

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR1439/06

In the matter between:

NATIONAL UNION OF MINEWORKERS

1ST APPLICANT

MONICA MITANI

2ND RESPONDENT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

1ST RESPONDENT

RICHARD BYRNE N.O.

2ND RESPONDENT

HARMONY GOLD MINING COMPANY

LTD T/A EVANDER GOLD MINES LTD

3RD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an application to review and set aside the arbitration award made by the Second Respondent (the Commissioner) under case number MP3155/04 dated 25th April 2006. In terms of the arbitration award the Commissioner found the dismissal of the Second Applicant (the employee) to be fair.

Background facts

- [2] The employee was at the time of her dismissal employed as an ABET facilitator by the Third Respondent. She was charged with the following offence:

“Dishonesty/Fraud in that you claimed an amount of R310.64 falsely for petrol.”

- [3] The charge related to the amount of R400 which was given to the employee by the Third Respondent to pay for petrol for the trip she together with others undertook to attend a human resource development meeting at Welkom.
- [4] The employee testified that they stopped on 3 (three) occasions to fill petrol in the car in which they were travelling in. She did not have a driver’s licence nor did she have experience with motor cars. On arrival from the trip she submitted a receipt regarding the expenditure of the R400.
- [5] The case of the Third Respondent both at the disciplinary hearing and the arbitration hearing was that the employee had submitted fraudulent receipts. The chairperson of the disciplinary hearing in upholding the charges proffered against the employee, found that she (the employee) was entrusted with the cash to pay for the petrol. He further found that for this reason she was responsible for all the payments and that she was entrusted with the money and therefore she was accountable for it.
- [6] In support of its case, the Third Respondent relied on the evidence Mr Van der Mescht (Van der Mescht) who in essence testified that the vehicle could not have consumed the amount of petrol reflected in the receipt.

- [7] Van der Mescht testified further that the first receipt of payment of petrol from Senegal was false because it reflected that an amount of 52.78 litres of petrol was put in the vehicle when in fact in terms of the specification of the car as set out by dealers can only take 45 litres. The distance between Evander and Senegal was 335 kilometres and therefore according to his calculations the vehicle would have on the reflection of the receipt consumed 15.75 litres of fuel *“which is double the average for the normal consumption on that vehicle.”*
- [8] The other reason why the Senegal receipt was false according to the Third Respondent was that despite the employee having been given cash, the transaction was processed and paid by means of a speed point electronic system and not cash. The other reason was that the receipt reflected that the premium fuel was purchased when in fact it is impossible to insert the premium nozzle in that vehicle.

Grounds for review and the award

- [9] The employee contended that the Commissioner relied on the evidence of Van der Mescht which according to her was largely hearsay. The employee further contended that:
- There was no evidence tendered that the mechanism which produced the receipt operated correctly or for that matter was operated correctly.
 - Her evidence that she had never driven a car was not challenged.

- There was no evidence that she had anything to do with the petrol or petrol money on those occasions.
- The Commissioner committed a gross irregularity in making factual findings unsupported by evidence.
- It was the defect in the reasoning of the Commissioner which led to the conclusion that the dismissal was substantively fair.

[10] The Commissioner in his award found that because the employee was an ABET Instructor and had been on a number of those trips previously, it was highly unlikely that she would not know the difference between leaded and unleaded fuel, even if she was just a passenger. The version of the employee that she could not see that a certain receipt was from a speed point and not from a cash slip was rejected as disingenuous by the Commissioner.

[11] It would appear that what formed the real basis for the conclusion that the employee was guilty of fraud was the comment by the Commissioner that:

“In my view, the Respondent’s version is clearly more probable version, and is highly suggestive of misconduct on the part of the Applicant as she accepted responsibility for the money and receipt, she also has to accept responsibility for any fraud that takes place, unless the evidence points to someone else committing the offence.”

The evaluation of the award

[12] The most important finding by the Commissioner is that the Applicant committed fraud or acted dishonestly is based on circumstantial evidence. Thus the issue in determining whether or not the Commissioner committed a gross irregularity or that his decision was reasonable or otherwise turns on the application of the key principles governing the use of circumstantial evidence in arriving at the conclusion that the employee was guilty as charged. If one accepts that the case of the Third Respondent was based on circumstantial evidence then related to this is also the issue of whether there was sufficient evidence upon which the Commissioner could draw an inference of wrongdoing on the part of the employee.

[13] Mr Young (Young) for the Third Respondent conceded that the case of the Third Respondent was based on circumstantial evidence. He however, contended that the conclusion of the Commissioner was the most probable in the circumstances of the case. He further argued that the employee was responsible for accounting for the petrol which was put in the car. In this respect he argued that the Court should not look only at the reasons given by the Commissioner but other reasons that may appear from the record of the arbitration proceedings in terms of *Fidelity Cash Management Services v CCMA & Others* [2008] 3 BLLR 197 (LAC).

[14] Mr Hulley for the Applicant conceded that the facts of this case pointed towards some wrongdoing but that the question which Commissioner should have

answered is whether or not the employee was responsible for the fraud. It would according to him seem that the Commissioner's finding was that if the employee was not able to show that she was not a victim of fraud she was therefore guilty.

[15] The Commissioner correctly found that the case of the Third Respondent which he accepted was based on circumstantial evidence. The issue for determination is therefore whether the conclusion drawn by the Commissioner is the most readily acceptable of all possible inferences.

[16] In criminal cases the approach to be adopted in dealing with circumstantial evidence was formulated by *Watermeyer JA R V Blom 1939 AD 288 at 302-3* as follows:

“(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(b) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

[17] In civil cases when reliance is based on circumstantial evidence, the onus is discharged if the inference advanced is the most readily apparent and acceptable inference from a number possible inferences. See *AA Onderlinge Assuensie-Assosiasie Bkp v De Beer 1982 (2) SA 603 (A)*.

[18] The inference relied on should be drawn from the objective facts and not based on a mere speculation. In *National Union of Metalworkers of SA & Another v Kia Motors & Others* (2008) 28 ILJ 2283 (LC), it was held that the process of drawing an inferences can be very dangerous in that whilst the possibility of error in direct evidence lies in a witness being mistaken or lying about the facts, the use of circumstantial evidence involves a potential error which is that a Commissioner or the Court may be mistaken in its reasoning and conclusion. Zeffertt, Paizes and Skeen *The Law of Evidence in South Africa* in dealing with the same issue say:

“The possibility of error in direct evidence lies in the fact that the witness maybe mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the Court may be mistaken in its reasoning. The inference that it draws maybe sequitur, it may overlook the possibility of other inference which are equally probable or reasonably possible. It some times happens that the trier of facts at having thought at a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred.”

[19] In the present instance the Commissioner based his finding on a number of assumptions which in my view do not make the inference from which the conclusion is based on the most readily apparent and acceptable inference. The first fallacious assumption is based on the evidence of Van der Mescht, that the

petrol was correctly recorded by the computer. The finding is also based on the assumption that the employee looked at and noticed the reference to leaded fuel on the receipt.

[20] Another important aspect which the which the Commissioner failed to consider in accepting the inference from the evidence of the Respondent is that Van Mescht conceded that he had no proof that the machine that produced the receipt was in fact correct. And also of importance was that the evidence of Van Mescht was not only hearsay but also that his investigation was conducted long after event. The possibility of the petrol attendant handing over to the employee an incorrect receipt for whatever reason received no attention from the Commissioner.

[21] The other material evidence which the Commissioner failed to take into account in the circumstances of this case is the testimony of the employee that the person who was in charge of putting the petrol in the car was the driver and not herself. The Commissioner also ignored the testimony of the employee which was not challenged that she simply took the receipt and looked at the amount which was to be paid.

[22] In my view had the Commissioner applied his mind he could have found that whilst the evidence indicated clearly that there was some wrong doing in as far as this matter was concerned, there was however insufficient evidence to link the employee to such wrong doing. The finding that because the employee was an adult who taught ABET and should therefore know the difference between

leaded and unleaded petrol has no basis in logic and was not supported by any evidence.

[23] In my view the Commissioner failed in his task in that he misconceived and misapplied the legal principle applicable when faced with circumstantial evidence to prove a fact. It is for this reason that I believe the arbitration award of the Commissioner stand to be reviewed. I see no reason why the costs should not follow the results.

[24] In the premises the following order is made:

(i) The arbitration award of the Second Respondent issued under case number MP3155/04 and dated 25th April 2006 is reviewed and set aside.

(ii) The conclusion of the Second Respondent is substituted with the following:

“The dismissal of the Applicant, Ms Monica Mitani, was substantively unfair.

The Third Respondent is ordered to reinstate the Applicant from the date of dismissal without loss of salary or benefits.”

(iii) The Third Respondent is to pay the costs of the Applicant.

Molahlehi J

Date of Hearing : 8th August 2008

Date of Judgment : 19th February 2009

Appearances

For the Applicant : Adv G Hulley

Instructed by : K.D. Maimane Incorporated

For the Respondent: Ms K Young of Brink Cohen Le Roux Incorporated