IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NUMBER: C693/2013

DATE: 7 MARCH 2014

In the matter between:

J F ROSSOUW t/a ROSSOUW BOERDERY Applicant

and

CSAAWU obo ANDRIES SWARTZ First Respondent

CCMA Second Respondent

COMMISSIONER V LANDU Third Respondent

J U D G M E N T

STEENKAMP, J:

[1] This is an application to have an arbitration award by Commissioner Vusumzi Landu, dated 24 July 2013, reviewed and set aside.

[2] The facts leading to the dismissal of the applicant, Mr Andries Swartz, are depressingly familiar in the rural areas of this country. The *dramatis personae* are farm workers, working on a farm belonging to the respondent, J F Rossouw Boerdery. As so often happens in that community, the dispute has its genesis in alcohol abuse over a weekend.

[3] What followed is an incident where the employee, Mr Swartz, took offence to comments made by one Hester Krotz who insulted Swartz's wife in the course of another altercation between two female employees (Krotz's mother, Annatjie Plaatjies; and Swartz's wife, Johanna)..

[4] It appears that, as also often happens, the workers were being transported on the back of a *bakkie*. It is common cause that Swartz grabbed Hester Krotz and pushed her against the rails of the *bakkie*.

[5] The employer dismissed Swartz. As Mr *Cronjé* argued, this would generally be seen as a fair reason for dismissal, especially taking into account the scurge of violence against women in this country. I have very little doubt that if this Court were sitting as a court of first instance, I would have imposed the sanction of dismissal.

[6] The question, however, is whether the conclusion reached by the arbitrator is so unreasonable that no other arbiotrator could have come to the same conclusion, as set out in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) and expanded upon in the recent cases of *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA) and *Gold Fields*

Mining South Africa (Kloof Gold Mine) v CCMA [2014] 1 BLLR 20 (LAC).

[7] The arbitrator accepted that Swartz was guilty of assault.The question then turns on the appropriate sanction and whether the sanction of dismissal was fair. The arbitrator took into account that:

> "*It was a singular incident that happened in the heat of the moment and that both parties have buried the hatchet*."

[8] The evidence before him further demonstrated that the parties implicated have maintained a cordial relationship and their children even continued to sleep over at each other's houses. The arbitrator also took into account that the employee has an unblemished record and that there was no evidence before him that progressive discipline would not have been an appropriate sanction.

[9] The arbitrator substituted the sanction of dismissal with the sanction of a final written warning valid for 12 months. He also ruled that the employee should be reinstated without any back pay. That amounts in effect to a sanction of suspension without pay for about four and a half months.

[10] The arbitrator further took into account that the employee had been provoked.

[11] I agree with Mr *Cronjé* that verbal provocation should not be an excuse for an assault on a woman. However, taking into account the test, as prescribed by the Constitutional Court, it is clear that the arbitrator did take into account all the evidence before him. He applied his mind to relevant factors that I have summarised above, including the fact that the parties have re-established a relationship. In short, the arbitrator fulfilled the requirements set out in *Goldfields (supra)* paragraph [20]:

(i) The parties had a full opportunity to have their say;

(ii) The arbitrator identified the issue he had to arbitrate;

(iii) He understood the nature of the dispute;

(iv) He dealt with its substantial merits; and

(v) His decision is one that a another decision-maker *could* reasonably have arrived at.

[12] I do not agree with the sanction. But that is not the test. The arbitrator used his discretion in deciding what a fair sanction is and it is the arbitrator's sense of fairness that must prevail. Uncomfortable as one may be with the sanction, it

falls within a band of reasonableness, especially taking into account the further sanctions of a final written warning and an effective suspension, without pay, for some four and a half months.

[13] The conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have come to the same conclusion. This is a review application and not an appeal. The Court is not in a position to interfere with that conclusion.

[14] With regard to costs though, I take into account that the respondent, i.e. the *Boerdery*, and the employee will have to continue working together. I presume also that the trade union, representing the employee, will still have a relationship with the farm. In law and fairness, I do not believe that an adverse cost order would be appropriate.

I therefore order that

THE APPLICATION FOR REVIEW IS DISMISSED (WITH NO ORDER AS TO COSTS).

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STEENKAMP, J

APPEARANCES

APPLICANT:	F Cronjé (attorney)
FIRST RESPONDENT:	Yvette Isaacs
Instructed by:	Brink & Thomas.