



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR1288/21

In the matter between:

**EXXARO COAL MPUMALANGA (PTY) LTD
(MATLA COAL)**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

NKGOENG W.N. N.O.

Second Respondent

MOKGWABONE, A

Third Respondent

Heard: 25 April 2024

Delivered: 29 April 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 29 April 2024.

JUDGMENT

MAKHURA, JIntroduction

- [1] Exxaro Mine Mpumalanga (Pty) Ltd (company) launched this application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the arbitration award (award) issued by the second respondent (commissioner) on 19 May 2021. In terms of the award, the commissioner found the dismissal of the third respondent (employee) to be substantively unfair and ordered reinstatement, without back pay.
- [2] The application is opposed by the employee. The employee's answering affidavit was delivered three months late. He seeks condonation for the late delivery of his answering affidavit.
- [3] In terms of item 11.4.2 of the Practice Manual², where the applicant does not object to the late delivery of the answering affidavit within 10 days of receipt of the answering affidavit, it is not necessary for the respondent to apply for condonation. The applicant did not object to the late delivery of the answering affidavit. Therefore, there was no need for the employee to apply for condonation.

Material facts

- [4] The facts leading to the dismissal of the employee are largely uncontested. The employee was employed by the company as a Plumber Artisan. He reported to Ferdinand Malcolm Pieterse (Pieterse), the Maintenance Foreman. He was charged with one allegation of misconduct – unauthorised possession of company property in that on 22 April 2019, he removed the company's items without permission.
- [5] It is common cause that on 22 April 2019, the employee was seen by Caiphus Mbedzi (Mbedzi) loading 12.5 kg of sugar, a box of Five Roses Tea and powdered

¹ Act 66 of 1995, as amended.

² Practice Manual of the Labour Court of South Africa, effective 1 April 2013.

milk on a golf cart. Mbedzi was going to the store room when he saw the employee. The employee, so Mbedzi testified, was with another colleague, Lucia Riba. After loading the items, they drove off. The employee was operating the golf cart.

[6] Mbedzi did not speak to the employees and proceeded to the store room. In the store room, he found Fortune Maimela (Maimela). Maimela was employed as a spray painter. Mbedzi asked Maimela about the items that were being loaded on the golf cart and where the employee and Riba were taking them to. Maimela was allegedly aggressive and essentially told him that he did not know. Mbedzi left Maimela and continued with his duties.

[7] On 23 April 2019, Mbedzi reported the incident to his line manager. The line manager then called Mbedzi and Maimela to explain the incident. Maimela apologised to Mbedzi for the manner in which he spoke to him the previous day and informed Mbedzi and his line manager that the items that were loaded by the employee belonged to him.

[8] Mbedzi's evidence was that he did not know where the items came from and where they were delivered. He however testified that when items are moved from one area to another, there must be permission in writing signed by the senior or manager.

[9] The second witness for the company was Pieterse. He testified that he was the complainant during the disciplinary hearing and that he was the employee's direct supervisor. He was not at work on 22 April 2019 and therefore could not testify about the incident.

[10] Pieterse's evidence of his relationship with the employee was as follows:

'APPLICANT REP: Your understanding and relation of him, is he a good employee, a bad employee?

MR PIETERSE: He is a good employee.

APPLICANT REP: Did these actions ruin the trust relationship between you to a point that you can never trust him again?

PIETERSE: No.

APPLICANT REP: So you still trust him as an employee, he is still a capable employee.

PIETERSE: Yes I do.

APPLICANT REP: Still trustworthy, you would still trust his word if he spoke to you and he said maybe I am sick today, I cannot come to work today, because I am sick, would you trust it?

PIETERSE: Yes.'

[11] Later on in his evidence, Pieterse was asked about his view should the employee be found to have removed the items without permission again, even if he was not aware that there was no permission granted to move the items. His response was that this would ruin the relationship and he would not trust the employee.

[12] The employee's evidence was that he worked for the company for about 15 years. On 22 April 2019, whilst driving past the central engineering section where Maimela worked, Maimela called and asked him to load the items and deliver them to the car park. He obliged, loaded the items and delivered them as requested. He then continued with his normal duties. He said that had he known that Maimela was not allowed to ask him to move the items, he would not have moved them. He testified that the job cards are issued when big items such as furniture are removed from the company premises.

[13] The commissioner found that:

'Probabilities are that the applicant removed items belonging to the company without authorisation. I am saying so because it was not disputed that he is the one who loaded them on the gold (sic) cart and took them to the car park. However, the applicant disputed the involvement of Lucia. According to him, he was alone

when the incident happened. This is contrary to an attempt by Mr. Mahlangu, his representative, to ambush the respondent by introducing inconsistent (sic) at the 11th hour, which I have declined.

However, even if I accept the respondent's contention and conclude that the applicant is guilty as charged, it does not automatically end my enquiry into the fairness of the dismissal.'

- [14] The commissioner found that the employee did not suspect any foul play on the part of Maimela and that he did not collude with Maimela to defraud the company. The commissioner then concluded that dismissal was not an appropriate sanction.

Review grounds

- [15] The company contends that the commissioner committed misconduct and gross irregularities and failed to apply his mind in his determination of the issues in dispute and thereby denied the company of its right to a fair hearing.
- [16] Specifically, the company criticised the commissioner's findings that there was no collusion. Further, the company contends that the employee contradicted himself insofar as it was alleged that he was with Riba on the day of the incident and that the commissioner failed to take this contradiction into account in his assessment of the appropriateness of sanction.
- [17] The company further contends that the commissioner misconstrued Pieterse's evidence and failed to apply his mind to the totality of facts and circumstances relating to the dismissal.

The review test

- [18] The test to review an award is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.³ The commissioner's award is reviewable if it is "one that a reasonable decision maker could not reach".⁴ The Labour Appeal Court

³ [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

⁴ *Ibid* at para 110.

(LAC) held that this is a stringent test that will ensure that awards are not lightly interfered with.⁵

[19] Numerous judgments subsequently expanded on this test.⁶ In *Duncanmec (Pty) Ltd v Gaylard NO and others*⁷, the Constitutional Court clarified that:

[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.

[43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[20] In *Makuleni v Standard Bank of South Africa Ltd and Others*,⁸ the LAC, reaffirming the *Mofokeng* decision above, also reminded the reviewing court not to act as a court sitting on appeal:

[4] ... The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

⁵ *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.

⁶ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] ZASCA 97 at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) at paras 16 – 20; *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC) at paras 31 – 33; *South African Rugby Union v Watson and Others* [2018] ZALAC 57; (2019) 40 ILJ 1052 (LAC).

⁷ (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

⁸ [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC) at para 4.

Evaluation

- [21] To prove the charge of unauthorised possession of company property, the company had to establish that the employee was (1) in possession of a property (2) that belonged to the company and (3) that he was not permitted or allowed to be in such possession or that he did not possess the necessary authority or permit.
- [22] Properly construed, the company's gripe with the award is that the commissioner should have found that there was collusion between the employee and Maimela and that the sanction of dismissal was justified and fair. There is no merit in this contention. First, the charge against the employee speaks for itself. Second, there was no evidence that established any collusion. Third, the complaint is against the commissioner's reasoning.
- [23] The issue before the commissioner and the evidence presented are not complicated. The company had to justify the employee's dismissal based on the reason it gave at the disciplinary hearing, and that reason was unauthorised possession of the company property. These review proceedings are limited to the issues raised and evidence led at arbitration proceedings.
- [24] The evidence led at arbitration proceedings established that the employee, on request by Maimela, loaded the items and delivered them to the car park, as per Maimela's request. Maimela, according to the company's evidence, informed Mbedzi and his line manager that the items belonged to him. There is no evidence to suggest that the items did not belong to Maimela and that the employee was aware of this fact. Both Mr Maeso for the company and Mr Groenewald for the employee agreed that there was no evidence before the commissioner to prove ownership of the items.
- [25] On the evidence before the commissioner, the items, according to Mbedzi's evidence, belonged to Maimela. The onus was on the company to prove ownership. It failed to do so. The employee cannot therefore be found guilty of the charge.

- [26] Even if the items did not belong to Maimela and it is accepted that they belonged to the company, as it appears to have been assumed in this case by the commissioner, there was no evidence to establish that the employee removed the items with full knowledge that they belonged to the company and not Maimela, and significantly, that Maimela was not authorised to remove them.
- [27] The employee did not dispute that he was in possession of the items. Even if the possession was unauthorised, on the facts and evidence, I see no reason to interfere with the commissioner's decision that the sanction of dismissal is not appropriate. The commissioner understood the enquiry before him. His decision is supported by reasons. The commissioner was persuaded that the employee did not suspect foul play and that he was not acting in collusion with Maimela. Further, the direct evidence of Pieterse was that the actions of the employee did not ruin their relationship and that the employee is still trustworthy. It is immaterial whether this Court agrees with the commissioner or not or that another decision-maker could have found differently.
- [28] The decision reached by the commissioner falls within the bands of reasonableness. The application stands to be dismissed
- [29] In the premises, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. M.G. Maeso of Shepstone & Wylie

For the Third Respondent: Adv. D.J. Groenewald

Instructed by: Cronje De Waal-Skhosana Inc.

LABOUR COURT