



Not reportable

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

Case Nos: J2652/13

J1484/16

In the matter between:

BELL EQUIPMENT SALES SA LTD

Applicant

and

TSHEPO MASHIGO (N.O.)

First Respondent

**METAL AND ENGINEERING
INDUSTRIES BARGAINING
COUNCIL**

Second Respondent

**NATIONAL UNION OF
METALWORKERS OF SOUTH
AFRICA**

Third Respondent

ZACHARIA RAPOO

Fourth Respondent

Heard: 26 October 2017

Delivered: 31 July 2018

Summary: (Review – misconstruing the misconduct for which the employee was dismissed causing distortions in arbitrator's approach to evidence – failing to

consider material evidence - misconstruction of evidence causing arbitrator to arrive at conclusions no reasonable arbitrator could have)

JUDGMENT

LAGRANGE J

Background

- [1] There are two applications under consideration in this matter. The first application by the employer party ('Bell') is to review and set aside an arbitration award of the first respondent, Mr T Mashigo ('the arbitrator') in terms of which he found that the dismissal of the fourth respondent, Mr Z Rapoo ('Rapoo'), was substantively unfair and awarded his reinstatement. Pleadings in the review application were closed in March 2015
- [2] The second application is brought by Rapoo and his union, NUMSA, to make the award an order of court. In February 2017, the two matters were enrolled to be heard jointly.

The award

- [3] Rapoo was appointed as an export controller in 2006, having worked for the company since 2001. His dismissal arose from his failure to ship a large order from a client in the Democratic Republic of the Congo ('the DRC') in circumstances where it is common cause that the order was urgent because the parts required were for a unit which could not operate. Such an order is known as a 'unit down order' ('UDO').
- [4] It was common cause that the order was received on Wednesday 19 October 2011 and in the normal course of things ought to have been airfreighted within a couple of days. There was a delay in the warehouse in picking and packing items for the order. Once that is done, the warehouse passes all the documents to a parts administrator, who prepares the invoice and closes off the order file in preparation for shipment. The parts administrator then passes the order file to the export controller.

[5] According to the parts administrator, Ms E Van der Merwe ('Van der Merwe'), on Tuesday 25 October 2011, she placed the file on Rapoo's computer keyboard on his desk. She worked at a desk opposite Rapoo's desk. The two desks were separated by a divider between them. However, he did not ship the order and according to the shipping manager, Ms C Miog ('Miog'), the file was still on Rapoo's desk on 1 November 2011, a week after it was ready for him to ship it.

[6] The crux of the arbitrator's reasoning is set out in the following paragraph:

It is inconceivable why the applicant was singled out to be the sacrificial lamb this whilst many hands were involved in the order. The applicant could not do anything to hurt whilst it was in the warehouse. Of significance to the whole transaction is the applicant's uncontested evidence that if a shipment is urgent, the stores should pick it up and they would call him when the shipment is already at the invoicing lady. That did not happen. Arno and CJ are the people that usually called him. Again, it is my view that if the order was urgent enough and everybody working on it have put their minds to it, Elmarie [v.d Merwe] should have given it to the applicant in his hand or on the phone to she could not find him at his desk to sensitise him of the urgency of the order. It should follow therefore that the dismissal of the applicant was unfair.

...

The respondent has suffered a financial loss as a result of the order being shipped late. I however, do not share in their sentiment the applicant was alone responsible for that, if he did play a role; he was not alone in that. The other departments were also responsible and they should also have been hauled over the coals for their inaction.

The working relationship had not broken down and the applicant could still be integrated into the employ of the respondent and continue to work.

[7] The arbitrator ordered the reinstatement of Rapoo but without back-pay because the delay in finalising the case could not be attributed to Bell.

Grounds of review and evaluation

Grounds of review

[8] In summary, the grounds of review set out in Bell's founding papers are:

- 8.1 The arbitrator misconceived the nature of the charges against Rapoo which related to his failure to expedite the matter after it reached his desk on 25 October, because he focused unduly on the period between 19 and 25 October. The findings he made because of this misdirection materially affected his final conclusions rendering them unreasonable.
- 8.2 He also failed to appreciate that there was evidence providing good reasons for the initial delay between 19 and 25 October, some of which was provided by Rapoo himself.
- 8.3 In failing to consider Rapoo's own evidence that he was not expected to go to the warehouse to follow up orders, but to use his phone and email, the arbitrator failed to appreciate that export controllers ought to be at their desks dealing with these kind of urgent orders. Consequently, he failed to appreciate that once Van der Merwe had placed the file on his desk, he ought to have assumed responsibility for it.
- 8.4 Further, the arbitrator misconstrued the evidence when he concluded that the practice was that the warehouse stores personnel would call him when the shipment documentation had been handed over to the parts administrator, or in concluding that Van der Merwe ought to have made sure she personally gave the shipment file to him or to have phoned him if he was not at his desk.
- 8.5 The arbitrator also failed to take account of the fact that Rapoo was already on a final written warning following a previous disciplinary enquiry.

Evaluation

[9] I agree with the applicant that the arbitrator failed to appreciate that the main complaint about Rapoo's conduct was his failure to ship the order despite

the passing of an entire week from the time that Van der Merwe said she put the order file on his desk. I also agree that, there was evidence given both by Miog and Rapoo which explained the initial delay between the 19th and 25th October, partly because of a weekend during that period and the fact that the items for the UDO order were in the same area of the warehouse, where staff were busy with a very large order valued at R17 million for the same customer, which complicated the picking process.

- [10] In relation to the third ground of review, the applicant's view is that the arbitrator materially misconstrued the evidence by not inferring from Rapoo's evidence that, because export controllers were not expected to go into the warehouse to follow up orders, that the arbitrator ought to have realised he should have been at his desk. I agree that would have been a possible inference that the arbitrator might have drawn, but it is not something which was drawn to his attention through the cross examination of Rapoo, and I cannot say that his failure to consider this line of thinking was unreasonable.
- [11] Having found that the others were to blame for the first week of delay and were not punished, the arbitrator failed to consider whether Rapoo's failure to do anything about shipping the order after 25 October was blameworthy at all. To the extent he did consider it, he implicitly accepted that Rapoo probably had no knowledge the order was ready for shipping for the entire week thereafter.
- [12] Indeed, Rapoo's defence was that, he never received the order documents from Van der Merwe, and when he cleared his desk on being suspended on 1 November 2011, there was nothing on the desk. Miog had testified that when she went to Rapoo's desk after his suspension on the same day she found the order file on it when she went through the documents on his desk. Van der Merwe also confirmed that the file had been moved from his keyboard and was found by Van der Merwe on the desk. During his own testimony and the cross examination of Miog, much was made of the email correspondence sent by Rapoo to the warehouse personnel trying to get them to speed up the warehouse process so the order could be shipped. However, after 25 October there were only two other pieces of email

correspondence from Rapoo to the warehouse, neither of which were obviously linked to the urgent order. It is difficult to see how the arbitrator could reasonably have inferred that Rapoo was still diligently following up on that order with the warehouse staff after 25 October in the way that he had between 19 and 25 October. In so far as Rapoo alleged that Van der Merwe had fabricated the document she claimed to have placed on his desk on the 25 October, she was not challenged on her statement that the order file was finalised and the invoice issued on 25 October or that the invoice date could not be altered. Even if Rapoo denied having received the file on 25 October, he provided little concrete evidence of the steps he took after that date to expedite the matter which ought to have become a greater concern with every passing day.

- [13] Taking all these considerations into account, I agree that the focus of the Commissioner on the earlier delay while the order was being picked caused him to completely neglect the evidence relating to Rapoo's conduct after 25 October in considering whether his conduct was blameworthy at all. Had he done so, and had he considered the absence of any evidence suggesting why Van der Merwe would have, let alone could have, fabricated the order invoice after 25 October, and given the paucity of evidence of Rapoo's continuing efforts after that date to pester the warehouse staff if he genuinely believed the order had not yet been invoiced, the arbitrator could not reasonably have come to the conclusion that he was not responsible for the delay after 25 October.
- [14] It must also be mentioned in this regard, as pointed out by the applicant in its fourth ground of review, that Rapoo's evidence that he would be called by the warehouse staff to say that the order had been given to Van der Merwe, was not put to either Miog or Van der Merwe and the arbitrator failed to consider the value of this untested evidence in reaching his conclusion.
- [15] Lastly, the arbitrator failed to consider the final written warning which had been imposed on 13 October arising from Rapoo's failure to finalise another urgent order for nearly a month.

Conclusion

- [16] Since the arbitrator's conclusion that there was an initial delay in finalising the urgent order for which nobody was sanctioned meant that it would be unfair to hold Rapoo accountable for the subsequent delay, was only possible if evidence of the explanation for the initial delay was ignored, the arbitrator was obliged to scrutinise whether there was a justification for Rapoo's subsequent delay. The evidence cannot reasonably support the inference that he was not to blame. Given the serious consequence of the delay in the form of considerable losses suffered by the applicant and Rapoo's previous final written warning for closely related misconduct, the arbitrator's finding that his dismissal was substantively unfair was not a finding a reasonable arbitrator could have arrived at on the evidence before him.
- [17] In view of the above, the application to make the award an order of court must fail.
- [18] In relation to costs, it is understandable the respondents would have opposed the review, given that it was in Rapoo's favour and not without any merit at all, so their opposition was not frivolous. Under the circumstances it would not be appropriate to award costs.

Order

- [1] The arbitration award of the first respondent dated 3 October 2013 issued under case no MEGA35188, is reviewed and set aside and the application to make the award an order of court is dismissed.
- [2] The finding of the first respondent that the fourth respondent's dismissal was substantively unfair is substituted with a finding that his dismissal was substantively fair.
- [3] No order is made as to costs.

R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: G M Kirby-Hirst of Macgregor Erasmus Attorneys

THIRD and FOURTH
RESPONDENTS B Matsena of NUMSA

LABOUR COURT