



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 3082/12

FIHLOKWAKHE SITHOLE

Applicant

and

COMMISSIONER ROB MAC GREGOR

First Respondent

CCMA

Second Respondent

TIBER BRANDS ALBANY BAKERY

Third Respondent

Heard: 10 July 2015

Delivered: 16 July 2015

JUDGMENT

HULLEY, AJ

Introduction

- [1] The applicant was employed by the third respondent as a despatch clerk. He was dismissed and referred an unfair dismissal dispute to the second respondent. The matter was, it appears, conciliated and when conciliation failed was arbitrated by the first respondent.
- [2] The first respondent found that the applicant's dismissal was not unfair.
- [3] The applicant in these proceedings seeks to review and set aside that award.

Factual background

- [4] On 8 March 2012 the applicant was charged with theft of bread to the value of R23 656.50. The charge sheet indicates that "from the period dated 02/01/2012 until 25/01/2012, you allegedly stole bread to the value of R23 656.50".
- [5] Alternative charges of dishonesty and theft arising from the same facts were also brought.
- [6] The charge sheet indicates that the details of the investigation conducted by the third respondent showed that the applicant had loaded various amounts of bread for "route AJB" on 9 separate occasions, these being 2, 4, 11, 13, 16, 17, 18, 24 and 25 January 2012.
- [7] A disciplinary inquiry ensued and the applicant was found guilty and dismissed. The chairperson did not specify in his findings whether he found that the applicant had committed misconduct on each of the nine dates specified in the charge sheet, but only that he was guilty of dishonesty / theft.
- [8] The applicant appealed against the findings of the chairperson, but the internal appeal failed.
- [9] Aggrieved at his dismissal the applicant referred a dispute to the second respondent which was ultimately arbitrated by the first respondent.
- [10] At the arbitration proceedings the first respondent called a single witness, Mr Abraham Tsotetsi, and the applicant testified on his own behalf.

- [11] Tsotetsi's testimony related mostly to what he had observed on a video recording which was produced at the arbitration proceedings. He also testified on the various procedures of the company and compared that with what he had observed on the video recording.
- [12] The third respondent was a bakery. The applicant was a despatch clerk who was responsible for checking and despatching bread from one of the despatch bays. Tsotetsi testified that an order for bread would be placed with the third respondent's telesales department. An invoice would then be produced (presumably by the telesales department) and drivers would then attend at the telesales department to obtain a copy of the invoice. The driver would then produce the invoice to the despatch clerk who was responsible for considering the invoice and ensuring that the number of loaves of bread which were loaded onto the delivery van was consistent with the number indicated in the invoice.
- [13] Invoices were generated on one day and deliveries relating to those invoices were executed the following day. A driver would then take a copy of the original invoice and the loaves of bread ordered and would repair to the customer. On exiting the premises the driver would present the invoice to the security guards who would check to ensure that the number of loaves of bread on the van were consistent with the number reflected in the invoice.
- [14] No evidence was led by either party on this score, but the loaves of bread would presumably then be delivered to a customer and the customer would in all probability have to sign some documentation as proof of delivery which, presumably, ought to be returned to the company for its record purposes in case a dispute arose in the future between the customer and the third respondent.
- [15] According to Tsotetsi the company had three shifts. The despatch clerk from each shift would compile a reconciliation in respect of the activities during his shift. The evidence of Tsotetsi was that these reconciliations would be compiled on a daily basis and a combined reconciliation would subsequently be prepared by Mr Emmanuel Sithole (no apparent relation to the applicant).

It is not entirely clear from the evidence of Tsotetsi, but it appears that the combined reconciliation was compiled on a monthly basis.

- [16] Tsotetsi explained that the individual reconciliations revealed no discrepancies; it was only when the combined reconciliations were prepared that the problem was discovered. An investigation then ensued and in the course of the investigation Tsotetsi spoke to Mr Dimitri Nkosi, the driver of a company named Mazambane, that was responsible for deliveries. It appears that the applicant was present during this meeting and that the video recordings which were ultimately used at the arbitration proceedings were then shown to both Nkosi and the applicant. Tsotetsi explained that when confronted with the video recordings, Nkosi (with reference to the applicant) declared:

“Let us tell Mr Tsotetsi exactly what we have been doing. Kaizer [who is the applicant in this matter] said ‘hey boy, I am not coming to play here’.”

- [17] Tsotetsi played the entire video recording to the two. He stated that the applicant then began crying and stated that the recordings would get him fired.
- [18] The video recording was not placed before me and the representatives of both parties agreed that it was not necessary to do so. Although there does not appear to be any formal agreement on what was observed on the video, there is sufficient information provided by Tsotetsi to allow me to understand in broad outline what he observed.
- [19] According to Tsotetsi the applicant could be seen loading bread onto the delivery van in what he described as “stacks”. I imagine these are crates of some sort. At any rate, it appears that there were different sizes of such stacks and each stack, depending on its size, held a specific number of loaves. Based on this, Tsotetsi was able to calculate the number of loaves of bread loaded onto the delivery van with reference to the number of stacks loaded in each video clip. (There was no evidence led by either party on whether only fully loaded crates were despatched or whether despatch clerks also loaded partially loaded crates).

- [20] Tsotetsi then compared the number of loaves loaded onto the van against the number of loaves ordered as reflected in the relevant invoices and concluded that more bread was loaded onto the vans than had been ordered.
- [21] Tsotetsi testified that the reconciliations performed by Emmanuel Sithole revealed that a substantial number of loaves of bread were disappearing. This led to an investigation which ultimately resulted in the implication of the applicant.
- [22] While Tsotetsi testified specifically in relation to an invoice dated 10 January 2012 he also testified that the video recordings covered all the dates reflected in the charge sheet. The first respondent afforded the applicant's representative an opportunity to consider all the recordings and to challenge any aspect of those recordings which he wished to. He declined the invitation.
- [23] In cross-examination of Tsotetsi the applicant's representative noted that the charge sheet did not include 10 January 2012. He also levelled various challenges at the invoices and the reconciliations which were handed in. The essence of his challenge, it appears, was that the invoices which were produced at the hearing, were, so it was put, not those which the applicant had received. Tsotetsi explained that the original invoice would be dispatched together with the loaves of bread and would ultimately be retained by the customer. I have indicated previously that while no evidence was led on this issue the third respondent would in all probability have had to have a system in place which required the customer to sign some form of proof of delivery. It appears that what the applicant's representative had in mind was this proof of delivery. Unfortunately, he did not express himself properly, his focus being on the invoice itself.
- [24] The invoices which Tsotetsi handed up at the arbitration proceedings were those which he said had been downloaded from the company's "system".
- [25] Tsotetsi testified that the applicant could be observed in some of the video frames checking the loaves of bread. In one frame he notes that the applicant "has got ink in his hand and a calculator". It is unclear why the company did

not produce the reconciliations performed by Tsotetsi himself. It appears that this may have been based upon Tsotetsi's view that it would reflect nothing because the applicant merely recorded therein what was recorded on the invoice. It was only when the video recordings were compared to the invoices that the discrepancy was realised.

[26] In his evidence the applicant gave different versions as to who loaded the van. Initially he testified that the despatch clerk would load the bread onto the truck. In this regard, he stated "you [referring to the despatch clerk] will check how many loaves of bread he [the driver] wants [as per the invoice] and you will go and load". Later he testified that the driver's assistant would load the bread and not him personally. When asked whether he loaded the truck he stated "no, there are assistants who load bread". Still later, however, he testified that "my job was to check the truck, or load what was written on the invoice". Shortly thereafter he explained "I don't fetch the bread I just open the bay and the driver will take out the bread and his assistants". (In the pleadings in the present review application, it was common cause that the dispatch clerk did not actually load the bread onto the vans. In these circumstances, it seems that the applicant's evidence must be understood on the basis that he was the person responsible to oversee the loading of bread onto the van but did not actually do the loading himself.)

[27] Under cross-examination the applicant indicated that while he had watched the video he had not counted how many loaves of bread were loaded as reflected on the video. He also indicated that he was unable to recall whether his stock had balanced on 10 January 2012.

The arbitration award

[28] In his award the arbitrator found that the applicant's testimony was not reliable. He pointed to the fact that the applicant had denied knowing many of the procedures which he ought to have known, an example of which related to the reconciliation process. The arbitrator pointed out that in the excerpt from the video recording it was clear that the number of loaves of bread loaded could be counted using the video.

- [29] The first respondent pointed out that at the disciplinary hearing the applicant stated that he had made a mistake when counting whereas in the arbitration proceedings before him the applicant claimed that he could not count the number of loaves making use of the video footage.
- [30] Given the frequency of the excess number of loaves of bread loaded, said the arbitrator, it was clear that the applicant had not made a mistake and therefore, on the probabilities, the applicant must have been fully aware of the number of loaves of bread loaded. "At best" for the applicant his misconduct consisted of his failure to report the matter to his superiors, and at worst he was "guilty as charged" for colluding with the driver to defraud the company.
- [31] With regard to the question of inconsistency of treatment the arbitrator found that he could see no reason why Tsotetsi or Sibisi should have been charged. (Sibisi was one of the other despatch clerks who worked a different shift from the applicant.)
- [32] The arbitrator found that the actions of the applicant were "fundamentally dishonest and he showed no remorse". He was therefore satisfied that the trust relationship had broken down and that dismissal was the appropriate sanction.

The grounds of review

- [33] The applicant in his papers before this court challenged the arbitration award on various bases.
- [34] First, insofar as the question of inconsistency was concerned, he pointed out that more than five security officers were responsible for checking the truck before it left the third respondent's premises and that he did not work alone and "the supervisors and managers were also involved and the securities together the drivers and crew members".
- [35] He complained that notwithstanding the aforesaid the third respondent "chose to dismiss the applicant only and all these other people who were working with the applicant were left behind not dismissed".

- [36] Secondly, the applicant contended that he had not been found in possession of the third respondent's property and that no evidence had been produced to prove that he had stolen the bread or had been found loading extra bread onto the van. In this regard, he pointed out that he was not the person who actually loaded bread onto the van.
- [37] Thirdly, he contended that the third respondent's entire case was premised upon hearsay evidence and pointed to the failure of the third respondent to call either Nkosi or the security guard or any of the security guards.
- [38] Fourthly, the applicant contended that the arbitrator was biased "and exceeded his powers for no reason" and that his award was unjustifiable. In this regard, the applicant contended that the arbitrator had failed to apply "the best evidence rule" and relied instead on the allegations of Tsotetsi.

My findings

- [39] In my view there is no merit in any of these submissions.
- [40] With regard to the question of consistency it was clear from the testimony of Tsotetsi as to why the other people who had been identified by the applicant had not been dealt with by the company. They were the employees of third parties.
- [41] Insofar as there may have been wrongdoing on the part of any person employed by the third respondent (such as supervisors and other despatch clerks), there was insufficient evidence to demonstrate that they were guilty of any wrongdoing at all and, even if they were, they were guilty of a dereliction of their duties in failing to detect the applicant's wrongdoing, not theft.
- [42] At best for the applicant, the evidence relating to all the other checks and balances could be relied upon by him to demonstrate precisely how difficult it would have been for him to have carried out the alleged thefts. It was insufficient to rely upon it to support a claim for inconsistency.
- [43] At any rate, having regard to the video footage it is clear that the company's checks and balances were breached. He provided no plausible explanation

for what was observed on the video recordings and contented himself with merely challenging the *bona fides* of the third respondent.

[44] The applicant's contention that he was not found in possession of the bread is, with respect, neither here nor there. The entire basis of the charge related to the fact that the applicant had successfully managed to avoid detection and steal the loaves of bread until subsequent investigations revealed the theft.

[45] I do not agree with the applicant's contentions that the third respondent's entire case was premised upon hearsay evidence. The evidence of Tsotetsi was supported by a video recording the authenticity of which was not in dispute. This recording coupled with the testimony of Tsotetsi and the invoices established the guilt of the applicant.

[46] What is a matter of concern is the failure of the company to produce evidence regarding the system and whether the invoice produced from the system was capable of being corrupted. The company was not able to produce the original invoice. It had good reason for its failure: the original invoices were with the customers. It was, however, able to print duplicates from the system. It seems to me that the focus of the cross-examination and the challenge to the third respondent's case ought to have been in regard to the reliability of the system and duplicates printed from it.

[47] The focus of the cross-examination was, however, not directed at the system per se, but rather at the fact that the original invoice had not been produced. The original invoices could, however, not be produced by the third respondent itself. They could, of course, be subpoenaed. In the present case, the arbitrator, during the arbitration proceedings, pointed out that the applicant ought to have requested whatever documentation he wished to have beforehand.

[48] Insofar as it is contended that the arbitrator was biased, no factual basis for that contention has been advanced and I am not prepared to consider it.

[49] The applicant's submission that the arbitrator exceeded his powers by failing to apply the best evidence rule presumably relates to the failure to receive the

original invoices. I have already explained what became of the original invoices.

[50] With regard to the justifiability of the award, it is apparent from the record that there was ample evidence available to the arbitrator to arrive at the conclusion which he did. On the face of it, the decision arrived at appears to be the correct one. It is certainly not so unreasonable that no reasonable arbitrator could have arrived at it.

[51] I have, as I have indicated previously, one misgiving which relates to the failure to lead evidence on how the system operated. I am, however, not satisfied that this issue was sufficiently challenged during the course of the hearing and it was in fact not challenged as a ground of review in the present proceedings.

[52] In all the circumstances, I am satisfied that the application must fail.

[53] With regard to the question of costs, I am satisfied that costs ought, in the interests of fairness and justice, to be awarded against the applicant. I say this primarily due to the fact that the applicant, without any apparent basis, accused the third respondent of deliberately fabricating evidence against him in order to get rid of him. Although the findings of the chairman of the disciplinary inquiry were not strictly speaking raised in the arbitration proceedings, it is apparent therefrom that the applicant was in fact held in high esteem within the company. I have little doubt that in appropriate circumstances a party is entitled to allege and pursue a claim that the company has fabricated evidence against him. However, where such a claim is made, it must be done responsibly, evidence must be produced and must be pertinently put to the witnesses of the company. In the present case it was not raised in a responsible fashion, no evidence was produced to support the theory and notwithstanding that was pursued in argument before me. No explanation could be provided, however, as to the absence of the factual substratum to support this theory.

Conclusion

[54] In all the circumstances, the application is dismissed with costs.

Hulley, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr Bayi of Bayi Attorneys

On behalf of the Respondent: Mr M. Khoza of Edward Nathan Sonnenbergs Inc