



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1760/10

In the matter between:

VELAPHI SIMELANE

Applicant

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondents

THULANI AKIN N.O

Second Respondent

NAMPAK RECYCLING

Third Respondent

Heard: 11 February 2014

Delivered: 05 March 2015

Summary: Review application. Decision of Commissioner reasonable – review application dismissed.

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by second respondent (the Commissioner) under case number GAJB 377277-09 dated 14 June 2010 in terms of which the dismissal of the applicant was upheld.

Background Facts

- [2] The third respondent is involved in the business of collecting recyclable paper from a number of retailers which it turns into bails and thereafter sells them to its own paper mills. The other company whose name appears in these proceedings is Smiley Enterprise CC, a competitor to the third respondent in that it is also involved in the business of recycling of paper.
- [3] The applicant who was prior to his dismissal employed as a supervisor. He was charged and dismissed for unauthorised removal of company goods and or involvement in the theft of the waste paper from the third respondent's Amalgam premises on 04 April 2009.
- [4] The applicant was aggrieved by the sanction and it was for that reason that he referred an alleged unfair dismissal dispute to the CCMA. In the referral, the applicant contended that the dismissal was both substantively and procedurally unfair. The dispute was finally arbitrated by the Commissioner who found that the dismissal was both substantively and procedurally fair.
- [5] The employee was again unhappy about the outcome of the arbitration award and, accordingly, filed the present proceedings in which he challenges the reasonableness of the outcome of the arbitration proceedings.

The case of the third respondent

- [6] The case of the third respondent during the arbitration hearing was that the dismissal of the applicant was for a fair reason and in support thereof presented its version through a number of witnesses. The testimony of the witnesses is dealt with by the Commissioner in his arbitration award and the other aspects thereof, which were taken into account in consideration of this review, appear in the transcript of the arbitration proceedings. I do intend dealing with the testimony of each witness as appears in the record but only those of the key witnesses.
- [7] The first witness of the third respondent was Mr Mandy, the operational manager, who testified that on 4 April 2009, he received a call from the risk manager who informed him that they had caught the respondent's truck at Smiley Enterprise at Fordsburg in Johannesburg with piles of paper belonging to the third respondent. He then proceeded to Smiley Enterprise where he found the truck parked in the weighbridge. In the truck there was seven bails of High Litter (HL) waste paper. The title HL signifies that the paper was of high value.
- [8] On arrival at Smiley Enterprise, Mr Mandy inquired from the driver, Mr Nogaga as to what he was doing there. He informed him that he had been instructed by the applicant to deliver the papers at Smiley Enterprise. He also testified that the driver did not have the delivery note, which is a requirement whenever delivery is undertaken.
- [9] The other thing which Mr Mandy did at Smiley Enterprise was to take the pictures of the scene which included those of the truck and the applicant. He also testified about the rule that prohibits employees from leaving the workplace without permission from their managers, which the employee was aware of. It is common cause that the applicant did not inform his managers when he left for Smiley Enterprise.

- [10] Mr. Mpanza, the operations control manager testified that because he was not present on the day in question, he had asked the applicant to take charge of his responsibilities. He further testified that he was phoned on the day in question by the risk manager who informed him about the incident in question.
- [11] The other witness of the third respondent was Mr Adendorf, the national risk manager, who testified that he, on the day in question he, received a telephone call informing him about the truck of the third respondent being at Smiley Enterprise. He enquired from driver as to what he was doing there. The driver informed him that he was instructed by the applicant to deliver the paper there.
- [12] Mr Mlalazi, the area manager of Maxi security, testified that on the day in question, he was outside Smiley Enterprise when he saw the truck of the third respondent entering the premises of Smiley Enterprise. He approached the driver and enquired from him as to what he was doing there. He informed him that he was there to deliver what was in the truck.

The employee's case

- [13] The applicant testified that, on the day in question, he was requested by his immediate manager to attend a meeting on his behalf as he would have arrive late at work on that day. The manager also requested him to process the incomplete collections from the previous day. He instructed him to also attend to the drivers including the horse and trailer that would be coming to load.
- [14] As concerning the incident in question, the applicant testified that he received a phone call from the driver who requested him to come to Mayfair. He enquired from the driver as to what was he doing at Mayfair when he had instructed him to collect paper at President Hyper in Krugersdorp. Before he could answer the question, his cell phone ran out of power. He then proceeded on foot to Mayfair. He initially went to the wrong place but after phoning the driver from a public phone he located the place where he had parked the truck.

- [15] During cross examination, the employee testified that the driver called him and told him to come to Mayfair without specifying the place where he was. He further stated that he did not enquire about the specific place because Mayfair is a small place.
- [16] In the written statement, the employee had stated that the driver had told him to come to Fordsburg. When pressed to explain this contradiction, he then evaded the question and referred to some minutes of a meeting in Bryanston. He later said that Mayfair and Fordsburg are one and the same place.
- [17] The employee further conceded that being the responsible clerk at the weighbridge on the day in question, he was responsible for the incoming and outgoing trucks. In relation to what happened to the truck when it left the third respondent's premises, he testified that he did not know because he was in a meeting.

Grounds of Review

- [18] The applicant in challenging the arbitration award of the Commissioner has raised several grounds of review which can be summarised as entailing the allegations of gross irregularity on the part of the Commissioner and that the decision reached was unreasonable. The key point upon which the allegation of unreasonableness is based on is that the findings made by the Commissioner are not justifiable in relation to the evidence which was properly presented before him. In relation to the allegation of gross irregularity, the main contention of the applicant is that the Commissioner failed to properly apply his mind and failed to have proper consideration of the facts and the law. This includes the allegation that the Commissioner took into account inadmissible evidence in reaching his conclusion.

The arbitration award

- [19] In considering the procedural fairness of the dismissal, the Commissioner rejected the version of the employee that he was not afforded an opportunity to cross examine the witnesses of the third respondent. It was for this reason that he found that the chairperson of the disciplinary hearing was not biased.
- [20] As concerning the substantive fairness of the dismissal, the Commissioner found that the probabilities favoured the version of the third respondent that the employee had given the driver instructions to deliver the recycle papers to Smiley Enterprise. It was for these reasons that he found the dismissal of the employee to have been fair and accordingly dismissed his claim.

Evaluation

- [21] In considering this application, the test to apply is that which is set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ in the following terms:

‘[T]he better approach is that Section 145 [of the LRA] is now suffused by the constitutional standard of reasonableness... Is the decision reached by the commissioner one that a reasonable decision maker could not reach?’

- [22] In applying the above test to the present case, I am of the view that having regard to the material which served before the Commissioner there is no doubt that his decision was not so unreasonable that it could not have been reached by a reasonable decision maker. Put in another way, I find that there is rational connection between the evidential materials properly made available to the Commissioner and the decision that the dismissal of the employee was fair.
- [23] It is apparent from the reading of the arbitration award that the Commissioner, took into account the totality of the facts and the circumstances of the case in arriving at the conclusion as he did. The complaint of the applicant that the driver

¹ [2007] 12 BLLR 1097 (CC) at 110.

of the truck was not called to testify does not assist his case because, as the Commissioner pointed out, there is overwhelming probabilities that the driver was sent to Smiley Enterprise by the applicant.

[24] In my view, the complaint of the applicant that he was denied the opportunity to cross examine the driver does not assist his case because that does not have any bearing on the second part of the charge which was proffered against him. In addition to the charge of theft of the waste paper of the third respondent, the applicant was also charged with the involvement in the theft of the third respondent's property. In this respect, the applicant has failed to provide plausible explanation for the following undisputed facts:

- a) Why did the driver call and request him to come to the premises of Smiley Enterprise.
- b) Why did he leave the premises of the third respondent and walk three kilometers without informing his superior, especially, knowing that that is what he was supposed to do.

[25] In light of the above, I am of the view that the applicant has failed to make a case for reviewing the arbitration award of the Commissioner. I do not, however, believe that it would be fair to award costs against the applicant.

Order

[26] In the premises, the applicant's application to have the arbitration award made under case number GAJB 377277-09 dated 14 June 2010, reviewed and set aside is dismissed with no order as to costs.

Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: L Makhuni

For the Third Respondent: Advocate MJ Van As

Instructed by: Cliffe Dekker Hofmeyer Inc.