REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOAHNNESBURG

JUDGMENT

Reportable

Case no: JRJR 05/10

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION	**First Applicant**
MAZIBUKO JC	**Second Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT	
BARGAINING COUNCIL	**First Respondent**
MABUSELA TL *N.O*	**Second Respondent**
RAND WATER	**Third Respondent**

Heard: **10 February 2012**

Delivered: **08 October 2012**

Summary:

JUDGMENT

MOLAHLEHI J

Introduction

1] This is an application to review and set aside the arbitration award made by the second respondent (the arbitrator) under case number GPD090802, dated 5 October 2009. In terms of the arbitration award, the arbitrator upheld the decision of the third respondent to dismiss the second applicant, as being fair.

2] The applicant has also applied for condonation for the late filing of the review application. In the circumstance of this case, taking into account the short period of 28 days delay, I see no reason why condonation should not be granted.

Background facts

3] The second applicant, Mr Mazibuko, (the employee) who at the time of his dismissal was employed as a conference coordinator, was charged with the following offences:

> "Charge 1
>
> Being in possession of Rand Water's property without authority in that you were found in possession of decanter and 18 glasses belonging to Rand Water on 13 February 2007 at the main reception of Rand Water's head office building.
>
> Charge 2
>
> Attempting to defeat the process of investigation by the forensic audit unit in

that on 13 February 2007, at about 17h30, you attempted to bring the above stated decanter and glasses into Rand Water's head office knowing that the Forensic Audit Unit is making investigations into the whereabouts of the said decanter and glasses.

Charge 3

Damage to Rand Water's property in that when you were found in possession of the above mentioned decanter and glasses by the Protective Service personnel, some of the glasses were damaged.

Charge 4

Deliberately giving untrue and misleading information in that when you were asked telephonically about the whereabouts of the above-mentioned decanter and glasses on the 13th of the right 2007, you stated that the items where in a cupboard in your office, however, when the office was searched the glasses could not be found.'

4] The chairperson of the disciplinary enquiry found the employee guilty of charges one, three and four. In terms of charge two the third respondent alleged that the employee attempted to defeat the process of investigation by the auditors. This charge was discarded.

5] The applicant was accordingly dismissed for being found in possession of the third respondent's property, damage to that property and for giving untrue and misleading information regarding its whereabouts.

6] The employee disputed the fairness of the dismissal and accordingly referred the matter to the first respondent for concilliation and thereafter to arbitration.

7] The testimony of the various witnesses that testified during the arbitration hearing has been summarised by the arbitrator and have not in any material manner been challenged by any of the parties and therefore will not be repeated in this judgment except where it is necessary.

8] The facts that gave rise to the charges against the second applicant arose from the discovery by the forensic department that certain crystal glasses and decanter which had been purchased by the third respondent went missing.

9] On discovering that the glasses and decanter were missing, the forensic auditor, Mr Kometsi required Ms Mmushi, to investigate. The person who purchased the glasses was Ms Mabena who gave the glasses to the second applicant during early February.

10] Ms Mmushi firstly checked whether the missing glasses were not at the other conference centre and when the glasses could not be found there, the auditor requested Ms Mmushi to enquire from the applicant as to what happened to the glasses. Initially when asked about the glasses, the applicant said that they were in his office in the cupboard. The glasses could not however be found in the office. In light of this, Ms Mmushi advised the security to be on the lookout for the missing glasses.

11] It was alleged that initially on arrival at the gate on the day when the glasses were brought in, the employee resisted being searched by the security. On searching the employee's car, the security found the glasses in the boot, one of which was broken.

12] The employee testified that the glasses were given to him earlier by his superior, Ms Mabena, who had phoned him to pick them up from her home as she was not feeling well on that day. In this respect, the employee testified that after taking the glasses from his superior, he enquired as to when he was expected to take the glasses to the workplace as it was already late at that time. The answer he got from his superior was that he could take them the following day.

13] It is common cause that the employee did not take the glasses to the workplace the following day but did so only after about 11 days. The employee gave a number of reasons for the delay in taking the glasses to work. The first reason is that on the day he was instructed to take the glasses to work he was busy with arrangements of attending a family funeral. The other reason is that he thereafter went on leave for few days and the other reason was that he forgot that he had the glasses in the boot of his car. The reason for taking the glasses to the workplace on that particular day was according to him because he was told by his colleague as to what kind of glasses the third respondent was looking for.

Grounds for review

14] The applicants in their challenge of the arbitration award contend that the arbitrator failed to have regard to the direct evidence which had been placed before her but rather took into account irrelevant considerations based on evidence which was not before her. The applicants further contend that there was no basis for the arbitrator to arrive at the conclusion that the employee's conduct amounted to breach of duty of good faith. The other ground upon which the applicants are challenging the arbitration award is that it was not fair in the circumstances of this case to impose the sanction of dismissal in particular having regard to the fact that there was no evidence of breakdown in the trust relationship between the parties. It was for these reasons that the applicants contend that the arbitration award is unreasonable.

15] In the supplementary affidavit, the applicants contend that in determining whether the second applicant should have been dismissed, the arbitrator ought to have determined firstly whether the second applicant was guilty of the three charges he was charged with. It was argued on behalf of the applicants in this respect that save for dealing with the charge of damage to property the arbitrator did not deal with all the other charges for which the second applicant was charged with.

16] It was argued on behalf of the applicants during the review that there was no basis upon which the arbitrator came to the conclusion as she did.

The arbitration award

17] After a brief analysis of the nature and the duties of both parties arising from their contract of employment, the arbitrator observes that in considering the fairness of a dismissal regard must be had to the Labour Relations Act 66 of 1995 and the Code of good Practice: dismissal. The arbitrator then found that the glasses were handed over to the employee by his manager, Ms Mabena. The arbitrator further found in this respect that the applicant was authorised by his manager to deliver them to the office on Friday, 2 February 2007.

18] As concerning the testimony of Ms Mabena, who at the time of testifying was no longer in the employ of the third respondent, the arbitrator accepted her version that she had authorised applicant to take possession of the glasses and that that version was not rebutted by the third respondent.

19] After making the above findings, the arbitrator raises the issue of the delay by the employee in delivering the glasses and observed that a period of 11 days was a very long period for the employee to have delivered the glasses. As concerning the query raised with him regarding the whereabouts of the glasses, the arbitrator found that even if the second applicant did not know as to which glasses the auditor was looking for at the time she called him, why did he not call her after realising that he had them.

20] As concerning the charge of damage to the property (breaking of one of the glasses) the arbitrator found that the third respondent had failed to prove 'any wilful damage to the glasses', by the employee. The arbitrator found that charging the employee with damage to the property was unreasonable because there was no element of intention on the part of the employee to cause the damage.

21] After observing that, 'an unauthorised use of company property is generally regarded as sufficient to warrant a dismissal, the arbitrator then makes the following finding:

> "… In the current matter the respondent could not prove that indeed the applicant was in an unauthorised possession of the glasses since Busi testified that she authorised him to carry those glasses and deliver them to the office and the respondent did not present contrary evidence to rebut her testimony."

22] In finding the dismissal to be fair, the arbitrator reasoned that the employee, 'failed in his duty of good faith.' It is apparent from the reading of the arbitration award that the reason for finding that the employee 'failed in his duty of good faith,' is because he kept the glasses for a lengthy period which according to the arbitrator the reason thereof 'is only known by him.'

<u>Evaluation</u>

23] The essence of the applicant's challenge to the arbitration award is that the arbitrator reached an unreasonable conclusion in finding the dismissal to be for a fair reason. It then follows that the test to apply in considering the review application is that of a reasonable decision maker as set out in *Sidumo*.[1] The Labour Appeal Court in *Fidelity Cash Management Service v CCMA and Others*,[2] interpreted the reasonable decision maker test as set out by the Constitutional Court as being a stringent test which would ensure that arbitration awards are not lightly interfered with. In relation to the determination of the fairness of a dismissal the LAC held that:

> 'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.'[3]

1 *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405.
2 [2008] 3 BLLR 197 (LAC).
3 *Fidelity Cash Management Service* at para 32.

24] It would appear that in addition to the contradiction between the reasoning and the conclusion made in the award, the arbitrator reached a conclusion that is unreasonable because of the failure to adhere to the above principle. It therefore follows that there can be no doubt in applying the *Sidumo* test that the arbitrator in reaching the conclusion that the dismissal was for a fair reason, made an arbitration award which a reasonable decision maker could not have reached. It is for this reason and the others set out below that I am of the view that the arbitration award of the arbitrator stands to be reviewed.

25] The important aspect that supports the view that the decision of the arbitrator is unreasonable is the fact that the arbitrator arrived at a decision which is not supported by the facts of the case. The arbitrator somehow found the employee guilty of a charge which was never before the third respondent nor formed the basis or reason for the dismissal of the employee. It would appear that the 'bad faith' for which the arbitrator found the employee guilty of arises from the fact that he delayed in delivering the glass to work. There is no evidence that for a moment suggest that the employee was charged with the delay in delivery the glasses after taking them from his superior.

26] The arbitration award is unreasonable because the decision reached by the arbitrator is not reasonably connected to the material and the evidence which was before her. In other words the arbitrator determined the matter not on the basis of the reasons given by the third respondent for dismissing the employee but on some other basis upon which the case of the third respondent was not based on. It is clear from the reading of the record that the employee was dismissed for three reasons which are set out in the third respondent's Discharge Form number 0041 as follows:

'1. Being in possession of RW property without authority.

2. Damage to RW property.

3. Deliberately giving untrue and misleading infor'

27] It is very clear that in as far as the first reason is concerned the third respondent failed to prove that the employee did not have authority to be in possession of the glasses. In that regard, the arbitrator does in fact make a finding that is correct and that is that the employee was not guilty of unauthorised possession of the glasses. There is no evidence that the authority given to the employee to take possession of the glasses was ever revoked by the manager that authorised him in the first instance to take possession thereof.

28] There was also insufficient evidence for the arbitrator in arriving at the conclusion that the trust relationship between the parties had broken down to the extent that it would not be fair to expect the third respondent to continue with the employment relationship. In this respect, what was before the arbitrator was an opinion by the forensic auditor about the trust relationship between the parties. There was no evidence as to the impact of the employee's conduct on the trust relationship. In any case there could never have been a breakdown in the trust because the facts which the auditor placed before the arbitrator did not support a finding of a breakdown in the relationship. Her version upon which she based her opinion that the relationship between the parties had broken down was based on the allegation of unauthorised possession of the property of the third respondent by the employee which the arbitrator found to have no merit. In other words there could be no breakdown in the relationship with the third respondent when the arbitrator had found that the third respondent had failed to show that the employee did not have authority to be in possession of the glasses. And furthermore there could also be no breakdown in the relationship when the arbitrator found that the third respondent had failed to show that the employee maliciously damaged one of the glasses of the third respondent.

29] The same applies to the allegation that the employee misled the forensic auditor when he informed her that the glasses were in an office. In this respect, the version of the employee that at the time the auditor asked him about the glasses he was not aware which or what type of glasses she was referring to. In finding the employee guilty of misleading the auditor on the basis that he had the duty to contact the auditor once he had become aware which glasses was referred to, seems to me to shift the burden on to the employee. It is trite that the *onus* to show that the dismissal was for a fair reason is on the employer and not the employee.

30] In light of the above and as already indicated, the arbitrator's arbitration award stands to be reviewed. In my view, although there are some deficiencies in the record, I do not believe that it would serve any purpose in remitting this matter back to the first respondent. There are sufficient material upon which this Court can determine the fairness or otherwise of the dismissal.

31] In as far as the relief is concerned, there is no basis from the record upon which it can be said that the primary remedy of reinstatement should not be granted. And with regard to the issue of costs, I see no reason why the costs should not follow the results.

<u>Order</u>

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

1. The arbitration award made under case number GPD 090802 on 5 October 2009 is reviewed and set aside.

2. The arbitration award is substituted with the following award:

‘a) The dismissal of the applicant, Mr Mazibuko, was substantively unfair.

b) The respondent is ordered to reinstate the applicant retrospective to the date of his dismissal without lost of any benefits that may have accrued.'

3. The third respondent is ordered to pay the costs of the applicants.

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Molahlehi J

Judge of the Labour Court of South Africa

<u>APPEARANCES</u>:

FOR THE APPLICANT: Adv C Orr instructed by Cheadle Thompson & Haysom Inc.

FOR THE RESPONDENT: Cliff Dekker Hofmayer Inc.