



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

Case No: P427/2009

In the matter between:

CROWN CHICKENS (PTY) LTD t/a SOVEREIGN FOODS

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

YVONNE GROOTBOOM N.O.

Second Respondent

SIPHO VICTOR MATU

Third Respondent

Heard: 25 April 2013

Delivered: 12 August 2014

Summary: An award that is inconsistent with the evidence led at the arbitration may be reviewed and set aside.

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 arbitration award of the second respondent ("the arbitrator") in which she found the third respondent's dismissal by the applicant unfair and ordered his reinstatement. The arbitrator furthermore ordered the applicant to pay the third respondent an amount of R13 000.00 which is equivalent to remuneration he would have earned over a period of two months. This application is opposed by the third respondent.

Factual Background:

- [2] The applicant employed the third respondent as a long distance truck driver on 24 April 2008. His main duty was to deliver the applicant's products. In January 2009, the third respondent effected a delivery at a business of one of the applicant's customers. The customer noticed that his employees, instead of the third respondent and his co-driver were offloading the goods that were being delivered. When he raised a query about the offloading an argument ensued between the third respondent and himself. He instructed the third respondent and his co-driver to leave with the load. They complied. On the way they were phoned by a representative of the applicant who instructed them to effect the delivery. They returned to the customer and effected the delivery.
- [3] In February 2009, the customer filed a complaint via e-mail which the applicant investigated and subjected the third respondent to a disciplinary enquiry in March 2009. The disciplinary enquiry culminated in the third respondent's dismissal which he challenged at the first respondent. The arbitrator was charged with the responsibility of arbitrating the dispute. She issued the award which the application seeks this court to review and set aside.

The award:

- [4] Giving reasons for her decision the arbitrator noted that the third respondent was issued with a final written warning arising from a complaint which had been filed by a customer against him in December 2008. The arbitrator accepted the hearsay evidence of the complaint, which had been filed via e-mail on the basis that the third respondent did not dispute that the incident had

taken place, although he presented a different version. She also accepted the third respondent's evidence that he required a long rope to offload the truck which was not available when the first attempt to offload was made. The arbitrator further accepted that the third respondent did not offload the truck at the first attempt, owing to lack of protective clothing. She found that the third respondent's refusal to offload the truck was not correct as offloading was not the customer's duty and that both parties were at fault as the customer did not provide the third respondent with a long rope to make offloading easy.

- [5] The arbitrator was not persuaded that the third respondent had spoken to the customer rudely by calling him "mlungu". She considered that the incident occurred in December 2008 and was only reported in February 2009. The delay led the arbitrator to conclude that the customer did not take the matter seriously. She made a finding that in the circumstances she did not believe that dismissal was the appropriate sanction.
- [6] A further finding the arbitrator made was that the trust relationship between the applicant and the third respondent had not irrevocably broken down. She acknowledged that the third respondent was not before her with clean hands as he was not sensitive enough to the customer and did not offload the truck when it was his duty to do so. She ordered reinstatement and payment of two months' salary for the period he was out of work.

Grounds for review

- [7] The applicant submitted that the arbitration award is unreasonable and that the arbitrator committed gross irregularities within the meaning of section 145(1)(a)(2)(ii) of the Labour Relations Act¹ ("the LRA"). The arbitrator did not consider the evidence, and that the third respondent had pleaded guilty to the charges he faced at the disciplinary enquiry. A further attack on the award is based on the manner in which the arbitrator dealt with the evidence. When accepting the third respondent's explanation for not off loading at the first attempt, that he did not have protective clothing, she lost sight of the fact that he still did not have it when he ultimately offloaded. The arbitrator did not

¹ Act 66 of 1995

consider the reasons for the third respondent's dismissal and limited her enquiry to whether the third respondent's dismissal for making a racial comment to the customer was unfair.

- [8] The Applicant submitted that the arbitrator miscalculated the period of the delay in the reporting and taking of disciplinary action in finding that the incident that led to the third respondent's dismissal took place in December 2008 instead of January 2009. This error, according to the applicant, constitutes proof of the arbitrator's failure to apply her mind. The applicant criticized the award on the basis that the arbitrator committed gross irregularities by issuing an award with a number of random and mutually contradictory observations and by finding that it failed to discharge the onus of proving the fairness of the third respondent's dismissal.
- [9] It was argued on behalf of the applicant that the arbitrator unreasonably limited the misconduct to the third respondent's use of the word "mlungu" when referring to a customer. The third respondent denied that the arbitrator's interpretation of the misconduct was unreasonable and submitted that he was not dismissed for insubordination. It is common cause that the customer did not testify. His evidence contained in the letter of complaint is therefore hearsay evidence. In *Naraindath v CCMA and Others*² it was held that reliance on hearsay evidence by an arbitrator does not necessarily constitute a reviewable irregularity. The arbitrator chose to accept the applicant's evidence that the incident took place. She rejected the applicant's version that the reason the third respondent did not off-load the truck on the first attempt was the unacceptable manner in which he spoke to the customer which brought the applicant's name in disrepute. The arbitrator accepted the third respondent's version which she found undisputed, that the long rope he requested from the applicant to off-load was not available. She further accepted that the third respondent was prevented by lack of protective clothing from off-loading.
- [10] A reading of the record reflects that the third respondent's evidence in chief was that they had been given the long rope when they first attempted to effect

² [2000] 6 BLLR 716 (LC) at para 34.

the delivery. This version is consistent with the explanation he gave when asked why the customer's employee was in the truck. He said the applicant did not allow them to get inside the truck because it would not be liable for injuries they could sustain while inside the truck. It was his evidence that the customer told him that if that was the way the applicant served them, he could not do business with the applicant. The arbitrator's finding that the long rope the third respondent required was not available is not based on the evidence before her. So is the finding that the customer was at fault, because he failed to provide a long rope. These errors constituted gross irregularities

- [11] There were several verbal exchanges between the third respondent and the customer, which caused the customer to complain other than being referred to as "umlungu". The arbitrator failed to make a finding whether, during the exchange, the third respondent spoke to the customer in a manner which brought the applicant's name into disrepute. The omission constituted gross irregularity as it limited the enquiry the arbitrator had to conduct to the use of the word "umlungu". It excluded other verbal exchange.
- [12] The arbitrator committed a gross irregularity in finding that the incident which led to the third respondent's dismissal occurred in December 2008 because it took place in January 2009. The finding that the customer delayed in reporting the incident led the arbitrator to draw the negative inference that the customer did not take the incident seriously is based on incorrect calculation of the period which lapsed from the date of the incident to the date on which it was reported. It incorrectly extended the period by about a month.
- [13] The arbitrator committed a gross irregularity by not considering the common cause evidence that the third respondent was on a final written warning for similar misconduct. The third respondent's disciplinary record was material in the determination of the appropriateness of the sanction of dismissal.
- [14] A consideration of the evidence as a whole shows that the gross irregularities committed by the arbitrator led her to reach the decision that the third respondent's dismissal was unfair. The decision is based on the erroneous finding that the customer was at fault by not providing the third respondent

with a long rope. It is further based on the omission to consider the full verbal exchange between the third respondent and the customer and the omission to consider that the third respondent was on a final written warning for similar misconduct when he committed the misconduct he was dismissed for. These gross irregularities led the arbitrator to reach an award which falls outside the bounds of reasonableness.

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

[15.1] The arbitration award issued by the second respondent under case number ECPE 1152-09 and dated 25 August 2009 is reviewable and set aside.

[15.2] The matter is remitted to the first respondent to be arbitrated *de novo*.

Lallie J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate. M Grobler

Instructed by: Werkmanns

For the Third Respondent: Mrs E van Staden

Instructed by: The Justice Centre

LABOUR COURT