



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

Not Reportable

CASE NO: P287/11

In the matter between:

VUYANI HENDRY TOTO

Applicant

And

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER NONTUTHUZELO MABENGE

Second Respondent

SASKO BAKERIES

Third Respondent

Heard: 28 May 2013

Delivered: 9 May 2014

Summary: A commissioner may rely on circumstantial evidence in determining the fairness of a dismissal.

Review in terms of Section 145 of the LRA-Dismisal for misconduct.

JUDGMENT

Lallie J

Introduction

- [1] In this application, the applicant seeks an order in terms of section 145 of the Labour Relations Act 66 of 1995 (“the LRA”) reviewing and setting aside the arbitration award of the second respondent (“the commissioner”). It is opposed by the third respondent.

Factual background

- [2] The applicant was employed by the third respondent, a bakery, on 1 August 2006. He was dismissed for misconduct on 17 September 2010 at a time he was a bread loader at the dispatching department of the third respondent. His main responsibility was to load bread in the third respondent’s delivery truck. The misconduct which led to his dismissal was dishonestly which involved the removal of the third respondent’s property, 200 loaves of white bread, without authorisation from a stock controller at the bread dispatch area. The bread was found in one of the respondent’s trucks on the evening of 22 July 2010. The truck in question is truck 25 and it was supposed to be empty when the discovery was made. The third respondent’s version was that the applicant had placed the bread in the truck without the necessary authority and asked a driver to move the truck from where it was parked so that its doors could be closed. The applicant denied ever talking to the driver on the day in question and denied having knowledge of how the bread got to be in truck 25 on the evening of 22 July 2010. Based on direct evidence and circumstantial evidence the third respondent decided that the applicant was responsible for the unauthorised removal of the bread and dismissed him. He challenged the fairness of his dismissal at the first respondent where the commissioner issued the award the applicant seeks this court to review and set aside.

Grounds for review

- [3] The applicant submitted that the commissioner committed gross irregularities by her failure to take into consideration some aspects of the evidence before her while evaluating the inherent probabilities of the dispute. The applicant attacked the award also on the grounds that the commissioner failed to play an inquisitorial role and establish how the applicant managed to load the bread unnoticed. He sought to rely on the commissioner's reliance on circumstantial evidence in the absence of direct evidence by criticising the manner in which the commissioner dealt with circumstantial evidence. The applicant further submitted that the commissioner committed further gross irregularities by concluding that the sanction of dismissal was appropriate without giving reasons for the finding and by her failure to establish whether the trust relationship had broken down.

The law of review

- [4] For the applicant to succeed in this application he needs to prove that the commissioner reached a decision a reasonable decision maker could not reach on the material before her. See *Sidumo and Others v Rustenbergurg Platinum Mines Ltd and Others*¹.
- [5] In *Gold Fields Mining SA (Pty) Ltd(Kloop gold Mine) v CCMA and Others*,² the correct approach in reviewing arbitration awards in terms of section 145 of the LRA is expressed as follows:

‘In a review conducted under section 145 (2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factory individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make’.

¹ 2008 (2) SA (CC)

² [2014] 1 BLLR 20 (LAR) at para 18

The court further clarified in para 16 that ‘a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her, evaluated the facts presented at the hearing and came to a conclusion that is reasonable’

- [6] A reading of the award reveals that the commissioner considered the principal issue before her which was whether the applicant’s dismissal for misconduct was fair. She evaluated the evidence before her. The totality of the evidence before the commissioner was that loading bread into trucks was one of the applicant’s responsibilities. On the evening of 22 July 2010, truck 25 was supposed to be empty. The third respondent’s version was that the applicant approached a driver, Mr Ntlonze (Ntlonze), at the smoking room and asked him to move truck 25 so that its doors could be closed. Later 200 loaves of white bread were found loaded in the truck. The applicant denied ever talking to Ntlonze or knowing him. It was not the applicant’s duty to either drive trucks or close their doors. Before truck 25 was moved, it was parked such that its doors were not closed.
- [7] The commissioner evaluated the evidence before her, accepted Ntlonze’s evidence and gave reasons for preferring it. She further evaluated the third respondent’s evidence including circumstantial evidence. She found that the probabilities were that the applicant was the one who placed the bread in the truck. He closed the truck doors out of self interest as closing truck doors was not his responsibility. She found that both direct and circumstantial evidence proved that the applicant had loaded the bread into the truck.
- [8] The commissioner considered the appropriateness of the sanction and made a finding that it was appropriate.
- [9] Section 138 (7) of the LRA required the commissioner to give brief reasons for her decision. An assessment of the award proves that the commissioner complied with the provisions of section 138 (7). A reading of the award proves that she applied her mind to the issue. The award falls within bounds of reasonableness in that the commissioner reached a decision a reasonable decision-maker could reach on the material before her.

[10] In the premises, the application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mrs Van Staden of the P.E Justice Centre

For the Third Respondent: Ms Kok of Van Zyl Inc

LABOUR COURT