



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case number: JR 160 /14

In the matter between

RAMOHANE JOEL MOGODISENG

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

RUSSEL MOLETSANE N. O

Second Respondent

METROBUS

Third Respondent

Heard: 03 March 2016

Judgment: 03 March 2016

Date edited and signed: 26 July 2016.

EX- TEMPORE JUDGMENT

STEENKAMP, J:

[1] This is an application by the employee, Mr Ramohane Joel Mogodiseng, to have an arbitration award of Commissioner Russell Moletsane, a Commissioner of the CCMA, reviewed and set aside. It arises from the dismissal of the employee by Metrobus after it was initially found that he had committed three counts of misconduct. For the sake of completeness I will quote them as they appear in the notice of a disciplinary hearing.

“Charge 1

You committed an act of gross dishonesty in failing to conduct yourself with honesty and integrity in breach of clause 1.2.5 of Metrobus Disciplinary Code and Procedure in that, during the month of November 2011, you instructed Felicia Harper to sell Metrobus property at a scrapyard around Roodepoort. You then instructed her to buy steel and wire mesh and then instructed Nkosi Ncube to make you a braai stand. Further to that, you instructed her to buy meat and other goods for your year end braai at the Roodepoort depot, which was held on the 2 December 2011, where you were present and part of.

Charge 2:

You committed an act of gross dishonesty in that, when

you were asked by the Acting Group Technical Manager about the selling of Metrobus property for the braai, you lied and told him that you were not there and you have no knowledge of such incidents because you were on leave, which was not true.

Charge 3:

You are charged in terms of Metrobus Disciplinary Code and Procedure, Clause 2.7.10, which states that any act of misconduct which could constitute a just cause for dismissal, [*sic*] in that you instructed Ted Henry and Felicia Harper in 2011 to sell Metrobus property at the scrapyard and instructed them to buy KFC [Kentucky Fried Chicken] for them and yourself instead of paying the money into Metrobus.”

- [2] The employee was in the position of Workshop Manager. He earned a substantial salary of just under R35 000 per month. His dismissal was confirmed on appeal. At the arbitration, as he did at the disciplinary hearing, he denied that he had committed any misconduct. The arbitrator found against Metrobus on charge 1. He found that it had not discharged the onus of showing that the employee had committed the misconduct in question. However, on charges 2 and 3, he confirmed that the employee did commit the misconduct and he found that the dismissal on that basis was fair.

- [3] There is no cross review, which means that the finding of the arbitrator on charge 1 is accepted. That charge therefore becomes largely irrelevant, except insofar as the evidence led in respect of that charge may have some peripheral relevance to the findings on witnesses' credibility.
- [4] The arbitration was a lengthy one that stretched over 10 days and the arbitrator heard the evidence of numerous witnesses. Both parties were legally represented by the same attorneys who appeared in court today, namely Mr Jabulani Gwebu for the employee and Ms Helena Strijdom for Metrobus.
- [5] The review application is also a lengthy one, comprising some 60 pages, in which the applicant, Mr Mogodiseng, with the help of his attorneys, carefully parses through the evidence led over 10 days and comprising 1 488 pages. Having done so, he then sets out wide-ranging but vague grounds for review. Those grounds are that the arbitrator:
- “(1) Failed to make an appropriate assessment of the evidence placed before him, particularly my evidence, and disregarded the contradictory evidence of the third respondent's witnesses;
 - (2) Failed to come to grips with the principles surrounding the resolution of factual disputes of facts with proper assessment of the evidence;
 - (3) Inappropriately favoured the evidence presented by Mr Muller and Ms Harper on behalf of the third respondent over mine applicant [*sic*]. This is tantamount to bias on the part of the second respondent as against me as he assumed that I am not

a reliable witness without any basis at all;

- (4) Failed to evaluate the probabilities of the evidence tendered before him. The probabilities are overwhelming, that the third respondent's witnesses had lied as the evidence is totally different (if not available) [sic] to what they stated at the arbitration proceedings and during an internal investigation conducted by an independent person from Tokiso;
- (5) Failed to take material evidence into account or has [sic] regard to evidence that is irrelevant, which resulted in me being prejudiced as a consequence;
- (6) Reached conclusions... which are either nonsensical [sic] or clearly wrong, which suggests a lack of understanding of the evidence placed before him or the assessment of such evidence (or both)...
- (7) Committed misconduct in relation to the duties of the second respondent as an arbitrator;
- (8) Committed a gross irregularity in the conduct of the arbitration proceedings; and
- (9) The decision was not rationally connected with the information before the second respondent and with the reasons given for it."

[6] Despite these wide-ranging grounds, Mr *Gwebu*, for the applicant, essentially argued today that the conclusion reached by the arbitrator was one that a reasonable arbitrator could not reach with regard to his findings on charges 2 and 3. I will deal with each of those.

[7] Charge 2, as the reader will remember, is the one relating to whether the employee had lied about having been at the braai on 2 December 2012. The arbitrator correctly posed the question in paragraph 68 of his award as follows:

“The issue here is whether the Acting Group Technical Manager (Muller) asked the applicant about selling of the Metrobus property for the yearend braai/party, and the applicant replied by saying he was not at the braai as he was on leave.”

[8] The applicant's case initially was indeed, and remains, that he was not at the braai. As Mr Gwebu put it in his opening address at the arbitration, and I quote:

“In respect of charge 2, the applicant will, you know, emphatically deny that he ever lied to the Group Technical Manager and he will testify that he was not party to the party, the Christmas party that was held on 2 December, because that was on a Friday and he was, he left at about 12:00, so he does not even know when the party started.”

[9] That version eventually transmogrified into one where the applicant conceded that he was indeed at the braai, but he said he was only there for a short time and he made a short speech to those present before he went on leave after 12:00 noon. Surprisingly though, that was not the version that his attorney, Mr Gwebu, put to Muller under cross-examination. Muller testified consistently that what transpired between him and the employee was that the employee told him that he was not at the braai at all. The following is a transcript of what

transpired between Mr Muller and Mr Gwebu in cross-examination: “

“MR MULLER: And then he said on the day of the braai, he was not in and he was on leave.

MR GWEBU: And then he went further and said on the day of the braai, he was not there.

MR MULLER: He was on leave.

COMMISSIONER: What did he say? Did he say on the day of the braai, he was on leave?

MR MULLER: Yes, the day of the braai, he was on leave. He says he was not even there.”

In the face of that emphatic version, Mr Gwebu then again says to Muller:

“MR GWEBU: And then he went further and said: ‘On the day of the braai, I was not there, I was on leave.’

MR MULLER: Yes.

MR GWEBU: Okay, and this is what you said he lies about it? What is it that he lied about?

MR MULLER: Okay, on the day of the braai, he was at work. He only went on leave that Monday. On the day of the braai, was the day that he may be knocked off a little bit earlier than usual, but he was at the depot.”

[10] And Muller goes on to say that the employee lied to him because contrary to what he had told him, he was in fact there on 2 December. Mr Gwebu then puts his client’s version to Muller in some detail. He says the following:

“MR GWEBU: Okay, now I put it to you that the applicant will deny that. First, his understanding of your

discussion with him, you came to his office and you said: 'You know, Joel, the party you had at Roodepoort, I understand it was held from the proceeds of the sales of the brake drums,' and he told you, he said: 'No, I know nothing about that,' and as far as he knows, there was a contribution of R50 for the party and secondly, he said as far, and he was anyway not involved with the party because he left early, at 12:00 because he was going on leave, so he knows nothing what went on in the party. So he never participated in that party. What would you say to that, if this recollection is what he said about that?"

Muller's response again is unequivocal:

"MR MULLER: I say that part of that statement is correct, Joel maintained that he had nothing to do with the sale of scrap, that is why I said to you, after the allegations and the statements of people, I also know that is not true and then he never said to me he was not on duty, he said he was on leave and I believe that Joel was on leave. He said to me: 'Nick, I was not there, I was on leave.' I even had some other discussions with other people, I said: 'Hey, Joel was not there, he was on leave,' only to find out later that, no, it is not the truth.

MR GWEBU: So his testimony is that he told you that: 'No, I was not party to these things because I was

leaving at 12:00, I was going on leave.”

[11] What is significant about that fairly lengthy debate between Mr Gwebu and Mr Muller is that Mr Gwebu does not put to Muller the version that, indeed, the employee was at the party, albeit for a short time. He also does not put that version to Ncube, who testified in some detail about Mogodiseng’s presence at the party. Ncube says that he joined the party shortly after 11:00, when it was already in full swing. When he arrived there, Mogodiseng was already there with a glass in his hand and drinking something. In cross-examination, Mr Gwebu made much of whether his client was drinking alcohol or not, but again, he does not put the version referred to above to Mr Ncube.

[12] It is against that background that the arbitrator finds on a balance of probabilities that the employee did lie to Muller. He notes, quite correctly, that the version of Muller and that of the applicant are mutually destructive and: “I therefore have to unbundle this issue on the credibility issue.” He then notes that Mr Gwebu, in his opening address, put the version of the applicant, that he had left at 12:00 and that he did not even know when the party started. The arbitrator then notes the following:

“During cross-examination, the applicant finally accepted that the party started at 10:00 AM, and that by the time he got there, at around 10:00 AM, the party had been in full swing. In my view, when the applicant claimed that he did not participate in the party, he was very economical with the truth.

The applicant contributed R50 in order to participate in the party, he was drinking something at the lapa and he also gave a short speech at the very same party. In my view, given the applicant's inconsistent versions regarding the party, I am of the view that Muller's version is more probable than that of the applicant and was therefore correctly found guilty as charged."

[13] In doing so, the arbitrator did exactly what he was enjoined to do. He took into account the credibility of the two parties, the probabilities and their credibility, and he came to a conclusion that is not so unreasonable that no other arbitrator could have come to the same conclusion. The award is not reviewable on that ground.

[14] I then turn to the evidence on charge 3, that is the allegation that the employee had instructed Harper and Harry to sell scrap metal on 26 August and used the proceeds to buy Kentucky Fried Chicken for themselves and the employees. Mr *Gwebu*, in his argument, took issue with two aspects of that allegation. Firstly, he made a fine distinction between rubble and scrap metal. Secondly, he admitted that his client had permitted Harper and Harry to sell Metrobus property to the scrap dealer; however, he said that his client had not instructed them to do so.

[15] Dealing with the first issue: As Ms *Strijdom* correctly pointed out, this fine distinction between rubble and scrap metal only emerged for the first time late during the evidence at arbitration. It was not raised at the disciplinary inquiry or at appeal. Even in his opening address at

the arbitration, once again, Mr Gwebu did not make that distinction and did not state that that would be his client's version or his defence. Instead, he says in his opening address:

"No, it is this one of, he agrees that, but he did not instruct. He said that Mr Ted Henry came and requested permission from him to say can they go and sell the scrap metal and buy food for them and then he okayed that."

[16] Clearly, it was not Mr Gwebu's instructions at the outset to take issue with the question whether it was scrap metal or rubble that had been sold. The only issue was whether his client had instructed the other two to sell the scrap metal or whether he had simply given them permission to do so. Also, as Mr *Gwebu* conceded in his argument today, he never put it to Felicia Harper, with whose evidence he took issue, that it was rubble and not scrap that she had sold to the scrapyard. Ms *Strijdom*, in fairness to the witness, did in fact ask her about that. Ms *Strijdom* deals with the issue of the scrap metal and then she says to Ms Harper:

"MS STRIJDOM: Okay, now Felicia, Mr Mogodiseng says Ted Henry asked him to sell rubble and an example of broken door handles. What is your comment on that?

MS HARPER: No. Door handles?

MS STRIJDOM: That is the example that was given, it may just be an example of what is considered rubble.

MS HARPER: No.”

[17] And then the exchange goes further for Ms Harper to make it clear that the scrapyard dealing in scrap metal never had any issue with the type of product that Harper and Harry sold to them, thus leading to the inference on the probabilities that it was indeed scrap metal that was sold and for which the scrapyard paid them R1 000.

[18] It is not common cause that those proceeds were used to buy KFC rather than giving it back to Metrobus, but as Ms De Beer testified, the proceeds were not accounted for, contrary to the usual procedure. Against that background, the arbitrator deals again with the probabilities and he says:

“It was put to Harper by the applicant’s representative that the applicant signed the dispatch document for the scrap metals to go out. Harper, who had earlier testified that on the 26 August 2011, she went to Letsoalo to be provided with a driver in order to sell the scrap metal, later conceded during cross-examination that she made a mistake (this was after she was shown a document indicating that Letsoalo was on leave on that day).

It was the applicant’s case that if Henry had never requested permission from him to sell the rubble on 26 August, that rubble was destined to be thrown away at the dump. He further testified that he wants to believe that he was acting within his authority in order to allow the staff members to buy food with the proceeds of the

sale of the rubble, as it was in line with his entertainment allowance, as long as he was going to submit proof of expenditure.

The evidence of the applicant that Henry asked for permission to sell the rubble is problematic in that:

- It was put to Harper that the applicant had signed the dispatch document for the scrap metal to go out.
- It was not put to Harper that what was sold was the rubble and not the scrap metal.
- What the applicant called “rubble” generated about R1 000,
- The charge is not about the selling of scrap metal but about the sale of Metrobus property.”

[16] The arbitrator then correctly notes that, as Henry was not called to testify, he had to analyse the versions of the applicant as against that of Harper. He did so and then came to the conclusion that the applicant had instructed Harper to sell the scrap metal on a balance of probabilities. In doing so, he took into account, *inter alia*, the following factors:

- “The applicant used the word “rubble” towards the end, when his representative had used the word “scrap metal” when he put the version of the applicant to the respondent’s witnesses.
- The applicant signed a dispatch document for the scrap metal to go out.

- If there was a dispatch document duly signed by the applicant for the scrap metal to go out, it would make no sense for Harper to claim the contrary.
- Since the applicant had claimed that Harper was not reporting to him, then there was no basis for Henry to request Harper to go with him.
- In my view, it was an honest mistake for Harper to claim in a statement that it was Letsoalo who provided the bakkie.
- It was not put to Harper that the rubble was sold.”

[19] It is against that background that the arbitrator came to the conclusion that he did on the probabilities. As Ms *Strijdom* pointed out in her heads of argument, the courts have set out, *inter alia*, in *Mabona v Minister of Law and Order*¹ how the credibility of witnesses should be ascertained:

“The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the plaintiff’s version and investigation where questions of demeanour and impressions are measured against the content of a witness’s evidence, where the

¹ 1988 (2) South Africa 654 (SE) at 662(c).

importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted and that therefore the other version is false and may be rejected with safety.”

See also *Marapula & others v Consteen (Pty) Ltd*². And further in *Isaacs v Education Labour Relations Council and Others*³ the court said:

“The issue is not whether the commissioner was correct or incorrect in coming to the conclusion that she did. She is entitled to be incorrect. It is only when the failure to have regard to relevant evidence or taking into account irrelevant is such that an applicant can be said to be deprived of a fair hearing, that it can be said that the commissioner acted other than as a reasonable commissioner would.”

And further in *Isaacs*, the court confirmed that a review court should not likely interfere with credibility findings in circumstances:

“Where the court, unlike the commissioner, lacks the advantage of first hand observation of the witnesses and their demeanour and where there is no apparent basis from the record to justify calling the commissioner’s findings into question.”

[20] That is especially so in a case such as this one, where there was a

² (1999) 29 ILJ 1837 (LC).

³ [2011] ZALCCT 64 (13 September 2011),

lengthy arbitration, in this case, over 10 days, where the commissioner had sufficient time to go through exactly that exercise -- a privilege that the court has not had, despite having trawled its way through 1 448 pages of transcript. I am also reminded of the cautionary note sounded by the Labour Appeal Court in *Goldfields Mining SA (Pty) Ltd v CCMA*⁴, where the court said in paragraphs 16 to 21:

“In short, a reviewing court must ascertain whether the arbitrator considered the principle issue before him or her; evaluate the facts presented at the hearing and came to a conclusion that is reasonable...

18. In a review conducted under section 145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. The piecemeal approach of dealing with the arbitrator's award is improper, as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could

⁴ [2014] 1 BLLR 20 (LAC)

make. To do it differently or to evaluate every factor individually and independently, is to defeat the very requirement set out in section 138 of the LRA, which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.”

[21] In the case before me, the arbitrator dealt with the substantial merits of the dispute as prescribed, and given the volume of evidence before him, he did so admirably. What the applicant has attempted to do is exactly what the LAC cautions against, namely to carefully parse through the evidence and to evaluate every factor individually and independently in an effort to find review grounds where none exist.

[22] With regard to the sanction of dismissal, the arbitrator takes into account the relevant factors. Those are, as he points out in his award, that both charges relate to dishonesty; that both charges may warrant a sanction of dismissal, according to Metrobus’s Disciplinary Code; that Muller, the applicant’s direct senior, testified that the trust relationship had broken down completely; and that the applicant had not shown any remorse. It is against that background that he came to the conclusion that the continued employment relationship was intolerable and that dismissal was fair. That is an entirely reasonable conclusion.

[23] I started off the proceedings this morning by debating an application for condonation with Mr *Gwebu*. As I explained to him, the question of prospects of success would be the decisive factor in that process. The application was three weeks late, which is about half again of a six week period that is prescribed by the Labour Relations Act. The explanation tendered is not entirely unreasonable, and that is, in short, that the applicant did not have money to pay his attorneys. The prospects of success are therefore decisive. As is apparent from my discussion up to now, the applicant did not have any prospects of success. Even if I had granted condonation, I would have dismissed the application for review.

[24] On the issue of costs, both parties asked for costs to follow the result. I see no reason not to heed that request.

Order

The application for condonation, and thus the application for review, is dismissed with costs.

Anton Steenkamp

Judge of the Labour Court

APPEARANCES:

APPLICANT: Jabulani Gwebu of Madlela Gwebu Mashamba.

THIRD RESPONDENT: Helena Strijdom (attorney).

LABOUR COURT