REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

CASE NO: JR 1621/09

In the matter between:

AMBRO SALES **Applicant**

and

METAL ENGINEERING INDUSTRIES BARGAINING COUNCIL **First Respondent**

SIPHO DLAMINI *N.O.* **Second Respondent**

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA OBO MOSES GAMA **Third Respondent**

Heard: 08 May 2014

Delivered: 15 April 2015

Summary: (Review – Unfair dismissal – arbitrator could only have arrived at conclusion by failing to evaluate credibility of employee's defence)

JUDGMENT

LAGRANGE, J

Introduction

[1] On 25 June 2009 the applicant applied to set aside and review the second respondent's award handed down on 1 May 2009. In terms of that award, the applicant was ordered to reinstate the third respondent, Mr M Gama ('Gama'), within 14 days of the date of the award, without backpay, but with a written warning valid for 12 months. Had the applicant complied with the award, Gama would have been reinstated by mid May 2009.

[2] In early June 2010, nearly a year later, the applicant filed its supplementary affidavit, and it was only about twenty months later, on 29 February 2012, that the respondents filed their answering affidavit accompanied by a condonation application for their delay. The applicant opposed the condonation application. The applicant itself was two months late in filing a replying affidavit on late June 2012, for which it also sought condonation.

The condonation applications

[3] Although the respondents filed a notice of intention to oppose the review after receiving the founding affidavit, they only filed their answering affidavit some two and a half years after they received the applicant's supplementary affidavit in June 2009. The main reasons given for the delay relate to major alterations at the union head office between December 2010 and March 2011. The workings of the legal department were extremely disrupted and the responsible legal officer lost the file when moving from his old office to his new one causing him to neglect the case. He was eventually dismissed. It became apparent from complaints from members that files were missing and after an intensive search for them, some of them were recovered. The file in this matter was allocated to a new legal officer only in February 2012. What is immediately apparent about the explanation is that it fails to deal with the period from June 2009 to December 2010 and is very sketchy about exactly when the file in this matter came to light during the course of nearly a whole year from the end of March 2011 until February 2012. There is really is no

explanation for the first extensive period of the delay, nor is there any indication that the third respondent did anything to goad his union to pursue the matter without unnecessary delay If they were not the respondents in the matter and were it not for the fact that the original arbitration award was in the third respondent's favour, I would be disinclined to have allowed the matter to proceed on an unopposed basis. I am also mindful of the fact that there was some initial attempt made to note the third and fourth respondent's opposition and to file an application making the arbitration award an order of court. In these circumstances, it is with grave reservations that I have condoned the late filing of their answering affidavit.

[4] The applicant's explanation for its own significant, but much less serious delay in filing its replying affidavit was that, from early March when the replying affidavit was due, the parties had been trying to settle the matter and the company assumed its erstwhile lawyers were attending to the pleadings. In April 2012, the applicant withdrew the mandate it had given to its former attorneys, but was only able to obtain the file of the pleadings from them on 19 June 2012. Within a week of receiving it, the replying affidavit was filed. Having regard to this explanation and on the merits of the application which is considered below, I believe the late filing of the replying affidavit should be condoned.

<u>Background to the dismissal</u>

[5] In summary, the factual background to Gama's dismissal was that on 10 October 2008 he left the premises of a client shortly after 14h00 but only arrived back at the employer's premises shortly after 16h00 after stopping to do some banking at a shopping centre which took him over an hour, the rest of the time apparently being consumed with travelling back to the depot. According to Gama he had needed to draw money but his attempts to draw money in the morning at an ATM had been unsuccessful necessitating a visit to a bank branch. As a result of this detour, he failed to fulfil three other deliveries to other customers, which were all marked urgent because they should have been delivered the previous day. The employer contended that Gama had misled it by not advising that the truck had been parked at a

shopping mall whilst he attended to his banking problems for over an hour between 14h53 and 16h05. In terms of his clocking record he would have been entitled to overtime pay for any time worked after 14h00. The employer contended that if it had not picked up the fact that Gama had been conducting his private business it would have paid him overtime pay for that period.

[6] Four charges were preferred against Gama arising from these events, which may be summarised as follows:

6.1 Gross dishonesty for claiming overtime payment, which he would have only been entitled to receive from 14h00 until 14h30, whereas his claim based on the time that he clocked in at 16h47 was that much greater.

6.2 Failure to comply with his duties and responsibilities by conducting his own private business when there were still outstanding customer deliveries and given that he knew he had to return to the employer's premises as soon as possible so his vehicle could be loaded for the next deliveries.

6.3 Conduct detrimentally affecting the employer employee relationship in that he conducted his personal business on company time to the detriment of customers and that his contact resulted in himself and other staff members being paid overtime because they were waiting for his truck to return to be loaded.

6.4 Causing intentional damage to the employer in that his failure to make the urgent deliveries would damage customer relations.

[7] In the course of evidence of Ms Anderson, a director of the company, she explained that she received information the following week that other employees had been trying to get hold of Gama on Friday afternoon but his phone was switched off. When she was calculating the overtime payments the following Thursday she noticed a discrepancy between the time she had completed his last delivery at 14h12 and the time he clocked out just before 17h00. The procedure was that a driver would clock out at the end of his work that day, which might include time spent at the depot while his vehicle was being loaded. In the absence of Gama advising her that she had not been

performing his duties between 14h12 and the time he clocked out, she was entitled to assume that he had been on duty and would have paid him overtime for the whole period. In this instance, it was only because of her investigations that it came to light that he had not been working during most of that time .

[8] Anderson also testified that it was a well-established rule that if an employee did not take their half hour lunchtime at 12h00, they needed permission to take it at a different time. The existence of the rule and Gama's knowledge of it was not contested with Anderson, but it was suggested it was not practical to implement.

[9] The employer also provided evidence of previous warnings issued to Gama for delaying his return to the depot. Even though these had expired, Anderson felt it was necessary to mention them because when she had issued the charges to Gama he had immediately suggested that they had no proof that he knew of the rule. Consequently the warnings were raised as evidence of his prior knowledge of the practice. The chairperson of the enquiry, Mr Sharawakanda, testified that he had taken the previous warnings into account because Gama ought to have known that, what he had done was misconduct which the company took seriously. He was at pains to explain that he had not taken the warnings into account for any other purpose, but some of his evidence does suggest that he had also concluded that Gama was unlikely to change his behaviour because the previous warnings established a pattern of similar behaviour.

[10] When evidence was provided of the attempts by two other employees to phone Gama at 16h03 and 16h52 respectively, it was put to Anderson that 'Patrick' had indeed phoned Gama at 16H03 and Gama had advised him that he was at the bank. Anderson was surprised to hear this version because at his disciplinary enquiry Gama had said he had tried to contact the company but had no airtime. He had made no mention of receiving any phone call from Patrick. It was also not put to either of the company witnesses that Gama did not see the necessity of explaining what he was doing that Friday afternoon because he had explained everything to Patrick on the phone, and it was only during his evidence in chief that this defence was offered for the first time.

During cross-examination of Anderson, all that was put to her was that Gama had told Patrick that he was at the bank, when Patrick allegedly spoke to him.

[11] It is also noteworthy that when he received the notice of the disciplinary enquiry he did assert his right to attend to his banking business, but did not query why he was being charged if he had supposedly cleared his actions with Patrick. At the arbitration, Gama offered no explanation why he had not raised his alleged conversation with Patrick during the disciplinary enquiry in order to dispel the apparent contradiction between his earlier and later version, when Anderson expressed surprise at hearing it.

[12] In his evidence in chief Gama then also argued that he had used his combined teatime and lunchtime to attend to business at the bank and disputed that he had ever made use of company time that afternoon, though he neither disputed the existence of the rule that he was supposed to obtain permission to take his lunch break at a different time, nor did he explain why he believed he was entitled to be paid for the remainder of the time between 14h12 and 16h57, which exceeded any combined tea break and lunch hour by almost one and a half hours. Gama did claim that because of road works, it took excessively long to travel back to the depot, but this contention was not put to either of the company's witnesses.

[13] Anderson had testified that what Gama ought to have done was to have returned with the vehicle after his last delivery and then asked permission to attend to his personal business. He could have dealt with the bank which had a branch a few blocks away from the depot. Obviously, his vehicle could also have been loaded while he was attending to his personal business. As it happened, because he returned so late to the depot, the vehicle could not be loaded.

<u>The arbitration award</u>

[14] Procedural fairness was not an issue in the arbitration. The arbitrator was of the view that some of the charges duplicated each other and that once the duplication was taken account of, the essential charges were the first two mentioned above.

[15] On the question of the dishonest overtime claim, the arbitrator reasoned that Gama would had to have clocked in on his arrival at the premises at 16h57 in any event. Moreover, there was the unchallenged evidence of Gama that at about 16h00 he had telephonically advised his colleague, Patrick, of the difficulties he was experiencing that day, which the arbitrator concluded showed that he had informed the employer he had gone to the bank. Consequently, the arbitrator concluded that there was no dishonesty involved in Gama clocking in when he did. The arbitrator also dismissed a suggestion that Gama's conduct had amounted to fraud, which in any event he had not been charged with.

[16] The arbitrator noted that there was evidence to the effect that it was company policy that if a driver was unable to take their scheduled lunch hour between 12h00 and 12h30, they had to obtain express permission to vary this. Further, there was evidence that it was only when an enquiry was made about the fact that Gama's truck was stationary between 14h53 and 16h05 that he advised he had gone to the bank.

Between the last delivery he made at 14h12 and the time he arrived at the firm's premises at around 16H57 was a period of nearly two and a half hours during which he was entitled to a half hour lunch break.

[17] The arbitrator discounted an argument raised by the employer to the effect that Gama had made an authorised use of company property, because that was something he was never charged with.

[18] On the second charge relating to the allegation that he failed to comply with his duties and responsibilities, the arbitrator was satisfied that the employer was on firmer ground. The arbitrator found that Gama's failure to make three urgent deliveries before he went to the bank was common cause. Whatever challenges he had faced he should have dealt with the employer's work demands. He found this conduct of Gama unacceptable and highly irresponsible and accordingly found him guilty of the second charge.

[19] Even though the arbitrator felt that the third and fourth charges largely duplicated the first and second charges, he did give them some attention. Dealing with the undue overtime payments he concluded that Gama had not

been paid overtime and no evidence was adduced that other employees had been paid overtime as alleged. In relation to the last charge, he also found that quite apart from it being a duplication of the second charge, the employer had not proven that Gama had intentionally caused any damage to it.

[20] Turning to the question of the appropriate sanction, the arbitrator criticised the internal enquiry chairperson's consideration of warnings that dated back as far as 2001. The arbitrator further dismissed the argument put forward by the employer that those warnings had been tendered in evidence merely to establish Gama's awareness of the offences for which he was charged. Noting that the disciplinary code and procedure of the employer classified the offence as a serious one, but for which a written warning was recommended, and taking account Gama's length of service of 12 years, he felt that a written warning valid for 12 months was appropriate.

<u>Grounds of review</u>

[21] The applicant argues that in finding Gama was not guilty of dishonest conduct, the arbitrator simply failed to consider the second half of the charge, namely that he had dishonestly claimed overtime for the time spent at the bank. In the light of Gama's concession that he had filled in the time sheets showing he clocked out after 16h00 with the expectation of receiving overtime for the whole period after 14h00, the arbitrator would have been compelled to conclude that Gama was guilty of the first charge as well.

More specifically, the applicant takes issue with the arbitrator's finding that there was no 'intentional' dishonesty on the part of Gama.

[22] In addition, the applicant contends that the arbitrator failed to consider that Gama showed no remorse for his misrepresentation and exposed the firm to actual loss of overtime wages of the two staff who had been waiting for Gama to return with his vehicle so they could load it and to the potential loss of paying Gama overtime he was not entitled to.

[23] Essentially, the review is one based on reasonableness. The question which must be answered is whether the outcome is one that no reasonable arbitrator could have reached on the evidence before the arbitrator

irrespective of his own reasoning. The current approach to reviewing an arbitration award on the grounds of reasonableness has recently been expressed in the following way in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***[1]:

> *" That test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."* [2]

[24] Consequently, the central question in this review is whether an arbitrator could reasonably conclude that the applicant had not been dishonest in not coming forward with information about his whereabouts for a period of two and a half hours in circumstances where his clocking record gave the impression that he had been on duty during all that time. Gama's defence, as it emerged gradually at the arbitration, was that he had reported what he was doing to Patrick and accordingly had given an explanation to the company. As such, it could not be said that he had misled the company about his private business that afternoon. The arbitrator effectively accepted this defence.

[25] However, he did so without taking into account the fact that Gama had not offered this defence at his disciplinary enquiry. He ignored the fact that Anderson pointed out the contradiction between the version offered by Gama at the arbitration and the version offered at the disciplinary enquiry. Instead, the arbitrator sought to put the responsibility on the applicant for confronting

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[1] (2013) 34 *ILJ* 2795 (SCA) at 2801, para [11]

[2] At 2802, para [12].(emphasis added)

Gama with the contradiction when he testified, even though the applicant had plainly raised it during its evidence. Essentially, the arbitrator absolved Gama of any responsibility for explaining this serious discrepancy in his defence. It must also be noted that when Gama's representative outlined his defence at the start of the arbitration proceedings, the only element he mentioned was that it was common cause that Gama had been to the bank. No mention was made that there was no dishonesty in not explaining his clocking record because he had already reported where he had been to Patrick the previous Friday.

[26] What this oversight highlights is not merely a flaw in the arbitrator's own reasoning, but an obstacle in reaching the conclusion that Gama had not acted dishonestly by failing to disclose his whereabouts that afternoon until Anderson raised the discrepancies with him a week later when she was calculating the overtime pay due. Essentially, to reach the same conclusion as the second respondent another arbitrator would have to conclude that the fact the applicant had not offered such an obvious defence at his enquiry or when Anderson raised the discrepancy with him had no bearing on whether his version should be believed. Any reasonable arbitrator dealing with this defence would have been compelled to assess the credibility of that version. The contradiction in Gama's versions was laid before the arbitrator: it was for Gama to explain why the critical issue of his alleged conversation with Patrick was never mentioned by him until the arbitration proceedings.

[27] A reasonable arbitrator faced with that contradiction and the belated introduction of that defence would have realised that it cried out for an explanation. It is difficult to see on what basis the later defence could be accepted as credible in the absence of a believable explanation by Gama for never having raising it before. This is especially so given the centrality of the issue to the charges against him and that it would have been the most obvious issue to raise in his defence from the very beginning when Anderson queried his clocking record. I am satisfied that no reasonable arbitrator could have accepted this defence on the available evidence. Consequently, it is difficult to see how a reasonable arbitrator could conclude that Gama could not have been aware that he would be paid overtime pay for all the time

between 14h12 and 16h57 that afternoon in circumstances where there would be obviously be a question mark over his entitlement to such payment because he had not sought permission to take a lunch break outside of the normal time nor to consolidate his lunch and tea breaks and because of the length of time taken to return to the depot. Therefore, it is equally difficult to avoid the conclusion that he was dishonest in remaining silent until his movements were questioned.

[28] In the circumstances, I am satisfied that no reasonable arbitrator would conclude that Gama was not guilty of misrepresenting the amount of overtime pay he was entitled to, by not alerting the employer to his whereabouts before he was questioned about them a week later. He ought to been found guilty of the first charge as well.

[29] Having substituted the arbitrator's finding in respect of the first charge, the fairness of the Gama's dismissal also has to be reconsidered. The arbitrator was correct that the previous warnings relating to other occasions when he had returned late to the depot could not be taken account of for the purposes of determining whether or not dismissal was appropriate. However it is not impermissible to consider that they established Gama knew of the importance of returning timeously with his vehicle. When one also considers Gama's failure to even attempt to make the urgent deliveries together with his prioritising of his own personal business without obtaining permission and without clearing this beforehand or reporting it afterwards, it is understandable that the applicant would have had little reason to believe it could trust him in future. The nature of his work as a driver is obviously one that means he cannot be directly supervised all the time. As such, greater reliance is placed on him exercising self-supervision than in the case of an employee who is always on site. The applicant is entitled to expect he will act diligently in performing his duties without the need for constant monitoring and ought to be confident that he will alert the employer timeously if a situation arises where he cannot perform his delivery duties for one or other reason. Gama's conduct on the day in question suggests that it did not really bother him that he had urgent deliveries to complete or staff might be waiting at the depot to load his vehicle. Incidentally though it was true that Gama was ultimately not

paid overtime pay for the entire period after 14h00, but the arbitrator also concluded that there was no evidence that the other two employees who had waited for the return of his vehicle had been paid overtime for the period. In fact, Anderson did testify that they were paid and this was never challenged. Had the respondent being aware that Gama was not going to return in time for his vehicle to be loaded, it clearly would not have been necessary for it to incur the additional overtime pay accruing to those employees, so it was also plainly incorrect of the arbitrator to conclude that no undue expenditure was incurred as a result of his actions. As such, this was a further aggravating factor.

[30] Gama was also not in the least bit apologetic for his delayed return and believed he was entitled to overtime pay in any event because he was entitled to consolidate his lunch and tea times. He also decided that he was best able to judge whether it was better to deal with his personal business before returning to the depot rather than returning to the depot first and then asking permission to do so. All things considered, I believe the employer was justified in believing it could not trust him.

Order

[31] The applicant's late filing of its replying affidavit and the respondent's late filing of its answering affidavit are condoned.

[32] The finding of the second respondent that the third respondent was not guilty of gross dishonesty for claiming overtime pay and conducting private business during working hours on 10 October 2008 is reviewed and set aside and substituted with a finding that he was guilty of this charge.

[33] The finding of the second respondent that the third respondent's dismissal by the applicant was substantively unfair is reviewed and set aside and substituted with a finding that his dismissal was substantively fair.

[34] The relief awarded by the second respondent in paragraph 5 of his award is reviewed and set aside.

[35] No order is made as to costs.

R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicant: N Preston of Cliffe, Dekker Hofmeyr

For the Third and Fourth Respondents: T Manasoe of NUMSA