



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2191/09

In the matter between:

TRANSNET RAIL ENGINEERING BLTD

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

W. de J. STAPELBERG N.O

Second Respondent

UNITED TRANSPORT AND ALLIED

TRADE UNION

Third Respondent

HERMAN ROSSOUW

Fourth Respondent

Date of hearing: 18 August 2011

Date of judgement: 1 December 2011

Summary: Review Application. Dismissal for theft. Defence kleptomania. Commissioner equating kleptomania to alcoholism. Duty of Commissioner to scrutinise expert evidence.

JUDGMENT

Molahlehi J

Introduction

- 1] This is an application for review and set aside of the arbitration award issued by the second respondent (the arbitrator) under case number TOKISO/T9/063 in terms of which the dismissal of the fourth respondent was found to have been unfair.

Background facts

- 2] The fourth respondent (the respondent), who was employed in the finishing section of the applicant, was found with two copper fittings which fell to the ground at the time he was searched. The search was carried out as the respondent was leaving the workplace at knock off time.
- 3] The respondent was charged for unauthorised possession of the applicant's property. The applicant was found guilty and dismissed. However, being unhappy with the outcome of the disciplinary hearing the respondent referred a dispute concerning an alleged unfair dismissal to the first respondent.
- 4] At the arbitration hearing the applicant called Mr Wessie, the security officer who conducted the search on the day in question to testify. He testified that on the day in question the respondent initially refused when he requested to search him. It was only when he was told that he would not be allowed to leave the premises that he then agreed to be searched. Mr Wessie further testified that two copper fittings fell on the ground as the respondent was handing his jacket to him.
- 5] The respondent did not dispute that he was found with the copper in which he was charged for on the day in question but contended in his defence that he took the item because of the urge he had which was caused by the condition known as kleptomania, that he was suffering. He stated that he picked the two pieces of the copper which he found lying all over the applicant's premises. He further stated he could not recall how he got possession of the two copper pieces.
- 6] In support of his version that he was a kleptomaniac, the respondent submitted a letter from Dr Fourie, a psychologist that he had been seeing

since August 2007. In the letter, Dr Fourie stated that he or she had been seeing the respondent since 17 August 2009 due to stress.

Grounds of Review

- 7] The applicant contends that there was no basis for the finding made by the arbitrator, in particular in relation to comparing kleptomania with alcohol abuse. The applicant contends that the arbitrator failed to properly apply his mind to the facts which were before him and committed misconduct as an arbitrator in relying on the University report whose authors are unknown. In this respect the applicant submitted that the arbitrator ignored the rules of evidence. The arbitration award is criticised for several weaknesses listed in the founding affidavit.

Arbitration award

- 8] The arbitrator found that the dismissal was procedurally fair and what he had to deal with was the substantive aspect of the fairness or otherwise of the dismissal. In arriving at the conclusion that the dismissal was unfair, the arbitrator compared kleptomaniac with alcoholism, and observed that if found to exist then it (kleptomaniac) had to be treated in the same way as an alcoholic person. In other words, the employer has to treat kleptomania as incapacity based on ill-health. In this respect the arbitrator says:

‘Many companies especially in a factory environment, have rules to state that being present at work under the influence of alcohol is a dismissal offence and many are fairly dismissed for contravening such a rule. If however a defence is raised that the specific employee is an alcoholic or his drinking has become a problem, such a employee is not dismissed but is issued with a written warning or final written warning and is sent for compulsory treatment. Even if experience taught us that treatment is usually not very effective this is still endorsed by our courts as a way to fairly deal with these problems. The defence raised by Herman that he is suffering from Kleptomania is very similar to the example of alcohol abuse. A letter from the psychologist as well as a report from the University of Free State indicates that Herman is benefiting from the treatment and the medication.’

- 9] The arbitrator then notes that the employee had been referred to National

Institute For Crime Prevention and the Reintegration of Offences (NICRO). He then in his assessment took into account the report from NICRO which according to him indicated that the criminal charge against the employee was withdrawn and further that the employee now understands that he was responsible for his actions and choices in life.

10] In applying the principle of progressive discipline, the arbitrator observed that the medication which the employee was receiving was having positive effect on him and that his behaviour was changing.

11] As concerning the trust relationship between the parties after the incident, the arbitrator found that it had not broken down because the respondent's supervisor testified at the hearing that the respondent was helpful and that he never had any problem with him.

12] The arbitrator further found in relation to the two copper pieces that they were scrap, because the applicant had failed to prove that they were new. It was on these bases that the arbitrator found that the respondent was guilty of not following the correct procedure to take the scrap out of the gate of the applicant's gate.

Evaluation

13] The test to apply in considering whether an arbitration award is reviewable is that of a reasonable decision maker as stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ and the subsequent cases that followed thereafter.

14] In this matter the key issue is whether the arbitrator applied the rules of evidence properly. In this respect the following need consideration:

‘2.1 whether or not Dr Miemie's report and/or University of Free State's report constituted admissible evidence at the arbitration;

2.2 whether or not Dr Miemie's report and/or University of Free State's report established that the Fourth Respondent was a Kleptomaniac;

¹ (2007) 28 ILJ 2405 (CC)

2.3 whether or not there was sufficient evidence presented before the arbitrator to establish that the Fourth Respondent was a Kleptomaniac;

2.4 whether or not the penalty of dismissal was too harsh;

2.5 whether or not the Fourth Respondent's reinstatement with 3 month's back pay was appropriate.'

15] It is common cause that the respondent's bag and helmet were searched and nothing was found therein. He initially refused to have his jacket searched and when he finally gave in, he was found in possession of the copper fittings.

16] It is further common cause that after being found with the copper the respondent was arrested and charged with the theft of the copper. In the magistrate's court, the respondent pleaded guilty and was referred to NICRO where he did 30 hours community service.

17] The employee's defence which he raised only during cross examination was that he was suffering from kleptomania. In general, kleptomania is defined as:

'The uncontrollable impulse to steal items of no real sense or value to the thief.'

18] The testimony of the applicant's witness was in general not challenged and more importantly he did not challenge the testimony of the applicant's witness who says when he was found with copper his defence was that he was set up by a black person who previously had a conflict with. However, under cross-examination he conceded that kleptomaniac does not blame others for stealing. He also conceded that he underwent kleptomaniac treatment for the first time after his dismissal.

19] In my view had the arbitrator applied his mind properly to the above common cause facts, he ought to have found that the applicant had established a case to answer by the respondent. In other words the respondent had a case to answer failing which that applicant would be regarded as having discharged its duty of showing that the dismissal was for

a fair reason.

- 20] In answering to the case of the applicant, the respondent had to put forward a defence. If there is a rule, which is reasonable, known or ought to be known, the defence of the respondent could have been a denial or an explanation justifying why he was in unauthorised possession of the cables.
- 21] The defence put forward by the respondent as indicated earlier in this judgement is that he suffers from kleptomania. Accepting the definition set out above, what was required of the arbitrator was to assess whether, firstly, admissible evidence to sustain the defence of the respondent has been placed before him; and, secondly, whether indeed the respondent suffered kleptomania.
- 22] The first issue in the assessment of the evidence of the respondent's case is the admissibility of the evidence of Dr Miemie of the University of the Free State. The evidence was presented in the form of a report. This report, it would appear was submitted to prove the health condition of the respondent. The report served before the Commissioner as an expert opinion on the condition of the respondent.
- 23] In admitting this evidence, the arbitrator ought to have applied the principles governing admissibility of expert opinion. The principles governing admissibility of expert opinion was stated in *Holtzhauzen v Roodt*,² where the Court held:
- 'a) firstly, the witness must be called to give evidence on matters calling for specialised skill or knowledge;
 - b) Secondly, we are accustomed to receiving the evidence of Psychologists and Psychiatrist, particularly in our criminal court. However, we should not elevate the expertise of the witness to such height that we lose sight of the courts own capabilities and responsibilities;
 - c) Thirdly, the witness must be a qualified expert;
 - d) Fourthly, the facts upon which the expert opinion is based must be proved

² 1997 (4) SA 766_(WLD) at 772C – 773C.

by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others;

- e) Fifthly, the guidance offered by the expert must be sufficiently relevant to the matter in issue which is to be determined by the court;
- f) Finally, opinion evidence must not usurp the function of the court. The witness is not permitted to give opinion on the legal or general merits of the case.'

24] It is apparent from the record that no expert witness or for that matter any witness was called to testify about the reports. Those who compiled the reports were never called to testify, firstly about their qualification, and experience, to be able to claim to be experts and secondly on what basis did they arrive at the conclusion that the respondent was suffering from kleptomania.

25] There can be doubt in my view, that in relying on the reports of Dr Mienie and/or the University of the Free State reports, the arbitrator committed gross irregularity and exceed his powers. It would appear from the reading of the arbitration award that the arbitrator did not only accept as evidence the medical reports which were submitted on behalf of the respondent but also regarded the opinion expressed therein as binding on him without having to evaluate the conclusions reached. In this respect, the arbitrator abdicated his responsibility of having to scrutinise such evidence to determine whether the conclusion reached could be logically supported by other evidence which would make the conclusion sustainable.

26] In other words the question of whether the respondent suffered from kleptomania is one which the arbitrator had to determine on the basis of the evidence before him. Assuming that the reports were to be regarded as admissible evidence then the duty of the arbitrator was examine the opinions expressed in the reports, evaluates them and made his own conclusion on the issues raised. The arbitrator was supposed to evaluate the opinions expressed in the reports to determine whether the opinion that the respondent was kleptomaniac was based on logical reasoning in light of

all the evidence before him. It does seem to me that the only way that the arbitrator could have appreciated the extent and the implication of the opinions expressed in the medical reports was to have the expert who developed the reports to come to the arbitration hearing and explain the conclusions reached therein. In *Schneider NO and Others v AA*,³ the Court per Davis J held that an expert witness comes to court to give the court the benefit of his or her expertise.

27] In *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another*,⁴ the Supreme Court of Appeal, in dealing with the approach to be adopted when dealing with expert opinion held that:

‘The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached “a defensible conclusion.”⁵

28] At para 39 of the judgment the SCA further said:

‘A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis and is therefore not reasonable.’

29] In *Media 24 Ltd and Another v Grobler*,⁶ the SCA per Farlam JA held that:

‘In my view, the traumatic incident which I have found did occur was sufficiently severe, on the probabilities, to have complied with Criterion A1. In this regard it is important to bear in mind the distinction between the scientific and the judicial measures of proof . . . ’

3 2010 (5) SA 203 (WCC)

4 2001 (3) SA 1188 (SCA) at para 37.

5 The same approach has been followed by the English Courts. See *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL) a case which was followed by the Supreme Court of Appeal in the *Michael And Another* supra. An example of an instance where the evidence of an expert witness was scrutinised by the Court, found to have significant problems and rejected for lack of credibility and expertise can be found in the judgment of Davis J in *Schneider v AA* 2010 (5) SA 203 (WCC) at page 213E-F. See also *Minister van Veiligheid and Sekuriteit v Geldenhuys* 2004 (1) SA 515 (HHA) at para 38 Representative of *Lloyds v Classic Sailing Adventures* 2010 (5) SA 90 (SCA) at para 60.

6 2005 (6) SA 329 (SCA) at para 59.

30] The risk of looking at expert evidence without scrutinising its logic and efficacy was expressed by Tshiqi JA in *Mutual and Federal Insurance Co Ltd v SMD Telecommunication CC*⁷ and quoting with approval what was said in *Dingley v The Chief Constable, Strahclyde*,⁸ where it was held that:

‘(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.’

31] The reading of the reports does not provide any factual basis upon which a reasonable conclusion could be reached that the respondent suffered kleptomania. The report of Dr Mienie amongst others states:

‘In view of the recent incident where a kleptomania incident, without pre-planning for personal gain, a senseless action-resulted, specific desensitisation will be offered.’

32] The University report makes no mention of the respondent being kleptomaniac. The case of the respondent is also not helped by his own testimony. His version is riddled with contradictions and inconsistencies. His initial response, at the time he was searched, was that he had been set up by someone. In this respect he testified as follows:

‘As I say, they asked me what is it and where is it coming from. I say I do not know, I think it is a set-up.’

33] The respondent belatedly sought to suggest that the offence was not serious enough to warrant a dismissal because the value of the copper and stated that it was below the value of the R400.00 placed on it by the applicant. He however testified that he was told at the Magistrate Court that the value of the copper was R900.00.

34] In my view, had the arbitrator properly applied his mind, he ought to have

⁷ 2011 (1) SA 94 (SCA) at para 40.

⁸ 2000 SC (HL) 77

found that the defence raised by the respondent was an afterthought and that the respondent was accordingly guilty of contravening a known and reasonable rule of the workplace.

35] In relation to the issue of the breakdown of trust, the arbitrator misconceived this issue. The facts before him had very little to do with the working relationship between the respondent and his supervisor. The issue before the arbitrator concerned the dishonest conduct of the respondent. Because of misconceiving the issue, the Commissioner failed to appreciate that dishonesty is the core to the trust relationship.

36] In my judgment, had the arbitrator appreciated the issue before him, he ought to have found that it would be unfair to expect the applicant to retain an employee, who when initially asked to be searched, resisted, and once found in possession of the copper he sought to blame someone else. He later seeks to suggest that he was entitled to remove the copper because it was scrap. Further, when he realised that his excuse is unsustainable as an afterthought, he resorted to concoct a defence in the form of kleptomania. It to be noted that there is no evidence that the respondent has in the many years that he has been employed by the applicant ever been accused of theft. There is also no evidence that the respondent has ever been charged outside the workplace with theft.

37] There is no doubt in my view the respondent breached the trust between him and the applicant. The length of service which the respondent had with the applicant did not assist his case in terms of the sanction. In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others*,⁹ the Court in dealing with the issue of the length of service had the following to say:

‘The presence of dishonesty tilts the scales to an extent that even the strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in a case where the employee shows no remorse. The

⁹ [2008] 3 BLLR 241 (LC) at para [42].

reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship.'

38] The final issue to consider concerns the fairness of the sanction imposed by the applicant. In this respect the length of service of the employee in relation to the fairness of the sanction has received attention in a number of cases. Whilst the long service that the respondent had with the applicant may serve as a factor in reducing the severity of the sanction it may also serve as a factor in the converse.

39] In *Toyota SA Motors v Radebe and Others*,¹⁰ the Court held:

'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty.'

40] In light of the above, I am of the view that the arbitrator's arbitration award stands to be reviewed. I find that it was unnecessary for the respondent to have opposed this application and accordingly I believe the costs should follow the results.

41] In the premises, the following order is made:

1. The arbitration award of the second respondent is reviewed and set aside.
2. The second respondent's arbitration award is substituted with an award to the effect that the dismissal of the fourth respondent was for a fair reason and accordingly his claim for unfair dismissal is dismissed.
3. The fourth respondent is to pay the costs of these proceedings.

¹⁰ (2000) 3 BLLR 243 (LAC) at para [15].

Molahlehi J

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr P. Maserumule of Maserumule Inc.

For the respondent: Mr X Ngako of Ruth Edmonds Attorneys