



REPUBLIC OF SOUTH AFRICA

The Labour court of South Africa, CAPE TOWN

judgment

Not Reportable

Case no: C495/09

In the matter between:

EDCON LIMITED

Applicant

and

COMMISSIONER DIK WILSON

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

CHERAY JANARI

Third Respondent

Heard: 25 May 2011

Delivered: January 2012

Summary: Review, admissibility hearsay evidence, record of disciplinary hearing, assessment of material properly before arbitrator

JUDGMENT

[1] This is an application to, *inter alia*, review and set aside an arbitration award (the award) of the First Respondent (the commissioner) in determining an alleged unfair dismissal dispute referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) by the Third Respondent, Ms Cheray Janari (Janari).

[2] The commissioner found that Janari had been unfairly dismissed and awarded compensation in the amount equivalent to 12 months' remuneration.

[3] Janari was dismissed for misconduct. The alleged misconduct consisted of directing employees of Edcon Limited (the applicant) to record payment arrangements with customers contrary to the applicant's ordinary processes and procedures. At the disciplinary hearing, Janari was found guilty of directing employees of the applicant to record that payment arrangements had been confirmed by a more senior employee in circumstances where such payment arrangements had not in fact been confirmed. The applicant had previously successfully reviewed an earlier arbitration award in relation to Janari's claim of unfair dismissal. The outcome of that application was that the matter was remitted back to the CCMA for hearing *de novo*. It is the second arbitration proceedings which form the subject matter of this review application. The commissioner in his award made a number of findings including the following.

- 3.1 Ms Flatwell, an employee of the applicant, who was adamant that the instruction to record that payment arrangements had been confirmed by Mr Alroy Roodt (Roodt) did not emanate from Roodt but rather came from Janari.
- 3.2 Ms Nadia Smith, another employee of the applicant, testified that the instruction came from Janari. Smith however conceded that in a prior statement, she stated that Roodt had given the instruction. Smith had also and in the disciplinary hearing which led to Janari's dismissal said that the instruction had come from Roodt and that Janari had instructed them to write 'confirm'. (emphasis added)
- 3.3 There were 'some marked contradictions between statements of agents who were not called as witnesses, and their evidence in the disciplinary hearing'.
- 3.4 Roodt stated that the instruction was given to him by Janari and he repeated the instruction to staff.
- 3.5 In light of the many contradictory statements it is difficult to see how the chairperson of the disciplinary hearing came to the conclusion that Janari gave the instruction to write 'confirm Alroy' irrespective of whether the arrangement had been confirmed.

- 3.6 Janari's version had been that she instructed staff to record 'confirm Alroy' rather than 'confirm line' or 'confirm supervisor' so that she knew who had confirmed the arrangement and not in order for them to make 'false notes' on the system that Roodt had in fact confirmed a payment arrangements when he had not actually done so.

3.7 Janari felt that, perhaps, her instruction was misunderstood.

[4] The commissioner found that three scenarios were equally reasonably possible i.e., that Janari gave the instruction, that the supervisor and agents had implicated Janari in an attempt to avoid disciplinary action against themselves and that Janari gave the instruction as she had understood it and that the supervisor and agents had misunderstood it and applied it differently. In those circumstances, the commissioner found that the applicant in the arbitration proceedings did not discharge the *onus* of proving that Janari was guilty of the misconduct alleged against her and accordingly found that Janari's dismissal was substantively unfair. However, the commissioner did find that Janari's dismissal was procedurally fair.

[5] The commissioner had also determined that witness statements that were prepared in anticipation of the disciplinary hearing and which were used at that hearing, together with the transcript of the prior arbitration proceedings, constituted hearsay evidence for the purposes of the arbitration proceedings before him and that he was not at liberty to have regard to those statements or transcript without first establishing a basis for its admission on application by either party. However, it appears that no such determination was made. In order for the commissioner to have regard to those witness statements and to properly determine the weight to be accorded to them, it would have to be determined that the statements were admissible. The commissioner did however find that the statements constituted hearsay and that he could not accept the truth of the contents of the statements but that he could have regard to the statements as evidence of 'what those witnesses said' at the internal disciplinary hearing.

[6] The applicant contends that this approach constitutes irrational and unreasonable conduct on the part of the commissioner. In particular, the applicant contends that this is a reviewable gross irregularity as parties in arbitration proceedings are entitled to know what is properly served before the arbitrators as evidence and how to deal with it. The applicant further contends that in the face of the commissioner's ruling as to a basis for subsequent admission of the statements, he was precluded from accepting the contents of the statements as a basis for rejecting admissible evidence before him. The applicant contends that there was no basis on which the commissioner could compare prior statements, written or oral, with evidence properly before him during the arbitration proceedings for the purposes of adjudicating the dispute.

[7] In my view, the commissioner's approach does constitute a gross irregularity as contended for by the applicant and the arbitration award falls to be set aside on that basis alone.

[8] The applicant further contends that the Commissioner should have had regard only to the admissible evidence before him including the oral evidence of those who testified namely Cinthia Adams (Adams), Natalie Flatwell (Flatwell), Nadia Smith (Smith), Julian Mathews (Mathews) and Janari.

[9] In this respect, the applicant contends that there were no contradictions as between the evidence of Smith and Flatwell as to who issued the instruction. Both Smith and Flatwell testified that the instruction had been issued by Janari, that the instruction was issued at a team meeting rather than a group meeting and that the instruction was issued for the purposes of addressing unacceptably high levels of 'escalation' in the team of Roodt.

[9] The largely undisputed evidence before the commissioner included the following:

- 9.1 It was in fact Janari's view that the number of escalations emanating from Roodt's team was too high.
- 9.2 The evidence of Flatwell, that the instruction came from Janari and had been given at a morning meeting.
- 9.3 Flatwell's evidence as to the instruction 'confirm Alroy' was not challenged or that Flatwell had understood the instruction;
- 9.4 In the arbitration proceeding, neither Flatwell nor Smith's evidence was challenged on the basis that they were in fact responsible for recording 'false notes' and were protecting themselves and Roodt from disciplinary action.

[10] The commissioner had before him largely two versions. On the one hand there was the version of Janari who denied giving the instruction at all and who testified that Roodt had given the instruction. On the other hand there was the version of the applicant that Janari had given the instruction (and/or confirmed it). In my view, the proper determination of the dispute required an assessment of these two versions and a decision to prefer one or the other.

[11] The record of arbitration proceedings and in respect of Janari's evidence records the following (page 243):

'Mr Mashego Mam let's in distinct the last question you were asked. The – when you started off with your opening statement, indication was made to the effect that you guys (in distinct) to say an instruction to say confirm Alroy. I want us to move on that premises.

Ms Janari Sir, I would just like to, with all do respect, continue with your question continue with the sentence. I said confirm Alroy to put a process in place and not to do it fraudulently. Don't use half of the question, or half of the sentence.

MR ALLOM: (indistinct) He's trying to – I must object to that suggestion.

COMMISSIONER: Ja, that's a fair comment. It's a fair comment and I think – I don't think it's fair to try and get the witness to say something that she hasn't said.

MR ALLOM: She trying to qualify basically what she, you know, (indistinct).

MR MASHEGO: Mr Commissioner, all that I am saying is I want us to move from the premise to say she did do this instruction. That's, all I'm saying .

COMMISSIONER: Ja, you must understand what she's saying. She's saying that she instructed the team members to write confirm Elroy when they had in fact confirmed with Elroy.

MS JANARI: Exactly, and every time (indistinct) thank you Mr Commissioner, my thing is that people choose only to look at the front, they don't read the full sentence, because in our previous – when we spoke in May or so, you did exactly what you did now, read the complete sentence. I didn't say do it fraudulently.'

[13] What is clear is that Janari conceded that she did issue an instruction to employees of the applicant in the terms 'confirm Alroy'. However, Janari contends that she did not do so fraudulently and that the instruction was to do so in circumstances where Roodt had in fact confirmed. However, the unchallenged evidence of Flatwell and Smith points to the contrary. The effect and import of that evidence, supported by the evidence of Janari herself, is that it was Janari's view that the level of escalations from Roodt and his team was too high, that she instructed employees to right 'confirm Alroy' even in circumstances where Roodt had not in fact confirmed payment arrangements. This was clearly a serious breach of the applicant's ordinary policies and procedures.

[14] The alleged unfair dismissal dispute and the review application have a long history. The record is voluminous. In my view no proper purpose will be served in remitting the matter back to the CCMA. The assessment of the evidence as to Janari's conduct arises from the record that was filed in the review application. This Court has been placed in a position to determine the dispute and it is appropriate in this matter that it does so. This Court has also had the benefit of extensive arguments written and oral, by the legal representatives of the parties before it.

[15] In the circumstances, I make the following order.

- 1) The arbitration award of the First Respondent is reviewed and set aside.
- 2) The arbitration award is substituted with an award that the dismissal of Janari was substantively fair.
- 3) There is no order as to costs.

VAN VOORE AJ

APPERANCES:

FOR THE APPLICANT: Adv C.A. Nel

FOR THE THIRD RESPONDENT: Mr R Allom