



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR810/15

In the matter between:

NTM OBO P TUNYISWA

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER CH STRIPP N.O

Second Respondent

SWISSPORT SOUTH AFRICA (PTY) LTD

Third Respondent

Heard: 18 July 2017

Delivered: 10 October 2017

Summary: The Applicant sought to review and set aside an award of the Second Respondent. It was found that the outcome of the award was reasonable and the application was dismissed.

JUDGMENT

HUTCHINSON, AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award of the Second Respondent.
- [2] The Applicant sought condonation for the late filing of its review application. The Third Respondent also sought condonation for the late filing of its answering affidavit. Both applications were unopposed and in light of the minimal delays, I deemed it in the interest of justice to grant condonation in respect of both delays.
- [3] The Applicant commenced her employment with the Third Respondent in the capacity as a Wheelchair Assistant on 1 December 2010. The Applicant was promoted to the position of OCC controller on 1 August 2011. Pursuant to a disciplinary enquiry, the Applicant was found guilty of the following charges:
- “1. Making a secret profit at the expense of the employer in that you are allegedly running an illegal business of lending money to employees on interest (Loan Shark) in the workplace during the times you are scheduled to be working.
 2. Moonlighting and engaging in a business that is in competition with the employer (Swissport SA) in terms of times in that you are allegedly running a loan shark/money laundering in the workplace and during working times.”
- [4] The Applicant was dismissed on 8 October 2014 and subsequently referred an alleged unfair dismissal dispute to the First Respondent. The Second Respondent was appointed under the auspices of the First Respondent to arbitrate the dispute. The Second Respondent found that the dismissal of the Applicant was procedurally and substantively fair.

¹ Act 66 of 1995 (as amended).

Grounds of review

[5] The grounds of review as enumerated in the Applicant's heads of argument are as follows:

- “2.1 It is submitted that the Commissioner committed gross misconduct by failing to draw an adverse inference on the failure by the Respondent to call in Mr. Magaboya to corroborate the allegation to the effect that he borrowed money from the Applicant, let alone that the Applicant was running a loan shark in the workplace.
- 2.2 It is further submitted that the Commissioner committed gross misconduct by failing to rule contradictions in favour of the Applicant in relation to the different amounts mentioned respectively by Design Subroyen and Kenneth Monnana.
- 2.3 It is further submitted that the evidence presented at the arbitration does not support what is set out in the arbitration award in particularly the conflicting versions to the effect that the Applicant gave Magoboya R1000,00 at the KFC and that Magoboya was given R1400,00 at the Hotel.
- 2.4 It is further submitted that the Commissioner had committed gross irregularity by failing to apply her mind on the fact that the Third Respondent, Swissport South Africa did not dismiss the employees, who committed the same offence, let alone that the Third Respondent acted inconsistently in dismissing the Applicant.
- 2.5 It is further submitted that the Commissioner had committed a gross irregularity by ignoring evidence presented before her as well as concessions made by the witnesses of the Third Respondent. To this end, the Commission ignored the Applicant's evidence to the effect that she does not know Magaboya and that she does not run a loan shark business, let alone that she did not confess to Design Subroyen and Kenneth Monnana that she lent R1000,00 to Magaboya.

- 2.6 It is further submitted that the Commissioner had committed a gross irregularity by failing to give due consideration to the evidence to the effect that the Third Respondent called the Applicant in to their offices long after she was dismissed in the pretext that they wanted to resolve the CCMA unfair dismissal dispute in which she is represented by the Union and later claimed without basis that the Applicant refused to be reinstated.
- 2.7 To this end, the Commissioner failed to draw adverse inference against the Third Respondent for its failure to call in the Union that represented the Applicant in the CCMA arbitration to be part of the aforesaid meeting.
- 2.8 It is submitted that the award made out by the Commissioner is unreasonable.'

Award of the Second Respondent

- [6] The Third Respondent called four witnesses to testify on its behalf namely: Mr Desigan Subroyen (Subroyen) (Vice President HR), Ms Sonande Struwig (Struwig) (HR Manager), Mr Kenneth Monanna (Monanna) (HR Manager) and Mr Masala Nemaakonde (Nemaakonde) (Duty Manager). Subroyen testified that the Third Respondent lent and advanced money to employees in special circumstances which did not attract any interest.
- [7] An employee, Mr Patrick Magaboya (Magaboya) approached the Third Respondent on several occasions for financial assistance. The financial plight of Magaboya and some other employees was so desperate that they would approach the Third Respondent with a request to withdraw funds from their pension to pay off debts. When Magaboya approached Subroyen for financial assistance, it came to light that he had borrowed money from the Applicant and was required to repay her with interest. The Third Respondent conducted an investigation into money lending amongst its employees and it revealed that the

Applicant had been lending money to her colleagues and charging them interest on the loans.

[8] In her award, the Second Respondent goes on to state the following:

“9. Around February 2015 the applicant met with Kenneth Monanna and Subroyen, and asked to be reinstated, as she had heard of the reinstatement of other employees dismissed for similar offences. Subroyen acknowledged that some employees had been re-employed, but under specific conditions. For example Shezi was reinstated after she made a full confession, declared all her ‘loan shark’ activities, promised to recover the loan amount excluding interest from her colleagues and undertook to stop her loan shark activities. The applicant was given the opportunity to be reinstated under the same conditions, but the applicant did not agree to the conditions. At the February 2015 meeting, the applicant confessed that she met Magaboya at KFC, Kempton Park, and she gave Magaboya R 1 000. Magaboya repaid her R 1 800 when he met the applicant and her husband when they were out for breakfast. The applicant admitted that she lent money with interest to Magaboya but denied that she was operating as a loan shark or that she was guilty of any wrongdoing. The applicant’s representative put it to Subroyen that the meeting of February 2015 never took place, but Subroyen confirmed that it did take place. Subroyen denied the applicant’s representative’s version that Subroyen coerced Magaboya into saying that he resigned because he was indebted to the applicant. Subroyen agreed that no employee had raised a grievance against the applicant.”

[9] Struwig chaired the Applicant’s disciplinary enquiry. It is not necessary to consider the evidence in light of the fact that the Applicant disavowed any attack on the procedural fairness of the dismissal.

[10] Monanna testified that he conducted the investigation into alleged loan shark activities. He confirmed that in February 2015, a meeting was held with the Applicant and Subroyen. In her award, the Second Respondent captured his evidence as follows:

"15. Monanna advised the applicant of the conditions for re employment, namely admission of guilt, full disclosure of loan shark activities, undertaking to stop loan shark activities and a promise to forego interest on loans granted. The applicant told Monanna that she was falsely accused of operating as a loan shark. Monanna believed her and Monanna and the applicant then met with Subroyen. At this meeting the applicant explained that she helped the 'old man' (namely Magaboya) by giving him R 1 000, but that this was not her money, it was money from 'people at KFC.' Magaboya met the applicant when she was having breakfast with her husband at a hotel, and he repaid her R 1 400. Under cross examination Monanna stated that Magaboya did not pay his debt on time so the interest increased and Magaboya owed R 1 800, which is the amount he repaid the applicant."

[11] Nemakonde testified that before September 2014, the Applicant and Magaboya came to the HR offices because Magaboya wished to meet with Subroyen to borrow money to pay for his son's school fees. Whilst Magaboya was speaking to Subroyen, the Applicant exchanged numbers with Nemakonde and asked him to bring R 1400.00 to her house which Nemakonde was to receive from Magaboya when he obtained a loan from the Third Respondent. The loan was declined however, on either the same day or a day thereafter, the Applicant contacted Nemakonde to establish whether the loan had been granted.

[12] The Applicant contested the evidence of the Third Respondent's witnesses. In particular, she denied ever having met Magaboya or lending him money. She denied having told Subroyen that she had lent money to Magaboya. Moreover, the Applicant denied having engaged in any discussions with Nemakonde to the effect that she would be paid the amount which she hoped the Third Respondent would lend Magaboya.

Discussion

[13] The Second Respondent was enjoined to apply the civil standard of proof to the

conflicting versions by considering the force, strength and weight of the evidence. Where the quantum of proof requires a preponderance or balance of probability, it means that the probability of the truth of a particular averment is measured or balanced against the probability of it being untrue.²

[14] The evidence was overwhelmingly in favour of the Third Respondent's case that the Applicant was guilty of lending money to Magaboya at an exorbitant interest rate. She was clearly profiting from her money lending activities. Any contradictions in the precise quantum involved played a minor role in assessing the overall weight and strength of the evidence. It is not for an employer to prove its case beyond reasonable doubt. The issues raised by the Applicant do not in any manner detract from the honesty and the *bona fides* of the Third Respondent's witnesses.

[15] If one considers the totality of the evidence, one is left with the impression that the Third Respondent's version is far more believable and a reasonable trier of fact would have little confidence in the likelihood of the Applicant's case.

[16] Similarly, the attack on consistency must also fail. Unlike the other offenders, the Applicant was not prepared to come clean and accordingly no purpose would be served in trying to rehabilitate her.

[17] For the above reasons, I am not satisfied that a proper case has been made out for reviewing and setting aside the award of the Second Respondent.

[18] Accordingly, I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

² The South African Law of Evidence Zeffertt and Paizes 2nd Edition at p 48

Wayne Hutchinson
Acting Judge of the Labour Court

Appearances

For the Applicant: Mr. Ephraim Mphalele (Union Official)

For the Third Respondent: Adv. E.J Steenkamp

Instructed by: Jacobs Gonyora

LABOUR COURT