

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1671/21

In the matter between:

SAMWU OBO TJ KGWARE

Applicant

and

MANGAUNG METROPOLITAN MUNICIPALITY

First Respondent

SA LOCAL GOVERNMENT BARGAINING COUNCIL

Second Respondent

JAN LE FLEUR N.O.

Third Respondent

Heard: 8 May 2024

Delivered: 10 May 2024

Summary: Application to review and set aside arbitration award. Material errors vitiating the award. Outcome was one no reasonable decision maker could have arrived at.

JUDGMENT

DANIELS J

Introduction

[1] The applicant brought an application to review and set aside an award issued by the third respondent. The review was opposed by the first respondent.

[2] The matter was enrolled for hearing, on the opposed motion roll, on 8 May 2024. When the first respondent's representatives failed to arrive, I directed my secretary to inspect the court file to determine whether the notice of set down had been properly served. When my secretary confirmed that the notice of set down had been properly served, I directed her to telephone first respondent's attorney and advise him or her that the matter would stand down to 12h00 to allow a member of the first respondent's legal team (counsel was on brief) to attend court. The first respondent's attorney was phoned, at approximately 10h30, and informed that the application would be heard at 12h00. First respondent's attorney informed my secretary that she was unavailable. When there was still no appearance at 12h00, the application was argued in the absence of the first respondent. While the court papers filed by the first respondent was taken into consideration, I did not have the benefit of oral argument from first respondent.

[3] For ease of reference, the first respondent will be referred to as "the Municipality" or "the employer." The third respondent, the arbitrator in the dispute before the Bargaining Council, will be referred to as "the commissioner" or "the arbitrator."

Background facts

[4] The applicant worked as a truck driver in the Solid Waste Department of the Municipality, where he was employed for 26 years before the alleged misconduct. The applicant had a clean record and had never been summoned to a disciplinary hearing.

[5] The applicant was driving a tipper truck in T Section (Botshabelo) when the truck capsized and incurred damage (the "incident"). The applicant was charged with:

5.1 Dishonesty¹ in that he allegedly misused the Council's truck (hereafter the "**first charge**"),

5.2 Gross negligence in that he damaged the Council's truck (hereafter the "**second charge**"),²

5.3 Gross dishonesty³ in that, on 10 October 2018, he failed to report the accident hereafter the "**third charge**").

[6] At his disciplinary hearing, the applicant pleaded guilty to driving the truck and damaging it but he denied the balance of the charges. Importantly, at the hearing, the applicant gave a detailed explanation of the incident. The applicant explained that he had been instructed by the senior supervisor, Mr Nkikane (hereafter "Mr N") to use the truck to move (and then off load) gravel to a particular area because it was muddy and a funeral would be held there over the weekend.⁴ Unfortunately, the truck capsized, and damage resulted to the truck (the "incident").

[7] The applicant was found guilty of all charges and dismissed.

Arbitration proceedings

[8] A brief survey of the evidence is necessary:

8.1 The Municipality called Mr Nkikane (or "Mr N") as its first witness.

¹ The charge did not reveal in what manner the applicant was allegedly dishonest.

² The charge did not reveal in what manner the applicant was allegedly negligent.

³ The charge did not reveal in what manner the applicant was allegedly dishonest

⁴ Transcript p183 line 24 to p184 line 20

8.1.1 Despite being aware of the applicant's version (that he had instructed the applicant to use the tipper truck), Mr N did not testify about whether he had instructed the applicant to use the truck on that day.⁵

8.1.2 Mr N testified that there are several acting managers at any one time, who are appointed on a rotational basis. Mr N confirmed that Mr Tladi had acted as supervisor previously, but he was unsure whether Mr Tladi was acting as supervisor at the time of the incident. In the circumstances, Mr N did not deny applicant's version - that Mr Tladi was his immediate supervisor on the day.

8.1.3 Mr N testified that he discovered the damage to the truck about a week after the incident when he saw Mr Tshego and the applicant trying to repair a broken mirror on the truck. Mr N testified that one of these two individuals told him that the truck had been parked in the yard, the brake got loose, and it rolled into a TLB machine. Mr N could not recall who said this.⁶

8.1.4 Mr N testified that Mr Tladi forwarded to him the photographs that he (Mr Tladi) had taken of the incident. Mr N did not question Mr Tladi about why he had not disclosed the photographs sooner. Mr Tladi was never charged for failing to report the incident to Mr N.

8.1.5 Mr N confirmed that the correct procedure following an accident is to report it to your immediate supervisor, who must then report the accident to the senior supervisor. He confirmed that, in this case, if Mr Tladi was indeed the immediate supervisor it was his responsibility to report the accident to him (Mr N). In addition, Mr N confirmed that if Mr Tladi was indeed the immediate supervisor, the applicant was correct to report the accident to him (Mr Tladi).

⁵ One would have expected him to testify about this issue given that the applicant had raised it during the disciplinary hearing.

⁶ Transcript p136 lines 10 – 24. According to Mr Nkikane, he had been fed a false version. Incidentally, no disciplinary action was taken against Mr Tshego, one of the potential offenders.

8.2 The applicant testified that Mr N had instructed him to use the truck to move gravel to a particular area.⁷ The truck capsized, and damage to the truck resulted. The applicant says he asked Mr Tshego to inform Mr Tladi of the incident. Mr Tshego did so and both he and Mr Tladi attended the scene thereafter. Mr Tladi took photographs of the accident scene. The applicant testified that Mr Tladi was an acting supervisor at the time, and his immediate supervisor.

8.3 Next, the applicant called a shop steward of his union, SAMWU. The shop steward testified that two other employees had been involved with similar accidents, but they were not dismissed and instead were permitted to pay for the damages.

Legal principles and analysis

Observations of the award and the evidence

[9] Having perused the pleadings, the record, and the submissions, I am compelled to make the following observations:

9.1 The *first charge* was that the applicant acted *dishonestly* by misusing the truck. In her analysis of the evidence, the arbitrator does not consider any of the evidence in relation to the first charge. It is unclear whether the arbitrator believed that the applicant was guilty of this charge.

9.2 The *second charge* was that the applicant was *grossly negligent* by damaging the truck. The arbitrator, once again, does not explain whether, or why, the applicant was guilty of this charge. Irrationally, the Municipality's view was that the applicant was acting intentionally or negligently.

⁷ Transcript p183 line 23 to p184 line 13

9.3 The *third charge* was that the applicant was *grossly dishonest* by failing to report the accident. In this regard:

9.3.1 The evidence did not establish that the applicant did not report the accident. It only established that the applicant did not report the accident in writing, and he did not report the accident to Mr N.

9.3.2 The Municipality could not deny that the accident had been reported to Mr Tladi, given that he attended at the scene, and he took photographs of the scene (which he sent to Mr N).

9.3.3 The onus was on the Municipality, as the employer, to prove the *alleged* misconduct. To do so, it was required to present evidence that the applicant failed to report the incident to his immediate supervisor.

9.3.4 Mr N testified that Mr Tladi had acted as a supervisor though he could not recall when. In the circumstances, the Municipality could only prove the identity of the applicant's supervisor by presenting documentary evidence, or by calling Mr Tladi. It did neither.

9.4 In the award, the arbitrator records:

[51] *The Applicant did not deny the evidence of his senior supervisor. Mr Nkikane (testified) that (he) became aware of the accident two weeks after the incident. The hearing minutes collaborated (sic) the Respondent's witness, Mr Nkikane's evidence, that the Applicant informed him that the truck was parked in the yard and the brakes were not engaged and the truck moved and bumped into a TLB tractor. (Own emphasis)*

9.5 Paragraph 51 of the award directly contradicts the evidence presented. Mr N testified that he became aware of the incident about one week later. Secondly, Mr N testified that he could not recall who told him

that the truck was parked in the yard, the brake was not engaged, and the truck moved, and bumped into a TLB.

9.6 Importantly, in relation to the second charge, the arbitration award and record does not reveal how the applicant was alleged to have been negligent. The arbitrator does not set out why the Municipality alleged applicant was negligent and why the evidence supported such finding.

Grounds of Review and analysis

[10] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*⁸ the court held that the appropriate test to be applied in relation to reviews of arbitration awards issued by the CCMA or Bargaining Council is whether the outcome is one which no reasonable commissioner could reach on the material before him or her.

[11] The *Sidumo* test has since been refined. In *Head of the Department of Education v Mofokeng and others*⁹ the LAC held:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity.... before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] ... examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, ...The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny...the arbitrator must not misconceive

⁸ 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

⁹ [2015] 1 BLLR 50 (LAC)

the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

[32] ...Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. ...misconceived inquiry or a decision which no reasonable decisionmaker could reach on all the material that was before him or her.

[33] ...In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute....”

(Own emphasis)

[12] With that in mind, I now turn to the grounds of review. In this matter, the applicant submitted that:

12.1 The arbitrator did not consider whether the applicant was acting on instructions from Mr N. This was, of course, fundamental to whether the applicant was guilty of the charge of using the truck without authorisation.

12.2 The arbitrator drew a negative inference by requiring the applicant to call Mr Tladi - when the third respondent should have called him and was best placed to do so. Of course, although the applicant did not state

as much, this approach had the effect of requiring the applicant to prove his innocence on the third charge. The arbitrator erred by rejecting the applicant's evidence (that Mr Tladi was his supervisor) as hearsay evidence.

12.3 The arbitrator failed to take into consideration that the applicant had *twenty-six years of unblemished service*.

12.4 The arbitrator incorrectly found that the applicant had informed Mr N that the truck was parked in the yard, without the brake engaged, and it had rolled into the TLB machine, when there was no evidence to this effect.

First charge: applicant acted dishonestly by misusing the truck

[13] The commissioner's analysis of the evidence, found in paragraphs 48 to 59 of the award, is particularly wanting.

[14] If the commissioner found the applicant guilty of the *first charge* (which was unclear) she provided no reasons for doing so. This was a material dispute of fact she was required to resolve, using the established tests, explained in detail in *Stellenbosch Farmers Winery Group and another v Martell & Kie SA and others*.¹⁰

[15] The issue on review is not whether the commissioner reached the correct decision, but whether she considered and determined the material factual disputes, by reference *inter alia* to the probabilities and the credibility of the witnesses. In the absence of such analysis, the outcome cannot be reasonable. Further, the applicant was deprived of his right to a fair trial of the issues.

The second charge: the applicant was grossly negligent by damaging the truck

¹⁰ 2003 (1) SA 11 (SCA) para 141

[16] The charge sheet does not explain why the applicant allegedly acted negligently; and the Municipality presented no evidence in this regard. The commissioner does not explain whether, in her view, the applicant was guilty of the charge or why. Does one need to say more?

[17] If the commissioner had considered all the evidence, the only reasonable outcome would have been that the applicant was not guilty of the first and second charges:

17.1 The Municipality presented no evidence that the applicant dishonestly misused the truck. Mr N did not testify on this issue.

17.2 The Municipality also presented no evidence that the applicant was negligent in his driving of the truck. Logically, the mere fact that the accident occurred cannot also be proof of negligence.

The third charge: applicant was grossly dishonest by failing to report accident

[18] This was the only charge the commissioner paid any attention to. A fair and proper analysis of the evidence was required. Had the commissioner done so, she would have taken the following into consideration:

18.1 The employer bore the onus of proving that the dismissal was substantively fair. This required it to prove, on a balance of probabilities, that the applicant failed to report the incident to his immediate supervisor. This required it to prove the identity of the supervisor. The Municipality was aware of the applicant's version from the disciplinary hearing. It should therefore have called Mr Tladi to testify.

18.2 The Municipality's only witness on this issue, Mr N, was unsure whether Mr Tladi was the applicant's immediate supervisor on the day.¹¹

¹¹ Transcript page 143 line 12 – 19

18.3 Even if the applicant's evidence on the issue was hearsay, which I do not accept, this cannot alter the fact that the Municipality presented no clear evidence as to the identity of the applicant's immediate supervisor (the evidence was clear that: (1) Mr N was the senior supervisor, not the immediate supervisor, and (2) the proper process was for the accident to be reported to the immediate supervisor who would then report to the senior supervisor).

18.4 The applicant readily conceded that he had not submitted a written report of the incident. He testified that nobody asked him to submit a written report. Regardless of whether the applicant should have been aware that a written record was required, his failure to submit a written report is not evidence of dishonesty.

[19] In relation to the *third charge*, the Municipality was required to prove that the applicant failed to report the accident to his immediate supervisor. To do so, it called Mr N. However, it turned out that Mr N was not the applicant's immediate supervisor. In addition, Mr N could not say whether Mr Tladi was the applicant's immediate supervisor at the time. Accordingly, on this evidence, the evidence dismally failed to establish that the applicant was guilty of the charge.

A fair and appropriate sanction

[20] The applicant submitted that the commissioner paid no attention to the common cause evidence that the applicant had *twenty-six years of service*, and a clean disciplinary record. In this, the applicant is correct. There is no indication in the award that this was considered by the commissioner.

[21] There can be no doubt that length of service, particularly a long period of service, plays an important role in determining the fairness of the sanction of dismissal. Length of service not only reflects the extent of the employee's loyalty, but it also impacts on the question of whether a lesser sanction may bring about a change of behaviour.

[22] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others*¹² the Constitutional Court set out the approach to be followed:

[78] *In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.*

[79] *To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.*

(Own emphasis)

[23] Despite her duty to do so, the commissioner failed to take into account the totality of the circumstances. Instead, she improperly deferred to the decision of the employer.

Commissioner ignored material evidence

[24] In his evidence, Mr N could not recall¹³ whether it was the applicant who informed him that the truck was parked in the yard, the brake was not engaged,

¹² 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at para 78

and it rolled into the TLB. Despite this, the commissioner found that Mr N's evidence was that the applicant had advised him of this.

Conclusion

[25] In light of what is set out above, the award is one no reasonable decision maker could reach on all the material before her. There can be little doubt that the commissioner's failure to consider material evidence before her had a significant distorting impact on the outcome. The applicant was denied a fair trial of the issues. The award must be reviewed and set aside.

[26] The applicant presented the court with a complete record of the arbitration. Though cognisant that the LRA requires that administrative tribunals, such as the Bargaining Council and the CCMA, must determine the fairness of dismissals for misconduct, I cannot ignore one of the primary objects of the LRA - the expeditious resolution of labour disputes. In the circumstances, a remittal would undermine the effective resolution of this dispute.

[27] In the circumstances, I make the following order:

27.1 The arbitration award issued by the third respondent under case reference FSD092005 is reviewed and set aside.

27.2 The arbitration award under case reference FSD092005 is replaced with an order that: (1) the dismissal of the applicant was substantively unfair, (2) the applicant is retrospectively reinstated into the employ of the first respondent with effect from the date of his dismissal,

¹³ Mr N: *They told me that the truck, the truck was parked in the yard and then it probably happened that the, the bricks (sic) of the truck got loose (sic). And then the truck hit the TLB machine that was parked in front of the truck.*

Commissioner: When the witness testify, when he said he was told, he mention two people that was standing next to the truck which is Mr Tshego and the applicant, he must tell us specifically who said that.

Mr N: Because I have taken an oath and also having to tell the truth, but because the incident happen in 2018, I cannot remember exactly who is the one who told me between Mr Kgware and Mr Tshego."

(3) the applicant is directed to report for duty at the first respondent as soon as reasonably possible.

27.3 There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant :	Adv T Du Preez
Instructed by :	Kramer Weihmann Inc
For the First Respondent:	No appearance