



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No: JR1632/05

In the matter between:-

SOUTH AFRICAN POST OFFICE

Applicant

and

ABNER ANGEL MOLEME

First Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

COMMISSIONER ANGELA SOLOMONS

Third Respondent

Date of hearing: 31 January 2014

Date of judgment: 6 March 2014

Summary: Review application. Employee charged with fraud. Employer failing to prove intention to defraud by the employee. The employee making an incorrect entry in the end of day report.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application in terms of which the applicant seeks an order reviewing and setting aside an arbitration award made by the second respondent (the Commissioner) under case number NW1383/05 on 18 May 2005 and for the same to be sent back to the first respondent to be determined by a different Commissioner.

Background facts

- [2] The third respondent who prior to his dismissal was employed as a teller at the applicant's Kanana Post office in Orkney was dismissed for misconduct related to fraud. He was initially charged with charges of misconduct which read as follows:

'Details of alleged charges

Charge 01

Fraud- In that the respondent, Mr A.A Moleme, on the 20th of March at the Kanana Postpoint, indicated to the SA Post Office Ltd, that he paid out R420.00 for Uthingo winning tickets, whilst the end of day report of the GVT system indicated a total payment of only R210.00. This action by the respondent resulted in the loss of R210.00 to the SA Post Office LTD. As he did not reflect a surplus of R210.00 in his balance for the 20th March 2004.

Charge 02

Negligence: In that the respondent, Mr A.A Moleme, on the 02nd of March 2004 at the Kanana Postpoint, indicated to the SA Post Office LTD, that he paid out R263.00 for Uthingo winning tickets, whilst the end of day report of the GVT system indicated a total payment of only R163.00 to which he manually added R100.00 for a lotto ticket already validated by another outlet. This action by the respondent resulted in the loss of R100.00 to the SA Post Office.

- [3] The employee was found guilty and dismissed. The notice of dismissal reads as follows:

'Please be advised that your services with the South African Post Office have been terminated with immediate effect for the following reason(s):

Fraud in that you on the 20th of March 2004 at Kanana Postpoint indicated to SAPO that you paid out R428-00 for winning tickets, whilst the end of day report of the GVT system indicated a total payment of only R210-00. (Loss to be recovered from pension)'

- [4] The employee being unhappy with the outcome of the disciplinary hearing referred the matter to the CCMA for conciliation and thereafter to arbitration.

The grounds of review

- [5] The applicant contends that the Commissioner committed reviewable irregularity for the following reasons:

20.1. She evidently overlooked overwhelming evidence tendered on behalf of the applicant, which showed on the balance of probabilities, that fraud was committed. Instead she chose to believe the respondent who failed dismally to lead any compelling or credible evidence in defence.

20.2. The arbitrator's conclusion that what the respondent did merely amounted to 'human error' was not justified in the light of the evidentiary material placed at her disposal by the applicant.

20.3 She unjustifiably interfered with the applicant's sanction of dismissal in the circumstances where the sanction was warranted given the seriousness of the offence and the fact that the respondent was aware of the rule.

The arbitration award

- [6] The Commissioner in finding the dismissal to be substantively unfair reasoned as follows:

'In light of the evidence before me, I find that the respondent has failed to prove on a balance of probabilities that the applicant had committed

an offence of fraud. It is clear that the applicant had not misrepresented any fact'; he made an error in not capturing the activity on the respondent's End of Day Report. The respondent also failed to prove that the applicant has committed an offence of fraud because if the respondent has suffered financial loss, it cannot be regarded as fraud as the loss was caused by a human error by the applicant'.

Evaluation

- [7] The test to apply in considering whether to interfere with the Commissioner's arbitration award is that of the reasonable decision maker as set out in the case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ and confirmed by other authorities. The test is based on the enquiry into whether the decision which is the subject of the review is one which a reasonable decision maker could not reach.
- [8] In the present instance the essential question is whether the decision reached by the Commissioner that the dismissal of the employee was substantively unfair is one which a reasonable decision maker could not reach. The essential question is whether the finding that the applicant has failed to discharge his duties of showing on the balance of probabilities that the employee had committed the offence of fraud is reasonable. This has to be evaluated on the basis of the evidence and the facts which were before the Commissioner during the arbitration proceedings.
- [9] It has already been indicated that the employee was charged with the misconduct concerning the allegation of fraud which is an act of serious dishonesty. The applicant's policy defines fraud in the following terms:

'Any wilful and unlawful misrepresentation by any employee in whatever form that will have the effect of damaging/harming or potentially damaging the company'.

¹ [2007] 12 BLLR 1097 (CC).

- [10] In terms of section 192 of the Labour Relations Act of 1995 the onus of proof that the dismissal of an employee was both procedurally and substantively fair rests on the employer being the applicant in the present instance. The onus is discharged on the balance of probabilities.
- [11] In order to succeed in proving that the employee was guilty as charged, the applicant had to adduce evidence showing that on the balance of probabilities the employee in making the entry that he paid R 420,00 for the Uthingo winning ticket whilst the GVT machine showed that the total paid was R210,00, did so with the intention of misrepresenting the true state of affairs in relation to the payment. The applicant had further to show that consequent to the misrepresentation it was prejudiced by the conduct
- [12] In my view, taking into account the facts and the evidence which was properly before the Commissioner, I do not agree with the contention that the outcome of the arbitration award was unreasonable.
- [13] The key testimony which the applicant relied on in seeking to show that the dismissal of the employee was for a fair reason was that of Mr Minaar. The essence of his testimony is that the employee presented to the applicant that he, paid out R420-00. According to him, the employee had no right to do that. He testified further that the employee was supposed to have reflected the surplus of R210-00 in accounting record. His failure, according to Mr Minaar to record the correct figure as R210-00 resulted in the applicant suffering the loss in that amount.
- [14] In my view, at best the testimony of Mr Minaar indicates conduct related more to negligence on the part of the employee than intentional misrepresentation. The employee did not deny that the incorrect entry of R420-00 instead of R210-00 was made. He could probably be criticised for not promptly informing the applicant about the variance in his accounting entry but that in my view is far from tilting the probabilities towards intentional misrepresentation.

- [15] The above discussion leads me to the conclusion that there is no basis for interfering with the Commissioner's arbitration award. Put in another way, the outcome of the arbitration proceedings is not unreasonable and therefore the arbitration award is not susceptible to review.

Order

- [16] In the premises, the applicant's review application is dismissed with no order as to costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate N Mbelle

Instructed by: Madlopa Attorneys.

For the Respondent: In person

LABOUR COURT