



REPUBLIC OF SOUTH AFRICA

not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG
JUDGMENT**

Case no: JR 1102/08

In the matter between:

CASHBUILD (PTY) LTD

Applicant

And

MAAKE, J S (N.O.)

First Respondent

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

MATODZI THOMAS SIKHWARI

Third Respondent

Heard: 21 October 2010

Delivered: 09 March 2012

Summary: (Review-unfair dismissal-poor work performance -misdirection on a material issue).

JUDGMENT

LAGRANGE, J

Introduction

This is an application to review and set aside an arbitration award issued by the first respondent, a Commissioner of the CCMA, the second respondent. This is the second occasion the matter has been taken on review. Prior to this another arbitration award was handed down and set aside on review. The matter was set down for a fresh hearing before the first respondent ('the arbitrator'), and the previous proceedings have no bearing on this review.

Condonation application

The review application was filed 20 days out of time, necessitating an application for condonation. The delay is not insignificant in relation to the six week period permitted for filing review applications, but the prejudice to the third respondent is not great. Further, to the extent it delayed him obtaining relief in terms of the award, that would be mostly cured by accumulated interest on the award if the award were not set aside.

The explanation for the delay was that the documents and award were mistakenly filed with the attorney's record of the previous arbitration proceedings in the matter, instead of a new file being opened. The new documents and the record of the previous arbitration were then archived as if they both concerned the previous arbitration. It was only when the applicant's attorney was phoned by the third respondent's attorney on 20 May 2008 that he realised that an error had occurred. The review application was filed within two weeks of hearing of the matter, it being necessary to locate the filed material first. The explanation has a ring of truth to it and does not suggest any deliberate dilatoriness on the applicant's attorney's part.

In so far as the main basis of the review might prove justified, the impact of such a material defect in the award would have led to an unjust result and the applicant's complaint deserves consideration.

On a balance of all the considerations, this is a case in which the late filing of the review application should be granted.

Factual background

The third respondent, Mr M T Sikhware ('Sikhware'), was charged with a complaint of poor work performance, namely his failure to meet certain standards, performing work in such a way it had to be repeated, and demonstrating an inability to control and manage his subordinates. After the hearing chaired by an external chairperson, the company acted on the chairperson's recommendation that he be dismissed for poor work performance.

The arbitrator held that Sikhware's dismissal was not procedurally unfair, but was substantively unfair. The critical paragraphs containing his reasoning on the question of substantive fairness read as follows:

"5.5 the applicant was essentially dismissed for poor work performance. As already indicated elsewhere above, there were numerous training, counselling and coaching sessions held with him, based on the training program afore-said. It appears from the remarks made by the witness in exhibit "A" that the applicant failed to reach the required standards of performance, leading to the disciplinary hearing. I however find difficulty with the fact that he was charged with misconduct.

5.6 Item 9 of Schedule 8-Code of Good Practice: Dismissal of the LRA, makes provision for guidelines in cases of dismissal for poor work performance. It seems to me that it is inapplicable to the nature of poor work performance being considered in this matter. In the present case, according to the witness, the applicant was being trained, counselled and coached with a view to determining if he could eventually be found to fit to be appointed to the position of store manager from his erstwhile position of relief manager. It therefore stands to reason that if he failed to reach the standards required for the position for which he

was being groomed, he would naturally not be appointed to that senior position but would rather remain in the position he held the time of his dismissal. In brief he would not progress beyond the latter position. This in itself is punitive in nature. This therefore implies that he ought not to have been dismissed. He could only be disciplined if he had failed to reach the performance standards applicable to his erstwhile position, and of course provided that this was in spite of counselling and coaching. In brief he ought not have been disciplined for his alleged failure to reach the required standards applicable to a possible new position he was being groomed for.

5.7 *In the circumstance, I determine that his dismissal was substantively unfair."*

(sic, emphasis added)

On the question of relief however the arbitrator found that because of the hostile relationship Sikhware displayed towards his store manager and the applicant's contention that the trust relationship had broken down, compensation equivalent to 12 months remuneration rather than reinstatement was appropriate.

There were only two witnesses who testified at the arbitration, the former store manager of the applicant's Louis Trichardt branch, Mr M B Ngobeni, and Sikhware. The arbitrator summarised their evidence quiteadequately in his award and I do not intend to repeat it here. However, it is instructive to convey the thrust of the evidence and the nature of Sikhware 's attack on the evidence against him.

Ngobeni's evidence concerned the on-the-job training which he had given Sikhware over a number of months. He had devised the training program and had evaluated Sikhware's performance at regular intervals. He had counselled Sikhware and issued him with warnings concerning the shortfalls in his performance. Sikhware acknowledged the warnings he was given, though he claimed he merely signed in receipt of the warnings. At the time, he did not

appeal against the warnings but he did protest the fairness of the second warning he received at the time it was issued to him. He took that objection no further.

The arbitrator himself noted that Ngobeni "did his best to grow the applicant within the respondent", and it is apparent that he accepted Sikhwari had not shown himself to be capable of being a store manager. It is also noteworthy, that Sikhwari had some prior experience as a manager in a retail environment, and had already worked for two years for the applicant before he started working under Ngobeni. It is apparent from his evidence, that he felt Sikhwari had done little to acquire any knowledge of the applicant's systems in the previous two years he had worked for it.

It is interesting to note that an overview of the cross-examination of Ngobeni and Sikhwari's own evidence reveals, for the most part, that Sikhwari did not directly defend the adequacy of his performance. Rather, he questioned Ngobeni's qualification to devise training for him and to evaluate his performance. He also attacked the fact that the evaluation performance did not involve a scoring system, and that he was dismissed one week before the training period was supposed to end. He also appeared to have been of the view that he should have simply been undergoing training without having to perform any responsibilities while training was in progress. He further suggested that Ngobeni was determined to get rid of him, without being able to advance any plausible reason why Ngobeni would have harboured such malicious intentions towards him.

Grounds of review

The applicant contends that the arbitrator ultimate findings are ones that no rational arbitrator could reach for the following reasons:

the arbitrator's conclusion that Sikhwari was incorrectly charged with misconduct cannot be reconciled with his conclusion that the procedure was fair.

The arbitrator's finding in paragraph 5.6 of his award is irrational and contrary to the evidence because:

a relief manager must be capable of doing the work of a store manager when replacing the latter and therefore had to be able to perform according to the standard of a store manager.

Sikhwari was being trained so that he could fulfil the proper role of a relief manager and if he could not do this there could be no point in retaining him.

Expecting the employer to continue employing someone who cannot perform the function they expected simply because they will not be promoted to the position of store manager is nonsensical.

The arbitrator completely failed to comprehend the nature of the position of a relief manager in finding that he had not succeeded in performing to the requirements of a more senior position, when in fact he had failed to perform to the standard expected of a relief manager, which is the position he held.

The arbitrator failed to provide any reasons or exercise his discretion properly in deciding to award Sikhwari the maximum amount of compensation possible in terms of the LRA.

The applicant also argues that by reasoning as he did, the arbitrator made findings that could not be justified on the evidence before him, exceeded his powers, failed to afford the applicant a fair hearing and failed to properly consider the evidence before him.

Evaluation

It is readily apparent from the award, that the arbitrator was satisfied that the applicant had done what it ought to have done in terms of how it had approached Sikhwari's training and how it had tried to address the shortfalls in his performance before deciding that he would not be able to perform the work of a store manager. The arbitrator did not take issue with the applicant's conclusion that Sikhwari could not perform the work on which he was being

trained.

From the arbitrator's analysis it is clear that he accepted that in so far as Sikhwari was expected to perform the job of a store manager, and if that had been his job, his dismissal would have been fair. The only basis on which the arbitrator found that it was unfair was that the job he was being trained for was not his existing occupation of a relief manager. In the arbitrator's mind, he clearly did not appreciate that the very function of a relief manager, in practice, was to take over the functions of an existing store manager when required, and that required the relief manager being able to fulfil the responsibilities of a store manager having with the skills necessary to perform that job. If the arbitrator had understood this, he would not have considered whether or not Sikhwari could still adequately perform the function of a relief manager even if he could not do the work of a store manager.

One of two explanations for the arbitrator's ultimate finding exist. The first is that the arbitrator misdirected his enquiry based on his failure to consider the purpose of training a relief manager. This in turn led him to disregard the relevance of his findings regarding the shortcomings of the applicant in performing the work of a store manager. It also led him to consider irrelevant issues such as the applicant's perceived failure to promote Sikhwari to the position of a store manager, as a result of his failure to perform adequately, when in fact his promotion was not under consideration at that time.

In *CUSA v Tao Ying Metal Industries & others* (2008) 29 ILJ 2461 (CC), Ngcobo J (as he then was) said of an arbitrator's misdirections on the issue to be decided:

"[76] It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside. Recently, in Sidumo, the matter was put thus:

'It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be

conducted in a fair manner. The parties to a CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined. Fairness in the conduct of the proceedings requires a commissioner to apply his or her mind to the issues that are material to the determination of the dispute. One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment, where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues.”

In this instance, the arbitrator failed to apply his mind to the correct occupation for which the applicant was being assessed, which was clearly a cardinal factor determining his suitability for continued employment based on performance.

A second explanation for the arbitrator's conclusion is that he misconstrued the evidence to mean that Sikhwari was not fit for promotion to a higher position when it fact it was relevant to his fitness for his existing position as a relief manager. Such an approach amounts to misconduct in relation to the duties of an arbitrator in terms of section 145(2)(a)(i) of the LRA.¹

Because the arbitrator misdirected himself in this manner, this resulted in him making an ultimate finding, which was not one a reasonable arbitrator could have made, and deprived the applicant of a fair hearing of its case.

For these reasons the arbitrator's finding that the dismissal was substantively unfair must be set aside.

¹ Per Mlambo, J, as he then was in *Metcash Trading Ltd t/a Metro Cash and Carry v Fobb and Others* **[1998] 11 BLLR 1136** **[1998] 11 BLLR 1136 (LC)**; (1998) 19 ILJ 1516 (LC); at [12]

Relief

If the arbitrator's misdirection on the performance that was being assessed is corrected, the unavoidable conclusion is that Sikhwari was unsuitable to perform the work of a relief manager, in which capacity he was employed, because he could not function in the place of a store manager. It is also clear from the rest of the arbitrator's findings, that the applicant was given sufficient training, counselling and opportunities to correct himself before the applicant decided to dismiss him. It is worth recalling that Sikhwari had already been working for two years for the applicant but had picked up little in the way of his knowledge of the applicant's operating systems.

In the circumstances, it would be unfair to burden the employer with further training responsibilities and the cost of continuing to employ the applicant when the evidence tends to suggest as a matter of probabilities that Sikhwari's performance was unlikely to improve, and the arbitrator had concluded the employer had done what it could to rectify it. Accordingly, I must find that Sikhwari's dismissal for poor work performance was not substantively unfair.

Order

An order is made in the following terms:

The applicant's late filing of its review application is condoned.

The finding of the first respondent issued on 25 March 2008 in case NP34-02 that the third respondent's dismissal was substantively unfair is set aside.

The arbitrator's award of twelve months' compensation is set aside.

The arbitrator's finding in paragraph 5.7 of his award is substituted with a finding that the third respondent's dismissal was substantively fair.

Each party must pay its own costs.