



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 224/14

In the matter between:

MTHANDEKI PETRUS VUMENDLINI

Applicant

and

AFRI OPERATIONS LTD

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

COMMISSIONER MARTINUS VAN AARDE

Third Respondent

Heard: 1 December 2016

Delivered: 19 January 2018

Summary: An application for review may not succeed when the applicant has failed to prove that the arbitration award which is the subject of the review falls outside the bounds of reasonableness.

JUDGMENT

LALLIE J

- [1] The applicant seeks an order reviewing and setting aside an arbitration award of the third respondent who will be referred to as the commissioner in this judgment. The application is opposed by the first respondent. The facts which gave rise to this application are that the applicant was employed by the first respondent as a grain grader at its Earam silo in Harrismith where it sells large quantities of grain. The first respondent suffered stock loss and took a decision to investigate its cause. The investigation revealed that on 31 January 2014, a truck which left the Harrismith silo (the silo) with a full load had not been accounted for. The applicant was subsequently charged for allowing a vehicle to load yellow maize and leave the silo without documentation resulting in financial loss of about R96 000 to the first respondent. A disciplinary enquiry was held in the absence of the applicant. He was found guilty and dismissed. He referred an unfair dismissal dispute to the second respondent (the CCMA) where the commissioner found his dismissal procedurally unfair but substantively fair. The first respondent was ordered to pay the applicant compensation for the procedural unfairness of his dismissal. In this application, the applicant seeks an order reviewing and setting aside the commissioner's decision on the substantive fairness of his dismissal.
- [2] The commissioner's reasons for finding the applicant's dismissal substantively fair are that the applicant acknowledged that he accepted a truck/vehicle on 31 January 2014 at about 12h46. He issued a loading instruction to a vehicle with registration number FTM 387 FS to the silo operator before trying to capture the transaction on the system. He immediately cancelled the loading instruction/dispatch letter when he noticed some irregularities with the truck/driver. The irregularities the applicant referred to include the absence of the client making the request for maize to be loaded in terms of the governing policy. The commissioner rejected the applicant's version because it was clear from the video footage/photos that the truck in question did not have any number plates/registration at all. The commissioner found that as the applicant was in charge of the silo in the absence of its manager, he simply failed to take the necessary care to protect the employer's interest. He found that the gravity of the misconduct the applicant committed justified dismissal.

- [3] The applicant submitted that the award is defective, irregular and reviewable because the commissioner committed a number of errors which include finding that evidence did not support the applicant's version. Further errors are that the commissioner found that the applicant cancelled the instruction later instead of immediately. He rejected his version. He failed to apply his mind to the facts presented in his defence. His decision is not supported by evidence. He also erred in finding that the applicant failed to take the necessary care to protect the first respondent's interests. The decision that the applicant's dismissal was substantively fair is contrary to the commissioner's finding of gross negligence as opposed to the dishonesty with which the applicant was charged. The first respondent submitted that the grounds the applicant sought to rely on had no substance and expressed the view that the arbitration award is correct and reasonable.
- [4] This court will review and set aside an arbitration award in terms of section 145 of the Labour Relations Act¹ when the commissioner has misconceived the enquiry before him or her, alternatively, when the commissioner has reached an unreasonable decision.² It is not the applicant's case that the commissioner misconceived the enquiry before him. The applicant sought to rely on a number of errors which in his view, the commissioner committed during the conduct of the arbitration. Commission of errors by a commissioner during the conduct of an arbitration is not sufficient to render an award reviewable. The error must lead the commissioner to reach an unreasonable decision.³ In determining the reasonableness of the award, the reviewing court has to consider the totality of the evidence before the commissioner and not adopt a piecemeal approach.⁴ Evidence has to be considered "in the round".⁵
- [5] The commissioner complied with section 138 of the LRA in that he conducted the arbitration fairly and provided reasons for his decision. The applicant's

¹ 66 of 1995 (the LRA)

² *Heroldt v Nedbank SA (Pty) Ltd (Congress of SA Trade Unions as Amicus curiae)* 2013 (6) SA 224 (SCA)²

³ *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC).

⁴ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2014] 1 BLLR 20 (LAC).

⁵ *Nedbank*

allegation that the commissioner did not apply his mind and failed to consider evidence in his defence is factually incorrect. In his award, the commissioner considered the applicant's version and gave substantial reasons for rejecting it. The applicant's attack on the award based on the submission that the commissioner erred in finding him guilty of gross negligence instead of the dishonesty he was charged with is unsustainable. The commissioner expressed the view that the applicant tried to manipulate the records/system in a dishonest manner. In addition to analysing the evidence before him and making a finding that the applicant had been dishonest, the commissioner considered the argument on behalf of the applicant that the applicant acted in a negligent manner and/or committed dereliction of duty. In dealing with the argument, the commissioner expressly confirmed his finding of dishonesty by stating that even if he was wrong in finding the applicant's conduct dishonest. He analysed the argument and facts on which it was based in detail and concluded that the gravity of the applicant's conduct exceeded negligence or dereliction of duty.

- [6] When the evidence before the commissioner is considered in its totality it proves that on a day the applicant was in charge of the silo, in the absence of the silo manager, the applicant issued a loading instruction, without a request from a client. He handed the loading instruction to a driver of a truck with no registration number plates. He, however, recorded a registration number. On his version, the applicant had realised that there were irregularities and cancelled the loading instruction from the system but did not demand the loading instruction from the driver of the suspicious-looking vehicle. He neither instructed the loaders not to load maize to the value of R92 000 on the truck nor ensure that the truck was not loaded. He took his lunch break and left the first respondent's premises. The totality of the evidence supports the commissioner's decision that the applicant acted dishonestly and that the sanction of dismissal was appropriate in the circumstances. The award therefore falls within bounds of reasonableness.

- [7] In the premises, the following order is made:

Order

1. The application is dismissed.

Lallie J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:

Mr Khang of NMphafi & Khang Inc

FOR THE FIRST RESPONDENT:

Ms Grundlingh of Grundlingh Attorneys

LABOUR COURT