



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2066/12

In the matter between:

SATAWU obo GEORGE PENI

Applicant

and

TRANSNET BARGAINING COUNCIL

First Respondent

K MULLIGAN N.O

Second Respondent

TRANSNET FREIGHT RAIL

Third Respondent

Heard: 10 January 2014

Delivered: 6 March 2015

Summary: Condonation application – slight delay and reasonable explanation for delay – principles for granting of condonation restated.

Review application – grounds – legal representation not granted to employee – discretion to be exercised by a commissioner – factors to be considered in the exercise in exercising discretion – not unreasonable to expect employee to continue with the assistance of legal representative if employee represented by trade union.

Review application – grounds – conflicting versions of evidence – commissioner assessed probabilities as well as evidentiary value of the evidence provided by witnesses – decision not so unreasonable as to justify a review of the award.

JUDGMENT

LANCASTER, AJ

Introduction

- [1] This matter came before me as an application to review and set aside an arbitration award by the second respondent in his capacity as an arbitrator of the Transnet Bargaining Council (“the first respondent”). The application was brought in terms of Section 145 of the Labour Relations Act¹ (“the LRA”).
- [2] As the applicant’s review application was filed out of time the applicant also applied for condonation for the late filing of the review application.
- [3] The applicant was dismissed by the third respondent on 2 February 2012 on allegations of dishonesty and/or fraud arising out of the alleged irregular use of the third respondent’s fuel card. The applicant subsequently referred a dispute regarding the alleged unfairness of his dismissal to the Transnet Bargaining Council and the matter came before the second respondent as arbitrator on 11 April 2012 and 3 May 2012, respectively.
- [4] The matter was arbitrated and in his award dated 30 May 2012, the second respondent found the dismissal of the applicant by the third respondent to have been procedurally and substantively fair. As a result he dismissed the applicant’s dispute. It is this award by the second respondent that forms the subject matter of the review application brought by the applicant, which application was filed on 27 October 2012.

Background facts

- [5] At the time of his dismissal the applicant was employed by the third respondent as a service driver at the salary of R5,996.16 per month. He was employed as such from 1 January 2010 until 2 February 2012. The primary duties of the applicant were to transport crew members to various train stations. It was common cause between the parties that there were no outstanding issues, disputes or problems between the third respondent and

¹ No 66 of 1995 (as amended).

the applicant prior to the incident which lead to the applicant's dismissal.

- [6] The incidents that resulted in the dismissal of the applicant took place on 22 May 2012, 12 June 2011, 21 May 2011, 24 May 2011 and 25 May 2011 to October 2011 respectively, and pertained to irregular fuel refills and excessive fuel consumption by the applicant.
- [7] The incidents were discovered when the third respondent noted the irregular fuel refills and excessive fuel consumption of its Ford Ranger with the registration number BC 70 FS GP. The third respondent subsequently requested Andy Patha, an employee in the third respondent's fraud risk management division, to investigate the matter.
- [8] Subsequent to this investigation, the applicant was charged with contravening the third respondent's policies and/or procedures by refueling the aforementioned vehicle with nominal and irregular amounts. The applicant was further charged with using the third respondent's fuel card for personal gain and for entering into fraudulent arrangements with the staff at Daveyton Total.
- [9] It was alleged that these arrangements included the use of the fuel card of the third respondent to pay for false fuel transactions and that the applicant would then receive the cash value of the transaction. It was alleged that in exchange for assistance with these spurious transactions he would then reward the staff members concerned with cash payments.
- [10] The applicant was on duty on the dates of the questionable transactions and the attendance registers of the third respondent showed that the applicant was on duty on the applicable dates and times.
- [11] A disciplinary hearing for the applicant took place on 24 January 2011. The applicant maintained in the disciplinary hearing that he did not commit any of the fraud or dishonesty for which he had been charged. He was found guilty during the disciplinary enquiry and dismissed.
- [12] The second respondent ultimately concluded that the applicant challenged the

procedural fairness of his dismissal solely on the ground that the chairperson was biased. He intimated that considering that no evidence was lead by the applicant on this issue the dispute regarding the procedural fairness of the dismissal had either been abandoned by the applicant or considering that no evidence was lead on the issue he could only but find that the dismissal of the applicant was procedurally fair.

- [13] In respect of the substantive fairness of the dismissal the second respondent dealt with the charges separately. On the first charge he found that the third respondent failed to prove that there was a policy in place that obliged the applicant to fill the vehicle's fuel tank to capacity and accordingly the applicant could not have been guilty of this charge.
- [14] In respect of the second charge the second respondent found that the applicant did in fact use the fuel card for personal gain on 21, 24 and 25 May 2011 and in doing so made himself guilty of fraudulent and dishonest conduct. In the premise the second respondent concluded that the third respondent had provided overwhelming documentary evidence to prove that the Ford Ranger was being driven by the applicant and further that the applicant was fully aware of the fact that his conduct had been dishonest.
- [15] This evidence was presented in the form of slips that had been signed by the applicant, allegedly proving that the applicant had filled up the car at the Zenex Northmead filling station and drove it for a short distance before seemingly filling the vehicle again at Daveyton Total station. Further documents in the form of transaction and trip logs were also provided also provided to me to consider as part of the record of review.
- [16] During the arbitration proceedings the evidence presented by the applicant in this respect was merely a bare denial of the allegations and a statement that he did not drive the vehicle in question to the Total in Daveyton. The evidence before the second respondent however, tended to show that this evidence was in fact not truthful.
- [17] As for the third charge the second respondent found that the third respondent had succeeded in proving the fraudulent arrangements between the applicant

and the staff at Daveyton. Two witnesses testified in respect of this charge, *to wit*, Mr Langa and Mr Mkhize who testified on the applicant's modus operandi in respect of the arrangements.

[18] The second respondent ultimately found that the applicant's dismissal had been substantively fair on the strength of the evidence lead before him.

[19] It is these findings by the second respondent that gave rise to the proceedings which came before me.

[20] I now turn to deal with the merits of the review and condonation applications.

The issue of condonation

[21] As the review application was filed outside of the six week period provided for in Section 145 of the LRA, the applicant applied for condonation for the late filing of his review.

[22] It would appear that the applicant received the arbitration award on or about 4 June 2012. The review application was however, only served and filed on 27 August 2012. The review application was therefore filed some 6 weeks out of time.

[23] The applicant provided the following explanation for the late filing of his review application:

- a. After receiving the award on 4 June 2012, the union official who represented the applicant discussed the award with the Gauteng Provincial Secretary and reached a conclusion that the matter should be handed to SATAWU Legal department for further consideration.
- b. At some point in time during July the Legal department informed the applicant's representatives that the matter was complex and approached the applicant's attorneys of record for an opinion. This happened on 16 July 2012.
- c. The opinion was finalized and forwarded to the union on 23 July 2012.

d. The union received approval to continue with the matter on 31 July 2012.

e. The applicant's attorneys were instructed on 8 August 2012. A consultation could however only be scheduled for 16 August 2012 and the review application was completed for signature on 22 August 2012.

[24] The principles governing the requirement for granting or refusal of condonation are well established in law. In terms of these principles the court has a discretion which is to be exercised judiciously after taking into account all the facts before it.

[25] The factors which the court needs to take into consideration in assessing whether or not to grant condonation are in my view still those recorded in *Melane v Santam Insurance Co Ltd* 2. These principles have been confirmed on many occasions and were amongst others also dealt with by the Labour Appeal Court in the matter of *Foster v Stewart Scott Inc* 3. In that matter the Labour Appeal Court summarised the factors as follows:

- (a) the degree of lateness or non-compliance with the prescribed time frame;
- (b) the explanation for the lateness or the failure to comply with time frames;
- (c) prospects of success or *bona fide* defence in the main case;
- (d) the importance of the case;
- (e) the respondent's interest in the finality of the judgment;
- (f) the convenience of the court; and
- (g) avoidance of unnecessary delay in the administration of justice.

[26] Considering the explanation by the applicant I am satisfied that the length of the delay is not exceptionally long and that the explanation for the delay is

2 1962 (4) SA 531 (A)
3 (1997) 18 ILJ 367 (LAC)

adequate. I have also considered the remainder of the factors and am of the view that the applicant has made out a proper case for condonation and that it was in the interest of the parties for the merits to be finally decided on.

Legal Grounds for Review

[27] The test for review and the high water mark which the applicant needs to reach to show that the award of the second respondent is reviewable was set out by the Constitutional Court in the matter between *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC).

[28] In this regard the applicant has to show that the award is one that “a reasonable decision maker could not come to” under the circumstances.

[29] In *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁴ the court dealt with the principles underlying a review application as follows:

‘In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification’.

[30] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁵ the Supreme Court of Appeal restated the principles that applied to review applications post the judgment by the Constitutional Court in *Sidumo* and held that:

⁴ (2010) 31 ILJ 452 (LC) at para 17.

⁵ (2013) 34 ILJ 2795 (SCA) at para 25.

'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable'.

- [31] I have accordingly reviewed the facts and grounds of review of the applicant against the principles as set out by the courts and as referred to herein above.

The Review grounds

- [32] The applicant contended that the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings, exceeded his powers and committed misconduct in relation to his duties as an arbitrator.
- [33] In this regard, the applicant submitted that in the first instance the second respondent failed to appreciate the complexity of the matter by ruling against legal representation.
- [34] Secondly, it was contended that the second respondent committed a gross irregularity in his duties by incorrectly concluding that corroboration between the fleet management report and the bank's transaction records tended to show that the transactions in question occurred in respect of the vehicle in question. This finding, so the argument goes, ignored the crucial issue of whether the applicant was the driver of the vehicle at the time.
- [35] On the whole, the applicant argued that the second respondent had failed to give consideration to the real issues placed before him and that the second respondent ought to have found that the dismissal was unfair given the fact that the fraudulent activities were clearly committed with a Ford Ranger which was not available solely for the individual applicant's use but could be and

was used by other employees as well.

- [36] I will firstly address the issue raised by the applicant regarding legal representation.
- [37] If one reviews the arbitration award it is evident that both the parties were allowed to present their respective arguments regarding legal representation. The second respondent untimely came to the conclusion that the applicant's union representative was adequately prepared to continue with the case.
- [38] I agree with the second respondent's conclusion in this regard, I am not convinced that the dispute was of such complexity to warrant legal representation. The union representative in my view was sufficiently equipped to represent the applicant during the course of the arbitration proceedings and that the comparative abilities of the parties were evenly balanced in the absence of legal representation.
- [39] In this regard, I have also considered the principles as applied in *Commission for Conciliation, Mediation & Arbitration and Others v Law Society of the Northern Provinces (Incorporated as the Law Society of the Transvaal)*⁶ the court held that:

'...A request for legal representation may be made at any time and not necessarily at the outset of the arbitration. The sub-rule indeed allows the commissioner considerable latitude in allowing legal representation. It may be allowed where the commissioner and all the parties agree. In addition, the commissioner may allow it in exercising his or her discretion when he or she considers that it is 'unreasonable to expect a party to deal with the dispute without legal representation' after consideration of the listed factors. The listed factors are: the nature of the questions of law raised by the dispute; the complexity of the dispute; the public interest; and the comparative ability of the opposing parties or their representatives to deal with the dispute. The sub rule does not disallow other forms of representation. Nor does it exclude the consideration of other relevant considerations. These factors may well, in a given case, include the seriousness of the individual consequences of a dismissal, assuming that this is not already encompassed by the sub-rule,

⁶ (2013) 34 ILJ 2779 (SCA) at para 21.

which I doubt. The commissioner must, if satisfied that it is appropriate to do so, also determine a dispute about legal representation if one of the parties objects or if he or she suspects that the representative does not qualify in terms of the rule...’.

- [40] Having considered the circumstances, I do not believe that the finding by the second respondent can be faulted or can be said to have been so unreasonable as to have denied the applicant a fair hearing on the merits of the matter. It would appear that the fact that the applicant was represented by a union representative as opposed to a legal representative did not prejudice the applicant nor does it render the second respondent’s arbitration award reviewable in my view.
- [41] The applicant further contended that the evidence that was provided during the arbitration does not unequivocally show that the applicant was guilty of the charges that he was found guilty of.
- [42] If one in this regard considers the evidence which was presented during the arbitration proceedings as a whole, which included the combi trip sheets, various fuel reports, bank statements, petrol slips, tracker reports and Google maps print outs, I cannot agree with the applicant’s contention in this regard.
- [43] It is evident from the Combi trip sheet for 24 of May 2011 and 25 of May 2011 that the applicant was intermittently driving the vehicle with registration number BC 70 FS GP on those days. Although the applicant seemed to try and deny the veracity of the trip sheets, the fact that he himself included the same documents in his bundle and relied thereon in terms of his evidence, undermines his claims regarding the veracity of the document. The applicant chose to include the documents in his evidence and accordingly could not later deny the content of those same documents.
- [44] In any event it would seem that the major part of the applicant’s evidence was but a bare denial of the third respondent’s allegations and did not in my view constitute true disputes of fact.
- [45] Ultimately, the applicant could not and did not provide any relevant evidence

that could refute the Fuel Transaction report, Bank Report and tracker report provided by the third respondent. I agree with the third respondent's argument that in essence, the applicant's evidence and case amounted to a bare denial and failed to provide an adequate defense to the charges and/or allegations against him.

- [46] It should also be taken into consideration that although the applicant denied signing various petrol slips during the arbitration proceedings, crucial evidence was provided during the arbitration proceedings indicating that the applicant had indeed signed the petrol slips and that the signature that appeared on the documents was his signature. This taken in conjunction with the evidence of Langa and Mkhize whom were employees of Daveyton Total garage, tended to show that the probabilities favoured the version of the third respondent.
- [47] I am of the view that the evidence of these employees was crucial and I agree with the conclusions reached by the second respondent in this regard. This evidence also tended to show that the applicant's allegations that he was not driving the vehicle on the days in question, was improbable. The applicant merely denied that he had signed the slips that he was alleged to have signed and failed to provide any further evidence in this regard and/or adequately dispute the third respondent's evidence in this regard.
- [48] The applicant argued that during the disciplinary hearing and the arbitration proceedings, the third respondent failed to produce a tag that identified the applicant as the driver of the Ford Ranger on 24 May 2011 and 25 May 2011. The second respondent clearly did not agree with the applicant's contention in this regard and he was seemingly satisfied that the third respondent's witnesses adequately explained the difficulties of the tags and further explained in detail that the tags to start the vehicles were initially issued for identification purposes and registered to an individual employee, but they were not properly controlled.
- [49] In respect of the evidence of Langa and Mkhize, the applicant attempted to allege that there were "loopholes" and contradictions in their testimonies that

the second respondent should have taken into regard when reaching his conclusions. Apart from the fact that the alleged loopholes and contradictions were not shown by the applicant, the second respondent seemingly correctly assessed this evidence in relation to these witnesses and also considered the alleged inconsistencies.

- [50] Be that as it may, the second respondent finds in this regard that it would make no sense for the witnesses to implicate themselves in criminal activities just to fabricate a version to benefit the third respondent, from which they could derive no benefit. In this regard, one should consider what the court found in *SA Revenue Services v Commission for Conciliation, Mediation & Arbitration and Others*⁷.

'Most telling when regard is had to the probabilities, is the evidence of Boltmann himself. He is the person who paid the bribe. He had nothing to gain from giving evidence other than to implicate himself in the serious crime of corruption. Not only did he do so, but he travelled at great cost, both in terms of time and money, firstly to Beit Bridge in order to give evidence at the disciplinary enquiry, and secondly to Makhado, previously called Louis Trichardt, to give evidence at the arbitration. As Boltmann himself says in his evidence, and his frustration is palpable, and I quote from this evidence under cross-examination (this is when it was suggested to him under cross-examination that he was fabricating his version):

'You know that is way below my intelligence here man. You know to think that I could fabricate a story like this. You know come out of the blue. I mean to come and sit here in Louis Trichardt, to come and make up a story that we fabricated somewhere, you know I feel that you are insulting my intelligence here man. You know for what reason do you think would I fabricate a story like this. You know, at my own expense. I do not get no benefit from coming here, not at all.'

That exasperated statement has the ring of truth to it. Throughout his evidence Mr Boltmann, without this court having seen his demeanour but from a reading of the transcript, created the evidence of a credible witness, a person who had done wrong but was now doing the right thing'.

⁷ (2014) 35 ILJ 249 (LC) p 253 E-I

[51] I am therefore of the view that the second respondent correctly considered the evidence provided by Langa and Mkhize.

[52] Having had sight of all of the documents and evidence placed before the second respondent and considered by him and the transcript of the arbitration proceedings, the conclusion that the second respondent came to in respect of the evidence is in my view the only reasonable inference that could have been drawn from the evidence and at the very least does not fall foul of the threshold set in *Sidumo*.

Conclusion

[53] Accordingly, I am of the view that the second respondent's award does not contain irregularities sufficient to justify the setting aside of his award and is not so unreasonable that another decision maker could not come to the same findings.

Order

In the premises, I make the following order:

1. The applicant's review application is dismissed.
2. There is no order as to costs.

Lancaster AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv J S Mphahlani

Instructed by: Baloyi Attorneys

For the Respondent: Adv X D Matyolo

Instructed by: Mkhabela Huntley Adekeye Inc

LABOUR COURT