IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C367/17

In the matter between:

JEROME LOUW **Applicant**

And

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER S. WRIGHT **Second Respondent**

FIDELITY ADT SECURITY (PTY) **Third Respondent**

Date heard: 17 April 2019

Delivered: 7 May 2019

JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review an award under case number WECT 4909-17. The second respondent (the Commissioner) found that the dismissal of the Applicant was substantively fair. There is also an opposed application for condonation before me for the late filing of the opposing affidavit in this matter as well as an application for condonation from the applicant for the late filing of an "amended supplementary affidavit". The applicant has prosecuted the review himself and the Court is prepared to condone his non-compliance with the Rules. However, the content of the "amended supplementary affidavit" is not relied on in this judgment. The applicant's non-compliance included his service of certain pleadings on the employer rather than its attorney of record. I gave the attorney for the third respondent the opportunity to read these papers before hearing argument and there was no objection to proceeding by either party. I deal with the third respondent's condonation application below.

[2] The applicant was dismissed on the 15 March 2016 from his job as a Site Senior, after being found guilty of the following charges:

"Sleeping on duty in that on the 27th January 2017 at approximately 00h50 you were found sleeping on duty by your Area Manager (Michael Wheeler) and Regional Manager (Mr Uys) during a site visit at Cisco in Kuilsriver.

Dishonesty in that on the 27th January 2017 at approximately 01h15 you were dishonest towards your Area Manager (Michael Wheeler) and Regional Manager (Mr Uys) when you stated that you did not sleep on duty during the management site visit at Cisko in Kuilsriver".

[3] At the arbitration the applicant disputed the charges against him. His position at his disciplinary enquiry, arbitration and in submission before Court was that it was unfair to dismiss him based on video evidence submitted by the employer which reflected a different date than the date for which he was charged. It was common cause that the applicant was on duty on the night of 27 January 2017 but the video footage did not reflect that date.

[4] In her summary of applicant's evidence, the Commissioner *inter alia* recorded as follows:

"He confirmed that the video footage shown by the respondent at these proceedings was the same as his video footage (minus the second clip) that he submitted (to the Commissioner) with date differences. He acknowledged that it was footage of himself sitting in the guard house during the night at CISCO, but denied that his feet were on the table but on a crate. He estimated the clip to be about three minutes. The video had been taken by another at a short distance from himself (two steps) while the (guard house) door was open, which he had not been aware of.

He had objected to the video footage being introduced at his hearing as it did not stipulate the date of the incident as alleged. The date showed 3 March 2017. As reflected in the disciplinary minute he had defended himself where the video was allowed to be introduced in the disciplinary inquiry by stating that his one eye had been closed due to pain from his sinus condition."

[5] In his written submissions before Court, the Applicant emphasized the discrepancy of the date in the video footage again. He stated that video footage of the wrong dates was shown to his witness at the arbitration in order to discredit him. He further alleges that the Commissioner was biased and recorded the facts incorrectly. Another basis for the review is that the Commissioner took into account hearsay evidence by the chairperson of the disciplinary enquiry as the managers who took the video were not present at the arbitration. It is this final ground for review that that deserves further consideration in this judgment.

[6] The transcript of the arbitration proceedings reflects that applicant challenged the Chairperson of the disciplinary proceedings (Van Dalen) on the basis that his evidence was hearsay. Mr Van Dalen agreed that he was not present when the video was taken of the applicant allegedly sleeping on duty. He relied on what was presented at the disciplinary hearing. The transcribed record reads:

"MR LOUW: So what you try to tell is now, Mr Van Dalen, in this hearing you went after, you're busy with he said, he said, he says, she says. So it's all hearsay. You didn't see this thing. If I never see this thing, it is hearsay. If I say he said so, he said so; isn't it hearsay in a court of law?"

[7] The Commissioner replied to this statement in a curious manner as follows:

"Commissioner: We're not on (sic) a court of law; this is on a balance of probability." When applicant pressed the point that he wanted an answer to the question of whether Van Dalen's evidence was hearsay, Van Dalen stated that "It's not hearsay, it's in a statement.."

[8] The following exchange between the applicant and the Commissioner bears recording:

"MR LOUW: He's not answering the question now.

COMMISSIONER: But he may, he can answer it the way he deems fit. Equally I got this video footage, and I got to determine based on all the evidence which is finally presented to me, whether I consider that video credible or not. So on disciplinary issues, just for yourself Mr Louw, everything is based on a balance of probability. It's not beyond reasonable doubt, okay? There's a very big difference between a court and the labour."

[9] The Commissioner does not deal with the issue of hearsay evidence in her Award. She does not reflect on the fact that no direct viva voce evidence was given at the arbitration by Wheeler and Uys for the employer. An arbitration under the auspices of the CCMA is a hearing de novo.[1] Sections 138(1) and (2) of the LRA accord the commissioner a discretion to determine the manner and form of proceedings. In terms of s138(2), subject to the discretion of the commissioner, a party may give evidence, call witnesses and address

[1] Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) para 8.

concluding arguments to the commissioner. In County Fair Foods (Pty) Ltd v CCMA & others (1999) 20 ILJ 1701 (LAC); [1999] 11 BLLR 1117 (LAC) at para 11, the following appears:

'However, the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing de novo.'[2]

[10] The applicant specifically disputed the statement by Uys that was before the disciplinary enquiry when asked by the Commissioner whether he agreed with its contents. The Commissioner however stated the following in her award:

"It is common cause that the managers, Uys and Wheeler entered the CISCO site, which is a steel manufacturer, in the early hours of the morning of 27 January 2017 by jumping over the fence/climbing over the wall, as reflected in Uys's statement. It was confirmed by Van Dalen that Uys's statement was read out at the disciplinary inquiry, which was not disputed by the applicant. This statement and its contents formed part of the evidence of Louw's disciplinary inquiry and gave an account of how Uys's and Wheeler entered the premises and on finding Louw in the guard house asleep took video footage thereof. The notes submitted by Louw[3] further support the statements made about the video footage when questioned about the footage".

[11] It is trite that Louw's admission that the statement was read out by Uys in the disciplinary hearing is not an admission as to the correctness of the content of that statement. As I recorded above, Louw specifically disputed its correctness.

[2] Footnote 9 to Sidumo paragraph 8 supra.
[3] i.e. his notes at the disciplinary

[12] The Court is keenly aware that the proceedings before then CCMA are not court proceedings. However, in this matter when presented with the submission that the evidence of the employer as to the charges against applicant was hearsay, the Commissioner appeared ill equipped to deal with the issue. In addition, she referred to the 'credibility' of the video footage rather than dealing with its admissibility and relevance and what weight should be given to it.

[13] I align my approach in this review with that of Francis J when he stated the following:

"[13] A commissioner has a discretion about how the arbitration should be conducted. A commissioner may decide to adopt an adversarial approach or an inquisitorial approach. In an inquisitorial approach the commissioner is in control of the process. The commissioner plays a more active role in the hearing, calling witnesses and interrogating them to ascertain the truth. The commissioner cannot abandon the well-established rules of natural justice and must be careful to guard against creating a suspicion of bias. In this regard see Mutual & Federal Insurance Co Ltd v CCMA & others [1997] 12 BLLR 1610 (LC) at 1619-20 and County Fair Foods (Pty) Ltd v Theron NO & others (2000) 21 ILJ 2649 (LC).

[14] Where the commissioner adopts the adversarial approach his role is much limited. The process is in the control of the parties. The evidence adduced is that which the parties choose to present and the commissioner operates more like an umpire. The commissioner must manage the process and ensure that the laws of evidence are complied with. The commissioner can intervene where irrelevant questions are asked, hearsay evidence has been led or where the parties are not dealing with the issues that need to be decided. The commissioner must make rulings on objections raised etc. The

commissioner must stamp his or her authority in the hearing and must be guided by s 138(2) of the Act."[4]

[14] In the Court's view the Commissioner was not equipped to make sure that the law of evidence was complied with in the arbitration proceedings nor to apply it in her award. In the circumstances of this matter, given the failure to deal with hearsay evidence appropriately, and to reflect her awareness of the onus of proof in her evaluation of the evidence before her, the Commissioner committed a gross irregularity rendering the Award susceptible to review. In a situation in which evidence has not been correctly tested and weighed, it is not possible for a review Court to find that despite the gross irregularity, the outcome of the award was a reasonable result. The process that would be undertaken to do this would blur the distinction between a review and an appeal.

[15] The third respondent sought condonation for answering papers that were 13 months late. Its principal submission in this regard was to the effect that its prospects of success in the review were excellent. This has not proved to be the case and my order below shall reflect this.

[16] In the premises, I make the following order:

Order:

1. Condonation for the late filing of the answering papers is refused.
2. The award under case number WECT: 4909-17 is reviewed and set aside.
3. The dispute is remitted to the first respondent for re-hearing before a Commissioner other than second respondent.

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H. Rabkin-Naicker

Judge of the Labour Court

[4] Vodacom Service Provider Co (Pty) Ltd v Phala NO & others (2007) 28 ILJ 1335 (LC)

Appearances:

Applicant: In person

Third Respondent: Crafford Attorneys