

NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

BEFORE: Her Ladyship Ms Acting Justice A M de Swardt

CASE NO: C 353/2009

In the matter between:

JACOB KENNETH RAMUSHU

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER VUYISA MAZWI

Second Respondent

PROPWISE ESTATE t/a FRUIT & VEG CAPE GATE

Third Respondent

JUDGMENT

DE SWARDT, A J:

The applicant applied for the review of an arbitration award delivered by the second

respondent, a commissioner of the first respondent ('the CCMA'). In terms of the said award the applicant's claims pursuant to his dismissal from the employ of the third respondent were dismissed.

The applicant's case before the CCMA was that he had been dismissed because he had preferred an unfair labour practice dispute with third respondent to the CCMA. The alleged dismissal accordingly fell within the framework of an automatically unfair dismissal, as is envisaged by section 187(1)(d) or (f) of the Labour Relations Act, No 66 of 1995 ('the Act').

The applicant and third respondent, however, agreed in writing to arbitrate their dispute before the CCMA instead of the dispute being referred to the Labour Court for determination. The second respondent accordingly arbitrated the dispute in terms of the provisions of section 141(1) of the Act.

The award was posted to the applicant on 14 May 2009, as appeared from the date stamp of the post office on the envelope (which the applicant handed up during the proceedings before this Court) and the applicant received same on 18 May 2009. The application for review had to be brought within 6 weeks from the latter date, i.e. by 29 June 2009 and it was indeed launched on the latter date.

Service of the Notice and Motion and supporting affidavit upon Fruit & Veg was initially effected by facsimile. The applicant, however, subsequently amended his

papers and the latter documents were served by the applicant on third respondent at the latter's business premises.

The applicant's application for review was not opposed.

The applicant had been dismissed for misconduct pursuant to a disciplinary enquiry which was held on 3 February 2009. It was alleged that on 28 January 2009 and during the course of disciplinary proceedings which were then being conducted against him, he had threatened the complainant by saying, inter alia, 'You are messing with the wrong person. You will die.'

At the arbitration proceedings, the applicant denied any misconduct at the aforesaid disciplinary hearing. The witnesses called on behalf of the third respondent testified that the applicant had indeed uttered the threat and had behaved in such an aggressive manner that he had to be removed from the disciplinary proceedings which were then concluded in his absence.

The Commissioner rejected the applicant's evidence as not being credible and accepted the evidence tendered on behalf of the third respondent.

The applicant, who appeared in person, raised a number of grounds for the review of the commissioner's award. I do not intend to deal with each and every one of these individually, inasmuch as the various grounds advanced overlapped and were

to some extent repetitive. In essence, the applicant's grounds for review boil down to the following:

1. The Commissioner misconducted himself by allowing third respondent to make an opening address and to present its evidence first;
2. The Commissioner erred in rejecting the applicant's evidence of victimisation;
3. The Commissioner erred in accepting the evidence of the witnesses called by third respondent to the effect that the applicant had made the alleged threat;
4. The Commissioner ought to have found that the applicant's disciplinary hearing had been unfair, because he had been removed from such proceedings and the proceedings were conducted in his absence;
5. The Commissioner was biased in favour of the third respondent.

At the outset it must be stated that the ground of review enumerated in paragraph 4 above clearly pertained to the disciplinary proceedings which had been conducted on 28 January 2009. The fairness of such proceedings were not at issue before the Commissioner and cannot serve to found review proceedings in this matter.

As regards the first of the grounds for review adverted to above, it is clear from the

record of the proceedings before the Commissioner, that the latter correctly decided that the fact of the applicant's dismissal was common cause and that the third respondent accordingly bore the burden of proving that the dismissal was fair. As a consequence of such decision, the third respondent was obliged to adduce evidence first and was entitled to make an opening address. There is nothing irregular about such ruling and there is no evidence to suggest that there was any misconduct on the part of the Commissioner in this regard.

The grounds adverted to in 2 and 3 above, relate to the credibility findings made by the Commissioner. It is trite that the presiding officer at a trial has the benefit of seeing and hearing the witnesses and of being steeped in the atmosphere of the case. For that reason, s/he is in a much better position to assess the credibility and reliability of witnesses than a court of second instance, such as on appeal or review, would be. Credibility findings and other findings of fact made by a court of first instance, are accordingly only interfered with on appeal if there was an irregularity in the proceedings, or if the presiding officer misdirected himself/herself, or if it is clear from the record of the proceedings that the finding was wrong (see *R v Dhlumayo* 1948 (2) SA 677 (A) at 705 - 706; *Shoprite Checkers (Pty) Ltd v Ramdaw & Others* 2001 (3) SA 68 (LC)).

The record of the proceedings before the CCMA does not provide any evidence that an irregularity occurred, or that the Commissioner misdirected himself. There is also no evidence indicating that the credibility findings made by the Commissioner were

wrong. The findings made by the Commissioner are accordingly presumed to be correct. On perusing the transcript of the proceedings at the CCMA, it can also not be said that the findings by the Commissioner were such that no reasonable Commissioner could have made them on the evidence before him/her.

The grounds referred to under paragraphs 2 and 3 above are accordingly not capable of sustaining an application for review.

The applicant's allegation that the Commissioner was biased in favour of the third respondent appears to have been founded, to some extent at least, on the applicant's misunderstanding of the proceedings at the CCMA. The applicant appears to have been aggrieved, because the third respondent made an opening address and led evidence first. As has been pointed out above, the Commissioner was correct in conducting the proceedings in that way. For the rest, the applicant appears to allege that the Commissioner was biased, because he failed to accept the applicant's evidence.

There is no indication on the record of the proceedings before the CCMA that the Commissioner was biased as alleged. The Commissioner's findings are in accordance with the evidence and with the probabilities.

It is accordingly clear that the applicant's application for review cannot succeed. The following order is accordingly hereby made:

1. The applicant's application for the review of the arbitration award made by the second respondent on 8 May 2009 under Case Number WE 2355-09, is dismissed.
2. No order as to costs is made.

A M DE SWARDT, A J

7 December 2010

Date of Hearing: 20 May 2010

Date of Judgment: December 2010

For Applicant: In person