THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2443/12

In the matter between:

HEAVY DUTY INDUSTRIAL (HDI)	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER QUEENDY GUNGUBELE	**Second Respondent**
VICTOR MACHININI	**Third Respondent**

Heard: 20 August 2015

Delivered: 20 October 2015

Summary: Review of CCMA arbitration award – application dismissed as a result of the outcome of the award being reasonable

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JUDGMENT

MYBURGH, AJ

Introduction

[1] This is an application in terms of section 145 of the LRA[1] to review and set aside an arbitration award issued by the second respondent ("the commissioner"), in which she held that the dismissal of the third respondent ("the employee") by the applicant ("the company") was substantively unfair and ordered his reinstatement.

Point in limine

[2] A point *in limine* raised in the employee's answering affidavit was pursued at the outset of the proceedings, it being to the effect that the signatory to the notice of motion (and founding affidavit), Mr Mengel, did not have *locus standi* to bring the application. This on account of the fact that he is an official of an unregistered employers' organisation, and thus does not qualify to act as a representative in this court in terms of section 161 of the LRA. Mr Mengel was the chairperson of the employee's disciplinary inquiry, and also the company's representative at the CCMA arbitration.

[3] While there was merit in the point *in limine* at the time that it was taken, it seems to me that the defect was cured by way of the company appointing Du Plessis and Kruyshaar Inc as its attorneys, and them formally coming on record on 20 August 2015 (the day upon which the matter was heard). No doubt, it would have been preferable for these attorneys to have delivered a fresh notice of motion signed by them, but it would, to my mind, be overly technical to dispose of the matter on this basis. In the result, the point *in limine* is dismissed.

[1] Labour Relations Act 66 of 1995.

Relevant background

[4] The employee was employed by the company as a driver. At the time of his dismissal, he had eight years' service and a clean disciplinary record.

[5] On 25 May 2012, the employee was charged with the following disciplinary offence:

> "Theft of material from employer – stock from supplier Matus signed for – cannot be traced. You collected items from supplier which were not received by HDI. These items were: (a) engraver mts; (b) Somta drill set; (c) Raco impact wrench; (d) Brito impact extension; (e) Brito impact socket; (f) Brito impact reducer."

[6] On 29 May 2012, and further to a disciplinary inquiry at which he was found guilty as charged, the employee was dismissed.

[7] Following the referral of an unfair dismissal dispute to the CCMA, the commissioner presided over the arbitration. At the arbitration only the substantive fairness of the employee's dismissal was placed in dispute – it being his contention that he was not guilty of theft. Each party called one witness – Mr Gqoboka (the dispatch manager) was called by the company, whereupon the employee gave evidence in his defence.

[8] The commissioner subsequently issued an arbitration award in the terms described above.

Evidence at the arbitration

[9] The following material facts emerged as common cause at the arbitration:

a) On 16 February 2012, the company generated a purchase order in favour of Matus (one of its suppliers) for the purchase of six tools at a cost of R3 424.71 ("the purchase order"). The purchase order, which was sent to Matus, was numbered PO26459.

b) On the same day, the employee collected the order from Matus. In the process, he signed an invoice from Matus reflecting receipt of the goods. The invoice reflects the customer order number as being PO26459, the sales order number as being 5390835, the Matus sales representative as being Rowayne, and the Matus checker as being Mafika ("the first invoice").

c) At the time that the employee collected the aforesaid order, he took receipt of a duplicate set of goods (of the same description and price). In the process, he signed a delivery note from Matus. The delivery note looks exactly the same as the invoices generated by Matus, save that it reads "delivery note" instead of "tax invoice" in the far right hand corner, and was referred to in evidence as an invoice (I do likewise). It reflects the customer order number as being LPO26459, the sales order number as being 5390853, the Matus sales representative as being Douglas, and the Matus checker as being Mafika ("the second invoice"). (The differences between the first and second invoices are that, in respect of the second invoice, the customer order number starts with an "L", the sales order number ends "853", and Douglas is reflected as the sales representative.)

d) Later that day, the employee returned to the company's premises. According to him, he handed over both sets of goods and both invoices to one Lungile, the goods receiving clerk. Lungile's signature appears on the second invoice (reflecting that he had received the goods), but not on the first invoice.

e) The company requires its drivers to keep a log book. In it, the driver records the kilometres travelled next to the order number of the orders that he is assigned to collect, with there also being a column in which the goods receiving clerk signs for receipt of the goods at the company (on a per purchase order basis). The employee's log book for 16 February 2012 reflects that he collected order number PO26459, with Lungile having signed for receipt of the order.

f) The vehicle trip report produced by Altech Netstar reflects the following relevant information regarding the movement of the employee's vehicle on 16 February 2012: (i) at 12h49, he arrived at Matus and remained on their premises until 13h47; (ii) at 13h47, he left Matus and drove to Africa Cell, where he arrived at 13h49; (iii) at 14h07, he left Africa Cell and drove to Matus, where he arrived at 14h08; (iv) at 14h31, he left Matus and drove to Africa Cell, where he arrived at 14h35; and (v) at 15h17, he left Africa Cell on route to Main Reef Gold Mine.

g) In about May 2012, and in circumstances where the accounts department had raised a query about the company paying for the same goods twice, the company undertook an investigation. It revealed that the first and second invoices were effectively duplicates, and that a second set of goods could not be traced by the company. The employee was then charged with theft towards the end of that month.

[10] In his evidence, Mr Gqoboka took the commissioner through the documents from which the bulk of the common cause facts set out above have been drawn. He also mentioned that Africa Cell is not a supplier or customer of the company. Save for this, Mr Gqoboka did not purport to have personal knowledge of the matter.

[11] The employee's evidence was essentially as follows:

a) He had collected a number of orders from Matus on the day in question.

b) He had gone to Africa Cell as he regularly bought food from a vendor in the vicinity. The sequence of events was this: he went to Matus and then went to Africa Cell with a friend (Sandile) to buy food while Matus was busy making up the orders; he went back to Matus to collect the orders; and he then returned to Africa Cell to collect his friend who he had left there.

c) Focussing on the order in question, he had presented Matus with the purchase order. Matus, in turn, had given him two invoices and two sets of goods. As the employee accepted, he “gave them one order number and they supplied the goods to [him] twice”. As he went on to state, Matus “gave [him] two orders [of goods] with the same order number and [he] signed the two”.

d) Taxed about how he could have signed for receipt of two sets of goods when he only had one purchase order for them and was supposed to check the goods received against that order, the employee experienced some difficulty. Along the way, he stated (unsatisfactorily) that he would normally just collect the goods and take them back to the company. He did, however, go on to explain that it was not uncommon for duplicates to be picked up by the company, which would then be returned to Matus (by way of a process described as “GRN”).

e) When he returned to the company, the employee left the goods and invoices for Lungile, and did not wait to see if he signed the invoices or not.

f) Regarding the fact that his log book only reflected the collection of order number PO26459 and not order number LPO26459, the employee accepted this. He stated that he had gone to collect the orders listed in his log book, and had received the duplicate order from Matus, which he did not then record in his log book. As far as he was concerned, he was not required to do so. (While on the issue of the log book, it warrants mention that Lungile signed for receipt of order number PO26459 in the log book. Yet the second invoice that he signed was for order number LPO26459.)

g) When it was put to the employee that he had (only) presented Lungile with the second invoice and the goods reflected therein, the employee stated that he had given Lungile everything that he had received at Matus.

h) When it was put to the employee that if he had given Lungile the first invoice, he (Lungile) would have ticked off the items received and signed it (like he had done in respect of the second invoice), the employee stated that he would normally just leave the goods and invoices for Lungile, and did not wait to see if he ticked and signed them.

i) It was also put to the employee that Lungile had not called the employee to discuss the duplications because he had not received a duplicate invoice or set of goods from the employee.

[12] In argument before the commissioner, the company sought to exploit the employee's failure to decline receipt of the duplicate set of goods, given that he only had one purchase order. The employee's representative, in turn, placed emphasis on the fact that the company had inexplicably failed to call Lungile as a witness.

The commissioner's award

[13] The full *ratio decidendi* of the commissioner's award (under the heading "substantive fairness") was as follows:

> "… Applicant argued that he was not aware of the rule that he should enter what he collected in the logbook and respondent did not counter that argument. It is not clear whether the delivery note on page 19 was an honest error on the part of the supplier or it was indeed accompanied by the products which allegedly went missing. Respondent's speculation that applicant went to Africacell without their knowledge does not indicate any mischief on applicant's part as his explanation that he went to buy food seemed to be understood by respondent.
>
> It is also unclear as to why the delivered products had to be checked by Lungile if applicant was the one who had to be accountable for their safe keeping. Indeed Lungile should have testified to clarify how he received the duplicate delivery notes which had discrepancies as stated above and failed to raise

> alarms. Applicant should not shoulder the blame and lose his job for something that went through a series of human chain unless if respondent could prove that he forged the duplication and stole the goods.
>
> I am not satisfied that respondent had shown that applicant, who worked for respondent for almost 8 years with a clean record of service, was the one who acted dishonestly on the day in question."

[14] In the result, the commissioner ordered the reinstatement of the employee.

The attack on review

[15] In argument before me, Ms Oschman (who appeared for the company) submitted that the commissioner's award failed the *Sidumo* test[2] for reasonableness. Mr van der Merwe (who appeared for the employee) submitted, on the other hand, that the award was capable of reasonable justification and was thus not unreasonable.

[16] As a point of departure, it would be fair to say that the commissioner's award evidences that she was not entirely on top of the facts. Two examples will suffice: firstly, the commissioner failed to appreciate that it was the employee's version that he had received two sets of goods from Matus; and, secondly, the commissioner failed to appreciate that the employee accepted that he had to check the goods received versus the purchase order. But as the SCA made clear in *Herholdt*,[3] factual errors and misdirections alone are not sufficient to sustain a review; the applicant must go further and establish that they caused the result to be substantively unreasonable.

[17] The question then is whether, despite any flaws in the award, the commissioner's conclusion that the employee was not guilty of theft is capable

[2] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para 110: "Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

[3] *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae*)* [2013] 11 BLLR 1074 (SCA) at para 25.

of reasonable justification. To my mind, it is, principally as a consequence of the company's (unexplained) failure to call Lungile as a witness. (This being something that the commissioner herself relied upon.)

[18] On the employee's version, he left Matus with two invoices and two sets of goods (this being the version advanced by the company). Insofar as the company set out to prove by way of the vehicle tracking report that the employee then disposed of the second set of goods at Africa Cell, it was unable to gainsay the employee's explanation of his movements (nor did it contend that they were irregular). On the employee's version, he then delivered the two invoices and two sets of goods to Lungile. The company's case on this issue is that Lungile: (i) only received the second invoice (which he signed) and the goods reflected on it; (ii) could not have received the first invoice, because, if he had, he would have signed and ticked it; and (iii) could not have received the first invoice and goods accompanying it, because, if he had, he would have raised the duplication issue with the employee. These are, of course, all important contentions in the circumstances of this case. But only Lungile could testify as to them.

[19] If Lungile had testified he could also have clarified certain other issues. These include why Lungile himself had signed the log book reflecting that he had received order number PO26459, whereas the second invoice (which he signed) was in respect of order number LPO26459.

[20] Faced with the predicament in argument that Lungile had not testified, Ms Oschman raised the question of who should have called Lungile, and suggested that the employee ought to have done so. I cannot accept this. Lungile gave evidence at the disciplinary inquiry for the company, and the company bore the onus of proving that the employee was guilty of theft.

[21] Although the employee's evidence was not free from blemish (particularly around his failure to check the goods received against the purchase order), it was not such that it stood to be disbelieved in the absence of the testimony of Lungile. This is not a case where on the evidence presented, the probabilities

were settled against the employee, rendering it unnecessary to call Lungile as a witness. Given that Lungile's evidence would have been material for the reasons stated above, and in the absence of any explanation for his failure to testify, it seems to me that an adverse inference can properly be drawn from his failure to testify.[4]

[22] In *Herholdt*, the SCA found that the *Sidumo* test is met "if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner".[5] This is clearly not such a case. On all the material before the commissioner, the award is not one that a reasonable commissioner "could not reach".[6] Consequently, I conclude that the award is not reviewable.

[23] Both parties sought costs. In circumstances where the employee (unrepresented by a union) has been successful in defending the review application, I can find no reason why he should not be awarded his costs.

Order

[24] In the premises, the following order is made:

1) The application is dismissed;

2) The applicant shall pay the third respondent's costs.

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Myburgh, *AJ*

Acting Judge of the Labour Court of South Africa

[4] *ABSA Investment Management Services (Pty) Ltd v Crowhurst* [2006] 2 BLLR 107 (LAC) at para 14.

[5] *Herholdt* at para 13.

[6] See fn 2 above.

APPEARANCES:

On behalf of the applicant: I Oschman (instructed by Du Plessis & Kruyshaar Inc)

On behalf of the third respondent: B van der Merwe (instructed by Maile & Associates)