REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: R1889/2009

In the matter between:

ROSS POULTRY BREEDERS (PTY) LTD **Applicant**

and

SABAWO obo AMOS DLAMINI **First Respondent**

COMMISSIONER FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER PRINCE KEKANA N.O. **Third Respondent**

Heard: **16 January 2014**

Delivered: **17 June 2014**

Summary: **Test on review re-stated. Application for review succeeded on the basis that the Third Respondent failed to appreciate the nature and meaning of the evidence before him and reached a conclusion that was**

outside the band of reasonable decisions which could be supported by the evidence.

JUDGMENT

SNIDER, AJ

[1] Before I consider the merits of this matter, there are two interlocutory applications before me.

[2] The first such application is an application for the rescission of the order of Gush J made on 19 October 2012 when this matter was last on the roll in terms of which the matter was dismissed due to the non-appearance of the Applicant.

[3] The second interlocutory application is an application by the First Respondent for condonation for the late service and filing of his answering affidavit.

[4] I do not think that it is necessary to deal with the detail of these applications as, in my view, to a large extent their success or failure depends on the merits of the matter.

[5] I have considered the merits of the matter from both the Applicant's and the First Respondent's perspective and have come to the conclusion that both parties have a case to be adjudicated on the merits; and it is therefore the best course of action for me to grant the interlocutory applications, which I hereby do, and deal with the substantive merits of the matter.

[6] What is then before me is a review application in terms of which the Applicant seeks to set aside an award made by the Third Respondent ("the Commissioner") in terms of which the Commissioner found that the employee's dismissal was procedurally fair but substantively unfair and made an award reinstating him into the employment of the Applicant on

terms and conditions no less favourable to him than those which governed the employment relationship prior to his dismissal and such reinstatement to operate retrospectively from 13 October 2008[1].

[7] The award was made on 25 June 2009.

[8] Briefly, the facts of this matter are that the employee worked for the Applicant, prior to his dismissal, as a supervisor at one of its chicken farms known as Schickfontein.

[9] Part of the process of farming chickens is to ensure that the nest boxes in which the chickens are kept are clinically clean so as to avoid diseases. To this end, the Applicant uses formaldehyde "prills" to disinfect the shavings in the nest boxes to prevent contamination of the eggs.[2]

[10] Prills are fine granules that form a powder when broken down. The prills will cause sever irritation if they come in contact with the eyes.

[11] On the relevant day, being 19 August 2008, a senior manager of the Applicant, Marius Gericke ("Gericke") and two other managers Russell Marriot and Ahmed Engar attended at the place of work of the employee apparently to do an inspection of sorts.

[12] Part of the inspection to assist with the control of prills is by utilising a check sheet recording the amount of prills used by weight. This amount is recorded and deducted from an opening stock figure. The stock of prills is then weighed and checked against the total of prills on the check sheet.

[13] Gericke was unhappy when it emerged that there was a discrepancy in the weight and then decided to weigh the contents of the measuring cup that was used to put the prills into the nest box.

[14] Clearly, on both parties' versions, Gericke was significantly aggravated with

[1] The award appears at page 26 of the paginated papers and the relief granted appears on page 31 at para 32.

the discrepancy that he had found and when he perceived the employee to be interfering in the weighing process, he took the cup of prills from him and threw it down on a table.

[15] The employee alleges that the act of throwing down the prills caused some prills to go into his eyes and caused them to become red and inflamed.

[16] The precise details of this incident and whether it was prills from this particular incident that caused the irritation to the employee's eyes are not factual findings which need to be made for the purposes of this judgment.

[17] The charge that was levelled against the Applicant was that he had been dishonest in making a false statement specifically:

> 'It is hereby alleged that you were dishonest on or about Tuesday, 19 August 2008 in that you proceeded to in a deliberate manner make false statements against Mr Marius Gericke, which false statements were of an extremely serious and derogatory nature and specifically aimed at not only jeopardising Mr Gerickes position with the company as Chief Operating Officer but to further jeopardise the good standing and overall image of Mr Gericke as an upstanding and well respected colleague of yours.'

[18] It does not appear to be in dispute that there was a rule of the Applicant to the effect that false statements of this nature constituted misconduct and could lead to dismissal.

[19] It appears that the "false statements" were constituted by the employee approaching the South African Police Services ("SAPS") to make a complaint against Gericke. Again, it is common cause that such an approach was made by the employee.

[20] The crisp question for determination by the arbitrator was then whether the statement made by the employee to the SAPS was false.

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[2] Applicant's founding affidavit page 11 of the paginated papers at para 8.2.7.

[21] The Applicant's grounds of review are essentially twofold:

21.1. that the Arbitrator conducted himself in a manner that indicated bias on his part and which prevented the Applicant from having a proper opportunity to ventilate its case and have a meaningful hearing of its case; and

21.2. the Arbitrator disregarded the full conspectus of the evidence in relation to the statement made by the Employee to the SAPS.

[22] These two factors, in the Applicant's submission, render the Commissioners award reviewable.

[23] With respect to the conduct of the Commissioner although it clearly appears, from the record that he was robust and unforgiving in his attitude towards Frederick Snyman ("Snyman"), the deponent to the Applicant's founding affidavit and the individual who both gave evidence for and ran the matter on the Applicant's behalf at the arbitration, it does not seem that Snyman was the only victim of the Commissioner's barbed tongue. For example, on one occasion, he says to the employee "shut up and listen".[3] There are other parts of the record where the Commissioner appears to, if anything, assist the Applicant.[4] I am, therefore, not inclined to review the award on the basis of the Commissioner's conduct.

[24] To the extent that Snyman ceased cross-examining the employee due to an altercation with the Commissioner, this was Snyman's doing and he should have adopted a more robust approach.

[25] In any event, the evidence was sufficiently fully ventilated to enable the arbitrator to make a decision. Similarly, I am able, on the strength of the record, able to assess the reasonableness of the arbitrators finding.

[3] Page 399 of the record, line 7.
[4] Page 413 and 414 of the transcript; page 417 of the transcript where the Commissioner is unequivocal and direct with the Employee when he says "you can't answer the question with a question. As a witness you have only one duty, to answer questions." Further examples appear at pages 421 and 424 where the Commissioner attempts to extract the very numb of the evidence in

[26] The question then becomes whether, on the evidence before the Commissioner, a Commissioner acting reasonably could come to the same conclusion that the Commissioner came to.

[27] There are perhaps three central questions which the Commissioner was bound to have regard to in his assessment of precisely what statement was made by the employee when he approached the SAPS:

27.1. why the SAPS would have investigated the matter to the extent of sending officers to the Applicant's premises and seeking to interview Gericke, both of which events seem to be common cause, if no charge of assault had been laid, which the employee alleged in his evidence, that is to say that he stated to the police that there was no intention on the part of Gericke to harm him;

27.2. why the employee would go to the SAPS and make a complaint which, amounted, on his version at the arbitration, to nothing more than the negligent slamming down of a cup of prills on a table which act was not intended to harm him; and

27.3. Why there was a discrepancy, on the evidence of Snyman and various other admissions (which I will deal with below) that a charge of assault had been made.

[28] If regard is had to the evidence of Snyman in relation to what was said by the employee at the disciplinary enquiry it is clear that a criminal complaint was made by the employee and was not simple a matter of, as per the Applicant's evidence, conceding to the SAPS officers present when he made the statement that it was simply a matter of negligence on the part of Gericke and that Gericke had no intention to harm the employee. The Commissioner had no basis upon which to disbelieve Snyman in this regard given that his version was corroborated by other evidence to this effect.

[29] The following corroborative evidence was before the Commissioner.

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relation to whether a charge of assault was laid or not.

Snyman gave evidence which was not challenged by the employee or his representative that the employee confirmed during the disciplinary enquiry that he has approached the SAPS to lay a criminal charge against Gericke.

[30] The submissions made on behalf of the Applicant in respect of Snyman's version of what transpired at the disciplinary enquiry not being challenged are, of course, correct. It is trite that if it is to be argued that a witness is not to be believed the version upon which it will be relied to make that argument must have been put to the witness.

30.1. In *Smal v Smith*[5] where his Lordship Mr Justice Claasen said:

> 'it is, in my opinion, elementary and standard practice for party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witnesses evidence go unchallenged in cross examination and afterwards argue that he must be disbelieved.'

30.2. This decision was cited with approval by his Lordship Mr Justice Francis in the matter of *Masilela v Leonard Dingla (Pty) Limited*.[6]

30.3. The judgment in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[7] is similarly relevant in this regard:

> '[61] The institution of cross examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witnesses attention to the fact by question put in cross examination showing that the imputation is intended to be made and to afford the witness an

[5] 1954 (3) 434 (SWA) at 438.
[6] 2004 (25) *ILJ* 544 (LC) at para 29.

opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross examination, the party calling the witness is entitled to assume that the unchallenged witnesses testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* (1893) (6) R 67 (HL) and has been adopted and consistently followed by our courts."

[62] The rule in *Browne v Dunn* is not merely one of professional practice but is essential to fair play and fair dealings of witnesses. It is still current in England and has been adopted and followed in substantially the same form in the commonwealth jurisdictions.

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

30.4. The *President of the Republic of South Africa* decision (*supra*) was referred to with approval by His Lordship Mr Justice of Appeal Nicholson in the matter of *General Food Industries Limited v Food and Allied Workers Union.*[8]

[31] It simply does not make sense that in a situation where the employee appears to believe, in terms of his testimony that the action of Gericke which caused prills to get into the employee's eyes was not deliberate or intended to harm him that he would under those circumstances report the matter to the police.

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[7] 2000 (1) SA 1 (CC) at paras 61 to 63.
[8] (2004) 24 ILLJ 1260 (LAC).

[32] At best for the employee, he would lodge a grievance and take the matter up internally.

[33] It is, by the same token, clear to me that Gericke acted in a manner which was less than satisfactory given his position as a senior manager of the Applicant and that a grievance could have legitimately have been laid against him. A criminal complaint could not have been.

[34] Similarly, it is highly improbable that the SAPS would choose to investigate such a matter where the complainant himself acknowledges that the conduct of the person against whom the complaint is made was not intentional.

[35] In my view, the irresistible conclusion which these facts lead me to come to is that the employee went much further, when he approached the SAPS, than make a complaint about an unintentional act on the part of Gericke which resulted in him having prills in his eyes and his eyes becoming red and bloodshot.

[36] In all likelihood, he did indeed make a complaint that he had been assaulted which, if regard is had to the circumstances and the charge, was not honest.

[37] The Commissioner did certainly make some rather odd findings. He seems to have formed a view that the statement must have been a written one and could not seem to see past the failure of the Applicant to produce same.

[38] The Commissioner deals with the central issue in the matter really in only one part of his award.[9] It is worth repeating this paragraph for the purposes of analysis:

> 'The Employee testified before me and at the disciplinary hearing that he reported to the Police that he had prills in his eyes because Mr Gericke spilt the prills out of anger. He has never said anywhere that he was

[9] At page 30 of the pleadings bundle at para 25.

> assaulted or that the prills were thrown at him. His version is probable because the police informed him that if it was not intentional it is not assault. The Employee (sic) version is made more probable by the Employers version that the Prosecutor decided not to prosecute.'

[39] Apart from incorrectly recording the evidence, the Commissioner demonstrates a level of lack of reasonableness when he states that the version is probable because the police informed him that 'if it was not intentional it is not assault'. What this in fact implies is either that the employee reported an assault or that the entire version is, and this is the more probable scenario, a fabrication.

[40] I am, accordingly, of the view that no reasonable Commissioner, on the evidence before the Commissioner, could come to the same conclusion which the Commissioner came to.

[41] There have been two significant recent decisions in regard to the test on review in circumstances such as this which, in essence, endorse the approach taken by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[10] The decisions I refer to are those in *Herholdt v Nedbank Limited (Congress of South African Trade Unions as Amicus Curiae)*[11] and *Goldfields Mining (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*.[12]

[42] The following is, with respect, a useful exposition of the test from the judgment of Waglay JP in the Kloof decision [13]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards

[10] [2007] 12 BLLR 1097 (CC).
[11] (2012) 33 *ILJ* 1789 (LAC).
[12] 2014 35 *ILJ* 943 (LAC).
[13] *Kloof* (supra) at para 14.

made under the Labour Relations Act ("the LRA") continued to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of section 145 of the LRA. This implies that the application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to setting aside of the award if any of the above grounds are found to be present. In other words, in the case such as the present where a gross irregularity in the proceedings is alleged, enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.'

[43] It is simply not reasonable bearing in mind the undisputed evidence of Snyman and the actions of the employee and the SAPS to come to the conclusion that the employee approached the SAPS to report what may have been ugly, but was certainly not criminal, conduct on the part of Gericke. What the Applicant did was indeed mischievous and intended to do harm to Gericke in an unwarranted manner.

[44] In light of my findings above, I have considered the appropriate order. Given that I have found that no other Commissioner could reasonably come to the same conclusion as the Commissioner came to and the fact that there is a comprehensive record before me, I make the following order:

44.1. the award of the Commissioner, save for his finding in respect of procedural fairness, dated 25 June 2009 under case number GAJB32267-08 is reviewed and set aside;

44.2. the award is substituted with the following finding –

44.2.1. the dismissal of the Second Respondent was substantively fair;

44.2.2. there is no order as to costs.

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SNIDER A J

Acting Judge of the Labour Court

Appearances

For the Applicant: Advocate M Aggenbach

Instructed by: Attorney Grant Marinus of Werksmans Attorneys

For the First Respondent: S Nyawuza – A Union Official