



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1621/21

In the matter between:

BRIDGE SERVICE AND PANEL (PTY) LTD

Applicant

and

FERNANDO KAMIRO NHAMBE

First Respondent

TANYA ROBERTS-KRUGER N.O.

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 30 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 2 April 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] In this opposed application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner) acting under the auspices of the third respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). In the award, the Commissioner found that the dismissal of the first respondent, Mr Fernando Nhambe (Nhambe) was substantively unfair and had further ordered his retrospective reinstatement, together with full back-pay from the date of dismissal.

Background:

[2] The applicant is in the business of vehicle panel beating. Nhambe was employed by the applicant in its Workshop on 1 February 2017 as an Assembler. He was suspended on 11 June 2020 and further notified to attend a disciplinary enquiry scheduled for the next day (12 June 2020), to answer to allegations of dishonesty and attempted theft.

[3] The outcome of the disciplinary enquiry¹ in terms of which Nhambe was dismissed is undated. However, on 17 June 2020, he was informed of his dismissal in correspondence that indicated that the hearing was held on 16 June 2020 (a public holiday).

[4] Following his dismissal, Nhambe had initially referred a dispute to MIBCO. The dispute was however been transferred to the CCMA. After a default award and a rescission ruling in that regard, the dispute was ultimately re-scheduled for a hearing on 24 June 2021, and it came before the Commissioner, resulting with the impugned arbitration award.

The proceedings and evidence before the Commissioner:

¹ Pages 64 – 70 of the Index to the Record.

[5] Nhambe's duties as an Assembler included having to assemble and repair vehicles that were brought into the applicant's workshop. In May 2020, he was allocated a vehicle under job number 976 to repair, which included having to replace parts on that vehicle. Amongst the parts he was required to replace was a sliding door handle. The process of acquiring and replacing parts involved making a requisition at the applicant's stores department, which required a job number. Once the vehicle part was acquired, the storeroom would inform the person (Assembler, Technician or Panel-beater) who had requested it. That person would then collect it from the storeroom and sign for it, indicating that he had received it in accordance with the job number.

[6] The evidence of Mr Sharab Mane, the applicant's Workshop Manager was that Nhambe after being assigned the vehicle under job 976, had in the process of assembling and repairing it, requested a new sliding door handle from the stores. This part was ordered as requested and issued to Nhambe. After he had completed the job, the vehicle was then parked in the applicant's yard, where the owner was expected to fetch it. Nhambe's completion of the job on the vehicle took place during the National Lock-down resulting from the Covid-19 pandemic. The owner could not fetch the vehicle, and had only done so a month after the lock-down measures were eased.

[7] The owner of the vehicle came and upon inspecting it, had discovered that the sliding door of the vehicle did not open from the outside. A supervisor, Mr Jacob Samson, was alerted to the problem and the vehicle was taken back to the workshop. At the time, Nhambe was busy working on another vehicle, and another Technician was requested to assist. This Technician upon inspecting the door handle then requested a new sliding door handle from the stores department. When processing the request and having entered the details of the vehicle into a system, the Storeman discovered that the same vehicle part was previously requested, was issued and collected by Nhambe.

[8] Following investigations, Nhambe was then confronted and asked whether he had replaced the door handle. He had confirmed that he had indeed ordered and received the new part. He had however insisted that upon receiving the door handle,

he had fitted it into the vehicle in question. Mane further testified that despite a new handle having been ordered and received, an old broken second hand part was instead fitted into the vehicle, hence it was found by the owner not to be in working condition. Mane contended that if there were problems with the new part that Nhambe had received from the stores, the procedure would have been to return it to the stores for it to be returned to the supplier for an exchange or a credit note. This was however not done.

[9] Mane further testified that the applicant had experienced a problem of theft at the workshop, and that discussions were held with all the employees on a daily basis in meetings. The applicant had even drafted and implemented a policy that prohibited workshop staff from going into the storage yard where parts could also be obtained. The yard area was also closely monitored by security, who kept a record of any parts that were taken, and employees could not access the yard without permission from either a supervisor or a manager.

[10] Under cross-examination, and when it was put to him that the Quality Controller had checked the vehicle after it was repaired and was satisfied, Mane's contention was that the Quality Controller did not have access to the system to check what part of a vehicle was replaced or repaired. Mane contended that the Quality Controller may have checked and found that the sliding door of the vehicle was working properly, but when the customer came to collect it, the door was not working. Mane further disputed Nhambe's version that the old door handle after being retrieved was not shown to him at the time that the vehicle owner had complained. Mane conceded that he could not think of how the new sliding door part had left the premises when there were security measures in place at the main entrance and exit points of the premises.

[11] Samson also testified that Nhambe reported to him as he was his direct supervisor. Samson had assisted the owner of the vehicle when he came to collect it and discovered the problem with the door handle. He confirmed Mane's evidence as above and also added that when Nhambe was confronted, he had suggested that the amount of the new door handle could be deducted from his salary. According to Samson, this indicated that Nhambe had acknowledged guilt.

[12] Mr Adeer Mohunlal, the Storeman confirmed that he had issued the new sliding door handle to Nhambe after he had presented his job card. When the same part was again requested on the same vehicle with the same job card, the system had prevented him from processing the issuing of the part. He testified that upon examination, the part that was fitted into the owner's vehicle was broken and/or was second-hand, and could not have been issued from the stores. He further confirmed that Nhambe did not return the new part that was issued nor reported it as faulty.

[13] Nhambe's evidence was that having obtained the new part from the Storeman, he had fitted it into the vehicle assigned to him. The workmanship on the vehicle was subsequently passed by a Quality Controller before it was parked in the yard for collection. As a result of the national lock-down resulting from Covid-19, the workshop had closed for a month. The owner of the vehicle subsequently came to collect the vehicle. It was at that stage that Nhambe was then informed that the sliding door that was fitted on the vehicle was not working. He had explained that he had indeed requested and received the part from the storeroom, and also fitted it into the vehicle.

[14] Nhambe further testified that he had requested to see the door handle that was taken from the vehicle and the new one that was fitted. His request was however refused, on the basis that management could also not distinguish between the old and new door handle. He conceded he had offered to pay for the handle or be issued with a warning as he was trying to save his job, even though he had insisted that he had fitted the new part in the vehicle.

The Commissioner's findings:

[15] The Commissioner in analysing the evidence accepted that the incident in question was reported on 11 June 2020, and that the vehicle was indeed parked for over a month after it was repaired before it was collected by the owner. The Commissioner found that during the lock-down, the vehicle was left unattended for about a month, and anyone could have removed the new part from the vehicle and replaced it with an old one.

[16] The Commissioner concluded that the applicant (employer), could not explain as to what could have happened to the vehicle part during the period of lock-down, nor could it demonstrate that it was Nhambe that had removed the new part from vehicle and out of the premises. Accordingly, the Commissioner concluded that the applicant did not discharge the onus of proving that the dismissal was substantively fair.

Grounds of review:

[17] The applicant contends that the Commissioner misdirected herself in that she failed to properly consider the evidence before her. In this regard, it is contended that the Commissioner ignored or failed to appreciate and understand the evidence led; misapplied her mind when she required the applicant to demonstrate that the trust relationship was broken; and failed to apply her mind to the facts and the evidence. The applicant further contends that the Commissioner committed misconduct in the proceedings by failing to advise its representative at the hearing to apply for a postponement when it was indicated that one of its witnesses was not available to testify due to ill-health.

[18] Nhambe in opposing the review application contends that the applicant has not established any defect in the arbitration proceedings. In submissions made on his behalf, it was contended that the review application was without merit, since the applicant failed to demonstrate that Nhambe was guilty of the allegations preferred against him.

The legal framework and evaluation:

[19] The test on review is well-known. The primary enquiry before the reviewing Court is whether the conclusion arrived at by the commissioner is one that a reasonable decision-maker could not have reached based on the material before him

or her.² In *Herholdt*, it was held that the test on review is stringent, as it ensures that awards are not lightly interfered with, and that emphasis is on the result of the case rather than the reasons for arriving at that result. The Supreme Court of Appeal (SCA) reiterated that on the *Sidumo test*, there would be justification to set aside an award on review if the decision was entirely disconnected with the evidence, or was unsupported by any evidence, and involved speculation by the commissioner³.

[20] In order for the commissioner to determine the fairness of the dismissal she was required to determine whether a misconduct on which the decision to dismiss was based, was indeed committed. In this regard, it has also been held in *Gold Fields*⁴, that a commissioner in dealing with the matter with the minimum of legal formalities, is also required to act fairly in the determination of unfair dismissal disputes, by affording the parties a fair trial in the sense that they are accorded their right to have their cases fully and fairly ventilated.

[21] To the extent that the applicant had contended that the Commissioner committed a reviewable irregularity by not advising its representative at the proceedings that he could seek a postponement as a result of one of the witnesses being unavailable due to ill-health, this ground is indeed meritless. This is so in that the applicant's representative had after the evidence of the three other witnesses was finalised, indeed informed the Arbitrator that a further witness was not available due to ill-health. As can however be gleaned from the transcribed record, the representative had upon being asked by the Commissioner whether he was 'comfortable' in closing his case without that witness, responded in the affirmative⁵.

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110. See also *Herholdt v Nedbank Ltd and Congress of South African Trade Unions (Amicus Curiae)* [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25, where it was held;

"... A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated in section 145 (2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

³ At para 13.

⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para [20]

⁵ See page 160 of the transcribed record at lines 11 – 20, and page 161, lines 6 – 7.

[22] There is therefore no basis for a conclusion to be reached that the Commissioner was not even-handed or was required to provide a 'helping hand' to the applicant's representative. If ever any party needed a helping hand, it was Nhambe who was representing himself at those proceedings.

[23] In relation to the substantive issues and related grounds of review, the primary enquiry before the Commissioner was whether there was conduct on the part of Nhambe as alleged by the applicant, that had demonstrated that he had acted in a dishonest manner or that the conduct amounted to attempted theft.

[24] In *SASBO-The Finance Union and Another v Standard Bank and Others*⁶, it was held that dishonesty as an aspect of misconduct, is a generic term embracing all forms of conduct involving deception. Dishonesty was defined as a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. The Labour Appeal Court (LAC) further held that deceitfulness could manifest itself in various forms, which included *inter alia* providing false information, pilfering, theft, and fraud. The LAC reiterated that the fiduciary duty owed by an employee to the employer generally rendered any dishonest conduct a material breach of the employment relationship, thereby justifying summary dismissal. The LAC had held that even though dismissals for dishonesty should be upheld, it was not an invariable rule that offences involving dishonesty necessarily incurred the supreme penalty of dismissal. The facts of every case must be assessed and the mitigating features taken into account.

[25] Stripped of all other side issues, the common cause facts before the Commissioner were that Nhambe had indeed ordered and received the vehicle part in question. He had insisted that he had replaced the old part with a new part, and the vehicle was parked in the yard which was under strict security controls. The vehicle was quality checked and no issues arose from that process. There was no evidence presented by the Quality Controller to confirm whether the door handle was repaired or replaced, or the nature of the quality inspection that was performed. All

⁶ [2022] ZALAC 100; (2022) 43 ILJ 1794 (LAC); [2022] 10 BLLR 934 (LAC) at para 17 – 18.

that was proffered by the applicant was that it was not the function of the Quality Controller to know or check whether a part was replaced, repaired, and that his functions were more directed at the roadworthiness of the vehicle. This evidence was however unhelpful and did not advance the applicant's case any further. The Commissioner could not simply accept as given, that the Quality Controller's task was limited, and did not include checking whether parts that were supposed to be repaired were indeed repaired.

[26] The Court is prepared to accept Nhambe was made aware that there was a problem with the door handle when the owner came to collect the vehicle. Nhambe could not dispute whether a new handle was fitted into the vehicle when the owner raised concerns, as he could not be called at the time as he was busy with another vehicle. Even though the Court is prepared to accept that indeed a new door handle had to be fitted in when the owner came to fetch the vehicle, there was nothing to gainsay the fact that no one knew what could have happened to the initial door handle that Nhambe had replaced on the vehicle. This was despite the security measures in the applicant's yard where the vehicle was parked. Furthermore, on the applicant's own version, when lockdown was effected, no one had access to the premises during that period except security personnel. Even if it might have been so, there appears to have been no evidence placed before the Commissioner as to whether any investigations were done with the security personnel, to enquire what may have happened in the yard during the period of lock-down. The nature of the allegations against Nhambe were serious enough to require more than a perfunctory investigations into the matter rather than reliance on conjecture.

[27] In essence, what was before the Commissioner was to a large extent, circumstantial evidence from which the applicant had concluded that Nhambe did not replace the door handle and had in effect 'attempted to steal' the new part. This was despite the fact that it is not known how the 'attempted theft' of the new vehicle part took place or what had happened to the new part.

[28] In cases such as these, where on the facts it is apparent that the evidence relied upon is clearly circumstantial, the onus is discharged if the inference advanced is the most readily apparent and acceptable inference from a number of possible

inferences. Furthermore, the inference relied on should be drawn from, and be consistent with the objective proven facts, and not be based on a mere speculation⁷. It would further be recalled that in *Herholdt*, the SCA warned that on the *Sidumo test*, there would be justification to set aside an award on review if the decision was 'entirely disconnected with the evidence or was unsupported by any evidence' and/or involved speculation by the commissioner.

[29] Even though the Commissioner did not in her analysis specifically mention that what she was confronted with was circumstantial evidence (an issue that cannot be held against her or lead to a conclusion that the nature of the enquiry may have been misconceived), she had nonetheless concluded that the applicant did not discharge its onus on the basis that since the vehicle was left unattended for a month whilst the business was on lockdown, anyone could have removed the new door handle from the vehicle and replaced it with a broken one. This conclusion in my view cannot be said to have been far-fetched, particularly since on the applicant's version, entrance into the yard was prohibited or strictly controlled.

[30] The only objective proven facts were that Nhambe was working on the vehicle, had ordered and received a new door handle when repairing the vehicle, and upon completing the job, the vehicle was parked for over a month in the yard as a result of the national lock-down. What this means is that there are effectively possible two scenarios from which plausible inferences could be drawn. The first is that contrary to Nhambe's contentions, the new part was not fitted into the vehicle as at the time he had completed the repairs and the vehicle it was parked in the yard. If this is indeed the case, an inference to be drawn would be that he had not replaced the old door handle or if he did, he had replaced it with an old one. As to what had happened to the new part is a matter of speculation in the absence of any evidence that he had left the premises with the new part. On the legal principles set out

⁷ See *AA Onderlinge Assuensie Assosiasie Bkp v De Beer* 1982 (2) SA 603 (A); See also *S A Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at para 35, where it was held;

'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible, conclusion from among several conceivable ones" when measured against the probabilities.'

elsewhere in this judgment, the process of inferential reasoning cannot be made from that speculation, as it cannot be consistent with all the proved facts.

[31] The second scenario is that Nhambe did indeed fit in the new part in the vehicle, which was however removed at some stage during the absence of everyone at the premises or the yard during the one month of lock-down as the Commissioner had found. There was no evidence placed before the Commissioner as to whether enquiries were made with the security personnel left at the premises during the lock-down period, to verify that indeed no one accessed the yard area at any time between the vehicle having been parked there and when the premises were opened for business in June 2020. As the Commissioner had in the absence of any other evidence concluded that anything could have happened during the lock-down, and further in the absence of any evidence to demonstrate that Nhambe had removed the new part from the premises, an inference cannot be drawn that he had removed it when measured against the probabilities. In the end, whether the Commissioner relied solely on the test of balance of probabilities, or ought to have adopted an inferential reasoning, the nature of the outcome would still have remained the same, i.e., that there was no basis for a finding that misconduct was proven.

[32] The applicant sought to place emphasis on the fact that Nhambe had suggested to Mane that he would pay for the part, and contended that this was an admission of guilt. This contention is misplaced in that what Nhambe had said was that he merely meant to save his job, not that he admitted guilt. In any event, this issue was not even raised with him during his cross-examination. It was instead raised with Samson in his evidence. At no stage was it ever put to Nhambe that his offer to pay for the part or be issued with a warning was an admission of guilt, and it was not for the Commissioner nor for this Court to draw negative inferences from his offer to pay for the part.

[33] The applicant further alleged that the Commissioner had made a finding that it (applicant) failed to prove that the trust relationship with Nhambe was broken down. This is not correct from the reading of the award. All that the Commissioner had found was that the applicant failed to discharge the onus to prove the

substantive fairness of the dismissal, and further that it failed to prove that Nhambe was the person responsible for removing the vehicle part.

[34] Even if the issue of a broken trust relationship was to be addressed, it could only have arisen where a finding was made that Nhambe had indeed committed the alleged misconduct. Even then, on the principles set out in *Impala Platinum Ltd v Jansen and Others*⁸, whether a trust relationship is broken or not does not require evidence to be led in that regard. It is the gravity of the alleged offence that is determinative of whether a trust relationship was intact or not, and whether a sanction of a dismissal was appropriate. These questions did not arise in this case in view of the fact that the applicant had not discharged its onus in demonstrating that the allegations of dishonesty or attempted theft were proven.

[35] In the end, I am satisfied that in line with the approach in *Goldfields*⁹, the Commissioner dealt with the dispute before her with the minimum of legal formalities, and employed a process that gave all the parties a full opportunity to have their say in respect of that dispute. The Commissioner further properly identified and understood the nature of the dispute she was required to arbitrate, and dealt with the substantial merits of the dispute. Based on the evidence before her, the Commissioner thus arrived at a decision that cannot be said to be entirely disconnected with the evidence, or was unsupported by any evidence, and/or involved speculation by her. Clearly the decision arrived at is one that another decision-maker could reasonably have arrived at based on the material before her. It follows that the arbitration award is unassailable and the review application ought to be dismissed.

[36] Costs in this Court do not follow the result as suggested by the applicant. Costs are determined in accordance with the requirements of law and fairness as dictated by the provisions of section 162 of the LRA.

⁸ [2017] 4 BLLR 325 (LAC) at paragraphs 13 and 15.

⁹ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20.

[37] Nhambe was compelled to defend his favourable award inasmuch as the applicant was entitled to approach the Court with its review. Nhambe as submitted, is however out of pocket when he had to defend his favourable award, and in circumstances where there that award was unassailable. There was further no suggestion that he had found an alternative means of income since 2020 to have been able to fund his litigation. In the circumstances, the requirements of law and fairness dictate that the applicant be burdened with the costs of this application.

[38] Accordingly, the following order is made;

Order:

1. The application to review and set aside the arbitration award under case number MINT 72438 issued by the second respondent is dismissed with costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Ad. TM Sadike, instructed by Oosthuizen, Du Toit, Berg & Boon (ODBB) Attorneys.

For the First Respondent: Adv. N Jongani instructed by Mphatlalazana Attorneys.