REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C507/2011

C530/2011

In the matter between:

SANLAM LIFE INSURANCE LIMITED	Applicant
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER STEPHEN BHANA N.O	Second Respondent
HILTON STEPHEN CROY	Third Respondent

Heard: June 15 2012

Delivered: 19 October 2012

Summary: Application to review an arbitration award; process related grounds considered in respect of failure to consider 'material evidence'

JUDGMENT

Rabkin-Naicker, J

[1] Mr Hilton Stephen Croy (Croy), a business Manager at Sanlam Life Insurance Limited submitted a grievance to his management on the 13th September 2010. His formal complaint read as follows:

> "Dear Jack and Kobus,
>
> Incident in the Sanlam private suite on Saturday 11 September 2010
>
> I refer to our conversation of Saturday evening. I would like to lodge a formal complaint against the persons; Pierre Jordaan, the suite manager, Sakkie Vermeulen, advisor with the Tygerberg unit and Johan Kotze, bar assistant. The background to the incident as well as the actions or mission (sic) which constituted the incident and which formed the basis of my complaint are as follows:
>
> Background to the incident
>
> The incident occurred in the Sanlam private suite after the match between Western Province and Leopards. During the course of the afternoon I met and had discussions with five guests of the adjacent SIM suite and I was keen to introduce them to some of my advisors. As a result I invited them to join me at the Sanlam suite after the match and they acquiesced. The group included three females and two males. Two of the three females are full time employed of SIM.
>
> Action or omissions
>
> 1) Pierre and Johan generally treated my invitees with hostility, in stark contrast to the warm reception other guests received from them.
> 2) Johan insulted the group with the following remark, as jy nie n' ding bu jou huis eet of drink nie, moet dit nie in die losie kom soek nie.
> 3) The female guest, who is not an employee of SIM, regurgitated on the floor at the back of the suite. I was visiting the loo at the time and on my return to the suite I was confronted by an emotional outburst from Pierre about the incident, who accused me in the presence of all guests of bringing the Sanlam box into disrepute by bringing those people here, obviously unaware that two members of the group were SIM employees. I repeatedly appealed to Pierre to keep his voice down and to calm down to no avail. Pierre shouted

loudly to vent his frustration at what transpired and wanted to know from me who would clean up the mess.

4) I went over to the area pointed out by Pierre and after careful inspection discovered a small area of what looked like a clear fluid on the floor. One of the male guests of the group took a serviette and wiped the floor clean, after which my invitees left the suite.

Sakkie Vermeulen then confronted me in an aggressive and disrespectful manner. Throughout the event Sakkie had made remarks about the incompetence of black players in the National Springbok Squad. Pierre and Johan consumed alcohol throughout the afternoon behind the counter and in full view of guests. I am not sure whether the aforementioned behaviour was motivated by racism as my invitees were non-white, or whether the offenders were under the influence of alcohol, or whether it was motivated by some other cause altogether. I trust the appropriate action will be taken and will be pleased to provide any assistance in this regard."

[2] The upshot of an investigation launched by the Sanlam managers, Jaco Coetzee and Kobus Swarts, which involved seeking statements from all the other persons present in the Sanlam box and a further statement from Croy himself was a shock to Croy. In a notice dated 28 September 2010, Croy was charged with the following:

1"MISCONDUCT: unprofessional conduct , in that on 13 September 2010 at the Sanlam Personal Finance Hospitality Suite at Newlands Rugby stadium you:

1.1 invited and allowed employees from SIM and their guests , who's behaviour caused discomfort and embarrassment for guests in the SPF suite, into the SPF suite;

1.2 made racist and derogatory remarks about Sanlam, Sanlam management and towards the bartenders of the SPF hospitality suite and;

1.3 acted inappropriately when the bartender of the hospitality suite indicated that certain behaviour of yourself and the individuals you

invited is unacceptable to other guests as well as when the bartender indicated that he will close the suite at a specific time.

The incident occurred in the presence of Sanlam Office staff, Sanlam financial Advisors as well as Sanlam external clients and caused great discomfort and embarrassment to the parties present as as a result brought Sanlam's name and image in disrepute.

2: **Unprofessional conduct**, in that you on 21 September 2010 made uncalled and inappropriate remarks towards Ms Danielle Esterhuizen and during same time touched her inappropriately. The incident caused a great discomfort and embarrassment to Ms Esterhuizen.
Note that these allegations are very serious and if proved, could have an impact on your contract as Business Manager with Sanlam Financial Advisers."

[3] Croy pleaded not guilty to both charges and after a disciplinary hearing held on the 7 and 12 October 2010, was dismissed with one calendar months' notice, effective 30 November 2010. I note that in the later arbitration proceedings, it was admitted by the Chairperson of the Disciplinary Hearing. Mr H. A. Bredenkamp (Bredenkamp) that that there was evidence before him in the disciplinary proceedings to the effect that the following words were uttered in a conversation between Vermeulen and Jordaan in relation to those invited into the box: "bobbejane" and "kaffers".

[4] In his "verdict" Bredenkamp made the following findings, among others, in regard to the First Charge. The emphasis is his own:

"In his argument in the hearing Mr Croy made explicit mention of the fact that it is *" the culture of black people to be loud. They simply do not speak softly".* I accept this stated fact by Mr Croy and I accept his argument that other cultures should respect and accommodate that. I would, however, also expect from Mr Croy, as an intelligent individual, to know **that the loudness of the black people is not shared by**

other cultures people is and that black people must also respect and accommodate the other side. To my judgment he **should therefore have realised that they were too loud** in the Sanlam box and **it was his responsibility**, as the inviter of this party, to ensure that they behave in a dignified manner. To all accounts he did not do anything about this. **Fact is that he allowed them to have fun and overstretch the tolerance of the guests in the Sanlam box**."

"I also attach weight to the statement and testimony of Ms Reinette Loots as to her experience and that of her client. She was very explicit that the party arriving from the SIM box was loud to the extent that she and her client could not hear each other. She also testified that one of the ladies of the party joined her and her client and insisted that they sing for her as it was her birthday. Ms Loots testified that they found this very interruptive and stated that she was of the opinion that the members of the party simply did not think or realise or consider that there were actually people entertaining the guests on a professional level. To my judgment it is a fair assumption that Ms Loots regarded the party as inconsiderate to the other people in the box. I regard it as a fair assumption that she and her client was disgusted."

"**To my Judgment the crux of charge 1 is the fact that Mr Croy, to his own admission, accused Mr Jordaan that he distinguishes between guests on the grounds of race and then Laboured the issue. To my further judgment this is unprofessional conduct to the definition."**

[5] Although I was informed by the legal representative of the the Applicant that there was no need for the court to read those parts of the record dealing with the racism charge for purposes of the review, I chose not to follow the advice, in an effort to contextualise the case before me.

[6] After lengthy arbitration proceedings, the Second Respondent (the Commissioner) made the following Award:

"81. The applicant's dismissal was substantively unfair.

82. The respondent, Sanlam Life Insurance Limited, must reinstate the applicant retrospectively to 1 December 2010 under the same terms and conditions that prevailed prior to his dismissal including his share options. The applicant must report for work by no later than 18 July 2011.

83. The respondent must pay the applicant the equivalent of what he would have earned for the period between 1 December 2-010 and 15 July 201. Based on the applicant's remuneration stated at arbitration this amounts to R398 124.97 (R637 000.00/12x 7.5 months) minus the applicable tax and must be paid to the applicant by no later than 31 July 2011."

Grounds of review

[7] In the review proceedings before me, the company has focused on the Commissioner's primary finding on the Second Charge. On Esterhuizen's version this charge concerned the allegation that Croy had touched her buttock with an open hand. The incident had occurred, she testified, during a conversation which took three or four seconds. On being asked by the Commissioner whether there was pressure from the hand, she said there was. The finding is contained in paragraph 79 of the Award as follows:

"79. The final allegation was that Croy touched her buttock. The two versions differ materially in respect of what time the incident had occurred, where the files were and what exactly happened. Croy's version is that he patted her hand whilst holding it with his other hand. Again Esterhuizen's version stands uncorroborated in that not even the people, whom she claimed she had spoken to immediately after the incident, were called to testify. It would have lent credence to her claim had her PA come to testify and at least corroborated the time of day, their positions, etc. Croy's version of not needing the files after the interview, that he was in a hurry before the interviews and had more time after the interviews was not rebutted. Even Esterhuizen admitted that the conversation was at most 60 seconds, which makes Croy's version more credible. It is commonly accepted that sexual harassment is subjective from the perspective of the alleged victim. The

evidence however must be assessed objectively and unemotionally. In this instance the evidence does not show, that on the balance of probabilities, that the incident had occurred as described by Esterhuizen. The onus of proof is on the respondent. The applicant need not to prove that he had not done what he was accused of having done."

[8] The Applicant has sought to rely on the **Southern Sun Hotel Interests**[1] case in this review application. In that case, Van Niekerk J had this to say:

> "In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification."[2]

[9] The award is susceptible to be set aside on Applicant's submission, for "process-related" unreasonableness. The Commissioner, it argues, committed a gross irregularity in the conduct of the arbitration proceedings for the following reasons:

9.1 He failed to have regard for Esterhuizen's undisputed evidence that immediately after the incident she contacted Swarts to report the incident, mentioned it to her personal assistant and contacted her husband who immediately travelled from Malmesbury to Bellville to counsel her.

[1] Southern Sun Hotel Interests (Pty) Ltd v CCMA &others (2010) 31 ILJ 452(LC)
[2] At paragraph 17

9.2 Although the Commissioner recorded Swart's evidence that Esterhuizen had sent him an SMS whilst he was in a board meeting and requested that he meet with her urgently, that Swarts met Esterhuizen in her office and that Esterhuizen was tearful when she relayed how Third Respondent had touched her inappropriately, he totally disregarded that evidence in concluding that Esterhuizen's version was uncorroborated;

9.3 He failed to have regard for relevant circumstantial evidence that supported Applicant's version of the incident that Applicant's access records did not exclude the conclusion that the incident as relied upon by Applicant took place at the time that Esterhuizen alleged it took place.

9.4 His conclusion that because Esterhuizen admitted that the conversation was at most 60 seconds, Croy's version was more credible, is devoid of any explanation and is logically not sustainable.

9.5 He failed to assess Croy's reliance on his good character in the context of Croy's inappropriate and sexist comments made to Applicant's employee Mandy Khan's sister.

Evaluation

[10] It is necessary to consider the above submissions in turn, taking the record of the proceedings into account. It was indeed undisputed that Esterhuizen SMS'ed Swarts to request him to meet with her urgently. The evidence given by Esterhuizen was that the alleged touching incident had occurred at about 13h.22 She testified that at about 14h.00 she called her husband and that he had arrived about 50 minutes later. At 14h.30 she SMSed Mr Swarts, having discussed the matter with her husband on the telephone, and decided 'for the option to allow my line manager to sort it out." She did not request her husband to come to her workplace, and the record reveals that he saw other employees while he was there.

[11] As regards being tearful, Esterhuizen testified to crying at about 14.10. At 15h.00 she had an appointment with a marketing specialist and Swarts only came to see her at 16.15. By 17.00 she had sent Swarts the email. None of the people who she allegedly spoke to immediately and soon after the incident were called to corroborate her evidence Swarts in contrast testified that he could immediately see the lady was upset and she was tearful when he came in to see her 16:15. It was Esterhuizen's evidence that when Swarts phoned her the next day after receiving her email he said that: "we can add it to a charge that was running at the same time" and that "I must make a decision how formal I want to handle this incident." She called him the next day, and according to her testimony said: " I really do appreciate him wanting to take into account how I feel but I want him to handle it and I'm comfortable with which way it goes."

[12] Under cross- examination, it is noteworthy that Esterhuizen stated the following: "…okay to put on record clear my intention was not for Mr Croy to lose his job. My intention was to have this conduct stopped to put me in a position to do my job without having to look over my shoulder all the time and wonder about ulterior motives."

[13] Given the above, I do not find that the Commissioners award is out of kilter with the evidence before him in relation to Swarts' testimony. I am unconvinced that his evidence was not given appropriate weight by the Commissioner or indeed that the evidence highlighted by the Applicant can be considered material to his ultimate conclusion in the Award.

[14] The Commissioner's conclusion regarding the 60 second long conversation between Esterhuizen and Croy is submitted to be devoid of logic and explanation by the Applicant. However, Croy testified (as recorded in the Award) that the conversation with Esterhuizen which the touching incident had allegedly , occurred before interviews he had scheduled. Paragraph 55 of the Award reads as follows.

"Croy, in dealing with the second allegation of sexual misconduct, explained that he had interviews scheduled on 21 September as part of a recruitment process. The first interview was from 11h30 to 12h30 and the second scheduled for 12h30 to 13h30. He was a few seconds late for the first interview which was held at the at the recruitment consultant's. (Mr Jonk) office in the regional office area. As he passed Esterhuizen she called him and asked for the list of names. He turned back to her desk and greeted her with his right hand i.e. shook her hand with his. In jest he replied that she must put his name, her name and her PA's name on the list. Whilst speaking to her he patted her right hand (which he still held in his right hand) with his left hand and then he released her right hand. He further told Esterhuizen that he was running late and that he would send her names later. Croy demonstrated how he did this whilst holding the interviews files under his left armpit. He added that her PA could see the whole incident. Croy denied that he had harassed Esterhuizen."

[15] Croy went on to testify that he was not in a hurry after the interview and if he had talked to her after it, as she alleged, he would not have been in a rush and could have sorted the list out with her there and then. The Commissioner's finding on this aspect is therefore not devoid of logic and if read with the award as a whole, does not lack explanation.

[16] The submission that the Commissioner failed to have regard to the circumstantial evidence that the company's access cards did not exclude that the alleged incident took place at the time Esterhuizen alleged, is without merit. The access card records did not exclude either Esterhuizen's or Croy's version.

[17] Finally, the Applicant relies on the Commissioner's failure to take into account the evidence given by Mandy Kahn that Croy had mentioned to her sister in the box at Newlands, that if he wasn't married he 'would pursue or wouldn't mind to pursue" Mandy Kahn. Kahn's evidence as to the impact of this was: " I first felt that he didn't know my sister, why would he say that to her". I said to my sister "…hy ken nie eers vir jou ie, hoekom sal hy nou met nie eers vir jou

nie, hoekom sal hy nou met ju sulke goed praat? But I was there, I overheard it, she didn't tell me that that's what he said." There cannot be any basis to consider this evidence as material to the outcome of the Award.

[18] In **Herholdt v Nedbank Ltd**[3] the Labour Appeal Court has confirmed that an award is reviewable on grounds of process related unreasonableness. Dealing with the threshold for interference in the case of a gross irregularity, the LAC stated as follows:

"There is no requirement that the Commissioner must have deprived the aggrieved party of a fair trial by, misconstruing the whole nature of the enquiry. The threshold for interference is lower than that, it being sufficient that the Commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different." (my emphasis)[4]

[19] In my judgment, the test as enunciated above, when applied to the matter before me, will not succeed in disturbing this award. I do not find that the Applicant has shown, even on this lower threshold, that evidence material to the outcome of the award was ignored by the Commissioner or that he failed to give appropriate weight to material evidence, or issues having potential for prejudice or a different outcome. The award is sustainable on the totality of evidence before the Commissioner.

[20] It stands to be emphasized that care should be taken not to water down the requirement that irregularities (whether latent or patent), vitiating an award, are gross in nature and must have a material bearing on the outcome of an award. On my reading, neither **Southern Sun Hotel Interests,** nor **Herholdt**, sanction such a departure from the law on reviews. If these principles are jettisoned there will be a floodgate situation, with the result the distinction between appeal and review in our courts will simply be obliterated.

[3] (2012) 23 ILJ 1789 (LAC)
[4] At paragraph 39

[21] At the hearing of this matter, I ruled that I will decided on an application to make the Award an order of court, under case number C530/2011, once I had decided the review application. I now grant the order sought in that matter.

[22] In as far as costs are concerned in the review application, I see no reason why the costs should not follow the result. I make no costs order in as far as the application in terms of section 158(1)(c) is concerned.

[23] In all the above circumstances, I make the following order:

1. The review application under case number C507/2011 is dismissed.
2. Applicant is to pay the costs in the review.
3. The application under C530/2011 is granted.

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Rabkin Naicker J

Judge of the Labour Court

Appearances

Applicant: Adv. Guy Elliot instructed by Maserumule Inc

Third Respondent: E J Simons of Simons Van Staden Attorneys