THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

CASE NO:C503/2020

In the matter between:

THE COMMERCIAL STEVEDORING AGRICULTURAL & ALLIED WORKERS UNION obo VAN WYK CLAUDINE	Applicant

and

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER SAMUELS N. O	Second Respondent
W & E DREYER BOERDERY (EDMS) BPK	Third Respondent

Date of Hearing: 29 June 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 10h00 on 21 June 2023

Summary: Application to review and set aside arbitration award – review test – reasonableness of arbitrator's decision.

JUDGMENT

R. PARKER AJ

Introduction

[1] This is an application for the review and setting aside of the arbitration award handed down by the Second Respondent dated 19 October 2020, whilst acting under the auspices of the First Respondent (the CCMA) in terms of terms of Section 145(2)(a)(i) and (ii) of the Labour Relations Act[1] under case number WECT23670-19.

Factual Background

[2] The Applicant, Ms Claudine Van Wyk, on whose behalf the Commercial Stevedoring Agricultural & Allied Workers Union (hereinafter referred to as ("*CSAAWU*") initiated this review application, was employed by the Third Respondent, W & E Dreyer Boerdery (DMS) BPK, as a contract general farm worker, on a fixed term contract for the 2019 harvesting period at a rate of R 18-00 (eighteen rand) per hour.

[3] Ms Claudine Van Wyk also resided on the farm premises where she was worked.

[4] The Third Respondent is a wine farm who exports its wines to Europe.

[5] In and during February 2019, Ms Claudine Van Wyk was visited by a Swedish journalist, who asked for an interview, to which Ms Claudine Van Wyk agreed.

[1] Act 66 of 1995 (as amended)

[6] The Interview was conducted in both English and Afrikaans.

[7] The interview was in relation to the working and living conditions of farm workers. Photographs of farm workers were taken by the journalist as part of the interview process.

[8] The interview was conducted openly and in the presence of numerous farm workers employed by the Third Respondent, who were also interviewed by the Swedish journalist.

[9] On 29 August 2019, the journalist published the interview in a Swedish Magazine called "*ARBETET".* The heading to the article read as follows:

> *"Farm Workers paying the prize for Cheap South African Wine",*
>
> And was accompanied by a photograph of Ms Claudine Van Wyk holding a payslip depicting that she earned only R 684-00 (six hundred and eighty-four rand). The content of the article seemed to somewhat create the impression that Ms Claudine Van Wyk was not being paid in accordance with the required statutory minimum wage applicable at that time.

[10] The journalist did not afford Ms Claudine Van Wyk an opportunity to proof read the contents of the article before publishing it in a Swedish magazine.

[11] The Third respondent was alerted to the content of the article by one of its Swedish clients, who demanded answers. The publication of the article tarnished the Third Respondents reputation amongst its Swedish clientele and caused the Third respondent to suffer a financial loss of 380 000 litres of wine.

[12] Subsequent to the above, Ms Claudine Van Wyk was charged as follows for misconduct:

> *"Skaad van u werkgewer se beeld, deur; Die afle van 'n valse verklaring en/of die weergee van valse inligting ten opsigte van u vergoeding gedurende*

parstyd 2019, soos gepubliseer in "ARBETET – Farm Workers paying the prize for cheap South African wine – 11/09/2019".

[13] Ms Claudine Van Wyk was subsequently found guilty on the above charge of misconduct and dismissed from the Third Respondents employ on 15 November 2019. Thereafter she referred an unfair dismissal dispute to the First Respondent on 25 November 2019 in which she sought retrospective reinstatement.

[14] Conciliation proceedings were held by the First Respondent on 10 January 2020 and upon non-resolution, referred for arbitration on 16 January 2020.

[15] The above dispute was arbitrated by the Second Respondent acting under the auspices of the First Respondent on 10 March 2020 and concluded on 02 October 2020. The arbitration award followed on 19 October 2020.

[16] During arbitration, the Second Respondent was tasked with determining whether Ms Claudine Van Wyk's dismissal was procedurally and substantively fair.

[17] The onus of proving the fairness (procedural and substantive) of the dismissal was with the Third Respondent as per Section 192(2) of the Labour Relations Act[2]

[18] In his award, the Second Respondent found the Applicant's dismissal to be both procedurally and substantively fair.

[19] Dissatisfied with this award, the Applicant (Ms Claudine Van Wyk) served a review Application on the Respondents, seeking to review and set aside the arbitration award, alternatively to refer the matter back to the First Respondent for adjudication by an arbitrator other than the Second Respondent, or the substitution of the arbitration award with an appropriate award which the court deems fit.

Issues in Dispute

[2] Act 66 of 1995 (as amended)

[20] The issue in dispute is as follows –

20.1 Was the dismissal of the Applicant (Ms Claudine Van Wyk) procedurally and substantively fair in the circumstances.

Review of arbitration awards

[21] Section 145 of the Labour Relations Act[3] reads as follows:

"(1) Any party to a dispute who alleges a defect in any arbitration proceedings may apply to the Labour court for an order setting aside the arbitration award –

a) Within 6 (six) weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or;

b) If the alleged defect involves corruption, within 6 (six) weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means:

a) That the commissioner –

i. Committed misconduct in relation to the duties of the commissioner as an arbitrator;

ii. Committed a gross irregularity in the conduct of the arbitration proceedings; or

iii. Exceeded the commissioner's powers; or

b) That an award has been improperly obtained."

[3] Act 66 of 1995 (as amended)

[22] In light of the above, I will now proceed to closely examine the relevant *provisos* of Section 145 of the Labour Relations Act[4].

Misconduct of the commissioner in relation to his duties as an arbitrator (Section 145(2)(a)(i))[5]

[23] The word misconduct is summarised as follows in Lawsa, Vol 1 (First Re-issue), at para.445*:*

> *"445.* ***Misconduct by arbitrator***
>
> *The word misconduct must be construed in its ordinary sense of wrongful or improper conduct on the part of the person whose behaviour is in question. A bona fide mistake of law or fact cannot be construed as misconduct; but if the mistake is so gross or obvious that it could not have been made without some degree of misconduct the award may be set aside, not on the ground of mistake but on the ground of misconduct, the mistake merely amounting to evidence of the misconduct. If there is an explanation for the error other than misconduct or corruption, a court would not be entitled to set aside the award in question. There is no assumption that an arbitrator knows and applies the principles of our law. Accordingly, if an arbitrator misdirects himself on the law, that in itself is no reason for setting aside the award; the parties are bound by his finding even if he errs on the facts or the law.*
>
> *An arbitrator is appointed not as the agent of the party who nominated him, but as a judge who should act impartially and should have no personal interest in the proceedings. He must dispense justice equally and impartially between the parties. Impartiality is achieved inter alia by granting both parties and equal opportunity to be heard. Where an arbitrator hears one party and refuse to hear the other, the court will interfere and set aside the award.*

[4] Act 66 of 1995 (as amended)

[5] Labour Relations Act 66 of 1995 (as amended)

Likewise, where the arbitrator fails to hear evidence of either party, the award will not be upheld unless the failure can be justified on the ground that the parties agreed that the evidence should not be led."

[24] In *Dickenson & Brown v Fisher's Executors*[6], it was held that –

"It is accordingly not misconduct for the arbitrator to be wrong in either fact or law "

[25] In Amalgamated Clothing & Textile Workers Union v Veldspun Limited[7], the court stated –

"It is not even misconduct for there to be no evidence apparent from the record that supports the award. Such an absence of evidence is merely a factor from which the inference may permissibly be drawn that the arbitrator could only have reached the decision in question as a result of misconduct."

Gross irregularity in the conduct of the arbitration (Section 145(2)(a)(ii))[8]

[26] Gross irregularity in the conduct of arbitration ordinarily relates to procedural irregularities[9], such as failure to give notice of the hearing, conducting a material part of the arbitration in the absence of a party not in default, refusing one party an opportunity to call evidence extended to the other party or excluding cross-examination of a witness on a material point.

[27] In Ellis v Morgan[10], it was held that –

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[6] 1915 AD 166 at para 174-175

[7] (1993) ZASCA 158; 1994 (1) SA 162 (AD) at 168I-169C

[8] Labour Relations Act 66 of 1995 (as amended)

[9] Lawsa, supra, para. 447

[10] Ellis v Desai 1909 TS 576 at para 581

"the irregularity is gross when it results in the aggrieved party not having his case fully and fairly determined ".

Exceeding the Commissioners powers (Section 145(2)(a)(iii))

[28] An act in excess of the commissioner's powers is liable to be set aside on review. This encompasses both going outside the terms of reference insofar as the matter in dispute is concerned, and acting beyond the powers conferred upon the arbitrator[11].

Grounds for Review

[29] In its review application, CSAAWU (Commercial Stevedoring Agricultural & Allied Workers Union) [hereinafter referred to as "the CSAAWU"] acting on behalf of the Applicant (Ms Claudine Van Wyk) raises the following reasons as grounds for its review application[12]:

1) The Second Respondent committed gross misconduct by failing to understand the reason for the dismissal and the fairness of the sanction imposed;

2) The Second Respondent failed to adopt a critical approach to the evidence placed before him;

3) The Second Respondent failed to examine the truthfulness of the comments to the journalist;

4) The conclusion reached by the Second Respondent was not one which a reasonable decision maker would have arrived at;

[11] Sections 147, S148, S149 and S150 of the Labour Relations Act 66 of 1995 (as amended).

[12] Applicants Founding affidavit pages 7 - 12

5) The Second Respondent failed to cognisance of the rule (if any) that the Ms Claudine Van Wyk was charged with;

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6) The Second Respondent failed to question why Ms Claudine Van Wyk was the only person dismissed when she was not the only person interviewed by the journalist;

7) The Second Respondent committed a gross irregularity in the conduct of the arbitration hearing as he failed to address the mutually destructive versions of evidence which was place before him;

8) The Second Respondent committed a further gross irregularity by not recording evidence that was led on sanction;

Case analysis

[29] In determining whether the Second Respondents award was right or wrong, the following principles will have to be borne in mind –

The causation test ("the but-for test ")

[30] The causation test first arose in *SA Chemical Workers Union v Afrox Ltd*[13] (hereinafter referred to as "*Afrox"),* where it was applied to determine the true reasons for dismissals. Since then, the causation test has been applied by the Labour Appeal Court (LAC) in various judgments.

[31] In terms of the causation test ("the but-for test"), one has to determine whether there is a sufficiently close causal connection *(nexus)* between the act or omission in question and the harm caused.

[32] This entails an examination of the following questions:

[13] 1999 20 ILJ 1718 (LAC)

1) Would the Applicant (Ms Claudine Van Wyk) have been dismissed, if the journalist had not published the article. If the answer is no, then the second question is one of legal causation.

2) Was the journalist's publication of the article, the main or dominant reason for the dismissal.

[33] In *Sidumo and Congress of South African Trade Unions v Rustenburg Platinum Mines Ltd*[14], the constitutional court stated –

"fairness requires a balancing of the interests of the employer and the employee ".

[34] In answering the first question in paragraph [32] above, cognisance must be taken of the following facts –

[35] In paragraph [27] of the arbitration award dated 19 October 2020, the commissioner states the following:

"in deciding the substantive fairness of the applicant's dismissal I must consider Schedule 8, item 7 of the Code of Good Practice on Dismissal. In this regard the code states that an arbitrator must consider:

Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not

- *the rule was a valid or reasonable rule or standard;*

- *the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*

[14] (2007) 28 ILJ 2405 (CC)

- *the rule or standard has been consistently applied by the employer and*

- *dismissal was an appropriate sanction for the contravention of the rule or standard ".*

[36] With reference to the above, it must be noted that Ms Claudine Van Wyk was charged and dismissed for the following act of misconduct[15]:

> *"Skaad van u werkgewer se beeld, deur; Die afle van 'n valse verklaring en/of die weergee van valse inligting ten opsigte van u vergoeding gedurende parstyd 2019, soos gepubliseer in "ARBETET – Farm Workers paying the prize for cheap South African wine – 11/09/2019".*

[36] Under oath, the Applicant (Ms Claudine Van Wyk) testified that she never gave any false information to the journalist. This statement was corroborated and confirmed by the testimony of Edgar Blaauw who testified as witness for the Applicant at arbitration proceedings.

[37] If one looks at schedule 8, item 7 of the Code of Good Practice on Dismissal, it cannot be said that the employee contravened a rule or standard, as she did not provide any false information to the journalist who interviewed her. She merely answered all the questions which the journalist posed to her during the interview.

[38] The journalist who interviewed the Applicant was not present at arbitration proceedings to corroborate or confirm any evidence.

[39] On 19 October 2019, the managing director of the Third Respondent, Mr Jacobus Andreas De Kock received an email communication from the journalist[16] stating the following -

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[15] Charge sheet, page 1 of the employer's bundle marked "R"

[16] Page 14 of employer's bundle marked "R"

"the paragraph you are referring to has since been changed as it was possible to misinterpret. It was never intended to describe the legal specifics regarding Mrs Van Wyk's employment contract, but rather the distressing situation wherein farm workers find themselves and the lack of other viable employment options they face when they are being replaced by day labourers.

Furthermore, the paragraph is not a direct quotation from Mrs can Wyk but my words to describe the situation. Any misconception therefore falls on me ".

[40] The fact that the journalist misconstrued the information provided by the Applicant, and thereafter published these incorrect facts in an article contained in a Swedish magazine is conduct for which the Applicant cannot be held accountable.

[41] The commissioner also failed to enquire from the Respondent in terms of schedule 8, item 7 of the Code of Good Practice on Dismissal, what rule in the employer's disciplinary code the Applicant was charged with, whether the rule was a valid or reasonable rule and/or standard, and if the Applicant was aware of the rule or could reasonably be expected to have been aware of the rule.

[42] It must be noted that commissioners are not expected to merely sit back and allow the parties to present their cases and not guide them to the real issues that need to be determined. There will be instances where intervention on the part of the commissioner would be necessary, whether an adversarial or inquisitorial approach has been adopted.

[43] Further to the above, the commissioner in paragraph [37] of the arbitration award dated 19 October 2020, states –

"It is more probable to accept the version of the respondent that the applicant wanted to create the perception the respondent is not paying according to NMWA. The evidence presented supports the version of the respondent that the applicant gave a false testimony to the journalist ".

[44] It must be noted that there is no evidence in support of the above statement by the commissioner. How can it be said that the evidence presented supports the version of the respondent, when the respondents main witness, the journalist was not present to testify at arbitration proceedings.

[45] It was the journalist who interviewed the Applicant, and it is thus the journalist alone who can confirm the details of the information provided to him by the Applicant (Ms Claudine Van Wyk).

[46] In light of the above, the answer to question [1] above as posed in paragraph [32]:

> *Would the Applicant (Ms Claudine Van Wyk) have been dismissed, if the journalist had not published the article*
>
> can be answered as no.

[47] Thus, we now move on to question 2 as posed in paragraph [32] above:

Was the journalist's publication of the article, the main or dominant reason for the Applicant's dismissal.

[48] When one looks at the causation test ("the but-for test") in conjunction with the facts of the dispute, it can undoubtedly be stated that if it had not been for the publication of the article by the journalist in the Swedish magazine, the Applicant (Ms Claudine Van Wyk) would not have been dismissed, and would still have been employed with the Third Respondent as a general farm worker.

[49] Question 2 can thus be answered in the affirmative.

[50] Thus, the only ground for contending that this award falls to be reviewed and set aside in terms of section 145 of the LRA [17] is that the commissioner committed a gross irregularity in the conduct of proceedings.

[51] The claimed irregularity is set to lie broadly in a wholly incorrect approach by the commissioner to his task as a result of which he did not apply his mind properly to the issues before him.

[52] Here one must have regard to the test for review as formulated by the Labour Appeal court in *Carephone (Pty) Ltd v Marcus NO and Others*[18] :

> *"It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decisionmaker between the material properly available to him and the conclusion he/she eventually arrived at? "*

[53] In applying the review test as formulated in the *Carephone* case *supra,* it cannot be said that the conclusion derived at by the Second Respondent was rational at all.

Wherefore, I have come to the conclusion that no reasonable commissioner could in the proper exercise of his duties and functions have made that award.

Conclusion

[54] As a result of the above, I find that the commissioners errors did amount to a gross irregularity in the conduct of proceedings, and that he did not properly apply is mind to the facts at hand as is required by Section 145 of the LRA[19].

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[17] Labour Relations Act 66 of 1995 (as amended)

[18] 1999 (3) SA 304 (LAC); 1998 (11) BLLR 1093 (LAC); (1998) 19 ILJ 1425 (LAC)

[19] Labour Relations Act 66 of 1995 (as amended)

[55] In the premises, the following order is hereby made

Order

1. The Applicant's review application is granted.

2. The Arbitration award of the Second Respondent acting under the auspices of the Third Respondent, under case number WECT23670-19 dated 19 October 2020, is reviewed and set aside.

3. The dispute is to be referred back to the First Respondent (CCMA) for adjudication by an arbitrator other than the Second Respondent.

4. There is no order as to costs.

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R. PARKER

Acting Judge of the Labour Court of South Africa

(In Chambers)