



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR2721/12

In the matter between:

LEWIS STORES

Applicant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER N SIELE M.O

Second Respondent

SACCAWU

Third Respondent

FRANS JONAS

Fourth Respondent

Date heard: 22 April 2014

Delivered: 25 September 2015

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award issued by the second respondent (the Commissioner) on 27 October 2012. In terms of the Award the Commissioner found the dismissal of the third respondent (Jonas) to have been substantively unfair and ordered he be reinstated with retrospective effect.
- [2] Jonas was employed as a stock clerk and relieving manager up until his dismissal on 16 July 2010. The following charges were levelled against him:

“Dishonesty in that on 4th April 2012 you received R4000.00 from customer, MK Mampe for the purchase of a fridge, you purchased the said fridge on your staff account and paid R2864.00 and misappropriated the difference.

Abuse of staff account in that on 4th April 2012 you purchased a fridge for a customer MK Mampe which is in contravention of the Staff Purchase Policy and in the process you benefitted financially.

Misconduct in that on the 5th April 2012 you breached the company stock movement procedures when you removed a fridge from the branch and delivered it to customer MK Mampe without authorization from Management and without proper documentation.”

- [3] In the founding affidavit the applicant avers that the Commissioner adopted a piecemeal approach to the evidence and failed to properly consider the totality of the evidence before her and also failed to correctly apply the balance of probabilities to the respective versions; or properly consider what she had to decide. This led to her making an award that a reasonable decision-maker could not make. The supplementary founding affidavit painstakingly traverses the record of the arbitration proceedings in support of these averments.
- [4] The Award records the evidence of the daughter of MK Mampe, Ms Nomathembu Mampe (a school pupil) as follows:

“[14] She testified that she gave the Applicant R3999.00. She stated that the fridge was not available as the ones they saw were white in colour. According to her, when she gave the Applicant the money they were three and stood next to the Applicant’s table. The fridge was not available and was delivered at night. She stated that she was asked to go and collect the receipts and documentation.

[14.1] When she was asked as to when she gave the applicant the money, the witness failed to respond. When she was asked as to when was the fridge delivered, she could not remember but said that it was during the night.

[14.2] The witness testified that she gave the Applicant the money and Applicant informed them that he was the manager. She conceded that they were regular customers of the respondents. She furthermore conceded that she knows that payments are made to the cashiers.

[14.3] Later during cross examination, the witness changed her story and said that it was her mother who went to buy the fridge. According to her, money for the washing machine was given to her on 10 April 2012. She could not remember when was the fridge delivered but it was after 20h00 in the night."

[5] At paragraph 27 of the Award the Commissioner writes as follows in reference to Nomathembu Mampe:

"[27] The Respondent's main witness contradicted herself during cross-examination. Although she could somehow positively by means of non-verbal communication identify the Applicant, she was somehow a little ashamed of boldly saying she gave applicant the money. She could only shamelessly point to the Applicant as he appeared in the arbitration hearing and perhaps because she saw the Applicant during the disciplinary hearing. It is for this reason that she later conceded that Money was given to her mother and her mother knew the Applicant."

[6] It is evident from the transcribed record that the Commissioner either misunderstood the evidence that was led or did not record it accurately, when she found that Nomathembu Mampe changed her evidence and said that her mother had gone to buy the fridge. Her testimony was quite clear that she had accompanied her mother to buy it and she had given Jonas the money. The record further reflects that no admission was made by her to the effect that she was aware that money was not to be given to sales advisors. Quite why the Commissioner believed this witnesses answer that they were regular customers at the store amounted to a concession is puzzling. Perhaps it was because the

Commissioner herself cross-examined the witness on this as the record reflects. The interpreter is speaking for Nomathembu Mampe:

“COMMISSIONER: So you gave Frans uh the money without him giving you the receipt?

INTERPRETER: Yes

COMMISSIONER: Would it be normal if you go into a furniture shop to go and buy furniture and give the money to somebody else, such a lot of money without such a person giving you a receipt?

INTERPRETER: We trusted him.

COMMISSIONER: So if you say you say you trusted Frans was it, it then means in other words that it was not for the first time you bought from him, isn't it?

INTERPRETER: Yes my mother bought a room divider from him.”

[7] In paragraph 22 of the Award under the heading “Analysis of Evidence and Arguments”, the Commissioner writes that: “The central issue in dispute is whether Applicant’s version is plausible of the denial as opposed to the version tendered by the respondent with due consideration to all the evidence tendered.”

[8] The evidence of Jonas is *inter alia* recorded as follows in the Award:

“[20.3.] He reflected on the charges levelled against him and was surprised that he was charged for receiving R4000.00 He had previously purchased a fridge on mark for a role in thousand and approached the manager requesting for the authorisation for use repairs. He later requested the branch manager for a credit and then bought another fridge.

[20.4] The applicant testified that the Branch Manager approved the purchase of the fridge on 04 April 2012. He took the fridge to his house. He denied that he delivered the fridge to the Mampe house. He stated that the delivery crew completes their deliveries at around 19.30. According to him, there are security guards and the shop is protected with an alarm system. He could not have had the company vehicle at 20h 00 or after 20h00. He said that the manager is the only one who uses the delivery vehicle after hours....

[20.7] The Applicant denied having been at Mampe house around 20h00. He denied having been at Mampe residence. He referred to the testimony of Mr Mampe who stated that he was at their residence around 8h00 when the children were asleep. He does not remember ever being at Mampe residence in the evening. He cannot remember delivering the fridge at Mampe house. He confirmed that the delivery crew always knocks off at 17.30."

[9] The transcribed record reflects that Mr Mampe testified that Jonas came to his house with another person at about 8 in the evening with the fridge. The Commissioner in her assessment of Mr Mampe's evidence records that it was "honest and detailed". The Commissioner however fails to deal with this crucial dispute of fact relating to the delivery of the fridge at the Mampe residence and make any finding in respect of it. She proceeds to find however that:

"[33] The Applicant in the arbitration stood fast to say that he did not receive any money from Mrs MK Mampe. The question is why could the Applicant after his progression to the level of assistant manager sacrifice his position by being dishonest. The Applicant was a collector¹ for six years and acted as a manager; he had all the opportunity of behaving dishonestly but did not. It is for these reasons, that I am convinced that the charges that were levelled against the Applicant had not been proved by the Respondent."

[10] The question as to why the Mampe father and daughter should lie in their testimony does not appear to have concerned the Commissioner. The evidence of the company's witness Johanna Du Toit that Jonas had asked her for permission to deliver goods to a customer at night, and it was Jonas' responsibility as stock clerk to get the deliveries out and check the backkie in and out was not recorded by the Commissioner in the Award. Nor was her evidence that shortly before the arbitration she visited the Mampe's house and confirmed the fridge they had was the one purchased by Jonas purportedly for himself (i.e. with the same serial number), clearly recorded or weighed by the Commissioner.

¹ The evidence was that he had been a debt collector

- [11] In view of the above, this is an Award that is susceptible to review. It is glaring that the Commissioner reached a result that a reasonable arbitrator could not reach on all the material that was before her². I see no reason in remitting the Award given the record before me. I do not consider it appropriate on grounds of law and equity that costs should follow the result in this matter and make the following order:

Order:

1. The Award under case number NWKD 224-12 is reviewed, set aside and substituted as follows:

“The dismissal of Frans Jonas was substantively fair.”

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

² *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at paragraph 25

Appearances:

For the Applicant: Norton Rose Fullbright South Africa

For Third Respondent: SACCAWU

LABOUR COURT