



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1203/13

Not Reportable

In the matter between:

STEP AHEAD

Applicant

and

SELEELE MOKWENA, N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

BOITUMELO SEICHOKELO

Third Respondent

Heard: 17 November 2015

Delivered: 28 December 2015

Summary: Review application. The decision of the Commissioner failing to meet the reasonable decision maker state

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an application to review and set aside the arbitration award made by the first respondent under case number GATW4191-13 and dated 03 May 2013 in terms of which the dismissal of the third respondent (the employee) was found to have been substantively unfair.
- [2] The application was unopposed.

Background facts

- [3] The applicant is involved in the retail shoe business, and has three branches in Pretoria. The stock to the three branches are delivered by the driver Mr Maswanganyi, who is also responsible for collecting money for banking for the three branches. The banking is done at the Brooklyn Mall. The money collected from the two other branches is counted and banked at the Brooklyn mall.
- [4] On 12 February 2013 Mr Maswanganyi attended at the Irene Mall and Woodlands Boulevard Mall where he collected the banking. He placed the money collected in the shoe boxes to conceal the cash from strangers. He proceeded to the Brooklyn Mall, where on arrival he placed the money into the shoe boxes on a trolley. The trolley was parked at the back of the store. After parking the trolley at the back of the store he then proceeded to the bathroom.
- [5] The money collected was generally counted by Mr Maswanganyi and Ms Masilela. On the return from the toilet both Mr Maswanganyi and Ms Masilela opened the shoe box where the cash had been placed. Upon opening the box she discovered that the money in the amount of R669.00 was missing.
- [6] Initially all the employees at the Brooklyn Mall were charged with the theft of the missing cash. It was apparently established during those disciplinary hearing that the three employees who had knowledge that the cash and

the opportunity to remove it where it was were Mr Maswanganyi; Mss Masilela and the employee. After that the disciplinary hearings were postponed and the three requested to subject themselves to a polygraph test.

- [7] The disciplinary hearings resumed after the polygraph test which the employee failed. The chairperson of the disciplinary hearing found after taking into account both the result of the polygraph test and the evidence of the witnesses presented that the employee was guilty of theft and accordingly dismissed the employee.
- [8] Aggrieved by the outcome of the disciplinary hearing the employees referred an alleged unfair dismissed dispute to the CCMA, which was ultimately arbitrated upon by the Commissioner. As indicated above the Commissioner found the dismissal to have been substantively unfair and accordingly ordered the applicant to pay compensation equivalent to four months' salary for that reason.

The grounds of review

- [9] The applicant raised several grounds of review, the essence of which is that the Commissioner failed to apply his mind to the facts which were properly placed before him. The applicant further contends that the conclusion reached by the Commissioner is not justifiable when regard is had to the evidence and the material which were properly placed before him.

The arbitration award

- [10] The Commissioner in arriving at the conclusion that the dismissal was unfair considered the testimony of the three witnesses who testified on behalf of the applicant. He found that the evidence of the second witness did not link the employee to the missing cash and that of the third witness to have not been irrelevant.

Evaluation

- [11] The test for review as set out is *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*¹ is that of a reasonable decision maker which requires the review Court to determine whether the outcome of the arbitration proceedings is one which a reasonable decision maker could not reach. In terms of this test a Commissioner in dealing with a dispute is required to ensure that the dispute is “fully and fairly” determined. In determining the dispute fully and fairly the Commissioner is required to have regard to the material facts properly presented before him or her. Failure to have regard to the material facts properly before him or her is likely to taint the arbitration award with unreasonableness.
- [12] In the present matter the record reveals that in addition to the testimony of the various witnesses the applicant presented evidence also in the form of the polygraph test report. As indicated earlier the employee was the only one who failed the test.
- [13] In *Truworths Ltd vs Commissioner for Conciliation, Mediation and Arbitration & Others*² the Court held:

‘Despite this negative inference which is unconnected with the evidence, the commissioner does not draw a negative inference from the fact that the respondent herself had initially refused to go for a polygraph nor from the fact that the respondent had actually failed the polygraph. No mention is also made of the fact that Wali who also took the polygraph actually passed the polygraph. Wali was in fact found to be honest and cooperative. If the evidence in respect of the polygraph is perused it appears that he respondent had obtained very low scores in her polygraph test and was in fact found to be dishonest. Although it is trite law that the probative value of a polygraph test on its own is not sufficient to find a person guilty, the result

¹ [2007] 12 BLLR 1097 (CC).

² (2009) 30 ILJ 477 (LC).

of a polygraph test is, however, one of the factors that may be considered in evaluating the fairness of a dismissal.'

[14] The Commissioner, in the present matter makes no reference to the outcome of the polygraph test. This means in weighing the fairness or otherwise of the dismissal he did have regard to the polygraph test results. This in my view was a serious and material omission which resulted in the material failure to fully and fairly determine the dispute. I accordingly find that the decision made by the Commissioner was for this reason unreasonableness. The review application accordingly stands to succeed. I do not however believe that the Court is in a position to substitute the decision of the Commissioner and therefore the matter stands to be remitted to the CCMA.

[15] It was for the above reasons that the following order was made:

1. The arbitration award issued by the first respondent under case number GATW4191-13 dated 03 May 2013 is reviewed and set aside.
2. The matter is remitted to the second respondent to be heard by a commissioner other than the first respondent.

E, Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: AJ Posthuma of Snyman Attorneys