



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JR 2088/14

In the matter between:

**MANGANESE METAL COMPANY
(PTY) LTD**

First Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER RAYMOND
DIBDEN N.O**

Second Respondent

EVANS MABILA

Third Respondent

Heard: 09 February 2017

Delivered: 14 February 2017

Summary: (Review – dismissal for derivative misconduct - incomplete record – important evidence potentially missing – inability to agree on reconstruction of missing portion)

JUDGMENT

LAGRANGE J

Introduction

- [1] In this matter, the third respondent Mr Mabila, who was a long serving employee of the applicant was charged with derivative misconduct in the form of a failing to report the theft of company property in his section which he had either witnessed or had knowledge of.
- [2] The theft occurred during a weekend shift when Mabila was working and the forklift which was assigned to him was used to load stainless steel plates on the back of a truck that was driven into the premises. The quantity and value of the plates stolen was considerable. It was common cause that Mabila had been approached by a cleaner working for a contractor on the premises to assist in loading goods onto a vehicle using his forklift.
- [3] According to Mabila, he declined to assist him because the cleaner could not produce a permit for loading any goods. In the course of his testimony in the arbitration, Mabila was equivocal about whether the goods consisted of the plates which were subsequently discovered to have been stolen or whether he had asked him to load other goods onto a vehicle which was parked outside the premises. On one version of what transpired, Mabila admitted seeing the cleaner and another forklift driver driving off in the forklift and he assumed that the cleaner had found the necessary permit. This was despite acknowledging that permits for removing goods were not issued on Saturdays when the incident occurred.
- [4] The arbitrator found that Mabila's dismissal had been substantively unfair because there was no evidence placing him at the scene when the illicit loading of the vehicle took place and no evidence to show that he become aware that the plates had been loaded by the other forklift driver. Moreover, he had not been approached for the use of his forklift by the other driver before it was used in the commission of the theft. Moreover, Mabila had refused to assist the cleaner because he could not produce a permit which showed that he was honest.

The review application

- [5] There are two legs to the application.

Alleged incomplete record

- [6] A distinct ground of review hinges on alleged missing portions of the record, which the applicant argues would decisively affect the strength of its case because they would reveal serious fault lines in Mabila's defence. In summary, the applicant claims that at one point during his testimony, Mabila claimed that he had attempted to use the employer's anonymous crime hotline but it was not working. Clearly such evidence would further impact on the credibility of his version that he was unaware of any wrongdoing. However, this did not appear in the transcript of the record. Nevertheless, in the record reference is made to the existence of the hotline and it seems reasonable to infer that there was at least discussion about whether Mabila was aware of the hotline at the time or only after the event and whether it was working.
- [7] In the record of the reconstruction meeting referred to in the applicant's supplementary affidavit, the arbitrator agreed that if Mabila had said that he had attempted to use the hotline or would have used the hotline if it was working that would have been critical evidence tending to show that he was aware of the need to report to the incident. However, the arbitrator also claimed that based on his recollection and his handwritten notes that the applicant did not give such evidence. In this regard, the entry dealing with this issue in the arbitrator's handwritten notes was brief and simply suggests that Mabila was asked about his knowledge of the hotline.
- [8] I am aware that a number of witnesses of the applicant who were present during the arbitration claimed that they all recalled Mabila saying that he had attempted to use the hotline and it was not operational and that a proposed reconstruction containing such a statement was put forward to complete the record. Presumably, part of the reason for the applicant arguing that the matter ought to be remitted back for a hearing *de novo* would simply be to test these claims in the course of further oral testimony. I am aware in this regard that the transcriber also indicated that there were gaps in the record itself. Nonetheless, the only other contemporaneous record of what was said are the arbitrator's notes. No other contemporaneous notes were submitted to support the recollection of the

applicant's witnesses. It also seems highly implausible that if Mabila had indeed testified that he had attempted to use the hotline, that this would not have been seized upon by the applicant's representative and pursued at great length under cross examination. Moreover, if that had been the case, then the reference to the hotline in the respondent's closing argument would have been focused on the impact of such a statement rather than dwelling on whether the hotline was operational or not.

- [9] In the circumstances, I do not believe that there is any reason to think that any genuine "gaps" in the record will be filled by referring the matter back and that it is more likely simply to result in fresh evidence being led on the issue that was not in fact canvassed at the arbitration.

Material defects in the award rendering it unreasonable

- [10] The applicant's alternative grounds of review are raised on the record as it stands. The applicant contends that the arbitrator's decision could be set aside on the basis that he simply failed to consider very material issues arising from the evidence. Some of these relate to alleged inconsistencies in Mabila's various accounts of events on the day in question as recorded in statements and given in testimony. The applicant contends that the arbitrator abjectly failed to deal with the credibility issues raised by the various accounts of Mabila's version of events. Secondly, it argues that the arbitrator failed to consider significant and uncontradicted circumstantial evidence that it contends showed that Mabila had, in all probability, moved the forklift to where the truck was to be loaded himself and that he was not ignorant of what was afoot.

- [11] In his initial written statement to the investigator, which Mabila confirmed during his evidence at the arbitration as being correct, he stated that he was the only person who should have operated the forklift, but that it had been operated by someone else and was seen approaching the truck but he had no knowledge of who the driver was. He also said that he simply told the cleaner that he was unable "to load the plate". Later under cross-examination he was reluctant to even acknowledge that he knew about the steel plates that restored on the premises.

- [12] In a statement he made subsequently in July 2013, he stated that the cleaner had asked him to use the forklift to load his goods which were “just outside the plant”. He claimed that he said he couldn’t help him because he did not have a permit. A little later he saw the cleaner with another forklift driver driving the forklift. On this occasion he identified the other forklift driver despite originally claimed that he did not know who was driving it. Secondly, for the first time he mentioned that he would not help the cleaner because he did not have a permit. However, a permit would only have been necessary for removing company goods from the premises, whereas the statement claimed that the cleaner only wanted assistance to load his own, unspecified, goods which were already outside the plant. Under cross-examination, he acknowledged that permits would not be issued for the removal of any company goods on a Saturday in any event. However, he claimed that he never thought that something might be wrong about the fact that the cleaner was trying to remove goods on a weekend when permits were not issued.
- [13] In his evidence in chief, he also dramatically changed his version that he had exclusive access to the forklift, claiming that it was a regular occurrence for forklift drivers to use each other’s forklifts. Under cross-examination, he claimed that even though the other forklift driver did not ask to borrow the forklift before getting onto it and driving off with the cleaner, he assumed that the cleaner must have produced the permit and so he had no problem with him driving the forklift. Later under re-examination, Mabila was asked if there was any restriction that a person could not use a permit obtained during the week on the weekend. He started to say that it was “even strange to me that a person is asking”, but his representative cut off his answer and asked him if he knew of any restriction on the use of a permit obtained on a Friday to remove goods on a Saturday and he confirmed that he did not know of any and would have loaded the goods if he had been presented with the permit. This contrasted starkly with his earlier evidence under cross-examination that permits were not presented on the weekends.
- [14] Mabila also had no explanation how is forklift was driven to the parked truck on which the plates were loaded about 15 minutes after the truck

entered the premises and at least another 15 minutes before the cleaner and the other forklift driver were recorded as coming into the area. In other words, despite Mabila's later explanation that the other forklift driver had simply taken the forklift with cleaner without asking if he could borrow it, the forklift had already been moved to the vicinity of the vehicle before they appeared on the scene.

[15] What emerges from the above is that, there were serious inconsistencies in Mabila's account of what transpired and an inability on his part to give any plausible explanation why his suspicions had not been aroused if he knew that permits to remove goods were not used on weekends, nor why his evidence of the other forklift driver taking the forklift could not be reconciled with the evidence that the forklift had already been moved to the truck for loading before the other forklift driver appeared on the scene. The arbitrator also failed to consider the relevance of the evidence that all tended to show that it was highly improbable that Mabila's suspicions would not have been seriously aroused by a request to remove goods on a weekend in circumstances where permits were not presented on weekends and where the person requesting the assistance had not been able to produce one in any event. In this regard, even in his second written statement in July, Mabila made no mention of the cleaner saying that he had left the permit in the shower but simply that he failed to produce a permit and he told him that he could not assist him because he could not do so. Moreover, Mabila had no prior experience of steel plates being sold as scrap to employees.

[16] However, in his analysis the arbitrator was of the view that Mabila's duty to speak would only have arisen if he had been present when the plates were actually loaded onto the vehicle. Even if the inconsistencies in Mabila's evidence are ignored for a moment, and a favourable interpretation of Mabila's evidence is adopted, Mabila was clearly aware that on a day when permits were never usually presented for the removal of goods, a contract cleaner who had not been able to present him with a permit to remove goods, was then seen on Mabila's own forklift with another forklift driver, after Mabila had already declined to use his forklift to assist him to load goods onto a vehicle. The arbitrator simply failed to deal

with the implausibility of Mabila's claim that he saw nothing suspicious about the situation and just assumed that the permit had been produced despite the fact that it would have been highly unusual to remove goods with a permit on a weekend and that the cleaner did not simply return to him and present the permit if that was all he required to render the requested assistance. The arbitrator further failed to consider what to make of the fact that Mabila's version evolved and changed over time, such as to include the new and important detail that the cleaner had claimed that he had a permit, but just did not have it on him when he spoke to Mabila. He also failed to consider the plausibility of Mabila's account of the other forklift driver and the cleaner getting onto the forklift and driving off in circumstances where the forklift had already been moved to the location where the loading was to take place.

- [17] The applicant contends that because of these and other material failures of the arbitrator in his evaluation of the evidence, led the arbitrator to make findings which no reasonable arbitrator could have made on the evidence. It is trite that a mere failure to consider evidence is not a ground of review, but in the circumstances of the case all these factors were highly material to the question whether Mabila must have had knowledge of highly suspicious circumstances that tended to show that a theft might be in progress. I agree that if the arbitrator had focused on Mabila's knowledge of what was happening and not simply on the question of whether he was present when the plates were loaded onto the vehicle, he would have been compelled to grapple with the difficulties in Mabila's version discussed above. Had he done so, I do not believe he could have reasonably avoided the inference that the evidence strongly tends to show that Mabila could not adequately explain why his suspicions had not been aroused in the circumstances. Nor could he have avoided making an adverse credibility finding against Mabila. Consequently, he would have naturally been led to the inference that Mabila probably did know that the theft was in progress but decided to keep his knowledge to himself.
- [18] It follows that, Mabila's trustworthiness in the eyes of the employer could not be sustained and that dismissal was not inappropriate as a sanction despite his service with the applicant.

Order

[19] In light of the above, the finding of the second respondent in his arbitration award issued on 9 September 2014 to the effect that the fourth respondent's dismissal was not fair and the relief he awarded in paragraphs 35 to 37 of the award are reviewed and set aside.

[20] The second respondent's finding that the fourth respondent's dismissal was not fair is replaced with a finding that his dismissal was substantively fair.

[21] No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

F Venter instructed by
Cowan Harper Attorneys

THIRD RESPONDENT:

P Mawasha, union official of
NUMSA

LABOUR COURT