



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

CASE NO: JR557/14

In the matter between

WADEVILLE SECURE (PTY) LTD

Applicant

And

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER DEPHNEY MAHOSI

Second Respondent

GEORGE KHAKHU MMAPHAHA

Third Respondent

Heard: 27 July 2016

Delivered: 3 March 2017

Summary: The commissioner's decision that the third respondent's dismissal was substantively unfair because the applicant had failed to tender admissible evidence proving his guilt was rendered unreasonable by the third respondent's admission that he committed a number of the acts of misconduct.

JUDGMENT

Lallie, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent who I will refer to as the commissioner in this judgment. It is opposed by the third respondent.

Factual background

- [2] The facts of this matter are that the third respondent was employed by the applicant as an administrator in September 2010. He was dismissed on 6 December 2013 after a disciplinary enquiry found him guilty of gross negligence in the performance of his duties. The negligence took the form of contravening the National Road Traffic Act 93 of 1996 in that the third respondent exceeded the speed limit on 17 November 2013, 18 November 2013. The third respondent was also charged and found guilty of exceeding the speed limit on 16 November 2013 at about 16h35 by driving at 83km/h in an area where the speed limit was 60km/h and caused the bonnet of the applicant's vehicle he was driving to open causing damage in the amount of R23 501.92 to the applicant's vehicle. He was found guilty of the charges and dismissed.
- [3] The third respondent referred an unfair dismissal dispute to the first respondent where the commissioner found his dismissal both substantively and procedurally unfair and ordered the applicant to pay the third respondent compensation in the amount of R79 000. 00 which is equivalent to remuneration he would have earned over a period of 10 months. It is that award which the applicant seeks this court to review and set aside.

The award

- [4] The commissioner found the third respondent's dismissal substantively unfair because the applicant had failed to prove that it dismissed the third respondent fairly. Its witnesses, sought to rely on a tracker report from the applicant's vehicle management systems which reflected that the third respondent had exceeded the speed limit on several occasions. The witness further testified that the applicant had a policy, a copy of which was not tendered as evidence, which required drivers to drive within the speed limit. The commissioner rejected the applicant's evidence as hearsay because it did not call the originator of the tracker report to testify or give reasons why the originator was not called. The commissioner accepted the common cause evidence that the third respondent had closed the bonnet of the vehicle tightly before leaving the applicant's premises. She further accepted the third respondent's version that he was not responsible for the opening of the bonnet while driving the vehicle which was an old 2003 Ford Bantam model. The vehicle had been involved in an accident and had no sign which would have warned him that the bonnet was opening. He also did not hear a sound suggesting that the bonnet was loose.
- [5] The dismissal was found procedurally unfair because the third respondent was issued with a disciplinary notice on 20 November 2013 for a disciplinary hearing scheduled for 28 November 2013. On 28 November 2013 the applicant issued the third respondent with a new notice, with new charges. He was required to attend the disciplinary hearing on 29 November 2013. The commissioner found that the procedure followed by the applicant was not recognised as fair in terms of item 4 of the Code of Good Practice: Dismissal, in schedule 8 to the Labour Relations Act 66 of 1995 ("the LRA").

Grounds for review

- [6] The applicant submitted that the commissioner committed misconduct in relation to her duties as a commissioner and gross irregularities in the conduct of the arbitration. Her finding on procedural fairness was based on false evidence as the

correct date and time of the disciplinary hearing were not disclosed at the arbitration. A further ground is based on the commissioner's failure to acknowledge that the tracker report was of vital importance to the applicant's case and warn the applicant that she would make an adverse finding against the applicant in the absence of a witness verifying the veracity of the tracker report. The submission that the commissioner should have warned the applicant of the consequences of leading hearsay evidence, is, in the circumstances of this matter invalid. The applicant was represented by a representative of an employer's organisation who is reasonably expected to have the necessary skills particularly after electing to take the responsibility of representing the applicant at the arbitration.

- [7] The third respondent admitted having exceeded the speed limit on several occasions but sought the applicant to prove that the accident occurred at the time he was driving at 83km/h at a 60km/h zone. He denied that the decision on procedural fairness was based on false evidence. He further denied that the commissioner had an obligation to warn the applicant to call the originator of the tracker report as a witness.
- [8] The test for review is whether the commissioner's decision is one which a reasonable decision-maker could not make on the material before the commissioner. An award becomes unreasonable and susceptible to review if the commissioner has either misconceived the enquiry or reached an unreasonable decision¹. Some grounds the applicant sought to rely on are factually incorrect. A proper reading of the award does not support the applicant's allegation that the ruling on procedural fairness is based on false evidence. The commissioner considered the common cause evidence that new charges were added a day before the disciplinary hearing was held. The commissioner cannot be faulted for finding the notice unreasonably short. The decision that the third respondent's dismissal was substantively unfair is based on the absence of evidence proving that he made himself guilty of the charges which had been preferred against him. Part of the gross negligence the third respondent was dismissed for is contravention of the National Road Traffic Act 93 of 1996 by exceeding the speed limit, while on duty on 16, 17, 18 and 19 November 2013. The applicant alleged that it was found that during the cause of 16 to 19

¹ *Herholt v Nedbank Ltd* 2013 11 BLLR 1074 (SCA) para 25

November 2013 the third respondent exceeded the speed limit on several occasions and drove at 83km/h having exceeded the 60km/h speed limit on 16 November 2013. Answering to the allegation the third respondent admitted having exceeded the speed limit on several occasions. He therefore conceded having contravened the National Road Traffic Act 93 of 1996 by exceeding the speed limit in the performance of his duties. The commissioner's decision that the third respondent was not guilty of the misconduct which led to his dismissal is inconsistent with the concession. When the third respondent has submitted that he committed the misconduct, a decision to the contrary is unreasonable. The applicant's prayer that this matter be remitted to the first respondent should, in the circumstances, be granted.

[9] In the premises the following order is made:

- 9.1 The arbitration award issued by the second respondent under case number GAEK10228 and dated 30 January 2014 is reviewed and set aside.
- 9.2 The matter is remitted to the first respondent to be heard *de novo* by a commissioner other than the second respondent.

Lallie J

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate Roode

Instructed by Deon De Bruyn Attorneys

For the Third Respondent: Advocate Khomola

Instructed by Noveni Eddy Kubayi Incorporated

LABOUR COURT