



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 539/12

In the matter between:

FIRE SPRINKLER INSTALLATION CC

Applicant

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL

First Respondent

MALUSI MBULI N.O

Second Respondent

SAEWA OBO J T LITHOLI

Third Respondent

Heard: 2 September 2015

Delivered: 30 October 2015

Summary: When the arbitrator's conduct of disregarding material evidence has an effect on the reasonableness of his or her award, the award may be reviewed and set aside.

JUDGMENT

LALLIE, J

[1] This is an application to review and set aside an arbitration award of the second respondent who I will refer to in this judgment as the arbitrator. The factual background of this matter is that the *individual* third respondent, Ms Litholi (Litholi) was employed by the applicant as a cleaner in 2001. She was dismissed for misconduct on 8 February 2012. Aggrieved by the dismissal, the third respondent referred an unfair dismissal dispute to the first respondent where the arbitrator issued an award in which he found Litholi's dismissal substantively unfair and ordered her reinstatement. It is that award which the applicant seeks this court to review and set aside.

[2] The conduct which led to Litholi's dismissal is mainly common cause. The applicant makes use of a siren to regulate working time. It rings at 07h25 for employees to go to their workstations and at 07h30 for employees to start performing their duties. On 23 January 2012, Litholi was seen entering the workplace at 07h45. The applicant's version, at the arbitration, was that Litholi had reported late for duty while on final written warning for the same misconduct. The third respondent denied. Litholi testified that, on the day in question, she reported for duty at about 07h18. She received a telephone call from her brother who was waiting for her outside the premises of the applicant. Her brother had brought her money which she had borrowed. She went out to fetch it and arrived at her work station late. She was charged with:

'1 DISHONESTY/MAKING FALSE STATEMENTS in that on the 23rd January 2012 you informed your employer that you reported for duty on time but left the premises and that is why you were late however you only arrived at the premises after the start of your shift.

2 REPORTING LATE FOR DUTY in that on the 23rd January 2012 you reported at 07h45 instead of the start of your shift at 07h30.

3 CONDUCT AFFECTING THE EMPLOYER/EMPLOYEE RELATIONSHIP DETRIMENTALLY in that the above misconduct (sic) the trust relationship had irretrievably broken down between yourself and your employer.'

- [3] Litholi was found guilty of all the charges and dismissed. The arbitrator found that the three charges were interlinked as they related to the same incident of 23 January 2012 when Litholi was alleged to have reported late for duty. The arbitrator accepted the third respondent's version that Litholi reported early for work on 23 January 2012, went to her brother who was waiting outside and re-entered the respondent's premises at 07h45. He concluded that Litholi did not commit any transgression. He noted that she had final written warnings for late coming.
- [4] The applicant's grounds for review were that the arbitrator committed a gross irregularity in that he misconstrued the issue before him. He failed to take into account relevant evidence before him. He erred in accepting the third respondent's evidence that Litholi was underpaid. He failed to consider that the third respondent conceded to have started working late. He failed to attach appropriate weight to the evidence that Litholi had warnings for reporting late for duty. It was the applicant's case that the irregularities committed and mistakes made by the arbitrator rendered his award unreasonable. The third respondent opposed the application mainly on the basis that the arbitrator's decision was correct. It sought to rely on the difference between reporting late for duty and starting work late. It submitted that Litholi was not dismissed for starting work late. The misconduct for which she was dismissed was, so went the argument, not approved.
- [5] The test for review is settled. It is whether the arbitrator's decision is one which a reasonable decision-maker could not reach on the evidence before the arbitrator.¹ In *Herholdt v Nedbank Limited and Congress of South African Trade Unions*,² it was held that an arbitration award issued by an arbitrator who misconstrued the issue before him or her is unreasonable. In *Gold Fields*

¹ See *Sidumo and Another v Rustenburg Platinum Mines and Others* (2007) 28 ILJ 2405 (CC) at para 110.

² (2013) 34 ILJ 2798 (SCA) at para 25.

Mine SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others,³ the court expressed the duty of the reviewing court to be to ascertain whether the arbitrator considered the principal issue, evaluated the facts presented and came to a conclusion that is reasonable.

- [6] In determining the substantive fairness of Litholi's dismissal, the arbitrator was required to take into account the guidelines in item 7 of schedule 8 to the LRA and consider whether Litholi contravened a valid rule regulating conduct at the applicant, whether Litholi was aware of the rule, whether the rule was applied consistently and whether dismissal was the appropriate sanction.
- [7] The arbitrator made a finding that for a dismissal to be fair, it must be for a valid reason because of the serious nature of the transgression and the fact that the employee had committed such transgression. He stated that he could not find any of the two factors in the dispute before him. He rejected the applicant's version that Litholi had committed a transgression of a serious nature which warranted dismissal. In reaching his decision, the arbitrator misconstrued the dispute before him in that he failed to determine whether Litholi had breached one of the applicant's rules of conduct, the gravity of which warranted dismissal. One of the charges which led to Litholi's dismissal was reporting late for duty on 23 January 2012 in that she reported for duty at 07h45 instead of 07h30. Litholi's evidence corroborated the applicant's evidence because she testified that she arrived at work at 07h18 and received a telephone call from her brother whom she joined outside the applicant's premises. They had a conversation about her financial problems. She heard the first and second siren ring but she kept talking to her brother until she saw a managers' car drive into the applicant's premises. It is then that she walked in for purposes of performing her duties. It is common cause that the time was 07h45.
- [8] Litholi's evidence was that she started performing her duties after 07h45 on 23 January 2012. The conclusion that Litholi did not report late for duty on the day in question because she arrived at work at 07h18 is untenable. It overlooks the unchallenged evidence that the siren rang at 07h25 to warn

³ (2014) 35 *ILJ* 943 (LAC) at para 16.

employees that in five minutes time they had to be at their workstations performing their duties. Litholi was aware that she should have been at her workstation at 07h30. She heard both sirens but took a conscious decision to ignore them, for no valid reason and only returned to the applicant's premises when she saw a manager's car. On her own version, she made herself guilty of reporting for duty late at a time she was on final written warning for similar misconduct. The arbitrator's decision that Litholi committed no misconduct is not based on the evidence before him. In *Herholdt (supra)* it was held that a decision which is not based on the evidence before an arbitrator is unreasonable. Further, by not considering the evidence which proved that Litholi made herself guilty of misconduct, the arbitrator failed to deal with the principal issue before him and to evaluate the facts before him; thus committing a gross irregularity which rendered his award unreasonable.

- [9] The applicant sought an order substituting the arbitration award. The applicant filed a record of the arbitration proceedings which has sufficient information on which the order can be based. It is common cause that on 23 January 2012, Litholi made herself guilty of reporting for duty at 07h45 instead of 07h30. By so doing, she breached the applicant's rule regulating hours of work. She was aware of the rule. She had breached it and was issued with a final written warning which was still in force on 23 January 2012. She heard the siren warning her that she had five minutes within which to be at her workstation. She ignored it and kept discussing her financial problems with her brother. Had a manager's car not driven into the applicant's premises, no one knows when she would have elected to start performing her duties. She proffered no valid reason for commencing her duties late. Her mere presence at 07h18 was of no value to the applicant as she was required to be at work for the purpose of doing work allocated to her from the beginning of her shift. There is, therefore, no reason to conclude that dismissal was not the appropriate sanction as she was on a final written warning for similar misconduct. Her dismissal was therefore fair.

- [10] In the premises, the following order is made:

10.1 The arbitration award issued by the second respondent under case number 619 and dated 11 October 2012 is reviewed and set aside and substituted with the following:

- (a) Litholi's dismissal was substantively fair.

Lallie

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Unwin of Unwin Attorneys

For the Third Respondent: Mr Engebrencht of SAEWA

LABOUR COURT