



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2551/10

In the matter between:

G4S CASH SERVICESSA (PTY) LTD

Applicant

and

**THE NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT INDUSTRY**

First Respondent

COMMISSIONER E. TLHOTLHALEMAJE

Second Respondent

GIYANI TIMOTHY BALOYI

Third Respondent

Heard: 07 January 2013

Delivered: 31 May 2013

JUDGMENT

NAIDOO; AJ

Introduction

- [1] This is an application to review and set aside an arbitration award made by the second respondent (the arbitrator) under case number GPRFBC12160, in terms of which the third respondent (employee) was awarded retrospective reinstatement. The application is opposed by the employee.

Background facts

- [2] The employee commenced his employ with the applicant (the employer) on 09 November 1998 and at the time of his dismissal occupied the position of 'Bank Supervisor'.
- [3] On 06 May 2010 he was dismissed for;
- 'Gross Negligence in that you failed to perform your duties as a supervisor'*. The employee referred a dispute to the first respondent (Bargaining Council), challenging only the substantive fairness of his dismissal.

Evidence led at arbitration

- [4] At arbitration the applicant led the evidence of 2 witnesses; Alfred Mazibuku and Ravidran Reddy.
- [5] Mazibuku, the initiator at the employee's internal enquiry testified that a bank marshal, Thandi, who received money bags from the applicant's vans at the bank, reported a money bag missing to the employee. The employee, according to Mazibuku failed to inform the applicant of this missing bag. Further to this, Mazibuku testified that the employee did not balance the money bags on the day in question which formed part of his duties and had he done so, he would have been alerted to the missing bag. Mazibuku conceded he did not speak to Thandi regarding this incident and was only informed by the investigator, one Oosthuizen, that Thandi reported the incident of the missing bag to the employee. However, according to Mazibuko the employee informed him that Thandi did indeed report the missing bags to him. In terms of the quantum of money contained in the bag, Mazibuku said it was 1.7 million rand. When asked to produce evidence that the bag was indeed missing and to the alleged quantum, Mazibuku's response was that the applicant was alerted to the missing bag by its client and its own investigations

confirmed same, however Mazibuku did not produce the investigation report on which he relied on. Mazibuku concluded by saying Thandi was dismissed for the same missing bag in that she signed for the entire consignment without recording that each bag in the said consignment was in fact there.

- [6] The applicant's second witness was Reddy the manager of the applicant's branch at Cleveland and the chairperson at the employee's enquiry. Reddy testified that he found the applicant guilty of the charge as he, the applicant had admitted to not following laid down procedures, more specifically he failed to balance the bags on the day. When asked what evidence was before him at the internal enquiry to suggest a bag was missing, Reddy's reply was that he relied on the investigation report, assumable prepared by Oosthuizen.
- [7] In his evidence the employee denied Thandi informing him of a missing bag or that it was his duty to balance money bags, as this duty was performed by a Bank Marshall.

The award

- [8] The arbitrator held the applicant had failed to establish a case against the employee and in the absence of calling Thandi, the investigator, Oosthuizen or introducing the investigation report, the applicant had relied on hearsay evidence, which in terms of the Law of Evidence Amendment Act¹ (LEAA), stood to be rejected.
- [9] In accepting the employee's version, the arbitrator went on to address the issue of balancing the bags. The arbitrator referred to a Bank Supervisor's duties wherein it stated that a supervisor must balance the receipt of all the work that came in against the signed copies of the work handed to the bank. On this understanding the arbitrator held the employee could not have noticed the missing bag, if the Marshall who received the bags on the day, i.e. Thandi, did not advise him of any missing bag in the first place. As recorded earlier the arbitrator found the employee's dismissal substantively unfair and awarded him retrospective reinstatement.

¹45 of 1988.

Grounds of Review

- [10] Mr. Pocock, appearing for the applicant set out 2 grounds on review. The first was that the arbitrator failed to consider the employee had, at the internal enquiry admitted to have failed to perform his duty of balancing the bags on the day in question. This, according to Mr Pocock, was one of the employee's primary duties and given the high degree of care expected of employees in this industry, the arbitrator should have found the employee guilty of gross negligence irrespective of whether or not money bags went missing.
- [11] The second ground on review was that the arbitrator 'simply endorsed a blanket rejection of the evidence as hearsay', without testing the reliability of the said evidence as well as taking into account what transpired at the internal enquiry.

Evaluation

- [12] On the first ground, it is worthwhile noting that the employee, at arbitration, disputed the allegation that it was his duty to balance the money bags. As the arbitration is a *de novo* hearing, it does not necessarily follow that an employee who changes his or her version from what they said at the internal hearing to what they say at arbitration, stands to fail in their claim for an unfair dismissal for this reason alone. An inconsistency of this nature will have a bearing when the arbitrator has to make a finding on credibility.
- [13] In any event, the arbitrator in casu accepted that the employee should have balanced the bags. In doing so the arbitrator, justifiably in my view, further found that the employee's failure to do so did not result or contribute to the alleged missing money bags. I use the word 'alleged' for the reason that this allegation was in dispute.
- [14] Be that as it may, it is with regard to the fact that at all material times, the employer's case was that the negligence of the employee contributed to the alleged bags going missing and it is for this reason that Mr. Pocock's argument stands to fail. It was never the case of the employer, both at the internal enquiry or at

arbitration, that the employee's failure to balance the bags, rendered him guilty of gross negligence and for this reason alone, the sanction of dismissal was justified.

- [15] For the sake of being thorough, I will record extracts from both the internal enquiry as well as the arbitration, to illustrate this point. Mazibuku at arbitration stated that had the employee balanced the bags he would have realised certain bags missing. This was confirmed by Qwen Kwankis, a Box Room Controller who testified to the same effect at the internal inquiry.
- [16] At the internal enquiry, Mazibuku who was the initiator, again held the same view when, in his closing statement, said the following when referring to the employee, *'he failed to double check and balance in the evening before they closed for the day end which was going to make things easier for everybody and the bags that went missing should be accounted for'*
- [17] Reddy, who was the chairperson, said the following when handing his finding down at the internal enquiry: *'.....it was mentioned that an amount of R1700 000 was lost due to gross negligence and the breech of procedures..... you yourself failed to adhere to the procedures that were drawn up, I have no alternative but the sanction of dismissal as you were aware of the rule in place and you failed to adhere to the rule that needed to be followed, failure of following this rule contributed to the loss of the missing cash.....'* Under cross examination at arbitration, it was put to the employee that he was negligent by not balancing the bags and therefore did not notice the missing bag.
- [18] The same representative when handing up written submissions says: *'The applicant was found guilty on charges relating to gross negligence in failing to perform his duties with regard to failing to report a missing bag by failing to perform his checks and balances which subsequently led to the loss of client of approximately R1.7 Million...'*
- [19] Given this overwhelming evidence, I am satisfied that the employee was dismissed for alleged actions which resulted in certain bags allegedly going missing. This was consistent at both the internal hearing as well as the arbitration. The employer cannot at this stage introduce the argument that the arbitrator should have upheld

the employee's dismissal once it was found that he breached a rule in the workplace. Nor was it the arbitrator's duty to *mero motu* find the employee's dismissal fair, once it was established he breached certain procedure. Had the arbitrator done so, he would have acted contrary to the fact that his duty was to ascertain the fairness of the dismissal, given at the time of dismissal (see *Fidelity Cash Managements Service v Commission for Conciliation, Mediation & Arbitration & others*)². In this regard, the high degree of care expected from employees in this industry does not take the employer's case further. For these reasons the first ground for review stands to fail.

[20] With regard to the second ground, I pause at this stage to set out what section 3 (1) of the LEAA says:

"(1) *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless -*

- (a) *each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
- (b) *the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
- (c) *the Court, having regard to -*
 - (i) *the nature of the proceedings;*
 - (ii) *the nature of the evidence;*
 - (iii) *the purpose for which the evidence is tendered;*
 - (iv) *the probative value of the evidence;*
 - (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*

²[200] 29 ILJ 964 (LAC).

- (vi) *any prejudice to a party to which the admission of such evidence might entail; and*
- (vii) *any other factor which should in the opinion of the Court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice,*

is of the opinion that such evidence should be admitted in the interest of justice.'

[21] An extract from the arbitrator's award reveals the following:

'The investigation report in this regard was not present nor made available in these proceedings. The investigator, one Oosthuizen was not called to testify on the nature of and conclusions of his investigations. The said Thandi was not called upon at any stage to testify, nor were attempts made to secure her testimony. If ever there were attempts made to secure her testimony, they were not revealed in these proceedings....Both Mazibuko and Reddy relied upon hearsay evidence, more particularly about what Thandi and Oosthuizen allegedly said. Such evidence should be rejected out-rightly as there was no justification for it to be admitted as contemplated by any grounds under section 3(1) of the Law of Evidence Amendment Act 45 of 1988'

[22] It seems other than making a sweeping statement that the hearsay evidence led stands to be rejected in terms of the LEAA, the arbitrator does not mention the considerations he took into account when coming to such a conclusion, more particularly those contained in section 3(1)(c), in ascertaining whether or not it would have been in the interest of justice to admit the hearsay evidence. When dealing with these considerations the arbitrator was duty bound to enquire why Oosthuizen or the investigation report was not led at arbitration, similarly why Thandi was not present. If there was a plausible reason for their absence then the arbitrator should have taken this into account when deciding whether or not to reject the testimony of Reddy and Mazibuko. Section 3(1)(c), in particular subsection (vii) obliged the arbitrator to consider the fact that not only did Oosthuizen, at the internal enquiry, testify to what Thandi said, Mazibuko also testified that the employee informed him that Thandi did indeed advise him of the missing bags and further this was

confirmed by Thandi in a conversation with Mazibuko. Furthermore Oosthuizen's testimony was never challenged by the employee. These are all critical factors the arbitrator should have taken into account when ascertaining whether or not to accept or reject the hearsay evidence.

- [23] In the absence of the arbitrator making any mention of these factors or what transpired at the internal enquiry and why, on those facts he rejected the hearsay evidence, one can infer that he failed to take such factors into account. On this point in *Maepe v Commission For Conciliation, Mediation & Arbitration & another*³ the Court said the following:

'While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

- [24] These factors were critical for the arbitrator to assess when making his finding on the admissibility of the hearsay evidence. Even if the employer's representative did not raise these issues at arbitration, the arbitrator, as mentioned, was duty bound to consider same when relying on section 3.

- [25] In *Maepe* (supra) the Court said the following;

'...where the law is that a commissioner must take into account a certain factor in deciding a certain question, he is obliged to take that factor into account even if none of the parties asks him to take it into account. When he is obliged to take it into account, it is no defence to say that he was not asked to take it into account. If the factor was a critical one and he did not take it into account, he may well have committed a gross irregularity justifying the reviewing and setting aside of his award.'

- [26] Whether or not the arbitrator would have arrived at the same conclusion after a proper analysis of section 3(1) of the LEAA, is not a point worth harbouring on for

³[2008] 29 ILJ 2189 (LAC).

the reason that, a careful assessment of section 3 could have led to a consideration of the hearsay evidence. The fact of the matter is that the arbitrator failed to take into account the considerations as set in the relevant section and for this reason alone the award stands to be reviewed and set aside.

Order

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

1. The award under case number GPRFBC12160 is reviewed and set aside.
2. The matter is remitted to the first respondent to be considered afresh by a commissioner other than the third respondent.
3. There is no order as to costs.

Naidoo; AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Adv. Pocock

Instructed by Blake Bester Inc.

For the Third Respondent: Mr PhidzaulimaEnos

LABOUR COURT