REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case number JR 157/2011

In the matter between :

PRIMEDIA OUTDOOR, DIVISION OF	
PRIMEDIA (PTY) LTD	**Applicant**
and	
MOTLATSI PHALA N.O	**1st Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**2nd Respondent**
MOSES SIZWE MNCHUNU	**3rd Respondent**

Date if hearing: 17 April 2012

Date of judgment: 31 August 2012

Summary: Review application- Point in *limine* : *Locus standi* of the deponent to

the founding affidavit. Principle- locus standing regarding the initiation and prosecution of the matter. Contention that the deponent to the founding affidavit had no *locus standi*. Initiation and prosecution in this matter done by the attorneys and not the deponent to the founding affidavit.

Failure to call and provide reason for not calling crucial witness- Commissioner applied the principle correctly. Review application dismissed.

JUDGMENT

Molahlehi J

Introduction

1] This is an application to review and set aside the arbitration award of the first respondent (the Commissioner) under case umber GAJB 31357-10 dated 20 December 2010. In terms of that arbitration award the dismissal of the third respondent was found to have been unfair and the applicant was accordingly ordered to reinstate the third respondent.

2] The third respondent has in his answering affidavit raised a preliminary point concerning the alleged unreasonable delay in the prosecution of the review application. This point was however not pursued in argument.

Back ground facts

3] The third respondent who prior to his dismissal was employed as debtors' clerk was dismissed for gross negligence and gross dishonesty. The charges arose from customer invoices which were found unattended in an office.

4] According to the applicant the third respondent was responsible for sending the invoices to its customers and therefore the finding of some of them in the office meant that customers had not been invoiced for the services which the applicant had rendered. The charge of dishonesty arose from the allegation that the third respondent when asked about the invoices, said that he had posted them. Two other employees were also charged for the invoices which were allegedly not send to customers. The third respondent and Ms Melanie Coombs were found guilty and dismissed. Ms Sandra Miller was only found guilty of negligence and not dishonesty and was accordingly not dismissed.

Grounds for review

5] The applicant contends that the Commissioner committed gross irregularity as his finding was inconsistent with the evidence present during the arbitration hearing. In this respect the applicant contends that the evidence which was presented showed that the third respondent was responsible for the sending of invoices to the customers of the applicant and the invoices which were found in the third respondent's office had not been sent to the customers. The applicant contends that the arbitration award was irregular because the Commissioner failed to take into account the following undisputed facts:

> "20.1 that each month the Third Respondent is responsible to send invoices to customers;
>
> 20.2 that a box of original unsent invoices was discovered in the Applicant's offices;
>
> 20.3 that the invoices in this box were for the period of June and August.'

6] As concerning the issue of inconsistency the applicant contends that the finding of the Commissioner was plainly wrong and in direct contrast to the evidence presented during the arbitration hearing.

The Commissioner's arbitration award

7] In analyzing the evidence the Commissioner found that it was important for the applicant to have called a number of witnesses in seeking to proof that the third respondent was guilty of failing to send the invoices to customers or that the invoices were indeed not sent. The witnesses which the Commissioner says the applicant was supposed to have called are; Ms Joshila Hari, Melnie Coombs and Denver.

8] The Commissioner says Ms Coombs ought to have been called as a witness to explain why she gave Denver invoices as a matter of practice when the applicant was also a debtor's clerk. And concerning Ms Hari the Commissioner says she ought to have been called as a witness because she had convened a meeting with the employees in the debtors department immediately when the issue came to her attention. She subsequent to the meeting sent an email requiring a detailed explanation of what happened. Denver ought to have been called, according to the Commissioner because she would have clarified the question concerning the distribution of work to the third respondent and other employees.

9] As concerning the charge that the applicant failed to show that the third Respondent was guilty of failing to send invoices, the Commissioner found that the applicant was inconsistent in the application of its discipline because the supervisor who gave work to the employee was not dismissed.

<u>Evaluation</u>

10] The third respondent raised as a preliminary point the issue of *locus standi*. The third respondent contends that the applicant has failed to prove *locus standi* because the founding affidavit is signed by a manager who has produced no evidence to show that he had authority to do so.

11] It is trite that the *onus* rests on party instituting proceedings and prosecuting a claim to prove *locus standi*. In the present matter the issue of *locus standi* was raised for the first time during argument and was raised not in the context of the institution of the proceedings but rather in relation to the attestation of the founding affidavit. The notice of motion instituting the proceedings is signed by the applicant's attorneys of record.

12] The question of *locus standi* in relation to the signing of the founding affidavit was answered by the Supreme Court of Appeal in *Games and Another v Telkom Namibia*,[1]where the court held:

"[19] The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided."

13] In the present case, in the same way as the above case the notice of motion is signed by the attorneys of record of the applicant and their authority in that regard has not been challenged. It therefore follows that it is the attorneys who are responsible for instituting and prosecuting the proceedings. Accordingly, the issue of *locus standi* cannot be sustained.

14] Turning to the merits of this case, the first point concerns the finding that the applicant was inconsistent in the application of its discipline. As indicated earlier the Commissioner found the dismissal of the third respondent to be inconsistent because Ms Coombs was charged of the same offences, found guilty but was not dismissed. Contrary to this finding the record reveals that Ms Coombs was

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1 2004 (3) SA 615 (SA) at paragraph [19].

dismissed. This fact was also conceded to during argument in these proceedings. It was, however, suggested that the inconsistency finding was in relation to Ms Miller, the supervisor of Ms Coombs.

15] Ms Miller was also charged with the same offences, as the third respondent but was found guilty of one charge and given a written warning. The applicant explained that the reason for treating her differently, even though she was found guilty was that this was her first offence.

16] It can therefore not be said that there was a typographical error that instead of Ms Miller the Commissioner said Denver. However, even if that was the case the finding of the Commissioner would still be unsustainable. It is trite that inconsistency does not automatically arise as a matter of application of a rule of law whenever an employer applies differentiated sanction to employees who are charged with the same offences. The question in general is whether the differentiation is fair and that it is also generally determined by enquiring whether there is a reasonable explanation for the differentiation in the discipline. In the present case the applicant has provided an explanation which has not been challenged by the employee.

17] The second point in as far as the merits of the case is concerned relates to the broader issue of the reasonableness of the conclusion reached by the Commissioner, including those defects envisaged in section 145 of the Labour Relations Act.

18] It is trite that [2]in considering whether the dismissal of an employee is fair or otherwise the Commissioner sitting as an arbitrator is required to take into account the totality of the facts and the circumstances of the case.

19] In the context of this case, the issue that led to the applicant dismissing its employees arose as a result of the invoices which were found in the box next to a scrap paper. The department responsible for sending invoices to the customers of the applicant is the debtors department. At the time the employees

2 See Fidelity Cash Management Services v CCMA and Others (2008) 3 BLLR 197 (LAC)

employed in that department were responsible for the processing and ensuring that invoices are sent out. At the time of the dismissal, the third respondent together with another debtors clerk were responsible under the supervision of Ms Coombs for sending out invoices.

20] It is apparent from the reading of the arbitration award that the operational process of sending invoices out played a significant role in the Commissioner arriving at the conclusion that the dismissal of the employee was unfair. The process described by Miss Coombs in her testimony and in this regard the Commissioner quotes her as having described the process as follows:

> 'Pearl, puts invoices on my desk as soon as she has printed, I placed them on Dever's desk before he got into the office and told him to ensure invoices are enveloped and posted- this was done until Denver left at the end of August.'

21] It is apparent from the above that the person responsible for allocating and posting of the invoices was Mr Denver. He was in essence responsible for distributing work to the employee and the other debtors' clerk. He was thus a critical witness to explain, as to whom the June invoices were given to. Put differently, he is the one who could confirm whether the invoices were given to the third respondent or Ms Miller. It is in this context that the Commissioner found that the applicant ought to have called Mr Denver as a witness to clarify what actually happened with the allocation of the June invoice.

22] The Commissioner clearly drew an adverse inference from the failure to call Mr Denver. This approach is not unreasonable as it accords with the legal principle enunciated by our courts. In *UPUSA OBO Khumalo v Maxiprest Tyres (Pty) Ltd*, where this court in dealing with this principle held:[3]

> "[30] It is a well-established principle of our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn.

The court further quoted with approval what was said in *Tshishonga v Minister of*

3 [2008] JOL 22873 (LC).

Justice and Constitutional Development and another[4], where the court had the following to say:

> "But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case."

23] As concerning the second charge of failing to inform the applicant about the invoices, the version of the third respondent as to what happened in that regard was not challenged. The version of the third respondent was that he was not present at the meeting where the question as to who was responsible for the June invoices was raised. He secondly, said that he became aware of the invoices when he received the email enquiring as to who was responsible. It therefore means that in the first instance, the submission by the applicant that the third respondent simply made a bare denial is incorrect.

Conclusion

24] I agree that the Commissioner's arbitration award is reviewable on the basis of the error he made in relation to the facts concerning the alleged inconsistent application of discipline by the applicant. I do not however believe that this error vitiates the whole of the arbitration award. In my view the arbitration award is still sustainable despite this error. I am of the view in this regard that the proper and fair approach to adopt is that of correcting the arbitration award in as far as the issue of inconsistency its concerned.

25] The Commissioner cannot however be faulted for finding that the applicant has failed to prove that the employee was guilty of failing to send the June invoices. The conclusion by the Commissioner that the applicant ought to have called Mr Denver as a witness is on the facts and circumstances of this case correct. The applicant has accordingly failed to make out a case justifying the setting aside the arbitration award. I see no reason why the cost should not in fairness and in law follow the results.

4 (2007) 28 ILJ 195 (LC)

<u>Order</u>

26] In the premises the following order is made:

1. The arbitration award of the Commissioner is reviewed and corrected to read as follows:

"1 The applicant has not made out a case for inconsistency in the application of discipline by the respondent."

2. The applicant's application to review and set aside the arbitration award made by the first respondent under case number GAJB 3135-10 dated 20 December 2010 is dismissed with costs.

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Molahlehi J

Judge of the Labour Court Of South Africa

Appearances:

For the Applicant: Snyman Attorneys

Fort the respondent: Adv DEJ Brown instructed by Medupi Lehong Attorneys