Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C163/2019

In the matter between:

SAMWU OBO D BOOYSEN	**First Applicant**
and	
CITY OF CAPE TOWN	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
JUSTICE NEDZAMBA (*N.O.*)	**Third Respondent**

Date of Set Down: 27 May 2021
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 15h00 on 6 July 2022.

Summary: (Review – Assault – Alleged reviewable irregularities – award not one that no reasonable arbitrator could have reached – application dismissed)

JUDGMENT

LAGRANGE J
Introduction

[1] This is a review application of an award handed down on an award issued on 30 December 2018 in which the applicant, Mr D Booysen ('Booysen'), was found to have the procedurally and substantively fairly dismissed. The applicant also seeks condonation for the late filing of the review application on 18 March 2019.

[2] Owing to the prevailing Covid-19 pandemic at the time the application was enrolled, the parties had opted to agree that the court could determine the application on the papers without oral argument on the matter.

Condonation

[3] The award was first seen by Mr N Hearne ('Hearne'), Booysen's shop steward on 7 January 2019, at which stage Hearne was still on leave though he did forward it to Booysen. Booysen awaited Hearne's return from leave on 4 February 2019. Hearne had to motivate taking the matter on review and to the regional secretary and within a week the latter contacted the attorneys of record instructing them to take the award on review. The earliest the attorney handling the matter and the shop steward could meet with Booysen was on 5 March 2019. The review application was filed about a fortnight later. Consequently, the review application was filed about a month after the six week period within which it should have been filed. Obviously such a delay is not trivial, but most of it was clearly beyond Booysen's control. The union may be criticized for not attending to it earlier as it should not have waited nearly a month until Hearne returned from leave. Nonetheless, once he did return the matter was issued with reasonable celerity. In the circumstances, condonation should be granted irrespective of the merits of the review application.

The award

[4] Booysen was charged with misconduct on two counts, namely:

> 4.1 accosting a colleague, Mr E Fisher ('Fisher'), shortly after the latter had arrived at work on Monday 21 August 2017 telling him in foul language that Fisher 'was not going to take him for a fool again', and

4.2 physically assaulting Fisher on the same occasion.

[5] Booysen was acquitted of the first charge, but found guilty of the second and dismissed.

[6] On the question of alleged procedural unfairness which concerned the chairperson of the inquiry taking advice from the HR official observing the inquiry about the issue of the three month timeframe for charging an employee, the arbitrator correctly noted that he did not have the power to determine if the disciplinary proceeding was invalid but could only determine the fairness of the procedure adopted. In respect of the six month delay it took to charge Booysen, the arbitrator found that he had not been transferred or suspended and had access to witnesses and the union. Strictly speaking he was transferred but this was only temporary and Fisher, the complainant, was transferred instead. Consequently, the arbitrator found there was no evidence of being prejudiced. The arbitrator also concluded that there was no evidence that the chairperson had prior knowledge of the facts of the case other than possibly what he had heard by way of rumour.

[7] Even relying on Booysen's own account of allegedly acting in self-defence by pushing Fisher against a truck and then to the ground, the arbitrator held that was sufficient to conclude that he had assaulted Fisher. He considered Booysen's defence that he did so because Fisher had nudged and allegedly choked him. It was common cause that Fisher had nudged Booysen, which was consistent with the undisputed evidence that Fisher had items in his hands at the time. The arbitrator also found that it was common cause that when Booysen approached Fisher, Fisher was bending to remove items from the passenger seat of his vehicle.

[8] Fisher testified that Booysen approached him, swearing at him as he did so. When he stood up after retrieving his personal items from the passenger seat of his vehicle, Booysen was 'upon him' and he nudged him away with his shoulder so that he could close the door of his vehicle. He claimed that was when Booysen grabbed him around the neck using his left hand and started hitting him in his face with his right hand until he fell next to the door of the truck, which he had not even had a chance to close. Booysen only stopped his assault when Booysen's supervisor and

another colleague intervened. Fisher said he could not defend himself because he had his clothes in his backpack in his hands. As a result of the assault his eye was injured and he lost all his front teeth. Immediately after which he went to the police station to report the incident, after reporting the matter to other managers. At the police station he was told that Booysen had already laid a charge against him.

[9] On Booysen's own version he had taken offence to a remark made by Fisher to another manager, Mr. Taylor, who had been complaining about the failure of the maintenance staff to repair a door. It appears that the complaint had been directed at maintenance staff, which included Booysen and his supervisor, though they were not mentioned by name. Fisher's comment to Taylor was "private work first, Council work later." Booysen had told his supervisor that he was going to confront people about the incident on Friday. He confronted Fisher on that Monday morning and claims he said to him "this is the last time you will take me for a laatje". Booysen had referred to the J88 form which had been completed in respect of himself after the incident which did not show any marks on his hands indicating that he had punched Fisher. It was only because Fisher had tried to choke him that he had forcefully pushed him against the vehicle and that is how he had sustained the injuries.

[10] Booysen said that he had apologised to Fisher, because he had worked with him for 30 years and because of Fisher's appearance after the incident.

[11] The arbitrator accepted that it is trite that assault in the workplace was a form of misconduct, noting that it is also a criminal offence and that Booysen must have been aware of that. He then turned to consider Booysen's claim that he had acted in self-defence. He accepted that Fisher had nudged Booysen and that was consistent with Fisher having both hands full. The fact that Fisher had things in both hands also made it improbable, together with other evidence, that that he would have attempted to choke the applicant. Booysen had conceded that Fisher had no chance to respond to him and that it was probable that Fisher had nudged him to move Booysen away from his personal space, but that could not have warranted the attack by Booysen. Even if it had been self-defence, the force used by Booysen was clearly disproportionate to being nudged by Fisher, as revealed by the extent of Fisher's injuries. In relation to an eyewitness who corroborated the testimony of Fisher, the

arbitrator considered that the eyewitness was standing on a balcony and would have had a view of what was happening, contrary to Booysen's claim that his view would have been obscured by vehicles. The eyewitness had no reason to falsely implicate either of them.

[12] The arbitrator did consider that Booysen's medical report form did show that he had a bruise on his neck thumb and forearm, but noted that he did not have an opportunity to see the extent of those injuries and those injuries were not consistent with the other evidence led during the arbitration. All the witnesses except Booysen had testified that he had no visible injuries after the incident. He also thought that it was more likely if Booysen had been injured that he would have shown the injuries to his superintendent and complained to him of Fisher's alleged assault on him. In his view, Booysen's act of laying a charge of assault with the police was an attempt to counteract the criminal charges which he knew Fisher would lay against him.

[13] The fact that Booysen was the instigator and that Fisher had no chance to defend himself was sufficient justification for the employer not to charge Fisher with assault as well. Accordingly, there was nothing inconsistent about the employer deciding only to charge Booysen.

[14] Coming to the question of an appropriate sanction, the arbitrator acknowledged Booysen's thirty-five years of service, but found that the attack was premeditated and that Booysen had had the entire weekend to think about it and even told his supervisor that he was going to confront Fisher, which he proceeded to do despite being cautioned by his supervisor. The premeditated nature of his conduct was an aggravating factor. Another consideration was that he and Fisher had been friends for many years and yet he had made no attempt over the weekend to raise his complaint with him by speaking to him about it, instead of waiting until Monday to confront him. The arbitrator also considered whether the apology made by Booysen was genuine. However he found that the apology was not motivated by an acknowledgment that what he had done was wrong or by any sense of remorse.

The Grounds of review

[15] The test for reviewing an award based on alleged irregularities in the arbitrator's assessment of facts has been expressed clearly in two LAC decisions. The first, *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 *ILJ* 943 (LAC), warned against taking a fine tooth comb to the arbitrator's assessment of evidence:

> "[20] An application of the piecemeal approach would mean that an award is open to be set aside where an arbitrator (i) fails to mention A a material fact in his or her award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or consideration of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?
>
> [21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health & another NO v New Clicks SA (Pty) Ltd & others* 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to

material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable — there is no room for conjecture and guesswork."

(emphasis added)

[16] The second LAC judgment, *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC), stressed, amongst other things, that an error of fact must be of such a magnitude that it materially affected the arbitrator's findings, *viz*:

> "[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute."

(emphasis added)

[17] The main alleged flaws in the arbitrator's evaluation, which Booysen relies on may be summarised as follows:

> 17.1 The arbitrator failed to consider that the J 88 form completed after the medical examination of Fisher was never produced in evidence in support of his injuries.

17.2 The arbitrator failed to take proper account of the fact that both Booysen and Fisher laid criminal charges against each other.

17.3 The arbitrator should have conducted and *in loco* inspection to determine if the eyewitness standing on the balcony (Mr Bowers) could have seen the assault.

17.4 The arbitrator should have placed more emphasis on Booysen's J88 report and, in particular, that it did not record any injury to his hands, instead of relying on the evidence of eyewitnesses that he showed no sign of injury.

17.5 The arbitrator failed to attach proper weight to Booysen's version that Fisher had sustained his injuries when he fell against his vehicle in the process of Booysen defending himself by pushing him away.

17.6 The arbitrator's emphasis on assault been a criminal offence ignored the fact that he was never convicted in a criminal court of that offence.

17.7 Booysen contends that it was 'bizarre' of the arbitrator to assume that it was not necessary to determine if a rule against assault actually existed at the workplace.

17.8 The arbitrator failed to just treat the matter as an unfortunate altercation between two lifelong friends at the workplace.

17.9 In finding that there was no inconsistent treatment the arbitrator failed to consider that Fisher had assaulted him.

17.10 The arbitrator's conclusion that he could be dismissed after 35 years' service with a clean record was shocking.

17.11 The arbitrator's conclusion that he was not remorseful was based on sheer conjecture, and only Booysen himself could know whether he was genuinely remorseful.

17.12 The arbitrator also failed to consider that a breakdown in the employment relationship had to be established by evidence and the evidence of the chairperson of the inquiry that the municipality no longer trusted Booysen should have been disregarded, and more attention should have been given to the fact that Fisher had expressed the view that he would have been satisfied if Booysen had been demoted.

17.13 Apart from the fact that the arbitrator did not attach any weight to the fact that it took seven months to charge him, which was contrary to the requirement that he should have a speedy inquiry, it also showed that the relationship had not broken down because he was not suspended during that time.

17.14 The arbitrator failed to consider that the chairperson of the disciplinary inquiry had discussed the incident with Booysen before he was appointed to chair the inquiry.

17.15 The chairperson of the disciplinary inquiry should never have had any contact with the HR officer and sought advice from her when his representative raised the preliminary issue about the delay in holding the inquiry.

Evaluation

[18] On the procedural questions, I can find no fault with the arbitrator's reasoning. It is trite law, as noted by the arbitrator, that mere noncompliance with a disciplinary procedure does not necessarily mean there has been any procedural unfairness. In that regard the arbitrator considered whether Booysen had suffered any prejudice as a result of the delay and found there was none. In relation to the advice taken from the HR officer, the arbitrator was satisfied that the inquiry by the chairperson was made in front of all parties at the inquiry and there was no evidence of any prior discussion between the chairperson and the HR officer and it was not inappropriate for the chairperson to ask for advice on the technical point raised by Booysen's shop steward. It was still the chairperson's decision as to what to do about the objection,

and in any event was not material to the fairness of the proceedings. This conclusion cannot be faulted. On the question of the chairperson's prior knowledge of the case, the arbitrator noted that not only Booysen, but also the union, was aware of Booysen's allegation that he had a conversation with the chairperson beforehand. However, neither Booysen nor the union raised in the objection to the chairperson proceeding with the inquiry, which indicated that any alleged prior knowledge he had of the incident was not seen to be a problem for Booysen. In the circumstances the arbitrator's finding that the fairness of enquiry was not tainted by this was a reasonable one.

[19] In relation to the question of the significance of establishing a rule against assault in the workplace, it is astonishing that Booysen seriously advanced this argument. It further appears to be a deliberate misconstruction of the arbitrator's reasoning to suggest that he did not appreciate in this regard that Booysen was never found guilty in a criminal court of assaulting Fisher. The arbitrator correctly made the point that an employer does not need to prove the existence of a rule that criminal misconduct also happens to be unacceptable in the workplace. The arbitrator's emphasis on this point was simply to make the point that because assault is a criminal offence, it would naturally be seen as a serious form of misconduct in the workplace, and that it should go without saying that it is unacceptable.

[20] On the question of Fisher's own J 88 report not been tendered in evidence, the first point that needs to be made is that it was Fisher's uncontradicted evidence that he never received a copy thereof because it was retained by the police. Secondly, the direct eyewitness evidence that Fisher was visibly and seriously injured, was not seriously disputed by anyone. In fact there were even photographs taken of him shortly after the incident. Indeed, even Booysen claimed that Fisher's appearance was one of the reasons he felt he should apologise. The arbitrator was plainly entitled to take the evidence of eyewitnesses into account both as to Fisher's condition and that of Booysen immediately after the incident. In passing, I note that Fisher's account of the medical treatment he received was not disputed.

[21] The arbitrator did consider the fact that both parties had laid criminal charges against each other, but on a consideration of all the circumstances concluded that

the charge laid by Booysen was simply an attempt to counter the charges which he knew that Fisher was going to lay. This was not a conclusion that no reasonable arbitrator could have come to on the evidence.

[22] On the question whether the arbitrator should have held an *in loco* inspection, the first point to make is that when Mr Bowers testified, with the aid of an aerial photograph of the premises and the location of Fisher's vehicle clearly indicated, no request was made to verify whether his observations were possible by means of an inspection. On the face of his evidence, Bowers was in an elevated position and would have been able to see Booysen and Fisher on the other side of the vehicle. It is apparent from his testimony that he might not have been able to see the lower half of their bodies but he was able to see whether either of them raised their hands and observed Fisher bending next to his vehicle. His evidence was that the only hand raised which he saw was that of Booysen. On the evidence presented, there was sufficient information before the arbitrator for him to draw inferences about what Bower could have seen. There was no reason for him to have *mero motu* taken the inquiry a step further by conducting an inspection of the site.

[23] Booysen placed much emphasis on the fact that there were no injuries recorded to his hands in his J88 report which ought to have been there if he had struck Fisher with his fist. Against that there was the evidence of Fisher and of Bowers that Booysen struck Fisher in the face, and the arbitrator also considered the improbabilities of Fisher sustaining those injuries simply because he was pushed away by Booysen in self-defence. The inferences he drew in this regard are not ones that were in any way untenable on the evidence before him.

[24] The arbitrator gave a reasoned explanation why he did not accept the claim of inconsistent treatment, and there is nothing irrational about his analysis thereof.

[25] Booysen's contention that, in effect, nobody except himself could know whether his apologies were genuine expressions of remorse, is a poor attempt to put the determination of remorse beyond the arbitrator's remit. Plainly the arbitrator was entitled and required to consider, on an objective basis, if the timing and manner in

which the apologies were made was indicative of something more than simply an attempt by Booysen to mitigate the possible consequences of his assault on Fisher.

[26] The arbitrator gave considerable attention to the mitigating and aggravating factors and clearly applied his mind to all of them. It is true that another arbitrator might have nonetheless concluded that the dismissal was substantively unfair and something less than an outright dismissal would have been appropriate. The fact that another arbitrator might reasonably differ in this respect does not render the arbitrator's conclusion reviewable. It was not unreasonable of the arbitrator to have counterbalanced Booysen's long service and previous clean record with the fact that the serious assault was premeditated, was inflicted on someone who was supposedly a good friend, and was a grotesquely disproportionate response to Fisher's remark the previous Friday, in circumstances where the employer had felt it necessary to subsequently move Fisher to a different workplace afterwards.

[27] In conclusion, it cannot be said on the totality of the evidence that the arbitrator committed any reviewable irregularity in his assessment of the evidence or his conduct of the proceedings, and the award should stand.

Costs

[28] There is virtually no merit in the review application. Were it not for the principles applicable to cost awards in these type of disputes, I would have little hesitation in awarding costs against the applicant.

Order

[29] The late filing of the review application is condoned.

[30] The review application is dismissed.

[31] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

(In chambers)