IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASENO: JR536/08

In the matter between

WOOLWORTHS (PTY) LTD **APLLICANT**

AND

COMMISSIONER SIBUSISO MAGWAZA N.O **1st REPONDENT**

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **2nd REPONDENT**

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION (SACCAWU) **3rd RESPONDENT**

LUNGILE QUMA **4th RESPONDENT**

JUDGMENT

MTHEMBU AJ

INTRDUCTION

[1] This application is in terms of section 145(2)(a) of the Labour Relations Act 66 of 1995(the LRA), to review and substitute an arbitration award dated the 28th of January 2008, issued by the first respondent, under the auspicies of the second respondent. The fourth respondent in whose favour the reinstatement award was issued and the third respondent opposed the application.

BACKGROUND FACTS

[2] Until the fourth respondent's dismissal, he was employed by the applicant as a classical management trainee.

[3] On or about 3 December 2006, the applicant held an end of the year function for the employees of the Fountaine Bleau, Blaigowrie and First Place stores.

[4] The fourth respondent was responsible for arranging music for the evening. He asked Karabo and another employee to organise a music system for the evening. Karabo confirmed that some of his friends would play music at the function and that they would setup a music system

[5] Karabo arrived at the function very late. In the interim management had organised somebody other than Karabo and his friends to play music. Management explained to Karabo that because he and his friends arrived so late, that the applicant no longer needed their services.

[6] It is alleged that the fourth respondent had been drinking excessively during the evening.

[7] At around 20H00 management was approached by an employee complaining that, the fourth respondent had shouted at her for the way she had been controlling the drinks served at the bar.

[8] The fourth respondent later approached Karabo demanding that he and his friends leave the party. Karabo had tried to explain why he was late to the fourth respondent who aggressively grabbed Karabo whilst yelling and swearing at him and threatened to kill him.

[9] Various members of management and other employees tried on a number of occasions during the evening to calm down the fourth respondent. During these attempts of calming him down, he yelled at the store manager.

[10] At approximately 22H30, the security guard approached management requesting that the crowd move out of the venue and the party stopped. As a result of the fourth respondent conduct and in the interest of the safety of the other employees, all of the employees were moved out of the function venue and into the parking lot. A member of management called the police to intervene.

[11] The employees saw the fourth respondent throwing a cooler box around. He also broke a bottle and whilst waving it above his head, yelled that he was a gangster and that he would call his friends to support him.

[12] The fourth respondent also manhandled and assaulted some of the employees by pushing them to the ground and hitting them.

[13] He was consequently suspended and charged with the following:

"Gross misconduct in that on 3/12/06 you brought the company's reputation and image into disrepute by displaying unacceptable and inappropriate behaviour during a X-mas function"

[14] The fourth respondent attended a disciplinary enquiry after which he was found guilty of the charge laid against him and was dismissed.

[15] He referred the matter to the second respondent for conciliation and arbitration. The first respondent as the appointed arbitrator found the dismissal to have been substantively unfair and ordered the applicant to reinstate the fourth respondent. It is this order which the applicant seeks to have reviewed and set aside.

REVIEW GROUNDS

[16] The applicant placed reliance on its founding affidavit and in the heads of argument, on a defect in the arbitration award as defined in section 145(2)(a) of the LRA .In addition it was submitted that the first respondent issued an award that was not rational when taking into account the body of evidence that was placed before him during the arbitration hearing. In the founding affidavit the applicant dealt with each paragraph of the analysis of evidence and argument by the first respondent to demonstrate how in its view the first respondent's award was visited by defects.

[17] The submission by the third and fourth respondents was that no valid grounds for review existed as the arbitrator did not commit any defects as described in section 145 (2)(a) of the LRA. It was

said that the arbitrator correctly applied his mind to all the relevant evidence and reasonably concluded that the fourth respondent's dismissal was unfair. Further the decision of the arbitrator was rational and justifiable in relation to the evidence presented before him and as such there existed no basis that his conduct constituted an irregularity in the proceedings. Accordingly there existed no basis to review and set aside the award.

[18] The attack on the arbitration award by the applicant was then in the following terms:

(a) The first respondent unreasonably and incorrectly committed a gross irregularity in the proceedings in finding that the fourth respondent's dismissal was substantively unfair in circumstances where evidence led indicated that there was more than fair reason to dismiss the fourth respondent, especially in light of the aggressive and violent behaviour shown by him towards both managements and colleques. The first respondent failed to place relevance on the fact that not only had the fourth respondent been grossly insubordinate, but that his conduct had intimidated and frightened his fellow employees and other guests at the function, bringing the applicant's name into disrepute. His conduct warranted his dismissal.

(b) The first respondent committed a gross irregularity in finding that the fourth respondent's dismissal was a result of the fact that the applicant does not have a system in place to deal with conflict and further that there are existing problems between management and other employees. This finding is entirely irrelevant in circumstances where corroborated evidence was

placed before the first respondent detailing the nature of the first respondent's violent and aggressive behaviour at the function.

(c) In finding on the one hand that the fourth respondent had acted correctly and consistently in complaining to management about Karabo and his friends' conduct, but that on the other hand the fourth respondent's conduct had been inappropriate and that he should have robustly sought management's intervention. This finding is contradictory, confusing and entirely incongruous with the evidence placed before the first respondent and his own finding regarding fourth respondent testimony.

(d) The first respondent committed a gross irregularly in finding that the fourth respondent's conduct had not been sufficiently serious to warrant dismissal and further that the applicant should have found an alternative to dismissing him. The arbitrator failed to attach relevance to the fact that the fourth respondent's misconduct had resulted in a very serious and negative impact on the trust relationship with the applicant. He could not have come to any other conclusion but that the trust relationship was broken down if one has regard to the evidence that was before him and that dismissal was the appropriate sanction to impose.

(e) The arbitrator failed to take into account that the fourth respondent's testimony was both contradictory and confusing. On the one hand, he testified that he was beaten by Karabo's friends, but on the other hand he claims that Karabo and his friends did not come after him. The arbitrator also failed to take into account the fact that prior to the arbitration the fourth

respondent did not report that he had been assaulted. The fourth respondent testified under cross examination that he had not mentioned this version at the disciplinary enquiry, because he had not been asked about the alleged assault. This explanation is wholly unconvincing. A reasonable decision maker would not have chosen the fourth respondent's unsatisfactory version over that of the applicant's witnesses.

(f) A reasonable decision maker could not have reached the same conclusion as the arbitrator that the dismissal was unfair in the circumstances.

(g) The arbitrator failed to take into account there fact that it was incumbent up on him to consider the contents of the test detailed in the judgment of *Sidumo & Others v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097(C).*

[19] The third and the fourth respondent's submission in contrast to those of the applicant were that:

(a) The first respondent is correct and justified in finding that;

(i) The company has failed to satisfy the commission that there were sufficient reasons to dismiss the fourth respondent,

(ii) It was the fourth respondent/others conflict dynamic which was the root of all problems eventually elected as the reasons for the dismissal.

(b) In dismissal disputes, the onus to prove that the dismissal is fair rest on the employer, as contemplated in section 192(2) of the LRA. The employer must adduce evidence which proves that there was a fair reason for the dismissal

(c) The applicant failed to prove the allegation against the fourth respondent by not calling Karabo and Prince to give testimony at the arbitration hearing

(d) Mr Danie Minaar's testimony does not prove that the fourth respondent committed the offence as charged as he was not present at the party but was informed about what had transpired.

(e) If the applicant did not allow Karabo and his friends to join the party there would be no problems. The conflict was started by Karabo and his friends.

(f) The fourth respondent acted reasonably in this matter, he consistently brought his dissatisfaction to management's attention and demanded remedial action.

(g) The first respondent did apply his mind to the facts and evidence presented before him. His decision was and remained rational and justifiable in relation to the evidence presented before him and there exist no basis that his conduct constitutes a gross irregularity in the conduct of the proceedings nor that the award should be reviewed and set aside.

ANALYSIS

[20] During argument, the third and fourth respondent's legal representative Ms Mpho Mjeza conceded that the award was unreasonable and falls to be reviewed and set aside but asked that the matter should be remitted to the second respondent before a commissioner other than the first respondent.

[21] The only issue left for me to decide is whether I should remit the matter to the second respondent for arbitration before a commissioner other than the first respondent.

[22] In *Eastern Cape Agricultural Co-operation v Du Plessis & others [2000] 21 ILJ 1335 (LC)*,the applicable test **to apply when considering whether or not to remit the matter back to the CCMA** was set out as follows:

"The issue then arises as to whether I should substitute my own finding for that of the arbitrator or whether I should remit the matter to the CCMA for re hearing. Prof Grogan stated that the correct test is whether I can make a fair finding in relation to the fundamental issues on the facts before me. If I have any hesitation in that regard the proper course is to remit the matter back to the CCMA. If I have no hesitation, then the most expedient course of action is to set the award aside and hold that the dismissal of (the employee) was fair." See also *McDonalds SA (Pty) Ltd v CCMA& Others [2003]10 BLLR 1020 LC*

[23] I have enough evidence on record and I have no hesitation to make a finding and substitute the first respondent's award. It is further my view that remitting the matter back to the CCMA would defeat the spirit of the LRA namely, dispute should be speedily resolved, for this reason and because of the sufficient information before me I do not deem it necessary to refer the matter back to the CCMA. It is clear from the reading of the record that the applicant had discharged its burden of showing that the fourth respondent committed an offence which warranted the sanction of dismissal. The circumstances of this case are such that it would not be fair to

have expected the applicant to keep the fourth respondent in its employment and to continue with the employment relationship. I therefore find that the applicant had a good and fair reason to dismiss the fourth respondent.

[24] The applicant has sought an order for costs against the third and fourth respondents jointly and severally, the one paying the other to be absolved. I am satisfied that it would be appropriate in this case to make an order for costs.

ORDER

In the result I make the following order:

(1) The award of the first respondent under case no GAJB 30184-06 under the auspicies of the second respondent is reviewed and set aside.

(2) The first respondent's award is substituted with the following :

(i) The dismissal of the fourth respondent was substantively fair

(ii) The third and the fourth respondent are jointly and severally ordered to pay the applicant's costs, the one paying the other to be absolved.

_____

MTHEMBU AJ

Date of Hearing: 15 May 2009

Date of Judgment: 2 October 2009

APPEARANCES

For the applicant: M Edwards

Instructed by: Perrott, Van Niekerk Woodhouse, Matyolo INC

For the Respondent: Ms M Mjeza

Instructed by: SACCAWU Wits Legal Unit

CASES REFERRED TO:

Eastern Cape Agricultural Co-operation v Du Plessis & others [2000] 21 ILJ 1335 (LC)

McDonalds SA (Pty) Ltd v CCMA& Others [2003]10 BLLR 1020 LC