



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR1276/12

In the matter between:

VMS GROUP (PTY) LTD

Applicant

and

FAIZEL MOOI N.O

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

LISO SIMUBALI

Third Respondent

Heard: 2 July 2015

Delivered: 29 October 2015

Summary: Review application; section 145 of the Labour Relations Act. Application of review test. Third respondent having being accused of

abusing his petrol card facility. Finding of commissioner that case had not been proved by applicant. Court on review finding that applicant had proved on a balance of probabilities that the employee was guilty of one of the charges against him. The decision reached by the Commissioner was not one that a reasonable commissioner could have reached. The Third Respondent had failed to meaningfully contradict the Applicant's evidence. This was clear on the evidence. Dismissal was accordingly substantively fair. Review application granted and award substituted with finding of the court.

JUDGMENT

SNIDER, AJ

- [1] This is an application to review and set aside an arbitration award ('the award') issued by the first respondent under case number GAJD15051-11 dated 30 April 2012.¹

Background

- [2] Briefly, the background to this matter is as follows. The applicant is in the business of merchandising. The third respondent ("the employee") was employed by the applicant in the capacity of an area supervisor.
- [3] As part and parcel of his duties, the employee would attend at various shops where the applicant did work in order to ensure that the applicant's work at the said shops was properly done, and do whatever was necessary in that regard.
- [4] The employee's job entailed a significant amount of travelling. The petrol

¹ A copy of the award appears at pages 25 to 51 of the application bundle.

costs of his travelling as well as any toll costs were paid for by the applicant utilising a petrol card system. Petrol cards were issued in the names of the relevant employees with the details of their vehicles also recorded. The information, mileage and other relevant figures were collated by the card issuer, being Standard Bank (the bank).²

[5] The employee was dismissed on 23 May 2011.³

[6] The employee was charged, in terms of a notice to attend an enquiry, with:

6.1. gross abuse of company fuel card in that during January 2011 to May 2011 you abused this facility; and

6.2. breach of company policy and procedures in that you put in fuel on Fridays and week-ends, contrary to policy during January 2011 to May 2011.⁴

[7] A disciplinary enquiry was duly held; the employee was found guilty of both charges and dismissed.

[8] Subsequently, the employee referred an unfair dismissal dispute to the second respondent and the unfair dismissal dispute was adjudicated by the first respondent.

[9] The applicant relied in its evidence on certain vehicle transaction reports provided by the bank and what the information they contained in relation to the employee's fuel consumption and patterns of usage.

The evidence of Godlonton

[10] The applicant led the evidence of Andrew Godlonton "(Godlonton)".

² Copies of the Standard Bank vehicle transaction reports in respect of the employees' vehicle are annexed to a bundle entitled index to record 6 from page 41 to 44.

³ Index to record V1 page 56.

⁴ Index to record V1 page 75.

Godlonton is the Group HR Manager of the applicant.⁵

- [11] It does not seem to be disputed between the parties that the employee understood that he was bound by the car allowance policy set out in the employee's conditions of employment.⁶
- [12] Specifically, at paragraph 7.3, the car allowance policy of the applicant is set out in some detail. The car allowance policy provides explicitly that a fuel card is issued for the purposes of purchasing fuel and that employees are not permitted to use the fuel card on a Friday, Saturday, Sunday or public holiday unless authorised by management.
- [13] It similarly appears to be common cause that the fuel card could only be utilised by the employee "within reason".
- [14] Godlonton gave detailed particularised evidence in relation to the vehicle transaction reports.⁷
- [15] Godlonton illustrated that the employee's petrol consumption and mileage travelled is, to say the least, improbable in terms of the work he does and the amount of travelling which he is required to do.⁸
- [16] A significant portion of evidence centred on the period 24 to 28 January 2011.⁹ On 24 January 2011, the employee attended at the Life Lane Medical and Dental Centre which is in Windsor East, Randburg. The document that he was presented with by the doctor he consulted, booked the employee off from 24 January 2011 to 28 January 2011. The doctor further stated that the employee 'is on sedating medication and will need to sleep to enable recovery. It is important that he refrains from active duty and that adheres to strict bed-rest. He will resume duties on 29 January

⁵ Transcript page 3

⁶ Index to record V1 page 113

⁷ Index to record V1 pages 41 to 44.

⁸ Transcript 153ff.

⁹ Index to record V1 page 120.

2011'.

- [17] If one the has regard to the dates on the vehicle transaction report,¹⁰ it is apparent that the employee during the said period on 26 and 27 January 2011 put fuel in his car twice for an amount in excess of R1, 000 (One thousand rand) and appears to have travelled, during the said period, at least 1100km.
- [18] Obviously, from the applicant's perspective, this presented a serious and troubling dichotomy. On the one hand, the employee has telefaxed a sick note which prescribes a routine of strict bed-rest for the employee whilst on the other hand he is driving long distances and filling his vehicle during the period when he should be in bed on his doctor's instructions.
- [19] The employee's version on this was that he was forced to work by his direct manager, Ferdie Senekal ("Senekal").¹¹
- [20] The employee was once again booked off from 16 February until 21 February 2011.¹² Once again, this is in contrast to him having continued having to utilise his petrol card during the said period.¹³
- [21] The employee appears to proffer the excuse in respect of this period that his manager forced him to work.
- [22] Given that this was the second fairly long spell of absenteeism due to ill health and given the seriousness of the first note from the doctor, it seems, to say the very least, highly improbable that the employee would have been in a position to work at all due to his physical condition during these periods. If any attempt was made to force him to work, he would surely have escalated the matter to higher management, which did not do. It would also have been open to him to enlist the assistance of the doctors who had

¹⁰ Index to record V1 page 41.

¹¹ Transcript page 159.

¹² Index to record V1 page 125.

examined him and required him not to work.

- [23] There is evidence from the employee that was accepted under cross-examination, that there was a meeting in this regard between him and management, but, as with much of the employee's evidence, it is not matched, chronologically or otherwise, to the events he is accused of.
- [24] The employee was again booked off from 4 to 7 March 2011.¹⁴
- [25] It appears, however, that the applicant filled his vehicle on 3 March and again on 7 March and travelled, during the period that he was allegedly ill, a distance of approximately 527km.¹⁵
- [26] Ultimately, Godlonton's evidence amounts to the employee having travelled significantly more kilometres than what was deemed necessary for business purpose and also during periods that he was ill.¹⁶
- [27] The cross examination of Godlonton only served to further illustrate the excessive and abusive use that the employee was making of the petrol card facility.¹⁷
- [28] The applicant's representative, an attorney, and later the applicant himself, who continued with the cross-examination, did little more than to confront Godlonton with a variety of possibilities which might explain the excessive fuel usage. These ranged from the employee having acquired a less economical vehicle, to the employee having to obtain stock items with his vehicle and deliver them to the stores, to the employee having to return to the office to download photographs taken at the relevant store.
- [29] None of this cross-examination was done with the level of specificity or

¹³ Transcript page 160 and Index to record V1 page 141.

¹⁴ Index to record V1 page 48.

¹⁵ Index to record V1 page 42 and page 161 of the transcript.

¹⁶ Page 165 of the transcript lines 10 to 16.

¹⁷ Transcript page 168 lines 10 to 20.

particularity that ought to incline a decision maker to regard it as seriously challenging the applicant's witness's evidence.

[30] Godlonton's evidence was squarely based on an appreciation of the distances and geographical locations of the various places to which the employee had to travel and on the vehicle transaction report, the accuracy and veracity of which was not challenged by the employee.

[31] The commissioner was aware of the employee cross-examining in a general and un-particularised fashion. He made this known to the employee.¹⁸ He in fact gave the employee clear pointers as to how the employee should cross-examine Godlonton.¹⁹ The fact that the employee did not do so can not be indicative of anything other than that he was not able to deal with the evidence in a particularised way as he had no explanation in relation to his abuse of the petrol card.

[32] The employee put it to Godlonton that he had complained to Godlonton in relation to being made to work during a sick period and how to go about putting a grievance.

[33] In these circumstances, it seems much more improbable that the employee would in fact have worked during any of the periods that he was sick as referred to above and, particularly, during the period where the doctor had stated that he was on sedating medication and required bed-rest. There is no question that he would have approached Godlonton or someone of equivalent or higher seniority or, as set out above, have approached the relevant medical professional to assist him in this regard. His explanation is wanting and highly improbable.²⁰

[34] Again the commissioner was acutely aware of the paucity of the employee's

¹⁸ Transcript page 183 to 184.

¹⁹ Page 184 of the transcript lines 4 to 7.

²⁰ Transcript page 191.

explanation.²¹

- [35] Godlonton makes the point, during cross-examination,²² that, according to the route list the employee had two calls a day to make and in light of this, it is again, very difficult to determine how the employee could have accumulated the sort of mileage which he did.
- [36] There was a dispute about the trip sheet and whether the one presented at the arbitration was the same as the one used at the disciplinary enquiry. Again, the probabilities weigh heavily in favour of the applicant in this regard.
- [37] There simply does not seem to be any reason or justification whatsoever for different documents to have been used and, similarly, the employee did not raise this at the inception of the arbitration which, given that he was represented at the time, one would have thought that he would.²³
- [38] The entire version surrounding the photographs that allegedly had to be transported to the applicant's office is once again lacking in any particularity.²⁴
- [39] The employee also tries to attach importance to where the vehicle was filled by him. It seems that the intimation here is because the vehicle is filled near the shops where he works. This, somehow, legitimises the extra mileage. Godlonton points out that this is all but irrelevant.²⁵
- [40] It appeared from re-examination that the trip sheet had never been questioned by the employee during the course of the disciplinary enquiry.²⁶
- [41] Godlonton contextualises the amount of money that was being spent on the

²¹ Bundle page 192.

²² Transcript page 199.

²³ Index to record V! page 39.

²⁴ Transcript page 200 lines 1 to 5.

²⁵ Transcript page 203 lines 1 to 5.

²⁶ Transcript pages 206 to 207.

employee's petrol when he illustrates that for half of January and half of February R5 900 (five thousand nine hundred rand) was spent, the next month it went to R5 500 (five thousand five hundred rand) and then in April R8147 (eight thousand one hundred and forty-seven rand). Godlonton gives evidence that town reps spend approximately R3000 (three thousand rand) a month.²⁷

The evidence of Senekal

- [42] Senekal's evidence was unequivocally that the disputed document²⁸ was indeed the employee's route list.
- [43] Senekal gave evidence of the events on 24 to 28 January 2011. His version is more consistent and probable than the employee's. I have dealt with the improbability of the employee working in circumstances where he was as ill as indicated in the sick note of 24 January 2011.
- [44] Senekal's evidence is that he did not force the employee to work and, in addition thereto, only knew about the sick note when it was faxed to the applicant on 25 January 2011. This is entirely consistent with the events that transpired and entirely consistent with the employee not having been available on 24 January 2011 to meet with Senekal and not having been available thereafter to meet with him. Senekal states that he, under the circumstances, would have to get a "relief person".²⁹ If Senekal was forcing the employee to work, there would have been no reason for the employee to telefax the sick note to the applicant. There was nothing at all to prevent the employee, under the circumstances, from simply staying at home and following the regime prescribed by his doctor.
- [45] The version put relative to the taking of pictures was exposed by Senekal to be a fallacy. There was no need for the employee to go back and forth to

²⁷ Transcript page 208 lines 3 to 14.

²⁸ Index to record V1 page 39.

²⁹ Transcript page 213 lines 14 and 15.

the stores he was working at for the purposes of downloading pictures.³⁰

- [46] The consistency in Senekal's evidence relating to the period for which the employee was booked off, 24 to 28 January 2011, is illustrated again when he demonstrates that he was not aware of the sick note until 25 January 2011 and this is consistent with Senekal wanting to meet with the employee on 25 January 2011, having expressed same to him on 24 January 2011. Given the above, the employee's version in this respect is palpably false. The versions in respect of the other days in which the employee was booked off does not even appear to have been put to Senekal.

The evidence of the employee

- [47] The employee's evidence itself begs the question of his excessive fuel usage. He gives evidence that on average he only visited one city per day.³¹
- [48] The absence of documentation corroborating the employee's version is stark. There appears to be no reason whatsoever why he could not have obtained such corroborating documentation and his failure to do so must carry with it an inference of his guilt. He does not appear to have even asked the employer to provide it.³²
- [49] The employee places much store by an affidavit of Celia Brown who, on one occasion, authorised him to put fuel in his car on one of the days on which he was conventionally not entitled to, in this instance being a Friday. This affidavit³³ clearly applies only to that single occasion.
- [50] In a fashion that is prevalent throughout his evidence and cross-examination, the employee is not able or prepared to disclose exactly

³⁰ Transcript page 234 lines 11 to 25.

³¹ Transcript page 253 lines 20 to 25.

³² Transcript page 254 lines 20 to page 255.

³³ Index to record V1 page 132.

where he travelled.³⁴ This passage is particularly demonstrative of the employee's uncertain and evasive pattern of giving evidence. The passage continues in this manner.

- [51] Relative to the issue of 25 January 2011, the following passage from the employee's evidence upon being questioned by the commission is relevant.³⁵

'Applicant - Yes sir, yes Mr Chairman I faxed through on the 25th because on the 24th as soon as I got home I had to sleep and then when I woke up at around 8 o'clock I called my manager who then forced me to come to work the following as per his testimony.'

- [52] Not only was Senekal's testimony to the contrary but, in addition, the absurdity of this evidence is illustrated when one realises that the fax was only sent to the applicant on the morning of 25 January 2011 after Senekal had allegedly instructed the employee to come to work. If this was the case, the sending of the telefax would no doubt have been an indication to Senekal and to the applicant itself that the employee would not be coming to work. The employee's evidence is patently false.

- [53] It is also relevant that the employee did not file a grievance in this regard.³⁶

- [54] It is simply illogically that the applicant would seek to force the employee to work in these circumstances and it appears that the commissioner recognised this.³⁷

- [55] The employee seems to be of the view that the documentation that would exonerate him would be in the hands of Senekal. There is, however, no evidence whatsoever that he sought to obtain same from the applicant or

³⁴ Transcript page 258 lines 5 to 20.

³⁵ Transcript page 259 lines 8 to 11 and page 263 lines 1 to 2.

³⁶ Transcript page 260 lines 4 to 6.

³⁷ Transcript page 260 lines 15 to 16.

Senekal directly.³⁸

[56] The employee is simply not able to give detailed evidence in his defence.³⁹

[57] In cross-examination, it was illustrated to the employee that in fact photographs would only be dealt with once a week on a Friday.⁴⁰

[58] Once again, the employee's answer is vague and evasive.

The award

[59] The second charge against the employee, being that relating to filling up on Fridays, weeks-ends and public holidays is certainly the less significant charge and it does seem fairly clear that on one occasion the employee was authorised by Celia Brown, an HR manager, to do so and that Senekal did not deny the possibility that he had authorised the employee on the second occasion.

[60] The fact that Senekal makes this concession is, in fact, testament to his credibility. In those circumstances, I am in agreement with the commissioner that the employee was not guilty of the second charge and I do not question that the decision that the commissioner took, in this regard, was in a band of reasonable decisions given the material that was before him. However, when it comes to the first charge, the position is very different.

[61] In this regard, the commissioner in fact makes out the case for the applicant and should have followed his analysis in this regard. It is quite clear from the evidence that the employee was consuming petrol way in excess of what he should have been, given the distances he had to travel.

[62] The probabilities of the employee's version relating to the times that the

³⁸ Transcript page 261 lines 19 to 22.

³⁹ Transcript page 264 lines 10 to 15.

employee was booked off sick and the allegations that he was forced to work, notwithstanding, that he was apparently gravely ill on one occasion, are wholly unsupportable in light of the evidence before the commissioner.

[63] The commissioner makes the point that there is no record of the stores not on the contested route list being near where he filled up.⁴¹

[64] The commissioner then says:

‘However, a suspicion is not sufficient to establish guilt on a balance of probabilities.’

[65] This is where the award departs from the reasonable.

[66] It is manifestly clear that the applicant put up a strong case supported by uncontested documentation and largely uncontested oral evidence. It was not a “suspicion” by any means but a factual case which the employee had to meet if he was to be successful. The fact that the route list was not signed cannot conceivably “break the chain of evidence” as the commissioner would suggest.

[67] The commissioner did not evaluate whether or not this was in fact the route list given that it was, on the evidence of Senekal, the same route list used at the arbitration. This was also the evidence of Godlonton and was to be viewed in the light of the commissioner’s finding that the employee did not fill up near any of the stores which he alleged visited, that were not on the route list.

[68] The commissioner seeks to utilise the argument relating to the photographs which, with respect, is nothing short of absurd. The commissioner also states that the notification dealing with this issue does not conclusively prove that the employee did not drive back and forth.

⁴⁰ Index to record V1 page 58 and Transcript page 66.

⁴¹ The application bundle page 29, para 37.

- [69] What the commissioner failed to appreciate is that, again, this was a speculatively piece of evidence on the part of the employee, the employee admitted that this was not a regular occurrence and that he could not fit it into the scheme of his evidence either temporally or specifically in relation to any of the allegations.
- [70] The commissioner stretches to find evidence to support the employee's case and uses Senekal's admission that there is some possibility that such journeys were made to exonerate the employee. This is entirely contrary to the flow of evidence.
- [71] The argument that because there were no complaints, therefore, the employee was not travelling excessively or utilising excessive fuel is, again, without merit. I do not understand on what basis the commissioner could conceivably have accepted this as an exculpatory argument or exculpatory evidence.
- [72] The applicant was not required to prove that the employee was not about company business, that he did not attend the stores on the days in question, that he did not drive to the office to download pictures nor that he did not sign the store register. The charges against the employee were that he abused the petrol card facility. This was demonstrated, most cogently by Godlonton, using the vehicle transaction reports and his own knowledge of the situation. This was simply never successfully challenged by the employee.
- [73] The commissioner finds that the main part of the applicant's case is that the employee filled up during times that he was booked off sick. The commissioner indeed makes out a powerful case that this was a problematic issue.⁴² However, somehow he finds that the sick note and Senekal's denial is not enough to prove the employee's guilt.

⁴² Application bundle page 29, para 36.

[74] This is entirely contrary to the evidence which was before the commissioner. The factors in favour of the employee having filled his car while he was on sick leave significantly outweigh those that suggest that he was working during that period. I have dealt with these above. They include the fact that the sick note was telefaxed the following day, that there were various periods during which the employee was sick and he allegedly discussed being required to work at some time with his superiors, Senekal had no reason to lie, the employee did not lodge a grievance, his sickness was so severe that he was sedated and, physically, even on his own version, he could not have worked at least for most of 24 January 2011.

The test on review

[75] All of this evidence is simply incontrovertible.

[76] The test for determining the reviewability of an award is as set out in *Sidumo and Another v Rustenburg Platinum Mine Limited and Others*;⁴³ *Herholdt v Nedbank Limited (Congress of South African Trade Unions and Amicus Curiae)*,⁴⁴ and *Goldfields Mining (Pty) Limited (Kloof Gold Mine) v Commissioner for Conciliation Mediation and arbitration*.⁴⁵

[77] The following is an exposition of the test from the judgment of Waglay, JP in the *Kloof* decision *supra*.⁴⁶

'*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that on evaluation, determination of the reasonableness of the decision arrived at by the arbitrator. The court in *Sidumo* was at pains to state that arbitration awards made under the Labour Relations Act continued to be determined in terms of section 145 of the LRA but that the constitutional standard of reasonableness is 'suffused' in the application of section 145 of the LRA.

⁴³ [2007] 12 BLLR 1097 CC.

⁴⁴ (2012) ILJ 1789 (LAC).

⁴⁵ (2014) 35 ILJ 943 (LAC).

⁴⁶ *Ibid* at para 14.

This implies that the application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings and/or excess of powers will not lead automatically to setting aside of the award if any of the above grounds are found to be present. In other words, in the case such as the present where a gross irregularity of the proceedings is alleged, enquiry is not confined to whether the arbitrator must conceive the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material.'

- [78] The evidence before the arbitrator was, as set out above, overwhelming that the employee had repeatedly, and over a significant time period, abused his petrol card facility. His excuses such as travelling to the office repeatedly to download photographs, that he was forced to work whilst he was significantly ill, and that he went to stores other than those on the route list produced (notwithstanding that there was no record of him having filled in the vicinity of those stores as there was in respect of other stores) lack any level of credibility.
- [79] There is no basis on which a reasonable commissioner could come to the conclusion that the employee was innocent on the basis of the evidence before him. The evidence of the applicant was cogent, thorough and well set out, but above all credible.
- [80] The evidence and cross-examination by the employee simply never attacked and undid the detailed information provided by the applicant. The employee could not account for what he had done and simply adopted an approach where in a vague and unsystematic way he threw out a variety of possibilities as to why he may have travelled the mileage that he did.
- [81] There was no possible reasonable basis on which the arbitrator could have accepted this evidence in the face of the compelling particularised case made out by the applicant.

[82] The award departs from the band of reasonable decisions which the commissioner may have reached in that, notwithstanding the strong and cogent case presented by the applicant, the commissioner took a range of evidence, which constituted nothing more than vague possibilities, not specific to the alleged events, and came to the conclusion that, in light of that evidence, the dismissal of the employee was substantively unfair.

[83] In the premises, I am of the view that the award should be reviewed and set aside.

[84] I have been placed in possession of certainly the bulk of the evidence, (although it does seem as if some of the transcript may be missing,⁴⁷ this is not an issue which was raised by either party). What has been canvassed in the affidavits and what appears from the remainder of the record, in any event, comprehensively deals with the matter.

[85] Procedure was not in dispute.

[86] Accordingly, I make the following order:

86.1. The award of the commissioner dated 30 April 2012 under case number GAJB15051-11 is reviewed and set aside.

86.2. The award is substituted with the following:

“The dismissal of the employee was substantively fair.”

86.3. There is no order as to costs.

⁴⁷ Transcript page 277.

Snider, AJ

Acting Judge of the Labour Court

Appearances

For the Applicant: Anita Bosch of Snyman Attorneys

For the Respondent: Charles Beckenstrater of Moodey & Robertson
Attorneys