IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: CA17/2017

In the matter between:

SOUTH AFRICAN RUGBY UNION	**Appellant**
and	
ANDRE WATSON	**First Respondent**
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Second Respondent**
JOSEPH WILSON THEE	**Third Respondent**

Heard: **04 September 2018**

Delivered: **11 October 2018**

Summary: Test for review of arbitration award – employee dismissed after being found guilty of using abusive language which misconduct is common cause by the commissioner and Labour Court- Labour Court founding however that dismissal not an appropriate sanction and opted for a progressive discipline- Court cautioning not to construe the review test to that of an appeal- Held that: In my view, applying the principles which have been developed with regard to review in terms of s145 of the LRA, the decision to dismiss employee, given the findings which were arrived at by both the court *a quo* and the commissioner on

the charges, was unquestionably one that a reasonable decision-maker could have made on the facts of the case. The test is not whether the arbitrator's award meets the precision that might be expected from a judgment of the Labour Court. It is one thing to argue that such a mistake justifies a different result on appeal, but a very different approach must be taken, when in a case such as the present, the decision of the commissioner is the subject of a review. Labour Court's judgment set aside and appeal upheld.

Coram: Davis and Sutherland JJA and Murphy AJA

JUDGMENT

DAVIS JA

Introduction

[1] This case concerns the proper application of the test developed by the courts, whereby in terms of s145 of the Labour Relations Act 66 of 1995 (LRA), an award of an arbitrator may be reviewed and set aside.

[2] First respondent was employed by appellant as a General Manager: Executive Head of Referees as from November 1998. On 13 March 2015, he received a notice of arbitration whereby he was informed of appellant's intention to request second respondent to conduct an arbitration in terms of s188 A of the LRA following upon a series of allegations made against him. The allegations were eventually formulated as charges levelled against first respondent as set out as follows:

> '1. Grossly inappropriate and/or unprofessional and/or unbecoming and/or abusive conduct:
>
> a. In the first instance, allegedly toward participants at the High Performance Referees Camp and, in particular, the Referees, in and around November

2014 arising from the manner in which you addressed such participants, the language that you used and the attitude you displayed towards them.

b. In the second instance, when you allegedly addressed Coaches and Referees prior to the commencement of the Varsity Cup in 2014, arising from the manner in which you address the referees and coaches, the language that you used and the attitude displayed towards them.

c. In the third instance, when you alleged uttered words to the following effect or similar effect to Mr Rasta Rashivenge – *I'll fuck you up … I will kill you if you turn your back on South African … I will destroy you as I am more powerful than you know'* – on or about 28 August 2014 during discussions between two of you pertaining to contract negotiations.

2. As a consequence of the alleged conduct above and, in general, the manner in which you manage and/or deal with referees, a breakdown of your relationship with the majority of referees on the Elite and National Panel has allegedly arisen in that they are unwilling to work with you thereby leading to a situation of possible incompatibility on your part arising from such conduct.

3. Your conduct as alleged has the potential to bring the name and reputation of SARU into disrepute.'

[3] The arbitration was conducted by third respondent who found first respondent guilty on charges 1 a, b and c, and, as a consequence of this finding, determined that dismissal was the appropriate sanction. First respondent, then approached the court *a quo* to review and set aside this determination of third respondent.

[4] Sitting in the court *a quo*, Tlhotlhalemaje J found first respondent to be guilty of charges 1 a, b, c and 3 as set out in the charge sheet but ordered that the appropriate sanction was a final warning and that first respondent should be reinstated with back pay being limited to six months' salary. With the leave of the court *a quo,* appellant has approached this Court on appeal.

The factual matrix

[5] First Respondent commenced employment with appellant in November 1998. A highly successful referee, indeed the only one to have refereed two world cup finals. First respondent's relationship with his employer was placed into jeopardy following a series of incidents which I shall briefly set out in chronological order.

[6] During August and September 2014, he was involved in contract negotiations with one of appellant's referees, Mr Rasta Rashivenge. Mr Rashivenge described first respondent's management style as "bombastic, dictatorial, intimidating and not open to reason". He considered that he was "set up for failure from the system". He approached Mr Watson to discuss this treatment. He told the court:

> 'I asked Mr Watson why does he hate me so much, alright? And then I even put cold questions as if, does he want to come back because I'm black and he stopped me right there because he got infuriated and at that point Mr Watson said to me "Do you know I'll f… you up and I'll destroy you if you turn your back on South African and you do not return or you and after that I told him I had a lot of respect for him.'

[7] I should add that the witness then continued:

> 'I told him he's a great person and everything and I shook my head and I asked him why our relationship has changed and he says he doesn't hate me. Mr Watson then got up and I said lets go for a walk and then at that point he came and gave me a hug and he said he doesn't hate me.'

[8] Following this encounter, a referee's high performance camp took place on 27, 28 and 29 November 2014. First respondent addressed participants at the camp in which he consistently used foul language. According to a senior referee, Jaco Peyper, at some point during the camp, a referee asked about the fact that the selectors had not attended the camp. First respondent then uttered abusive and foul language towards the selectors and towards their mothers. First respondent continued to swear and then took an empty jar, placed it in front of him and said

words to the following effect: “This is a swearing jar, R5,00 for anyone who swears for use in the bar later.”

[9] One of the other referees, Marius Jonker testified in similar fashion:

> ‘He was, he was constantly using the “F” word in front of these ladies and which was, it wasn’t a once-off, there were several counts of this and which was inappropriate in my, inappropriate, in my view…
>
> Just because you wouldn’t expect that from a manager who is, who holds the high esteem of André Watson. He is a well-known figure and also because we had some overseas visitors and some overseas lady referees that were, and I could see that they were uncomfortable. That was my perception of the whole scenario.’

[10] He did not believe first respondent could change. As he told third respondent:

> ‘There has been some incidents where the relationship between myself and André have deteriorated in the sense that André is not a kind of guy that accepts that you challenge him. He’s not the kind of person that apologises easily and he’s a highly intelligent individual, but in my own personal experience, I found it difficult to state my case due to him blasting you off the path you know, this, my way of the highway.’

[11] In January 2015, the Varsity Cup tournament took place. At a meeting thereafter, video footage was shown to referees in which first respondent said, “this is not the way to communicate on the field and we will not communicate like that”. He then turned on one of the referees, Mr Cwengile Jadezweni, and said “I hope you learnt your lesson from that”. Mr Jadezweni felt humiliated as a young referee in front of his colleagues as a result of first respondent’s conduct.

[12] In January 2015, 14 referees and 10 others who fall within the Referees Department lodged a written grievance against first respondent. These included some of the most senior referees in South Africa. Following this grievance, Mr Jeremy Chennels, a management consultant and specialist in labour law, was

engaged to conduct an investigation into the grievances as set out in the January 2015 letter.

[13] Mr Chennels dealt with each of the grievances separately. With regard to the manner in which Mr Rashivenge was allegedly managed by first respondent Mr Chennels concluded:

> 'It is probable that Watson's style of managing his subordinates did little to assuage concerns that he did not have their interests at heart and that the decision was his alone when in fact it might well have been from powers above… [t]he perception remains that these shortcomings have been exacerbated by Watson's lack of empathy, his lack of professional input, his lack of communication to his subordinates and what is perceived his lack of interest in the development of referees in his stable.'

[14] With respect to first respondent's conduct at the High Performance Camp, Chennels concluded:

> 'All 23 grievants asserted in different degrees that they had believed as depicted in Watson's "I won't change my management style, I won't change the way I speak to you" rant at the November camp that Watson would not and could not change his fundamental style and approach to others'.

[15] Mr Chennels then concluded in respect of the allegation of intimidation:

> 'There appears to be a palpable lack of cohesion and shared vision amongst the referee body and it is at face value, a highly dysfunctional unit. It is probable that besides Watson's management shortcomings, elements of the dissatisfaction amongst referees can be attributed to organisational governance issues which are not of Watson's making. However, his overall style has done little to mitigate these frustrations.'

[16] As a result of these findings, Mr Chennels recommended that a disciplinary hearing be initiated, in particular, to determine whether first respondent's overall management style and relationship with his subordinates accorded with the

values of the organisation which had employed him. He also needed to answer the allegation that he had directly threatened Mr Rashivenge through his abusive language.

[17] The arbitration before third respondent took place in April, May and June 2015. After evaluating the evidence led before him, third respondent found, on the probabilities, that first respondent had insulted the selectors and their mothers in an egregious fashion and that he was guilty on charge 1 a. He also found, with regard to charge 1 b that first respondent had made the remarks as charged during the meeting with varsity coaches and referees and was guilty as charged. With regard to charge 1 c, third respondent held that he did not believe that "Rasta would fabricate his version and incriminate Watson falsely specially in the light that I believe that they had a good relationship."

[18] Third respondent then dealt with the remaining issue, namely the appropriate sanction for these contraventions. He posed the question as to whether the trust relationship between the employer and employee had broken down and whether incompatible circumstances had arisen. In his award, he expressly took account of appellant's disciplinary code and procedure of 01 October 2010, in particular, the provision for progressive disciplinary measures in relation to individual misconduct.

[19] He evaluated first respondent's behaviour including, taking account that at the end of their encounter first respondent had hugged Mr Rashivenge, he concluded: "I am not convinced that the trust and confidence can be restored which he himself had broken".

[20] After analysing whether first respondent's conduct may constitute possible incompatibility which he defined as an inability on the part of an employee to work "in harmony or culture with fellow employees", third respondent held, on the basis of the trust and confidence between the parties which had broken down and given that the conduct of which first respondent had been found guilty, that

these were of a sufficiently serious nature to justify the conclusion that first respondent's employment should be terminated with immediate effect.

The judgment of the court *a quo*

[21] Significantly, Tlhotlhalemaje J agreed with third respondent's findings in respect of charges 1 a, b and c. In this regard, the learned judge said the following:

> 'There can be no doubt that the conduct complained of, especially in regard to the events at both the open and closed sessions of the High Performance Camp should be viewed as grossly inappropriate, unprofessional and unbecoming. Even if the spewing of obscenities was part of "rugby culture" as alleged by Watson, the nature of the crude language used by him in the presence of foreign guest was inexcusable, and the consequences thereof, without the need for any other evidence, was to bring SARU's name into disrepute, bearing in mind that the event was hosted by it.'

[22] The learned judge then turned to the question of whether the complaints as consolidated and proved by third respondent were of such a nature that it could be justifiably concluded that the relationship between the referees and first respondent had broken down leading to a finding of incompatibility. He accepted that first respondent's management style was "vulgar, autocratic, demeaning, unprofessional and to some extent abusive". He further accepted "without reservation that Watson's general demeanour in dealing with the referees was unprofessional, uncouth and borders on the despicable as demonstrated by the events of the High Performance Camp and as further attested to by Jonker."

[23] However, with reference to appellant's own disciplinary code and procedure, Tlhotlhalemaje J found that a process of progressive discipline, should have been implemented in an attempt to correct first respondent's behaviour, particularly to determine whether first respondent could respond positively to such measures. On the basis of this evidence, it was not "reasonable for the arbitrator to conclude that Watson was incapable of changing when he had not been afforded an opportunity to do so." Hence dismissal was not the appropriate

sanction. The learned judge found that third respondent had conflated the issue of incompatibility with that of ordinary misconduct and accordingly, the sanction imposed was not one that a reasonable decision-maker could have made in the light of the evidence placed before him.

Evaluation

[24] The court *a quo* correctly determined that the key issue was whether the decision of third respondent to find that first respondent should be dismissed was one which a reasonable decision-maker could make in the light of the evidence presented. The merits of the charges levelled against first respondent were not in dispute in that it was common cause between the third respondent and the court *a quo* that first respondent had correctly been found guilty of charges 1 a, b and c.

[25] The test to be applied in this kind of dispute is the one which was set out in *Heroldt v Nedbank (COSATU as amicus curiae) (Heroldt).*[1] In their joint judgment, Cachalia and Wallis JJA gave welcome additional content to the Constitutional Court's decision in *Sidumo v Rutenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) in respect of a review brought in terms of s145 of the LRA. A review of an award issued by second respondent is permissible if the arbitrator has misconceived the nature of the enquiry or arrived at an unreasonable result. A result will be considered to be unreasonable, if it is one that a reasonable arbitrator could not reach on all the material presented to him or her. A material error of fact as well as the weight and relevance to be given to any particular fact is not in and of itself a justification for an award to be set aside on review. (para 25)

[26] This approach was followed by Waglay JP in *Gold Fields Mining South Africa (Pty) Ltd v CCMA (Gold Field):*[2]

[1] 2013 (6) SA 224 (SCA).
[2] (2014) 35 ILJ 943 (LAC) at para 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. 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 an argument to the failure to have regard to material facts have potential result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitution imperative that the award must be rational and reasonable – there is no room for conjecture and guess work.'

[27] In my view, contrary to the *dicta* in *Gold Field, supra,* the judgment of the court *a quo* unfortunately fell foul of the established test for review and thus, to a considerable extent, conflated the concept of an appeal with that of a review. The court *a quo* had found "even if the spewing of obscenities was part of rugby culture as alleged by Watson, the nature of the crude language used by him in the presence of foreign guest was inexcusable and the consequences thereof without the need for any other evidence was to bring SARU name into disrepute bearing in mind that the event was hosted by it." It had also found that "Watson's general demeanour in dealing with the referees was unprofessional, uncouth and bordered on the despicable."

[28] Why, it might then be asked would a decision to dismiss be regarded as one that a reasonable decision-maker could not make? To put it differently why would such a decision fall foul of the test as set out in *Heroldt* and *Gold Fields supra*? Two answers were proffered by first respondent's counsel, namely the one offered by the court *a quo,* namely the need for progressive discipline and secondly the conflation by third respondent of the concepts of incompatibility and misconduct.

[29] As noted, third respondent had taken account of the appellant's disciplinary code of conduct and concluded that, given the seriousness of first respondent's conduct, this was not a case where progressive discipline could be justified, particularly in the light of first respondent's insistence, until proceedings before third respondent, that he could not change together with the absence of genuine remorse. As Mr Chennels indicated in his report, first respondent had most grudgingly conceded that he might need to change his ways but he had hardly embraced the need for serious behavioural change.

[30] First respondent's counsel submitted that the facts of this case required that first respondent's alleged incompatibility demanded a careful assessment of his alleged incompatibility within the established principles pertaining to concept of incompatibility. In this regard, reference was made to *Jabari v Telkom SA (Pty) Ltd* [2006] 27 ILJ 1854 LC at paras 3-5:

> '[3] An employer is entitled, where the conduct of an employee creates disharmony, to-
>
> (a) evaluate the nature and seriousness of the problem, address same, and assist the employee to overcome his personal difficulties, and,
>
> (b) effect remedial action, and if unsuccessful, to place the employee in a position suitable to his qualifications and experience.
>
> [4] In order to prove incompatibility, independent corroborative evidence in substantiation is required to show that an employee's intolerable conduct was primarily the cause of the disharmony.
>
> [5] In determining the applicant's alleged incompatibility, it is appropriate to enquire whether the fault for the disharmony is attributable to the applicant's conduct in that, he was unable to fit within the respondent's 'corporate culture' despite attempts by colleagues and the respondent, to accommodate him and to remedy the situation or that his conduct was unacceptable or unreasonable.'

[31] In the present case, the conduct of which first respondent was found guilty by the court *a quo* had the potential to bring the name and reputation of appellant into disrepute as set out in charge 3. Furthermore, there was substantial evidence that the conduct of first respondent had caused significant problems insofar as his relationship with the other referees was concerned. By way of example, in a string of e-mails generated by a senior referee, Mr Mark Lawrence, on 05 February 2015 the following is said "there was NO trust and that we couldn't reconcile with AW (first respondent) and that the cause of action was 'probably a hearing that will occur within the next two to three weeks or AW resigns."

[32] The point of this evidence is the following: whether the third respondent accurately applied the law of incompatibility is not critical to the ultimate conclusion. The question for determination is the following: given the findings that first respondent's behaviour was of an extremely serious magnitude and utterly unacceptable not only to his employer, but also to his colleagues, could it be said that, on this evidence, a reasonable decision-maker could not conclude that a dismissal was an appropriate sanction for the conduct so approved? This is not an appeal; hence a court must be careful not to substitute its own preference for a reasoned but different finding.

[33] In my view, applying the principles which have been developed with regard to review in terms of s145 of the LRA, the decision to dismiss first respondent, given the findings which were arrived at by both the court *a quo* and the third respondent on the charges, was unquestionably one that a reasonable decision-maker could have made on the facts of the case. The test is not whether the arbitrator's award meets the precision that might be expected from a judgment of the Labour Court. It is one thing to argue that such a mistake justifies a different result on appeal, but a very different approach must be taken, when in a case such as the present, the decision of third respondent is the subject of a review.

[34] For these reasons, the appeal is upheld and the order of the court *a quo* is set aside and replaced with the following:

'*The review application is dismissed*.'

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D Davis

Judge of Appeal

I agree

_____

R Sutherland

Judge of Appeal

I agree

_____

J Murphy

Acting Judge of Appeal

APPEARANCES:

FOR THE APPELLANT:

Instructed by

FOR THE FIRST RESPONDENT: