



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT, JOHANNESBURG

Not Reportable

Case No: JR 881/11

In the matter between -

ALLEN SIKHAKHANE

Applicant

And

**DISPUTE RESOLUTION CENTRE
OF THE MOTOR INDUSTRY**

First Respondent

LUVUYO QINA N.O

Second Respondent

AUTOZONE

Third Respondent

Heard: 29 May 2014

Delivered: 19 February 2014

Summary: Review application. Failure to submit evidence regarding the breakdown in the relationship. Absence proof that the relationship has irretrievably broken down the arbitrator ought to have found the dismissal to be unfair.

JUDGMENT

MOLAHLEHI J

Introduction

- [1] This is an application to review the arbitration award made by second respondent (“the arbitrator”) under case number MINT 25468D, in terms of which the dismissal of the applicant (“the employee”) was found to have been substantively fair.

Background facts

- [2] The third respondent is involved in auto parts retail business throughout South Africa. The employee was prior to his dismissal employed as a driver. The employee was charged for misappropriation of the third respondent’s funds and dishonesty.
- [3] The incident that led to the dismissal of the employee relates to the requisition of money which was to pay three casual employees whose services were engaged for a day to clean the rubble around the premises of the respondent. On the version of the respondent, the casuals were to be paid R50.00 each.
- [4] In addition to being required to supervise the casual employees the employee was instructed to requisition money for their payment from the cashier.
- [5] The version of the respondent is that the employee was authorized to requisition an amount of R150.00 from the cashier but instead requisitioned R180.00.
- [6] The employee withheld an amount of R30.00 at the point of having to pay the casual employees. The respondent discovered that the employee had withheld the amount of R30.00 when the casual employees complained that the amount paid to them for the work done was too little.
- [7] The employee explained that he withheld R30.00 because one of the casual employees was still to complete his task and had told him that he would pay him once he had completed the task.

The ground for review

- [8] The applicant has raised several grounds of review in challenging the arbitrator's arbitration award. The grounds of review can be categorized into two categories, namely that the arbitration award is unreasonable and secondly that the arbitrator committed gross-irregularity in the manner in which he conducted the arbitration proceedings.
- [9] In relation to the issue of gross-irregularity the employee complains that the arbitrator misconstrued the nature of the enquiry he was to conduct, ignored the relevant evidence which was presented at the arbitration hearing and failed to assess the evidence on the probability.

The arbitration award

- [10] As indicated earlier the arbitrator found that the dismissal of the employee was substantively fair and it was for that reason that the employee's claim was dismissed.

Evaluation

- [11] The question to be answered in considering this review application is whether the conclusion reached by the arbitrator is one that a reasonable decision-maker could not reach? The question is answered by considering the outcome of the arbitration award taking into account the facts and the material that served before the arbitrator.
- [12] In determining whether the dismissal was fair, the arbitrator's first task is to determine whether the misconduct upon which the dismissal is based on was committed. The next task is, if found that the misconduct was committed, to inquire into whether the sanction of dismissal was fair. In determining the fairness of the sanction of dismissal of the arbitrator it is required to investigate whether the trust relationship between the parties has irretrievably broken down as a consequence of the misconduct. The question of whether the relationship between the parties has irretrievably broken down has to be assessed on the

evidence presented by the employer. The test to apply in determining whether the dismissal sanction was fair is whether the misconduct rendered the continued employment relationship intolerable.¹

- [13] The test to apply in determining whether the trust relationship had broken down is set out in *SACCAWU v OK Bazaars Kimberley*, as follows:²

"The real test is whether the trust relationship has been breached to the extent that the employment relationship has become intolerable. ... The question whether the trust relationship between employee and employer has in fact broken down in a particular case is a question of fact and not a question of law. One must scrutinize the evidence on record carefully ... "

- [14] The approach to adopt in considering whether the relationship of trust has broken down due to the misconduct received attention in *Edcon Limited v Pillemer N.O.*,³ where it was found that the dismissal of the quality controller who failed to report that a company car she was using was involved in an accident was unfair. The involvement of the car in the accident was discovered by the manager when it went for service. Initially the employee denied knowledge of the damage to the car. The employee was before her dismissal charged with "failure to be honest and act with integrity... And this resulted in a breach of trust between herself and the company." The arbitrator found that the employer had failed to show that the misconduct committed by the employee broke down the trust relationship.

- [15] On appeal the Labour Appeal Court found that the Commissioner's decision that the dismissal was unfair because the employer had failed to show that the breakdown in the trust relationship could not be faulted. In this respect the Court had the following to say:

"[20] The gravamen of Edcon's case against Reddy was that her conduct breached the trust relationship. Someone in management who had dealings with Reddy in the employment setup, as already

¹ Anglo American Farms t/a Boschendal Restaurant v Komjwayo (1992) 13 ILJ 573 (LAC).

² [1998] 7 BALR 887 (CCMA).

³ [2010] 1 BLLR 1 (SCA).

alluded to, was required to tell Pillemer in what respects Reddy's conduct breached the trust relationship. All we know is that Reddy was employed as a quality control auditor; no evidence was adduced to identify the nature scope of her duties, her place in the hierarchy, the importance of trust in the position that she held or in the performance of her work, or the adverse effects, either direct or indirect, on Edcon's operations because of her retention, eg because of precedent or example to others. In *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 ILJ 1051 (LAC) at paragraphs 17–27 [also reported at [2007] 12 BLLR 1097 (LAC) – Ed], Conradie JA considered the relationship between an employee's dishonesty continued employment, the bearing of such factors as long service, which Pillemer also considered. In the present context he said . . .

'The seriousness of dishonesty – ie whether it can be stigmatised as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way it impacts on the employer's business.'

But to get here, evidence showing adverse impact, if any, on the "business" is critical."

- [16] In dealing with the reasonableness or rationality of the Commissioner's finding that the dismissal was unfair because there was no evidence showing the breakdown in the relationship the Court held:

"[23] . . . In my view, Pillemer's finding that Edcon let no evidence showing the alleged breakdown in the trust relationship is beyond reproach. In the absence of evidence showing the damage Edcon asserts in its trust relationship with Reddy, the decision to dismiss her was correctly filed to be unfair. She cannot be faulted on any basis and had conclusion is clearly rationally connected to the reasons she gave, based on the material available to her."

- [17] In the present case the applicant was at the time of the incident employed as a driver. He was, as stated earlier, required to supervise the casual workers and ensure that they are, on completion of their task, paid for their services. There is no evidence that shows how the

conduct for which the employee was found guilty of impacted on the relationship of trust relationship between the parties. In the absence of such evidence the proper approach which the arbitrator ought to have adopted was that the dismissal of the employee was in the circumstances of this case unfair because there was no proof that the trust relationship between the parties had broken down.

[18] In light of the above I am of the view that the applicant's review application stands to succeed. I see no reason why costs should not follow the results in the circumstances.

Order

[19] In the premises I make the following order:

1. The arbitration award made by second respondent under case number MINT 25468D is reviewed and set aside.
2. The arbitration award is substituted with the following award:
 - (i) The dismissal of the Applicant, Mr Sikhakhane was substantively unfair.
 - (ii) The Respondent is to reinstate the Applicant retrospective to the date of his dismissal without loss of benefits.
 - (iii) For the misconduct the Applicant should be issue with a written warning.
3. The third Respondent is to pay the costs of the applicant.

E MOLAHLEHI

Judge of the Labour Court, Johannesburg

Appearances:

For the Applicant: T Mangena of Mangena & Associates Attorneys

For the Respondent: D Mer of Fluxman Inc.

LABOUR COURT