



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not Reportable/Reportable

Case No: **JR472/15**

In the matter between:

TRIOMF FERTILIZERS (PTY) LTD

Applicant

And

**COMMISSION FOR CONCILIATION,
 MEDIATION AND ARBITRATION**

1st Respondent

GREYLING P.J.

2nd Respondent

JOSEPH BUYS P.

3rd Respondent

**SHERIFF OF THE HIGH COURT
 POTCHEFSTROOM**

4th Respondent

HEARD: 17 January 2017

DELIVERED: 20 January 2017

JUDGMENT

PRETORIUS AJ

Introduction

- [1] This is an unopposed application in terms of which the Applicant seeks an order that the arbitration award made by the second respondent dated 18 February 2015 be reviewed and corrected or set aside.
- [2] In its stead, the applicant seeks an order that the dismissal of the third respondent was fair, alternatively that the dispute be remitted to the first respondent for hearing *de novo* by a commissioner other than the second respondent.
- [3] The Applicant also seeks an award for costs in regard to an urgent application to stay a writ of execution that was heard on 3 December 2015, as well as in regard to the wasted costs of the hearing of this matter when it was previously set down on 26 April 2016.

Background

- [4] The third respondent was employed as a General Worker in the service of the Applicant. It was alleged by the applicant that the third respondent made himself guilty of misconduct whilst executing his duties.
- [5] The following charges were levelled against the third Respondent:

"You are therefore informed of the following transgressions against you and on which you must respond during your disciplinary hearing on 30 October 2014 at 13h00;

- 1. It is alleged that you made yourself guilty of theft of copper cable belonging to your employer and/or another employee of the Company on 27 October 2014;*
- 2. It is alleged that you made yourself guilty to theft of a laptop belonging to your employer and/or another employee of the Company on 22 October 2014;*
- 3. It is further alleged that by making you guilty of theft of the aforementioned property in paragraph 1 above by removing these items from your workplace or the premises of your employer and that you are therefore guilty to dishonesty and in breach of the conditions of your service agreement;*
- 4. You further entered a part of your employer's working premises without any authorisation and/or permission and removed these mentioned property as stated in paragraph 1 and 2 above from the employer's premises without his consent or knowledge;*
- 5. It is alleged that you made yourself guilty to misconduct in that you deliberately absconded and/or was absent from your workplace without authorisation during the period between 17 October 2014 and 21 October 2014;*
Alternatively;
- 6. During the period between 17 October 2014 and 21 October 2014 you were absent from your workplace without informing your employer of your whereabouts or making arrangements with your employer for your absence or failure to apply for leave;*
- 7. Acting in bad faith and conducting yourself in such a manner, that impairs the trust relationship between, you, management and your fellow employees".*

[6] The disciplinary hearing took place on 30 October 2014. During the disciplinary hearing, the third respondent did not admit guilt to abscondment, but admitted that he did not make any arrangements

with management for his absence on the dates as charged, but could not give a valid reason for his absence. The third respondent also did not admit guilt to theft of the laptop or copper cable that was removed from the applicant's premises and allegedly stolen from the applicant.

- [7] The third respondent stated at his disciplinary enquiry that he was sick and that this was the reason he did not report for work on the dates mentioned above. It must also be pointed out, that the dates in relation to his absence included a weekend. He, however, did not provide a medical certificate nor a clinic note to confirm his version.
- [8] During his disciplinary enquiry, the third respondent was acquitted of the charges in relation to the theft of copper.
- [9] The third respondent was found guilty on the charges of stealing the laptop, alternatively removing it from the applicant's premises without authorisation, and that he was deliberately absent from work from 17 October 2014 to 21 October 2014 without a valid reason and without authorisation or made no arrangements with management for such absence.
- [10] A sanction of summary dismissal was imposed and the third respondent was dismissed effective 3 November 2014. The third respondent referred an unfair dismissal dispute to the first respondent on 12 November 2014 seeking reinstatement.
- [11] The matter was eventually arbitrated before the second respondent on 12 February 2015. At such arbitration, the applicant was represented by an official of an employer's organisation and the third respondent represented himself.

- [12] In an award issued by the second respondent dated 18 February 2015, the second respondent concluded that the dismissal of the third respondent was substantively unfair, but procedurally fair. As a result, the second respondent ordered the retrospective reinstatement of the third respondent.
- [13] This is the award which forms the subject matter of this review application.

Review Grounds

- [14] The applicant relies on some 15 grounds of review in its founding affidavit which is unnecessary to repeat here, and will be dealt with in the analysis hereunder.

Applicable Legal Position

- [15] I do not deem it necessary to extensively address the relevant test to be applied in proceedings such as this. The test laid down in the Constitutional Court in *Sidumo v Rustenburg Platinum Mines* 2008 (2) BCLR 158 (CC), namely that an arbitration award will be reviewable if it is one that a reasonable decision-maker could not reach, is well established.
- [16] The Labour Appeal Court confirmed in *Fidelity Cash Management Services v CCMA* (2008) 29 ILJ 964 (LAC) that there can be no doubt under *Sidumo* that

“... the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent

assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely that could have relied which are enough to sustain the decision.”

[17] Ultimately, whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable, must be determined objectively with due regard to all the evidence that was before the commissioner, and what the issues were that were before him or her.

[18] The Labour Appeal Court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC) restated the applicable test as follows:

“In short: a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.”

Analysis

[19] With reference to the laptop computer, it is evident that the applicant's evidence during the arbitration proceedings was of a circumstantial nature. No evidence was tendered of anyone who saw the third respondent taking such laptop or leaving the premises with such laptop.

- [20] The charges relating to the laptop is squarely based on the fact that the third respondent was with Fouche when he placed the laptop on his chair and pushed it under his desk, and thus it is argued that he was the only person who saw this happening which makes him the most likely candidate for having taken such laptop.
- [21] The second respondent concluded that from the evidence submitted, a number of other probabilities existed and that those probabilities were not properly investigated. As a result, the second respondent concluded, on a balance of probabilities, that the applicant had not made himself guilty of theft of the laptop computer that was in Fouche's custody.
- [22] With reference to the charge of absenteeism, the second respondent pointed out that the third respondent pleaded guilty and testified that he was ill. He also took into account that the third respondent was a first offender.
- [23] As a result, he concluded that the dismissal of the third respondent was substantively unfair and ordered retrospective reinstatement.
- [24] I will now deal with the various grounds of review as stated in the founding affidavit.
- [25] With reference to the first review ground, it is unclear how the second respondent's failure to have the third respondent make an opening statement can constitute a gross irregularity. I am mindful of the fact that the third respondent was unrepresented at the arbitration proceedings and it is common practice in such proceedings for the presiding commissioner to illicit the relevant information required from an unrepresented applicant at the commencement of arbitration proceedings. Such an approach also

does not fall foul of the provisions of Section 138(1) of the Labour Relations Act, Act 66 of 1995 ("the LRA"). It is also unclear to me how such an approach denied the applicant a fair hearing.

[26] With reference to the second review ground, it is correct that at the commencement of the arbitration proceedings, the proceedings were reverted into conciliation proceedings, but this occurred with the consent of both parties, as is evident from the record. Furthermore, what occurs during consensual conciliation proceedings are without prejudice and cannot be relied upon in arbitration proceedings. Had the applicant felt so aggrieved by what occurred during the conciliation proceedings before the second respondent, it ought to have sought the recusal of the second respondent prior to proceeding with arbitration. This it did not do.

[27] With reference to the contention that the second respondent took part in cross-examination (the third review ground), I have carefully considered the evidence alluded to in the applicant's heads of argument, and again does not consider the approach adopted by the second respondent as infringing upon his obligations in accordance with Section 138(1) of the LRA. Again, I am mindful of the fact that the third respondent was unrepresented and the second respondent was entitled to follow a more inquisitorial approach as would have been the case had both parties been equally represented.

[28] The fourth ground of review is unclear as it relates to evidence at the security gate, and that such evidence was not disputed by the third respondent. It is alleged that the applicant was prevented from questioning the third respondent in this regard. I could, however, not find the passage in the record which is quoted in italics in this ground of review in the founding affidavit.

- [29] With reference to the second respondent taking into account that the third respondent alleged that he was ill and that such reliance constituted a gross irregularity rendering the award unreasonable (the fifth review ground), I am of the view that given that it was common cause that the third respondent pleaded guilty to the absenteeism charge, nothing turns on this.
- [30] Much is made of the absenteeism charge. If the absenteeism charge is the only one of relevance, and given that the third respondent was a first offender, coupled with the fact that two of the days of his absence included a weekend, then I am unable to conclude that the alleged insufficient weight afforded this charge rendered the award of the second respondent reviewable.
- [31] With reference to the seventh ground of review, this relates again to the alleged cross-examination of witnesses by the second respondent, and has been dealt with the third ground of review above.
- [32] With reference to the second respondent not allowing further witnesses to be called as alluded to in the eighth ground of review, it is clear from the record that the applicant intended only calling two witnesses of which the second witness would have testified in regard to procedural fairness. The second respondent concluded that the process followed by the applicant was procedurally fair, and accordingly no prejudice had been suffered by the applicant as a result of the second respondent disallowing the applicant to call a witness to testify in regard to procedure. Incidentally, I also could not find this reference in the record.
- [33] With reference to the ninth ground of review, this constitutes a conclusion and does not in itself indicate on what such conclusion is based.

[34] With reference to the tenth ground of review, I disagree that the second respondent accepted the reason for the third respondent's absence. It is clear that the third respondent pleaded guilty to this charge. It appears to me as the conclusion which the second respondent reached was that dismissal for a first offense in regard to a relatively short period of absence was unreasonable. Such a conclusion is not a conclusion which could not have been reached by a reasonable decision maker.

[35] I disagree that the second respondent placed undue emphasis on the theft of the laptop, and failed to properly consider the third respondent's absence from work without a valid reason (the eleventh review ground). It is clearly apparent that the second respondent did not consider that the absenteeism charge alone would warrant dismissal. In that context, his interrogation of the theft of the laptop was appropriate. In that regard, I agree with him that various other probabilities existed, that were not properly investigated. When one deals with circumstantial evidence as is the case here, the inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. If the facts permit more than one inference, the most plausible inference must be selected. See *De Wet v President Versekeringsmaatskappy* 1978 (3) SA 495 (C) at 500E – F.

[36] In this regard, I agree whole heartedly with the following passage from *Distell Ltd vs CCMA* (2014) 35 ILJ 2176 (LC) at paragraphs 65 and 67:

"The danger with circumstantial evidence on the other hand, is that in addition to the possibility that a witness may be lying or mistaken, the evidence may be capable of more than one logical explanation without it being clear what other possible explanations exist or the judge, in analyzing the evidence may embark upon a non sequitur. Thus circumstantial evidence may, at first blush, appear to be much

more compelling than it really is, largely because the trier of fact does not have sufficient knowledge or understanding of the particular field to be able to question the evidence and its potency or because the trier of fact does not understand how to make sense of it.”

“One must be careful to distinguish between an inference and an assumption or speculation. An inference is drawn from an existing fact; speculation has no factual foundation to it”.

[37] The facts upon which the applicant relied for the inference drawn that the third respondent had stolen the laptop computer are:

37.1 the third respondent was the only person aware of the laptop being hidden on the chair of Fouche;

37.2 the third respondent was further suspected of the theft due to the fact that he clocked out about an half an hour later than Fouche;

37.3 It was also suggested that the third respondent knew which exit gate to use as he knew which security cameras were functioning properly and which not;

37.4 Lastly, it was believed that because the third respondent was familiar with computers that he would have stolen the computer.

[38] Facts which suggest that someone else may have stolen the laptop computer are:

38.1 Fouche's office could not lock and were left open over night;

- 38.2 Some fifteen people worked on the floor where Fouche's office was situated, who could have gained access to the unlocked office;
- 38.3 Some of the employees who had access to Fouche's office utilised an exit from the premises where they were not subjected to any form of search;
- 38.4 The evidence that some of the people who had access to the premises were not searched upon their exit from the premises also militates against such an inference being drawn.
- 38.5 The third respondent's evidence that he went to shower after leaving Fouche's office and that he was searched on his way home, could not be contested.

[39] If one compares the facts for and against the inference being drawn that the third respondent had stolen the laptop computer, it must be abundantly clear that the inference drawn by the applicant is not the only reasonable inference or even the most plausible inference to be drawn from the facts placed before the second respondent.

[40] As a result, the conclusion that the third respondent was not guilty of the theft of the laptop on the evidence available, and on a balance of probabilities, is clearly a conclusion that a reasonable decision maker could reach.

[41] On the facts before the second respondent, I disagree that his conclusion that the dismissal was procedurally fair, but substantively unfair is inappropriate, irrational or unreasonable (the 12th review ground), for the reasons alluded to above.

[42] With reference to the thirteenth ground of review, this again seems to be a conclusion rather than a ground of review, and on the

totality of the award rendered by the second respondent, I am unable to agree with this review ground. It is immediately apparent from the second respondent's award that he did make an assessment of the probabilities. In any event, the probabilities and inferences to be drawn from the facts, in a matter such as this, would prevail over issues of credibility. See *SFW Group Ltd v Martell et Cie* 2003 (1) SA 11 (SCA), as well as *African Eagle Life Insurance Co v Cainer* 1980 (2) SA 234 (W).

[43] With reference to the fourteenth ground of review, it is alleged that the third respondent's conduct destroyed the trust relationship between the parties. As a result, the order of reinstatement, it is contended, is irrational and unreasonable. The difficulty I have with this ground of review is firstly, absent the theft charge nothing else was placed before the second respondent in the form of evidence to suggest that the trust relationship has been destroyed. To make a submission in closing argument that the trust relationship has been destroyed will not suffice. See: *Edcon v Pillemer NO* (2009) 30 ILJ 2642 (SCA).

[44] In the absence of a guilty finding on the theft of the laptop computer, coupled with a guilty plea to absenteeism, would not in my view disentitle the third respondent to reinstatement which is the default position as contemplated in Section 193 (2) of the LRA. The second respondent's award of retrospective reinstatement is thus not unreasonable in the circumstances.

[45] With reference to the fifteenth ground of review, it is immediately apparent from the award that all that the commissioner did was to award back pay from the date of dismissal to the date of the award, in addition to reinstatement which had to be effected within 48 hours after becoming aware of the award. I can see nothing wrong with such an award.

Conclusion

[46] As a result, and in dealing with the all-encompassing last ground of review, I disagree that the award of the second respondent was unreasonable and not one that a reasonable decision maker could reach based on the evidence placed before him. In my view, the second respondent applied the test laid down in the *Goldfields* matter alluded to above as he considered the principal issue before him/her; evaluated the facts presented at the hearing, and came to a conclusion that is reasonable.

[47] In the result, the review application falls to be dismissed.

Costs

[48] With reference to the issue of the costs which had been reserved on 3 December 2015 and 26 April 2016, in terms of Section 162 of the LRA and in accordance with the requirements of the law and fairness, I exercise my discretion not to make any award for costs, taking into account that:

48.1 the matter is unopposed;

48.2 there will be a continuing relationship between the parties given the reinstatement order.

Order

In the premises, I make the following order:-

1. The application is dismissed.
2. No order is made as to costs.

Pretorius AJ
Acting Judge of the Labour Court

Appearances:

For the Applicant: M. E. Coetzee

Instructed by: Manong Badenhorst Inc

LABOUR COURT