



Of interest to other judges

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

Case no: JR 108/15

In the matter between:

PICK 'N PAY (BLOEMGATE)

Applicant

and

RAMPAI, N (N.O.)

First Respondent

COMMISSION FOR CONCILIATION,

Second Respondent

MEDIATION & ARBITRATION

NUPSAW obo SOPHIE MOKOENA

Third Respondent

Heard: 22 and 26 March 2018

Delivered: 28 March 2018

Summary: (Review – Arbitrator discouraging a party asking for an adjournment to call a witness not in attendance at the arbitration but not expressly refusing to adjourn proceedings – whether or not party wishing to call witness should have anticipated need to have ensured attendance of witness before arbitration commenced – whether issue was in dispute at disciplinary hearing – costs of postponement occasioned by applicant's incorrect diarising of date of review hearing and failure to read respondent's practise note)

JUDGMENT

LAGRANGE J

Background

- [1] The employee party in this review application, Ms S Mokoena ('Mokoena'), was dismissed for gross negligence by the applicant ('PnP') for failing without good cause to perform the duty of care necessary expected of her in that she had till shortages of approximately R212 for the month of July 2014. She was employed by PnP as a cashier at a monthly wage of R 2761.79.
- [2] The application had to be postponed on the first day it was set down because PnP's attorneys' office had incorrectly recorded the set down date which had been agreed upon at a pre-enrolment hearing and also failed to notice the correct date of the set down appearing on the respondent's practice note.

The award

- [3] In terms of PnP's disciplinary code, cash shortages of more than R100 are deemed to be gross negligence if they are not incidental to an act of theft or fraud. The arbitrator found that the list of shortages attributed to the employee did not support the aggregate sum of the alleged shortage and the Front-End Manager, Mr J Visagie ('Visagie'), who had both testified for PnP and represented it in the arbitration, could not explain how the figure was arrived at.
- [4] The arbitrator also found that PnP's policy on shortages was well known and understood by the employee. The arbitrator accepted that the policy was a valid one. The arbitrator did not deal with whether gross negligence can be pre-defined with reference to a fixed amount of cash shortages in the way PnP's code does.
- [5] However, the arbitrator concluded that PnP had been unable to prove that the policy had been breached because neither of its witnesses could

explain how the total alleged amount of the R212.21 shortfall was derived. The Cash Office Supervisor who had prepared the record of shortages was not called as a witness and the arbitrator condemned the conduct of PnP without making a finding on the reasons advanced by PnP for not calling the supervisor, namely that the employee had not disputed the amount at the disciplinary enquiry. The arbitrator was highly critical of PnP's failure to call the supervisor as a witness to the enquiry, which he expressed in somewhat exaggerated judgmental terms:

"During cross-examination of both witnesses of the respondent, both witnesses admitted that it could not be explained how the amount of R 212.21 was arrived at. Yet the respondent found it prudent to discipline PnP overcharged that the respondent itself could not explain. The claim that the supervisor had prepared the shortages record was not available to testify because PnP had not indicated prior to the arbitration that the amount was disputed, is indicative of the respondent's disdain towards the notion of social justice at the least. The respondent need not be reminded that the same shortages record, on the basis of which PnP was subjected to disciplinary enquiry and eventually dismissed was prepared by no other person but the respondent. Who else was supposed to explain and show this process how the amount of R 212.21 was arrived at?"

(emphasis added)

- [6] The arbitrator concluded that the dismissal was substantively unfair but procedurally fair and ordered the retrospective reinstatement of the employee.

Grounds of review

- [7] The crux of PnP's grounds of review is that, until the arbitration hearing, it was not apparent that the employee disputed the amount of the shortage. Accordingly, it had not called the supervisor as a witness to explain how the total figure was arrived at. However, when it became clear that this would be an issue the arbitrator unreasonably refused to allow PnP an opportunity to call the appropriate person to prove how the amount of the shortages was calculated.

- [8] Further, the failure to prove the amount of the shortage was an issue raised by the arbitrator whereas the employee had not disputed the determination of the shortage but based her case on the fact that the shortfall had already been deducted from her salary without her consent and accordingly she had already been penalised for the shortfall.

Evaluation

- [9] From the record, it is apparent that when Visagie was being questioned about the determination of the amount of the shortfall, he was unable to explain precisely how the amount was arrived. When it was put to him under cross-examination that the shortfall was only R 18.18, his response was that they had worked on the amount of R 212.12 and that he would have brought his witness who works with the shortages if he had known the figure was going to be in dispute, but at the disciplinary enquiry the figure had never been disputed. He was not challenged when he claimed it had not been disputed at the enquiry, even though he said it more than once.
- [10] When pressed further on the calculations Visagie pointed out that he already said that there was an office at the company that did the calculations and he would ask for a postponement of the arbitration so that he could call the responsible person who had 14 years' experience and did the calculations on a daily basis. The employee's representative nonetheless pursued his questions about the calculations and Visagie then appealed to the Commissioner as follows:
- “Mr Commissioner uhm, I would request that we have a short adjournment so that I can get more witness to be able to explain this to uhh, Pick ‘n Pay uhm, which will think be at the end of the day be benefit to both of us that he knows exactly how it works uhh, this lady as a sales worked in this office for 14 years and she’s absolutely clued up she cannot any questions that he could or might want to ask her she’ll be able to answer.”
- [11] The Commissioner then intervened and questioned him about the supervisor's work and then queried why he had not felt it necessary to ensure her presence at the arbitration so she could testify. Visagie reiterated that she was not called because no dispute was anticipated

about the figure and that is why she was not in attendance at the arbitration. The arbitrator then reminded Visagie that at the commencement of the proceedings that day, the employee's representative had made it clear that the amount of the shortage was being disputed, which he readily conceded. The Commissioner then confirmed that Visagie was suggesting that the process be adjourned for the Cash office supervisor to be called to come and explain the shortages. Visagie reiterated his motivation for that suggestion and PnP's representative even recommended that she be called as a witness. The arbitrator then got side-tracked and irritated about the fact that Visagie had testified without having direct knowledge of the calculation of the shortages, viz:

"Commissioner: now, now if you can explain that you are saying you'd maybe need those questions to be referred to another person being your witness who you did not bring. What are you saying I should do with this evidence?

Respondent's representative [Visagie]: well Mr Commissioner in all fairness of just trying to be fair to, to her and to everybody here and that's the reason I would like to have are here and as I mentioned for any clarity I would love to have everything clear so that there's aren't any uhh, misunderstandings and stuff I understand your view there but uhh, as I say I was at, but this morning I wasn't aware about it, before that there was no indication that there would be any discrepancy or any dispute about that uhh, not even on a document that we got from the CCMA so that is the reason why I didn't uhh called her as a witness.

Commissioner: Okay.

Respondents representative: if mention was made I would have had her here.

Commissioner: Okay."

Without expressly dealing with the request for a postponement, the Commissioner then invited PnP's representative to continue his questioning of Visagie. More than once after that, Visagie emphasised that he could not deal with the detailed calculation of the shortage. At the end of his evidence, the Commissioner asked if he had another witness to call

and Visagie called the chairperson of the enquiry, Mr J Du Plooy ('Du Plooy'), a Labour Consultant. He too was present on the day of the arbitration having been called by PnP to testify.

- [12] Interestingly, Mokoena's representative never put to Du Plooy that the amount of the shortfall had been in dispute at the disciplinary hearing. The Commissioner however of his own accord questioned Du Plooy about how he had made a finding that Mokoena had been responsible for a shortfall in the amount of R212.00. His response was that, there had been evidence of the calculation provided by the supervisor but the amount was never in dispute in the disciplinary enquiry.
- [13] After Du Plooy's evidence, the Commissioner asked Visagie if he had any other witnesses and when he said he did not the Commissioner asked him if he closed his case. The Commissioner did not enquire whether he still wanted to ask for a postponement to call the cash office supervisor, whom Visagie had previously identified as having full knowledge of the determination of the amount of the shortfall.

Evaluation

- [14] Although Mokoena's counsel, *Mr Ford*, cited a couple of places in the record of the disciplinary enquiry where it might be conceivably inferred that Mokoena had not entirely agreed with the calculation of the shortfall in those proceedings, as things stood on the evidence before the arbitrator there was no reasonable basis for inferring that the shortfall had been a matter of dispute during those proceedings. That being the case, it is difficult to understand how the arbitrator came to the conclusion that PnP ought to have realised in advance that it was essential to have Ms Naidoo available at the arbitration to give evidence. It ought to have been manifestly obvious to the arbitrator that this had come as a surprise to PnP.
- [15] It is true that the arbitrator did ask Visagie after Du Plooy had testified if he had further witnesses and he confirmed he had none, at which point the arbitrator confirmed that Visagie had closed its case. It was argued on behalf of Mokoena that Visagie should not have been considered a

layperson who needed guidance from the arbitrator in the conduct of the applicant's case, because at the beginning of the arbitration proceedings, he had made reference to one of Mokoena's potential witnesses not being subpoenaed. That reference was a response to Mokoena's representative complaining that they did not have time to subpoena a shop steward as a witness when PnP refused to release him. I hardly think that is enough to presume Visagie was an experienced representative.

- [16] In any event, what is revealing about the arbitrator's treatment of PnP's failure to call the cash office supervisor to testify, is that the arbitrator clearly ignored the fact that the need for her testimony had only become evident at the start of the arbitration proceedings. Nowhere in his award does he deal with the fact that Visagie repeatedly expressed the wish to call her as a witness and specifically asked for a postponement to do so. Instead he castigated Visagie for not bringing her to the arbitration in the first place and found that this failure demonstrated that PnP had a cavalier attitude towards 'social justice', whatever that term is supposed to mean in the context of an arbitration proceeding. These findings in the award were foreshadowed by the thrust and tenor of arbitrator's questioning of Visagie in the arbitration proceedings about why he had failed to bring the supervisor to the proceedings to testify. That questioning and the findings which followed, were premised on the assumption that PnP necessarily ought to have realised that her evidence would be crucial, despite it being obvious from the evidence of Visagie that he had no reason prior to the arbitration to believe that the value of the shortages would be a contentious issue.
- [17] The arbitrator must have been acutely aware of the fact that Visagie repeatedly stressed that the supervisor would have to be called to present such evidence and that he needed to do so. Mokoena's own representative at the arbitration, as well as the arbitrator himself, also recognised the importance of her testifying. However, because the arbitrator was reluctant to accept that the need to call the witness could not reasonably have been foreseen, he made it very clear that he believed Visagie was at fault for not arranging beforehand for the supervisor to be present at the arbitration and declined to directly address Visagie's

express and repeated requests for a postponement. Under the circumstances, the arbitrator's failure to address the issue of the postponement, or at the very least to ask whether Visagie still wished to ask for a postponement before he declared Visagie's case closed, was a dereliction of his duties and clearly deprived PnP of an opportunity to lead a very crucial witness. Moreover, the arbitrator's decision that PnP had failed to prove its case that Mokoena was responsible for cash shortages in excess of R100.00 was inextricably linked with the failure to allow Visagie to call a witness who could testify how the shortage was determined. Not only was PnP deprived of a fair hearing as a result of this, but it is probable that this irregularity would have affected the determination of whether or not the misconduct was proved. This means the arbitrator committed a reviewable irregularity in the sense having a distorting effect on a vital finding, as alluded to in ***Head of Department of Education v Mofokeng & Others***, where the LAC held:

"[33] 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 enquiry. 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 enquiry, the delimitation of the issues to be determined and the ultimate outcome."¹

[18] In the circumstances, I am satisfied that the award must be set aside. Because the defect relates to evidence which ought to have been led, the only remedy is to remit the matter for rehearing, subject to limiting the scope of any additional evidence to be led.

Costs

[19] In relation to the postponement necessitated by the non-appearance of PnP's representative, I am satisfied that it was not a result of wilful or mala fide conduct on the part of PnP's attorneys, but nonetheless was a result of

¹ (2015) 36 ILJ 2802 (LAC) at 2813.

negligence, which necessitated the third respondent having to appear twice. Accordingly, it is appropriate for PnP to pay the wasted costs of the postponement, but a punitive cost order would be excessive.

- [20] In relation to the costs of the application, it was argued by PnP that Mokoena should not have opposed the review application because the merits of the application were strong. However, I cannot say that Mokoena's opposition was groundless and another arbitrator might still find the dismissal was substantively unfair even after hearing additional evidence. Consequently, I am not persuaded that the requirements of law and fairness warrant a cost order against Mokoena.

Order

- [1] The arbitration award issued on 17 November 2014 under case no FSBF 4624-14 is reviewed and set aside.
- [2] The matter is remitted back to the second respondent for a hearing *de novo* before an arbitrator other than the first respondent, to be convened within 30 days of receipt of this order, save that the record of the arbitration hearing shall consist of the record of the original hearing and such additional evidence that the parties may lead in proving or disproving the amount of the alleged shortage of R212-12 attributable to Ms Mokoena and on the appropriateness of the sanction of dismissal in the event she is found guilty as charged.
- [3] The applicant must pay the third respondent's wasted costs of the postponed hearing of 22 March 2018.

Lagrange J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

R J Orton of Snyman
Attorneys

RESPONDENT:

B Ford instructed by
Ndumiso Voyi Inc.