* 863 (LAC) at paragraph [19]; *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others* (2001) 22 *ILJ* 1603 (LAC) at paragraph [26]; *Carephone (Pty) Ltd v Marcus NO and Others* (1998) 19 *ILJ* 1425 (LAC) at paragraph [37]; *Pharmaceutical Manufacturers' Association of SA and Others: In re Ex Parte Application of the President of the RSA and Others* 2000 (3) BCLR 241 (CC)).

[7] More recently, the Constitutional Court has pronounced that "the better approach" is to enquire whether the decision reached by the commissioner is one that a reasonable decision-maker (presumably faced with the same evidence) would not reach (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), at paragraph [110]).

[8] It is not the reviewing court's task to consider whether or not the decision is correct in law as that would be an appeal (*Minister of Justice and Another v Bosch NO and Others* (2006) 27 *ILJ* 166 (LC) at paragraph [29]).

[9] In my respectful view the "constitutional standard" now propounded by the Constitutional Court in *Sidumo* bears a striking resemblance to the test usually applied in applications for leave to appeal, the only difference being the substitution of "a reasonable decision-maker" for the higher court or another court. The danger is thus the blurring of the line between an appeal on the merits, on the one hand, and a review based on the rationality and justifiability of the decision when regard is had to the evidence advanced on the other. It is hoped that the reasonableness standard now introduced by the Constitutional Court will in future be tightened to ensure there is no confusion as regards the extent to which reasonableness of the commissioner's decision may be tested.

Applying the Standard

[10] It seems to me the proper approach is to ask not whether the commissioner's decision is one that a reasonable court (or reasonable decision-maker) could not reach but rather whether, in light of the evidence advanced and having due regard to considerations of equity (after all, the Labour Court is primarily an equity court), the commissioner's decision is one that can properly be said to be reasonable. Thus phrased, the standard avoids a review enquiry that leads inexorably to entanglements in appeal territory.

[11] This in my respectful view is not so much an exercise in substituting this court's own standard for that of the Constitutional Court, as it is an attempt at giving the constitutional standard a construction that eschews the blurring of the line between reviews and appeals.

[12] It was argued on behalf of the applicant that the first respondent misdirected himself in resolving the matter by having regard to the question of onus. If I understood the submission properly it seems to be this: the first respondent should have accepted the version of Fouche over that of Sikhakhane for two reasons. First, no adverse credibility findings were made against Fouche. Second, Sikhakhane's version was contradictory.

[13] Well, as regards the first basis for the submission, there were no adverse credibility findings against Sikhakhane either. So there we are. As regards the second, I could find no material contradictions in the evidence of Sikhakhane of the kind that would render his evidence implausible or bereft of any credibility. In fact, it is the version of Fouche that in my view readily lends itself to that difficulty.

[13.1] He says no-one witnessed the altercation between him and Sikhakhane. Yet he does not dispute that there were a number

of people in the vicinity at that time whom he say were within 10 meters of where the event was taking place.

[13.2] He says Sikhakhane was “angry” and “aggressive” when he said to him he (Fouche) must get his face “out of his f*** face”. Yet he says Sikhakhane did not raise his voice enough for people only 10 meters away to hear him.

[13.3] He says Sikhakhane assaulted or threatened to assault him. Yet he also says Sikhakhane was sitting down at the time of this alleged attempted assault.

[13.4] He says his instruction to Sikhakhane was reasonable, yet his explanation for Sikhakhane’s refusal to carry it out (namely, attending to his private vehicle in the parking lot) seems far fetched. Sikhakhane’s version seems more plausible.

[14] Section 192(2) of the LRA places onus on the employer to prove that the reason for dismissal was fair. The applicant failed to satisfy that onus. Sikhakhane had nothing to prove, apart from the fact that he was dismissed. Thus, the fact that he did not call any witnesses to corroborate his version of what had happened on that 8 May 2008 at the applicant’s premises is of no moment in the circumstances of this case.

The applicant had all to prove. It proved nothing that could help it ward off the relief that the first respondent eventually awarded to Sikhakhane.

[15] The applicant has also failed in this court to show that the decision of the first respondent is not one that a reasonable decision-maker could reach.

[16] As regards the appropriateness of the re-instatement, the applicant did not once allege that the working relationship between Sikhakhane and management of the applicant had irretrievably broken down. Fouche simply made a bald allegation (impermissibly led by his representative) that the trust relationship had irretrievably broken down. Nothing by way of empirical evidence of this was advanced. There is in any event no evidence that the alleged assault even occurred. The whole thing seems dreamt up by Fouche for whatever reason.

[17] I should mention, *en passant*, that following the decision of the Constitutional Court in *Barkhuizen v Napier 2007 (5) SA 323 (CC)*, power relations (or bargaining power) between the parties in matters of the kind with which we are here concerned are a relevant consideration in determining fairness. On evidence, Fouche seems to have accorded to himself the unchallengeable power to issue instructions that must be obeyed regardless of consequences to the subordinates for whom the

instruction is intended. A court cannot, in my view, ignore the power dynamics in those circumstances and hope still to arrive at a decision that is fair and reasonable.

[18] In these circumstances, the application must fail. Since there was no opposition, no costs order is warranted.

Ngalwana AJ

Appearances

For the applicant:	*Mr Ascot*
Instructed by:	*Fluxmans Incorporated*
Date of hearing:	*15 December 2009*
Date of judgment:	*18 December 2009*