

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1587/22

In the matter between:

SOLIDARITY

First Applicant

PIETERSE, B

Second Applicant

and

SOUTH BAKELS (PTY) LTD

First Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION, JOHANNESBURG**

Second Respondent

KHULULEKANI XAMESI N.O.

Third Respondent

Heard: 10 January 2024

Delivered: 1 March 2024

JUDGMENT

SCHÄFER-KING, AJ

Introduction

[1] The Applicants launched an application in terms of Section 145 of the Labour Relations Act¹ (LRA) to review and set aside and/or correct the Third Respondent's arbitration award under case number GAJB 20683-21 dated 21 June 2022. The

¹ Act 66 of 1995, as amended.

application was opposed by the First Respondent.

[2] In terms of the arbitration award, the Third Respondent found that the Applicant's dismissal was substantively fair and accordingly dismissed her case.

[3] The Applicants seek an order that the arbitration award be reviewed and set aside and that the award be corrected with an award that determines that the dismissal of the Second Applicant was substantively unfair and to award the Second Applicant compensation that is just and equitable.

Background

[4] Briefly, the facts of this matter are that the Second Applicant was employed by the First Respondent on 1 January 2008 as a personal assistant to the transport manager.

[5] During July 2021, the Second Applicant was appointed as an acting fleet manager. During August 2021, the Second Applicant updated the First Respondent's parking allocation list. It subsequently became apparent that the names of two black female employees namely, Kate Netshiande (Kate) and Irene Nthambeleni (Irene) had been removed from the parking allocation list.

[6] Kate and Irene subsequently lodged a grievance against the Second Applicant.

[7]

[8] Following the grievance hearing, the Second Applicant was called to a disciplinary hearing and was initially charged with three charges, one of which was withdrawn. The remaining charges were framed as follows:

'Charge 1:

Failing to act within the best interests of the Company and/or disrespect in that on the 12th of August 2021, you removed/deleted the black senior ladies from their parking bays which they occupied/used from 2016 and 2018 respectively and replaced them with two white ladies who are juniors and who had recently joined the Company making the employees feel unfairly discriminated against.

Charge 2:

Gross dishonesty in that in the grievance hearing held on the 25th and 30th of August 2021, you deliberately tried to manufacture evidence by stating that you had received a hard copy from a witness who disputed your version. When you were requested to tender the said parking list you were unable to provide it because it does not exist. You further tried to influence/induce Joseph Kgasu who was a witness to lie and cover up for you. Over above that, you influenced/induced Jaco Head of Security to provide a dishonest testimony which suited your dishonest narrative by stating that he gave you the hard copy of the old parking list which he claimed he got from another Security Guard.'

[9] Following the disciplinary enquiry, the Second Applicant was found guilty of both charges and was dismissed from the employ of the First Respondent on 23 September 2021.

[10] The Second Applicant appealed against her dismissal, which appeal was dismissed.

[11] The Applicant challenged the substantive fairness of her dismissal by referring an unfair dismissal dispute to the Second Respondent under case number GAJB20683-21.

[12] The unfair dismissal dispute was arbitrated on 26 January 2022, 7 and 8 March 2022, 25 and 26 April 2022 and 8 June 2022.

[13] The Third Respondent issued the arbitration award on 21 June 2022, which dismissed the Second Applicant's case and found that the dismissal of the Second Applicant by the First Respondent was substantively fair.

[14] The Second Applicant's grounds for review are set out in her founding affidavit, which is amplified in her supplementary affidavit. In summary, her grounds for review are that the Third Respondent:

13.1 Committed gross irregularities in the conduct of the arbitration proceedings;

13.2 Did not properly, rationally and justifiably apply his mind to the facts or the law;

13.3 Did not apply the provisions of the LRA; and

13.4 Came to a conclusion that a reasonable commissioner could not reach.

[15] I will now deal with the submissions made on behalf of the Applicant and the First Respondent.

The Applicants' submissions

[16] The Applicants' submitted that:

15.1 Despite the Third Respondent having correctly referred to the provisions of Schedule 8 of the Code of Good Practice: Guidelines in cases of dismissal for misconduct, the Third Respondent failed to properly and correctly apply the applicable test set out therein. In this regard, the Applicants contended that evidence was submitted which was uncontested that there was no formal policy or agreed procedure at the First Respondent as to how parking bays were allocated and/or amended. The First Respondent failed to submit any evidence as to what process was in fact in place to allocate and/or amend parking bays, bearing in mind that the Second Applicant had not been appointed to the position of acting fleet manager for even one month when the alleged incident occurred. The Third Respondent did not consider that the Second Applicant was still learning as to what her position entailed and how things were to be done in her department. The Third Respondent failed to understand and/or take into account that no policy and/or agreed process existed as to how parking bays were allocated and/or amended.

15.3 The Third Respondent committed a gross latent irregularity by misconceiving the nature of the enquiry before him and his duties in connection therewith;

15.4 The Third Respondent failed to apply his mind to the evidence, both verbal and documentary submitted by the Applicants and throughout his award only accepted the version of the First Respondent without any proper analysis, evaluation or consideration of the probabilities relating thereto.

15.5 The Third Respondent contradicted himself in paragraphs 67, 68 and 72 of his award in that he firstly accepted that the Second Applicant made a mistake. Then he determined that she is inexperienced and therefore at the most her conduct amounted to neglect of duties and he finally found that she was dishonest;

15.6 The Second Applicant testified that she had made a mistake, and her mistake was immediately rectified. Throughout the disciplinary process, the Second Applicant

showed remorse, a fact that should be considered in misconduct cases, which the Third Respondent failed to do;

15.7 The incident happened on 12 August 2021 and she rectified her mistake on 13 August 2021;

15.8 The Third Respondent ignored the evidence submitted by the Second Applicant and Mr Jaco Reed (Reed). The uncontested evidence of Reed was that Joseph Kgasu (Kgasu) and Reed brought the Second Applicant a parking list, however, the Third Respondent in paragraph 69 finds that Kgasu's uncontested evidence was that he did not provide a copy of the parking list to the Second Applicant. Reed's evidence was further confirmed by means of an affidavit;

15.9 The Third Respondent contradicted himself in paragraphs 70 and 71 of the arbitration award in that firstly he found that there was no dispute about whether the names of Kate and Irene were on the list but in paragraph 71 found that there was a dispute about the names being on the list.

15.10 The Third Respondent failed to take into account that there was no policy and/or agreed process by the First Respondent but still found that the Applicant failed to follow company practices and did not consult the affected employees. Kgasu confirmed that the late Mr Jan van Niekerk never consulted the employees;

15.11 The Third Respondent found in paragraph 73 that the trust relationship was broken down. The Third Respondent failed to take into account the evidence of the Human Resource Manager namely Ilze Le Roux (Le Roux) where she indicated to the Second Applicant that she was proud of her.

[17] The Applicants' submitted that had the Third Respondent applied the correct test and considered all the relevant material facts and evidence related to misconduct, he would have come to another finding. Further, had the Third Respondent applied his mind correctly he would have considered that a first instance of this mistake and/or alleged transgression by the Second Applicant is not misconduct and is not a dismissible offence.

[18] The Third Respondent further made unreasonable findings by failing to consider documents that had a material bearing on the veracity of the version of the Applicant's testimony. Had the Third Respondent considered all the material documents and evidence and applied the test for misconduct correctly, he would have

reached a different outcome.

[19] In the Second Applicant's supplementary affidavit, it was submitted that the nub of the issue is whether the Third Respondent took all evidence into account regarding the charges against the Applicant. In terms of charge 1, the crisp issue was whether the Second Applicant replaced Kate and Irene's parking with those of two white ladies and unfairly discriminated against Kate and Irene. Charge 2, the crisp issue was whether the Second Applicant manufactured a parking list and induced and/or influenced Kgasu and Reed to lie for her.

[20] It was contended that in the event that the evidence submitted does not support the charges with which the Second Applicant was charged, the Third Respondent cannot make a finding of dishonesty or fair dismissal.

[21] It was uncontested that there were no grounds for discrimination and the evidence was clear that Kate and Irene were not replaced by two white ladies, in fact, it was found that Kate and Irene were replaced with an African female and a white male.

[22] It was submitted that the First Respondent failed to prove charge 2 and that the Third Respondent failed to consider the evidence before him.

[23] Kgasu testified that the Second Applicant had asked him to tell the truth. Reed confirmed in his evidence that the Second Applicant had not asked him to lie on her behalf. As such it was submitted that the First Respondent had failed to prove that the Second Applicant had induced and/or influenced Kgasu and Reed.

[24] The Third Respondent failed to have regard to the fact that the evidence presented by the First Respondent did not substantiate the fact that the Second Applicant had manufactured evidence.

[25] The witnesses for the First Respondent had contradictory evidence and the Third Respondent failed to appreciate these contradictions. Kgasu confirmed that

there is a parking list with security whilst Carl Mbombi, the security denied that there is a parking list in the security office. Reed also confirmed there is a parking list in the security office.

[26] Irene and Kate were not in the late Jan van Niekerk's email distribution list when the parking allocation was emailed on 25 September 2019. Ilze le Roux confirmed that only the relevant people, the people that had parking bays were on the email distribution list.

[27] Kgasu confirmed that the late Mr Jan van Niekerk never consulted any employees on the changes on the parking list which is contradictory to the evidence of Irene when she testified that the late Mr Jan van Niekerk always consulted her.

[28] The Third Respondent contradicted himself in that he accepted and found that the Second Applicant made a mistake, which she rectified a day later but later found that she was dishonest. The Third Respondent ignored the Second Applicant's evidence where she disputed Kgasu's evidence that he did not give her a copy of the parking list. Reed also confirmed that Kgasu gave the Second Applicant the parking list.

The First Respondent's submissions

[29] The First Respondent contended that the award was reasonable and that the Third Respondent's conclusions on the evidence could have been reached by any other decision-maker.

[30] The Third Respondent accepted in the award that the Second Applicant made a mistake when she removed the names of the two individuals. The First Respondent submitted that this transgression of the processes involved in the allocation of parking bays was not the key question in the mind of the Third Respondent when he determined that the dismissal was fair.

[31] It was submitted that the Third Respondent:

30.1 Found that the Second Applicant was dishonest in her dealings with the First Respondent when confronted about the contents of the parking bay list;

30.2 Accepted that the trust relationship between the parties had broken down; and

30.3 Was therefore alive to the dispute he was required to determine.

[32] Kgasu's evidence that the list included the names of the two ladies and that the Second Applicant asked him to remove the names, was not disputed.

[33] The evidence before the Third Respondent was that the list of names was on the laptop of the late Mr van Niekerk and he accepted that that is where the Second Applicant found it. It was submitted that the topic is in any event irrelevant to the bigger picture of what led to the Second Applicant's dismissal.

[34] The Second Applicant stated that the names of the two ladies were not on any list, and when Kgasu's evidence was undisputed she instructed him to remove them from the list.

[35] The Third Respondent accepted that the Second Applicant made a mistake in the removal of the names. It was reiterated by the First Respondent that the misconduct that led to her dismissal was her dishonesty after the fact.

[36] The First Respondent submitted that:

35.1 The Third Respondent's award is entirely reasonable and the conclusion therein could have been reached by any other reasonable decision-maker;

35.2 The Third Respondent did not commit any irregularities to the extent that vitiates the entire award;

35.3 The award should not be interfered with; and

35.4 The crisp issue is encapsulated in paragraph 72 of the award where the Third Respondent finds that *"the Applicant acted dishonesty when she alleged to have received a parking list hard copy from Kgasu and further lied when she alleged that Irene and Kate's names were not on the parking list. This was a clear attempt to shift blame and to conceal her error of removing Irene and Kate..."*. It was submitted that the finding of the Third Respondent is unassailable and entirely reasonable and is not susceptible to review and interference by this Honourable Court.

Analysis

[37] I do not deem it necessary to extensively address the relevant tests to be applied in the proceedings such as this. The test laid down in the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² is namely as follows:

‘[110] ... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach.’

[38] The LAC confirmed in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*³ that there can be no doubt under *Sidumo* that:

‘[102] ... the reasonableness or otherwise of a commissioner’s decision does not depend – at least not solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.’

[39] The LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration*⁴, stated the applicable test as follows:

‘In short: A review court must ascertain whether the arbitrator considered the principal issue before him/he; evaluated the facts presented at the hearing and came to a

² [2007] ZACC 22; 2008 (2) BCLR 158 (CC) at para 110.

³ [2007] ZALAC 12; [2008] 29 ILJ 964 (LAC) at para 102.

⁴ [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC) at para 16.

conclusion which was reasonable to justify the decisions he or she arrived at.'

[40] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*⁵, it was held that in as much as it was necessary to scrutinize the evidence presented before the commissioner for the purposes of determining whether the outcome was reasonable, courts should nevertheless guard against the setting aside of awards which do not coincide with their own opinion on the matter and that an award shall only be susceptible to be set aside in circumstances where the outcome is entirely disconnected with the evidence, or where it is not supported by any evidence, and/or involves speculation on the part of the arbitrator.

[41] In *Nyathikazi v Public Health and Social Development Sectorial Bargaining Council and others*⁶, in assessing whether the arbitrator committed errors of fact or failed to attach weight or relevance to any particular facts, it was reiterated that:

'[21] After the decision in *Sidumo and another v Rustenburg Platinum Mines Ltd and another*⁷ and the further the explication in *Herholdt v Nedbank Limited*⁸, it is clear that our law dictates that an award delivered by an arbitrator will only be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable.'

[42] Ultimately, whether or not an arbitration award, decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues before him or her were.

[43] Applying the above principles an examination of the evidence presented at the arbitration proceedings clearly points to the fact that the Third Respondent has not

⁵ [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 13.

⁶ [2021] 8 BLLR 778 (LAC); [2012] ZALAC 11 at para 21.

⁷ 2008 (2) SA 24 CC.

⁸ 2013 (6) SA 224 (SCA).

properly rationally and justifiably applied his mind to the facts and evidence presented before him and has not taken all the evidence presented before him into account.

[44] The material charge which led to the dismissal of the Second Applicant was gross dishonesty. It would appear from paragraph 72 of the arbitration award that the Third Respondent found that the Applicant had acted dishonestly when she claimed to have received a parking list hard copy from Kgasu and further lied when she alleged that Irene and Kate's names were not on the parking list which she received from Kgasu. On reading this finding, the Third Respondent accepted Kgasu's evidence but failed to take into account the evidence of Reed and the Second Applicant.

[45] In this regard, the Second Applicant testified that on 4 August 2021, Kgasu and Reed attended at her office at the same time, and each furnished her with parking lists. Her version of events was corroborated by Reed. Reed testified that he had taken a parking allocation list from the window in the security room and he took the list to the Second Applicant's office where he found Kgasu standing with another list which was handed to the Second Applicant.

[46] It was further the evidence of Reed that the Second Applicant had not asked him to lie. She had told him to tell the truth.

[47] The Third Respondent also erred in finding that the Applicant had not followed company practices and had not consulted the affected parties when the evidence was clear there was no formal company policy or practice in place for the allocation of parking bays.

[48] The crux of the matter as contended by the First Respondent is charge 2: gross dishonesty.

[49] In the case of *DRS Dietrich, Voigt & MIA v Bennet CM N.O and Others*⁹, the LAC distinguished between conduct resulting from an error or negligence and conduct which is intentional. Intentional conduct would amount to dishonesty.

⁹ [2019] ZALAC 2; (2019) 40 ILJ 1506 (LAC).

[50] In my view, there is no evidence that the conduct of the Second Applicant was intentional and she cannot be said to have been dishonest. Further, she showed remorse. I am of the view that the Third Respondent failed to assess and consider all of the evidence presented to him. A reasonable commissioner could not have found the Second Applicant guilty of dishonesty as charged.

[51] In *Nedcor Bank Ltd v Frank and Others*¹⁰, the LAC held that dishonesty entails “a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently”. The court also held that the term implies intention on the part of the employee; just as one cannot steal negligently, negligence, however gross, cannot give rise to a charge of dishonesty.

[52] Glaringly absent from the arbitration award is an assessment of the versions of the credibility of the witnesses and the inherent probabilities of the versions presented.

[53] The Third Respondent failed to take cognisance of the material evidence placed before him and failed to assess the totality of the evidence presented. It was incumbent upon him to make credibility findings and to state why he accepted one version and rejected another, which he failed to do. Had he done so, he would not have accepted the evidence of Kgasu and would have accepted the evidence of the Second Applicant and Reed.

[54] The arbitrator was required to make a factual adjudication on the issue of misconduct and he had to do that by considering and assessing all the facts placed before him. He failed to do that. The evidence of both Kgasu and Reed was that the Applicant had asked them to tell the truth, accordingly the First Respondent had not discharged the onus of proving that the Second Applicant was grossly dishonest. Given the evidence presented, I am also not convinced that the trust relationship had broken down irretrievably.

¹⁰ [2002] ZALAC 11; (2002) 23 ILJ 1243 (LAC) at para 15.

Conclusion

[55] I am of the view that the Third Respondent did not properly, rationally and justifiably apply his mind to the facts before him and did not come to a conclusion that a reasonable commissioner could reach.

[56] I have considered the grounds for review. The ultimate question is whether viewed holistically, the decision taken by the Third Respondent was reasonable based on the evidence placed before him.

[57] After perusal and consideration of the arbitration award, the record of the arbitration proceedings (which includes a transcript of the proceedings and all documents relied upon at the arbitration proceedings) and the grounds for review, the Third Respondent's finding that the dismissal of the Second Applicant by the First Respondent was substantively fair, is disconnected from the evidence presented and is not reasonable.

[58] The Third Respondent failed to consider the central dispute, ignored relevant evidence and failed to take into account all of the evidence. He rejected the Second Applicant and Reed's evidence without a proper analysis and evaluation thereof.

[59] Whether the award stands to be set aside now has to be determined by the reasonableness of the outcome. This court can only intervene if the award represents a decision that no reasonable decision-maker could come to on the available evidence. It must be determined whether the award can nevertheless be sustained.

[60] I am not persuaded that the outcome of the award can be sustained. It is unreasonable and not a decision that a reasonable decision-maker could have reached.

[61] The Applicant seeks an order that the arbitration award be reviewed, set aside and corrected with an award that determines that the dismissal of the Second Applicant was substantively unfair and to award the Second Applicant just and equitable compensation.

[62] In my view, the most appropriate remedy would be to substitute the arbitration award with an award that the dismissal of the Second Applicant by the First Respondent was substantively unfair and to order the First Respondent to pay the Applicant an amount equal to 6 (six) months compensation.

Costs

[63] The arbitrator got the award wrong. The First Respondent was entitled to defend an award in its favour and should not be punished. Therefore I make no order as to costs.

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

Order

1. The arbitration award under case number GAJB 20683-21 dated 21 June 2022 is reviewed and set aside.
2. The arbitration award is substituted with the following:
'The dismissal of the Second Applicant by the First Respondent is substantively unfair and the First Respondent is ordered to pay the Second Applicant an amount equal to 6 (six) months compensation (6x R24,763.00).'
3. There is no order as to costs.

L Schäfer-King

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: N. Ras
Instructed by: Solidarity

For the First Respondent: A.J. Posthuma
Instructed by: Snyman Attorneys