



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

CASE NO: JR 2790/12

In the matter between:

FAIRBRIDGE CHINA APHANE

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

E MAREE NO

Second Respondent

GIJIMA TECHNOLOGIES PEOPLE (PTY) LTD

Third Respondent

Date Heard: 13 July 2016

Date Delivered: 25 October 2017

JUDGMENT

MOSEBO AJ,

[1] *Introduction:*

- 1.1. This is an application brought in terms of section 145 (1) (a) of the Labour Relations Act 66 of 1995 as amended ("the Act"). In this application, the applicant seeks to review and set aside the arbitration

award handed down by the second respondent (“the commissioner”) on 13 October 2012, under case number GAJB20724/12.

- 1.2. In her arbitration award, the commissioner had accepted that the applicant was guilty as charged and had found his dismissal to have been substantively fair.¹ The review application is opposed by the third respondent.

[2] *Preliminary points:*

- 2.1. On or about 09 November 2012, the applicant launched the instant review application. However, the said application was not prosecuted until the third respondent, on or about 03 June 2013, launched an application in terms of Rule 11 to dismiss the review application. The application to dismiss was seemingly abandoned after the applicant had on or about 13 June 2013 served the third respondent with the record and a supplementary affidavit. However, for some unexplained reason, the supplementary affidavit was only filed of record on 22 January 2015.
- 2.2. By that time, the third respondent had delivered its answering affidavit on 14 October 2013 and the applicant had delivered his replying affidavit on 06 November 2013 also raising a point *in limine* for the late delivery of the answering affidavit. On or about 17 December 2014, the third respondent delivered an explanatory affidavit indicating that the applicant had failed to raise an objection as required by clause 11.4.2 of the Practice Manual which had come into effect as from 02 April 2013.
- 2.3. The point *in limine* was then abandoned and the parties agreed to proceed with the review application as none had raised an objection as required by the provisions of the Practice Manual. The applicant has also failed to file heads of argument despite the fact that he was

¹ Record arbitration award p115 para 61

represented by the attorneys both at the CCMA and at these proceedings.

[3] *Background:*

- 3.1. The applicant was employed by the third respondent as a Field Service Engineer (“FSE”) in 2008. The respondent operates an Information Technology company that supplies clients with IT support and equipment. This includes, *inter alia*, the replacement of outdated laptops with new ones to one major bank. The third respondent operates a call centre from Johannesburg that coordinates its operations. A client is required to call the call centre to request a service. A call would be logged by the call centre and an FSE would be allocated to perform the requested task by allocating a CHG number to the said FSE for that particular task.
- 3.2. The applicant’s duty was to attend to the replacement of the old laptops with new ones and was also required to collect the old laptops from the said client. After collection, the old laptops are supposed to be returned to the third respondent’s warehouse situated in Germiston referred to as the stores.
- 3.3. When returning the old laptop, the client is required to sign a form entitled ‘*client service form*’² and this form is to be signed by both the client and the FSE. The old laptop together with the client service form are to be left at the stores. This is because most of the said old laptops are still in working condition and they also contain parts that can be harvested and resold.
- 3.4. After the task has been completed, the FSE is required to report back to the call centre in Johannesburg to indicate that the old laptop has been returned to the stores or he can also himself log onto the system and write a comment indicating that the old laptop has been returned to the stores including the serial number of the said laptop. The

² Record V2 p31

coordinator at the call centre will then close the task based on the report received from the FSE.

- 3.5. It appears that there is no one who physically receives the returned old laptops or who physically confirms that same have indeed been returned as reported by the FSE. The system is based on trust of the FSE when he reports that the old laptop has been returned because he has the client's service form and he also records the serial number of the returned laptop on the system. The facts set out above are largely common cause.
- 3.6. It was also not placed in dispute that at the beginning of June 2012, the third respondent was conducting a reconciliation of old laptops relating to another FSE, Eugene, who had given notice of resignation. In that process, it was established that on 16 March 2012, Eugene had been called out to a client to install a new laptop and to collect an old laptop with serial number L3KH651. The client had informed Eugene that the applicant had already collected the said laptop. The third respondent discovered that according to the records, the applicant had collected the said laptop from client on 23 February 2012. He was then approached regarding this laptop. The applicant indicated that he still had the laptop with him and he then arranged for same to be returned to the stores. Once received and on further inspection, it was discovered that the serial number at the back had been scratched out and the hard drive removed. It was further discovered that this laptop's serial number was actually L3KH375 and not L3KH651 as alleged by the applicant.
- 3.7. On further investigation, it was discovered that the laptop with serial number L3KH375 and other 4 laptops were also collected from the client by the applicant but none of them had been returned to the stores. The serial numbers of the said laptops are L3AB660, L3HP375, L3HP095, L3KH674 and L3NG565.

3.8. The applicant was then confronted regarding these 5 laptops and in response he stated that they were with the client. He was then instructed to collect and return them to the stores. However, he failed to return anyone of them. On further investigations, the third respondent discovered that after completion of several of his tasks, the applicant would report to the call centre that he had completed the task and had returned the old laptops to the stores when he had not actually returned same. As a result of his reports, the coordinators at the call centre would record in the system that the old laptops had been returned and close the task as they relied on the applicant's word when in fact the applicant's report was false.

3.9. On or about 11 June 2012, the applicant was issued with a notice to attend a disciplinary hearing to answer the following complaints levelled against him:

3.9.1. *Gross Dishonesty in that you committed fraud in that on various occasions as per the below mentioned schedule you did not return the stock/equipment back into stores. The attached schedule covered some 50 laptops.*³

3.9.2. *Bringing the companies name into disrepute regarding the misplacement of the above stock.*

3.10. On or about 14 June 2012, the disciplinary hearing proceeded before Ms Lerato Mabuso when the employee pleaded not guilty to both charges. At the end of the hearing, the applicant was found guilty of charge 1 and not guilty of charge 2 and was dismissed.⁴ Thereafter, the applicant referred an alleged unfair dismissal dispute to the first respondent ("the CCMA") for conciliation which was unsuccessful and the matter was referred to arbitration scheduled before the commissioner on 05 October 2012. As stated, the commissioner handed down her arbitration award on 13 October 2012 wherein she had found the applicant's dismissal to have been substantively fair.

³ Record V2 p161-164

⁴ Record V2 p166-174

[4] *Grounds for Review*

- 4.1. The arbitration award is attacked on various accounts but mainly on the ground that the commissioner committed gross irregularity and failed to apply her mind to the facts before her when she found that; *“it is clear from the evidence that the applicant had indicated that the laptops had been returned and when this was verified by the respondent it became clear from the system and a physical check on the system that the laptops were not there”*. It was submitted that the laptops were returned to the stores and recorded as such on the system.
- 4.2. It was submitted that the evidence that was before the commissioner is that the search on the system and the physical search for the laptops was done in the applicant's absence. The applicant became aware of these searches during the disciplinary hearing. It was submitted that nothing prevented the third respondent from inviting the applicant to conduct the searches together. It was submitted that the commissioner failed to take into account that when the applicant stated that he could not dispute the third respondent's evidence of the alleged searches conducted both on the system and physically at the store, that response was informed by the fact that the applicant was never invited to the search nor was the search done in his presence.
- 4.3. It was also submitted that the two witnesses for the employer confirmed that they did not do a physical search at the factory because the applicant does not work at the factory/stores.
- 4.4. It was also submitted that the commissioner failed to take into consideration the fact that the third respondent had admitted that it could not attribute the loss of the laptops to the applicant.
- 4.5. The applicant also submitted that the evidence presented at the arbitration was not presented at the disciplinary hearing but was produced and invented some days prior to the arbitration.

[5] *Test for review:*

- 5.1. The test for review is settled. The question to be answered by the reviewing court is whether the decision reached by the commissioner one that a reasonable decision maker could not reach?⁵ This turns on whether a reasonable decision maker could have not come to the conclusion reached by the commissioner.
- 5.2. In *Herholdt*,⁶ the SCA (per Cachalia and Wallis JJA) explained the *Sidumo* test as follows:

‘that test involves the reviewing court examining the merits of the case “in the round” by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasoning results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.’

- 5.3. In *Mofokeng*,⁷ the LAC (per Murphy AJA) stated the following:

“mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision

⁵ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) para 110

⁶ *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 para 12

⁷ *Head of the Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC) para 32

which no reasonable decision-maker could reach on all the material that was before him or her.

And,

“Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result.”⁸

[6] *Analysis:*

6.1. The first ground of review relates to whether or not the commissioner failed to apply her mind to the facts before her when she found that even though the applicant had testified that the laptops had been returned but when this was verified by the respondent it became clear from the system and *physical check on the system* that the laptops were not there. As stated, the applicant submitted that the laptops were returned to the stores and recorded as such in the system. Further in his evidence in chief, the applicant relied heavily on the third respondent’s bundle to establish this fact.⁹

6.2. In my view, it is common cause between the parties that the third respondent’s bundle established that all the laptops had been recorded on the system as returned to the stores and also confirmed by the

⁸ Para 33

⁹ Record p61-72

coordinators as such. It is apparent therefore that the commissioner's statement at paragraph 57 of her award is incorrect. This is because *the physical check on the system* established a comment made in most cases by the applicant himself indicating that the old laptop had been returned. It was the physical check at the store, *not on the system*, that established that the laptops recorded on the system as returned had actually not been returned. These included the 5 laptops that the applicant had undertaken to collect from the client but which he never collected up to this day.

- 6.3. In my view, the commissioner's statement at paragraph 57, relating to *physical check on the system* was a mere error and/or a lapse in her reasoning. My view in this regard is fortified by the commissioner's statement at paragraph 56 where she stated that:

*"The respondent's witnesses further indicated that a physical search of the store showed that the mentioned laptops were not there ..."*¹⁰ and further at paragraph 58 where she stated the following:

"The fact that other persons had confirmed on the system that the applicant had returned the laptops does not exonerate the applicant as they merely write on the system what he told them. They do not check the store but accept in good faith that he indeed had returned the laptops."

- 6.4. In my view, this was an immaterial error which produced no distorting effect on the commissioner's conception of the enquiry and/or on the ultimate result. Therefore, this ground of review is dismissed.

- 6.5. The second ground of review is based on the fact that the evidence that was before the commissioner established that the search on the system and the physical search for the laptops at the stores, was done in the applicant's absence. The applicant became aware of these searches during the disciplinary hearing. It was submitted that nothing had prevented the third respondent from inviting the applicant to conduct the searches together. It was submitted that the commissioner

¹⁰ Record arbitration award p115 para 56

failed to take into consideration that it was precisely due to his absence, during the physical searches that the applicant was unable to dispute the third respondent's version concerning the physical search at the stores.

- 6.6. At second sentence of paragraph 56 of her award, the commissioner has stated that:

*"The applicant testified that he "cannot dispute" that they had searched the stores as he had not been asked to accompany them."*¹¹

- 6.7. In my view, it appears that the commissioner was quite alive to the above issue but she did not consider it to be of any significance on the outcome and/or the result. However, as was stated in *Herholdt*, the reasoning by the arbitrator assumes less importance where the reviewing court can still reach the same result made by the arbitrator using another route.

- 6.8. The applicant has not referred the court to any authority supporting his submission that he was supposed to be present when the third respondent conducted an investigation both on the system and at the stores. The only instrument this court is aware of concerning investigations at work-place is item 4 of schedule 8 to the Act, which provides that:

"Fair Procedure

- (1) *Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand...."*

- 6.9. There is nothing in the above item that indicates that the employee should be present when the employer is conducting an investigation. However, in my view, Rule 29 of the CCMA rules may be used by any

¹¹ *ibid*

interested party for the disclosure of the relevant documents and other evidence. At this stage of the proceedings an interested party may seek an agreement on inspection in-loco and/or resort to Rule 20 of the CCMA rules which specifically has a clause on on-the spot-inspection.

6.10. In this matter both parties were legally represented at the arbitration and I see no reason why the CCMA rules were not used to achieve the desired purpose. For reasons set out above, the applicant's second ground of review falls to be dismissed.

6.11. The third ground for review is based on the applicant's submission that the two witnesses for the employer confirmed that they did not do a physical search at the factory because the applicant does not work at the factory/stores. The applicant was unable to refer the court to the record where the said confirmation was made. However, the record indicates that under cross-examination, the applicant's representative asked the respondent's witness, Duncan Nozaic, whether at any stage he thought of taking the applicant to the stores for purposes of showing him exactly where the relevant laptops were and the witness responded by stating that the Applicant does not work in stores. Then the commissioner indicated that she understood that to mean that the applicant would not know where the laptops are at the stores because he does not work at the stores.¹²

6.12. In re-examination, the respondent's witness stated that he personally went to the stores to physically check the laptops and he also asked the logistics coordinator to do the same.¹³ The logistics foreman also testified that he and Duncan physically searched the stores but there was no trace of the laptops in the system or physically at the stores.¹⁴

6.13. It is evident from the record that the evidence indicated that the search both on the system and physically at the stores were conducted in the applicant's absence because according Duncan, the applicant does not

¹² Record p39-40

¹³ Record p49 l15-25

¹⁴ Record p53-54 & p56

work at the stores and the commissioner understood that statement to mean that the applicant would not know where the laptops are at the stores because he does not work there. The impression created in the applicant's submission that the third respondent's witnesses confirmed that they did not do a physical search at the stores is not supported by the record and therefore this ground falls to be dismissed as well.

6.14. The fourth ground of review is based on the applicant's submission that the commissioner failed to take into consideration the fact that the third respondent had admitted that it could not attribute the loss of the laptops to the applicant. The applicant did not refer the court to any part of the record that supports this submission. The record indicates that under cross-examination, Duncan, was asked by the applicant's representative on what basis he was alleging that the applicant might have stolen the laptops. In response, the witness stated that he never said that, instead, he had testified that the laptops were never returned to the stores and according to him the applicant was dishonest.¹⁵

6.15. In my view, the applicant's submission that the third respondent had admitted that it could not attribute the loss of the laptops to the applicant is not supported by the record. Therefore, this ground of review also falls to be dismissed.

6.16. The final ground of review is based on the applicant's contention that the evidence presented at the arbitration was not presented at the disciplinary hearing but was produced and invented some days prior to the arbitration. The evidence referred to in this instance relates to the third respondent's bundle of documents, B1 that was, as I have already stated, heavily relied upon by the applicant in his evidence in chief. The applicant's reliance on Bundle B1 is apparent even from the arbitration award¹⁶. It is therefore ironic for the applicant to rely so heavily on that evidence but at the same time complain about same.

¹⁵ Record p48-49

¹⁶ Record p113, arbitration award, applicant's evidence

6.17. It is trite that an arbitration is a hearing *de novo* and that there is nothing inappropriate for a party to present fresh evidence that was not presented at the internal hearing.¹⁷ This ground of review has no substance and falls to be dismissed as well.

Costs:

[7] The parties indicated that they leave the issue of costs in the hands of the court and this Court finds that it would be fair for each party to bear its own costs.

Order:

[8] In the premises, I make the following order:

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

P.M. Mosebo

Acting Judge of the Labour Court of South Africa

¹⁷ *Country Fair Food (Pty) Ltd v CCMA* (1999) 20 ILJ 1701 (LAC) para 11 & *Independent Municipal & Allied Trade Union obo Strydom v Witzenburg Municipality* (2013) 33 ILJ 1081 (LAC) para 14-15

APPEARANCES:

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LABOUR COURT