



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA,
PORT ELIZABETH

JUDGMENT

Not reportable

Case No: P390/11

In the matter between:

SIMPHIWE NELSON MALEZA

APPLICANT

and

SPAR DISTRIBUTION CENTRE

(EASTERN CAPE)

FIRST RESPONDENT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

SECOND RESPONDENT

SIYABONGA COKILE N.O

THE COMMISSIONER OF THE CCMA

THIRD RESPONDENT

HEARD: 31 NOVEMBER 2012

DELIVERED: 3 OCTOBER 2013

Summary: When the applicant has not proved that an award is unreasonable, his application for review will not succeed.

Review in terms of section 145 of the LRA-Dismissal for misconduct

JUDGMENT

LALLIE, J

- [1] This is an application to review and set aside an award issued by the third respondent (the commissioner) in which he found the applicant's dismissal substantively fair.

Factual Background

- [2] The first respondent distributes food to Spar retail stores in the Eastern Cape. It was located at Kurland Street, Perseverance in Port Elizabeth. In September 2010 it relocated to Burman Road, Deal Party in Port Elizabeth. The applicant was employed by the first respondent as a manager for perishables. When the first respondent was taking occupation of Burman Road premises the applicant was charged with the responsibility of overseeing the clearing of the interior of the areas that were vacated at the Kurland Street warehouse. Items which the first respondent sought to discard during the move were sorted and placed in different bins for scrap metal, paper and cardboard and general waste. The bins would then be collected by a third party supplier which would evaluate the contents and pay the first respondent. Employees interested in the items in the bins had to seek the permission of the head of department to remove them from the first respondent's premises. Employees were required to pay for items to which value could be attached. The head of department authorised the removal of an item by issuing a gate pass.
- [3] On 6 September 2010, the first respondent discovered that electric cables with the value of R70,000.00 were missing. It was discovered that it had been removed by the applicant who sold it to the Kurland Street scrap metal dealer and shared the proceeds with junior employees. He was charged with theft for selling the first respondent's property without permission and dismissed. Aggrieved by the dismissal he referred an unfair dismissal dispute to the second respondent (the CCMA) where the

commissioner issued the award which the applicant seeks this court to review and set aside.

The award

[4] The award is based on facts, the majority of which the commissioner found common cause. On 31 August 2010, the applicant was told by Mr Daniel (Daniel) of the first respondent's IT department to throw computer cables in one of the bins placed at the Kurland Road warehouse. The applicant removed the cables from the warehouse without a gate pass and sold it at Kurland Road scrap metal dealer (scrap metal dealer). He received R151.80. On the same day the applicant gave Mr Blaauw, a forklift driver, an amount of R40.00 to give to Messrs Nopho (Nopho) and Zembe (Zembe), casual employees who assisted in cleaning the warehouse R20.00 each. On the same day, the applicant asked Blaauw to assist the two casual employees sell more cables at the scrap metal dealer. He received an amount of R105.00 which he gave to the applicant. The following day the applicant attempted to sell more cables with the assistance of Nopho and Zembe. He was interrupted and authorised Blaauw to assist. Blaauw received R105.00 from the sale and gave Zembe and Nopho an amount of R15.00 each. The applicant conceded that he received the R105.00 from Blaauw. On 6 September 2010, the applicant accompanied by Blaauw, bought back from the scrap metal dealer the cables sold by Blaauw and himself on 31 August and 1 September 2010. The applicant, Blaauw and Mr Koutsouvelis (Koutsouvelis) the risk and maintenance manager, went to the scrap metal dealer to look for the missing cables. Both Blaauw and the applicant did not disclose the presence of the cables in the boot of the applicant's car.

[5] The commissioner made a finding that the applicant committed theft by selling the first respondent's computer cables without permission. The finding is based on the evidence that the applicant authorised the sale of the cable without the necessary permission or gate pass. Blaauw never asked the applicant for the cable. The commissioner rejected the

applicant's version that he only assisted Nopho and Zembe who had requested the cables, on the grounds that the applicant also benefited from the proceeds of the sale. The applicant concealed the fact that he had sold and authorised the sale of the first respondent's cables on 31 August and 1 September 2010. When the applicant realised that the first respondent was looking for missing cables he did not disclose the truth but secretly bought it back from the scrap metal dealer and reported that he had found the cable at the Burman Road warehouse. The applicant did not deposit the proceeds of the sale of the cables in the first respondent's bank account as he was required. The commissioner found that the trust relationship between the applicant and the first respondent had been destroyed and found dismissal an appropriate sanction.

Grounds for review

- [6] The applicant submitted that the commissioner's process of reasoning was defective leading to the decision he arrived at being susceptible to review. The defect manifested itself in a number of ways. They include the submission that the commissioner overlooked the evidence led by Daniel to the effect that he instructed the applicant to dispose of the cables as the first respondent did not need them anymore. The commissioner considered the first respondent's waste disposal policy that was not in use at the time. Another ground the applicant sought to rely on in proving the absence of the rule he was accused of having breached was that he removed the cables openly and no one asked him for any gate pass. Not even the security officer insisted on a gate pass. The requirement that a gate pass be obtained for every removal of the first respondent's property was not popularly known. Even Blaauw was not asked for one when taking cables out. The commissioner failed to consider that the applicant lacked the intent to steal as he had been instructed by Daniel to throw the cables away. The first respondent should have found him guilty of failure to adhere to prescribed procedures, misconduct which attracted a sanction less than dismissal. The commissioner, so went the submission, misdirected himself,

considered the matter incorrectly and not on the strength of the material available to him.

Test for review

Considering the test for review in *Fedeliity Cash Management Services v CCMA and Others*¹, Zondo JP relied on *Sidumo and Another v Platinum Mines LTD & Others*² and found that if a decision is one that a reasonable decision maker could reach, the decision is reasonable and must stand. In paragraph 98 the court proceeded to issue the following warning:

'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA Commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the Commissioner and that system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently.'

[7] The test for review is further clarified as follows in *Andre Haroldt v Nedbank Limited and Congress of South African Trade Union a decision of the SCA under case number 701/2012*³,

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have

¹ [2008] 3 BLLR 197 (LAC) at para 98.

² [2007] 12 BLLR 1097 (CC)

³ [2013] ZASCA 97 (5 September 2013) at para 25,

misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

- [8] The applicant submitted that in arriving at his decision, the commissioner made errors of both law and fact and failed to apply his mind to material relevant facts thus committing gross irregularity. The applicant's main argument is that his dismissal was based on a non-existent policy. He removed the cables openly. Not even the security guard at the gate asked him or Blaauw for a gate pass for the removal of the cable. He produced his identity document when selling the cables. He voluntarily purchased the cables from the scrap metal dealer when it transpired that the road show cables were missing. He was told by his manager Mr Darney (Darney) that the cables could be thrown away and Koutsouvelis produced no evidence that items of value in the bins were sold. The applicant submitted that the commissioner's failure to consider the above rendered his award reviewable.
- [9] When the applicant's case is considered against the arbitration award the record and the submissions on behalf of the first respondent, the invalidity of the grounds he seeks to rely on become glaring. The commissioner considered the evidence before him and gave reasons for finding that the applicant acted dishonestly and that contrary to the applicant's version, he had the necessarily intention to steal. The arbitrator's reasoning and finding cannot be assailed. He highlighted all the evidence which supported the finding that the applicant conducted himself the way he did out of dishonesty. He did not disclose that he had sold and gave authority that the cable be sold. When questions were asked about missing cables he acted dishonestly by buying it back secretly and made a dishonest report that he had found cable at the Burman Road warehouse. All the applicant's dishonest acts pointed to

one conclusion, that he knowingly stole the cables, sold them and pocketed part the proceeds.

[10] The allegation that the commissioner committed gross irregularity is unsustainable. The commissioner went to great lengths when giving reasons for his decision. He dealt with disputes of fact, the credibility of witnesses, probabilities and provided valid reasons for preferring the first respondent's version and rejecting the one presented by the applicant. The commissioner cannot be faulted for rejecting the applicant's version that he sold and authorised Blaauw to sell the cable to get money to buy food for hungry casual workers. The version fails to explain why he benefited from the proceeds of the sale and why he did not simply disclose to the first respondent the noble cause the cables were sold for. The applicant conceded that the items discarded in the bins were not waste which any employee could help himself to as he latter alleged in an attempt to exculpate himself.

[11] An analysis of this application proves that the award falls within bounds of reasonableness in that it is a decision a reasonable decision-maker could reach on the material before the commissioner. See *Sidumo (supra)*. Even if there was merit in the applicant's submission that the commissioner committed errors, errors on their own do not constitute grounds to review an award. They can render an award susceptible to review if they have the effect of vitiating the reasonableness of the award see *Herholdt (Supra)*. The applicant failed to prove that the award is unreasonable.

[12] I could find no reason for cost not to follow the result.

Order

[13] In the premises, the following order is made

13.1 The application for review is dismissed with costs.

LALLIE, J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Msizi

Instructed by: Pumeza Bono Attorneys

For the first Respondent: Francois Le Roux for Chris Baker and Associates