



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1578/12

In the matter between:

THEMBISILE J JOFILE

Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL AND OTHERS

First Respondents

ADV TIMOTHY BOYCE

Second Respondent

MERAFONG CITY LOCAL MUNICIPALITY

Third Respondent

Heard: 13 June 2014

Delivered: 08 January 2015

Summary: Review application. The conclusion reached by the arbitrator that the dismissal was fair is unreasonable and therefore the review application stands to succeed.

JUDGMENT

MOLAHLEHI, J

- [1] This is an application to review and set aside the arbitration award issued by the second respondent (the arbitrator) under case number GPD061112 dated 20 February 2012 in terms of which the dismissal of the applicant was found to have been for a fair reason and accordingly her unfair dismissal claim was dismissed.
- [2] The applicant had also applied for condonation for the late filing of review application. The condonation was granted at the hearing of the matter and the reasons for that are in the *ex tempore* ruling.

Background facts

- [3] The applicant was prior to her dismissal employed by the respondent as the chief licensing officer with her immediate supervisor being Ms. Combrinck. She was charged and dismissed for misconduct relating to dishonesty. The charge proffered against her reads as follows:
- “Gross dishonesty regarding the unlawful and intentional stealing of an amount of R18, 635 on 26 July 2010.”
- [4] The incident that led to the above charge against the applicant arose when Ms. Combrinck noticed that the amount had not been banked with the security company, SBV.
- [5] During August 2010, the applicant received the call from Ms Van Tromp saying that the money in the amount of R18, 635 is not reflected in the bank statement of the municipality.

- [6] According to Ms. Combrink, she was informed by the applicant that the money had been banked after it had been placed in the plastic money bag and thereafter placed into another bag with the serial number 1012001656972. The applicant further signed a memorandum which reads as follows:

'I THEMbisile JOYCE DECLARE THAT ON 26TH OF JULY RECEIVED THE MONEY TO THE VELUA OF R18635 FROM THE ACTING SUPERVISOR MS JM LETSOELA. I TOOK NECESSARY DOCUMENTS (DEPOSIT BOOK & THE RD754 PRINTST OUTS) AND BANKED THE MONEY WITH THE MONEY WITH A PLASTIC BAG BAR CODED 10220016569760. AT THE LATER STAGE I WAS INFORMED THAT THE MONEY WAS NOT BANK. AS FOR HOW THIS INCIDENT OCCURRED I DO NOT KNOW BECAUSE I BELIEVE THAT I DID ALL THE NECESSARY PROCEDURES AS A SUPERVISOR AND I AM REALY PAUZZELED THAT THE MONEY WENT MISSING IN THAT MANNER....'

- [7] Subsequent to discovering that the money had not been banked, it was arranged with the security company to watch the video footage relating to the banking of the money. It is apparent from the observation of the video footage that there was no tempering with the bags in which the money had been placed and also that there was no money in the bag.

The ground for review

- [8] The applicant raised several grounds of review in challenging the manner in which the arbitration proceedings were conducted including the outcome thereof. The thrust of the challenge is, however, that the outcome of the arbitration award is unreasonable and that the arbitrator committed gross irregularity in the manner in which he conducted the proceedings. In summary, the complaint of the applicant is that:
- a. She was denied a fair hearing because she was refused a postponement.
 - b. The arbitrator was found discussing the matter with one of the officials of the third respondent before the commencement of the proceedings.

c. The arbitrator was biased against the applicant and exceeded his powers.

- [9] As concerning the outcome of the arbitration award, the applicant contends that the arbitration award is unreasonable because the arbitrator failed to apply his mind to the facts before him and thus the arbitration award is unreasonable. The arbitrator is also criticised for failing to apply his mind to the issue of inconsistent application of discipline by the respondent and also failing to apply his mind to the circumstances and the explanation as to how the plea of guilty was incorrectly entered during the disciplinary hearing. In respect to the plea of guilty, the applicant contends that the arbitrator failed to apply his mind to the fact that the applicant's representative did not have the authority to enter that plea.

The case of the third respondent

- [10] The case of the third respondent during the arbitration proceedings was based on the testimony of a single witness, Ms Combrink, the immediate supervisor of the applicant. The version that she presented during the arbitration proceedings was based mainly on hearsay evidence as she was not present when the two key incidents that formed the basis for the charges against the applicant occurred.
- [11] Ms Combrinck testified that on 13 August 2010, the applicant whilst in her presence received a call from Ms Van Tromp who informed her (the applicant) that the bank statement does not reflect the amount of R18 635.00, which was collected on 23 July 2010. The applicant then proceeded to her office to check the bank deposit slip. She then according to Ms Combrinck, confirmed that she did receive the money from the cashier which was thereafter banked.
- [12] She further testified that on 23 July 2010, Ms Letsoela, who at the time was the cashier, was acting as supervisor because the applicant was acting manager. It would appear that on that day, 23 July 2010, the applicant was supposed to have gone back to her position as a supervisor but did not and it would further appear she was not on duty because she had to go and see a doctor. The applicant had

informed Ms Combrinck that she would resume her duties as a supervisor on 26 July 2010.

- [13] In relation to the receipt of the amount in question, Ms Combrinck testified that it was received by Ms Letsoela because the applicant was not there on that day. She further testified that during cross examination that she did not verify whether amount in question was correct because she was not present at work in the afternoon when the money was counted. According to her, the person who verified the amount of money collected for that day was Ms Letsoela. And when put to her that the money was lost in the safe and not in the hands of the applicant, Ms Combrinck stated:

“Okay, I will say I was not there, Ms Jofile make an affidavit and state that she did receive that amount of money and the documents on 26th, so how can it be lost from 23rd to 26th ? I am not sure.”

- [14] Ms. Combrinck conceded under cross-examination that the signature of the person who handed the money to the security company was Ms Theunisen. She also confirmed that she was not present on 26 July 2010 when the whole transaction of banking the money took place. She further testified that on 23 July 2010 to the Ms Letsoela was the supervisor on duty and was responsible for receiving the money. Ms Letsoela had to sign back that responsibility to the applicant.

- [15] She also stated that after Ms Letsoela had signed for the money received, the applicant took the responsibility of sending the money for banking to the security company. She also stated that between the 23 July and 26 July 2010, the two supervisors who had the keys to the safe were Ms Letsoela and Ms Theunissen.

The case for the Applicant

- [16] The applicant states that she was surprised at the hearing when her union representative submitted a plea of guilty on her behalf. According to her, when she enquired as to why a plea of guilty, she was told by the representative to

keep quiet and that he would speak to her later. She raised the issue of the plea of guilty with her representative and not with the chairperson in the hearing. The applicant contends that she never gave the union representative the authority to plead guilty on her behalf. And when asked by the arbitrator why did she not tell the chairperson of the disciplinary hearing that that is not her plea, she explained:

“I did not know what are my rights of saying anything in the court room, nobody has explained in the first place that if you are in the court room you have the right to do this, if you are not agreeing with this you must do, I thought I must just keep quiet because I was represented by the union. I did not know that I have the right to say anything because it was never addressed to me when I got inside the court room.”

- [17] The applicant says that she approached the chairperson of the disciplinary inquiry, apparently after the hearing, to explain to him that she did not give her representative the authority to plead guilty. The chairperson refused to speak to her. She then approached the municipal manager who advised her to file an appeal.
- [18] In relation to the missing money, the applicant testified that when she came back after being away on 26 July 2010, the hand over was already done. Ms Letsoela was acting in her position as supervisor and, therefore, she was responsible for her daily duties which included banking. According to her, Letsoela showed her the money bag already sealed with documentation that showed that the money was to be banked. The bag was then placed in the safe.

The arbitration award

- [19] The arbitrator in arriving at the conclusion that the applicant was responsible for the missing money rejected the version of the applicant and accepted that of the third respondent. He rejected the version of the applicant that her representative did not have the authority to enter the plea of guilty on her behalf. He found that the applicant failed to provide an explanation as to why her representative entered the plea of guilty if she did not give him the authority to do so.

[20] In relation to the missing money, the arbitrator found that the question of whether the applicant was liable for the theft depended on whether Ms Letsoela had given the money to her (the applicant). He found in this respect that Ms Letsoela did give the money to the applicant who in turn banked it. He also found that that version was supported by the applicant's memorandum wherein she stated that she had banked the money. The arbitrator found the version of the applicant to be fanciful and a fabrication.

Did applicant's representative have the authority to enter a plea of guilty?

[21] It is generally accepted that the instruction given to the representative to sue or defend a claim does not include authority to settle or compromise a claim or defense without the consent of the client. The authority to settle or compromise a claim may, however, be implied from the conduct of the client.

[22] The approach to adopt when dealing with the issue of whether a representative has the authority to compromise or settle the client's claim received attention in *MEC for Economic Affairs, Environmental and Tourism: Eastern Cape v Kruizenga*.¹ In that case, the Supreme Court of Appeal dealt with the issue in the following terms:

[7] It is settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client's approval. The rule has been applied to a judgment consented to by an attorney without his client's authority and also when the attorney did so in the mistaken belief that his client had authorised him to do so. This principle accords with the rule in the law of agency that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction.²

[23] The SCA further stated that:

¹ 2010 (4) SA 122 (SCA).

² *Ibid* at para 7.

[11] To summarise it would appear that our courts have dealt with questions relating to the actual authority of an attorney to transact on a client's behalf in the following manner: Attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests. The office of the State Attorney, by virtue of its statutory authority as a representative of the government, has a broader discretion to bind the government to an agreement than that ordinarily possessed by private practitioners, though it is not clear just how broad the ambit of this authority is.³

[24] In the present case, the following have not been disputed :

- a. That the applicant, questioned her representative about entering a plea of guilty on her behalf.
- b. The representative told the applicant to wait when she questioned why he was entering the plea of guilty and that he would speak to her later about it.
- c. The applicant stood up, cried and left the hearing as soon as her representative told her to wait after she queried the entry of the plea of guilty.
- d. The applicant approached the chairperson of the disciplinary hearing and raised with him the issue of the plea of guilty but received no response.
- e. The applicant further approached the municipal manager regarding the plea of guilty. She was advised to file an appeal.

³ *Ibid* at para 11.

- [25] It is apparent from the record that the version of the applicant was not challenged regarding how the plea of guilty was entered. The chairperson of the disciplinary hearing or any other person who could have shared clarity on this issue was not called to testify on behalf of the first respondent.
- [26] It is trite in our law that failure to produce a witness who is available and able to testify and give relevant evidence, may lead to an adverse inference being drawn.⁴ In the absence of an explanation as to why the chairperson of the disciplinary hearing was not called to testify about what happened regarding the plea of guilty, the only inference to draw is that he may have confirmed the version of the applicant in this regard.
- [27] In the present instance, the arbitrator ought to have considered the explanation tendered by the applicant as to the circumstances that led to the entry of the plea of guilty. In this respect, had the arbitrator applied his mind to the evidence of the applicant, he would have found that the explanation as to how the plea of guilty was entered and why it should be disregarded. The version of the applicant was not challenged neither was the key witness, being the chairperson of the disciplinary inquiry called to clarify what happened when the representative entered the plea of guilty. The third respondent tendered no explanation as to why the chairperson of the disciplinary hearing was not called as a witness.

Did the third respondent apply discipline inconsistently?

- [28] It is generally accepted that the dictates of fairness requires an employer to apply discipline consistently in the workplace and thus employees who commit the same or similar offense should be treated in the same manner and equally. In dealing with this issue the Court in *Comed Health CC v National Bargaining Council for the Chemical Industry and Others*⁵ held:

⁴ See *Primedia Outdoor, Division of Primedia (Pty) Ltd v Phala NO and Others* (JR 157/2011) (2012) ZALCJHB 94 (31 August 2012) at para 22.

⁵ (2012) 33 ILJ 623 (LC) at para 10.

'It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out.'

- [29] In the present instance, the applicant had placed before the arbitrator sufficient details as to the other employee who was alleged to have been involved in the same alleged misconduct but unlike her, was not dismissed. In failing to consider the complaint of the applicant regarding the inconstant application of discipline by the third respondent, the arbitrator misconceived his task as an arbitrator. Accordingly, in my view, the Commissioner's arbitration award stands to be review for this reason alone.

The nature of the evidence

- [30] In my view, the arbitration award further stands to be review for the reason that the arbitrator failed to apply the proper test in evaluating the evidence which was placed before him. It is as a result of this that the Commissioner's arbitration award fails the standard of reasonableness as set out by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.⁶
- [31] It is apparent from the reading of the record that the case of the third respondent as was presented during the arbitration proceedings was based on circumstantial evidence; there being no direct evidence that the applicant took the money that went missing.

⁶ [2007] 12 BLLR 1097 (CC).

[32] The approach to follow when dealing with circumstantial evidence was considered and summarised by this Court in *National Union of Metalworkers of SA and Another v KIA Motors and Others*⁷, as follows:

- “(a) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
- (b) The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”

[33] It is trite that in civil cases, the *onus* is discharged if the inference advanced is the most readily apparent and acceptable inference from a number of possible inferences. It has also been held that a mere conjuncture or speculation cannot sustain a case based on circumstantial evidence.⁸ The case based on circumstantial evidence can only be sustained on the basis of presentation of objective facts that support the existence of a particular facts.

Conclusion

[34] In my view, had the arbitrator applied his mind to the explanation tendered by the applicant regarding the entry plea of guilty, he would have found that the applicant’s representative did not have the authority to act as he did. The version of the applicant is that she tried to engage with her representative when he made the entry of the plea was not disputed in cross examination neither was the chairperson of the disciplinary hearing called to testify at the arbitration proceedings regarding the same. In my view, the chairperson of the disciplinary hearing was best placed to explain what happened at the beginning of the hearing when the plea of guilty was entered.

⁷ (2007) 28 ILJ 2283(LC) at para 21.

⁸ *NUMSA v Kia Motors* (2007) 28 ILJ (LC).

- [35] In brief, the version of the applicant that her representative did not have authority to enter the plea of guilty was not challenged neither was there evidence that the authority could be implied. It is thus my view that the representative had no authority to enter the plea of guilty on behalf of the applicant.
- [36] As concerning the issue of the alleged inconsistent application of discipline, I am of the view, that the arbitrator misconceived the task that he was expected to perform. His view was that there was no need to lead evidence with regard to the issue of inconsistency and that it could be dealt in argument.
- [37] I have already indicated that the arbitrator failed to apply his mind to the issue of the authority of the applicant's representative to enter a plea of guilty. Had he properly applied his mind to this issue, he would have firstly appreciated that when the applicant admitted to receiving the money it was on the basis of an assumption that the money was in the bag which had been pointed to her by Ms Letsoela. In the circumstances where there seems to have been a high level of trust between the staff as indicated in the testimony of Ms Combrinck, the assumption made seems reasonable and acceptable.
- [38] Once it is accepted that the applicant's representative did not have the authority to enter a plea of guilty and the assumption made by the applicant that there was money in the bag, then what remains is a case based on circumstantial evidence. The issue for determination once evidence was presented would have been whether the third respondent had discharged its onus of proving that the applicant was on the basis of the circumstantial evidence guilty of the theft of the missing money.
- [39] The third respondent called Ms Combrinck as the only witness to testify about the missing money. She was, however, not present on the 23 July and when the money was counted and also on 26 July when the money was supposedly banked. The person who could have assisted in clarifying what happened on the days in question is Ms Letsoela. She was never called despite an indication earlier in the proceedings by the third respondent's representative that she would

be called. The third respondent has not tendered any reason as to why she was not called despite the earlier indication by the representative of the third respondent that she would be.

[40] In respect of the memorandum by the applicant and her statement that she received the money and it was banked, I am of the view that she tendered a reasonable and satisfactory explanation as to why she was denying the responsibility of the missing money after making such statements.

[41] In light of the above, there can be no doubt that the applicant has made out a case for the review of the arbitration award issued by the commissioner. There is no reason in the circumstances of this case why the costs should not follow the results.

Order

[42] In the circumstances, the following order is made:

1. The arbitration award made by the Second Respondent under case number GPD061112 dated 20 February 2012, is reviewed and set aside.
2. The arbitration award is substituted with an award to the effect that:
 - i. The dismissal of the Applicant was substantively unfair.
 - ii. The third respondent is ordered to reinstate the Applicant retrospectively with back pay and without loss of any benefit that may have accrued since her dismissal.
3. The Third Respondent is to pay the costs of the Applicant.

E MOLAHLEHI

Judge of the Labour Court, Johannesburg

Labour Court