



IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PR73/15

In the matter between:

BUFFALO CITY MUNICIPALITY

Applicant

and

THE SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL, EASTERN CAPE

REGIONAL OFFICE

First Respondent

MALUSI MBULI N.O

Second Respondent

SAMWU OBO S SPILITO

Third Respondent

Heard: 3 August 2017

Delivered: 11 April 2018

Summary: When an arbitrator has failed to take into account material and relevant evidence and the failure results in the arbitrator reaching a decision a reasonable decision maker could not reach, the arbitrator's award may be reviewed and set aside.

JUDGMENT

LALLIE, J

- [1] The individual third respondent Ms Spilito (Spilito) was employed by the applicant as a ticket clerk/cashier at the applicant's swimming pool complex (the swimming pool). After an incident involving the disappearance of money from the swimming pool, Spilito appeared at a disciplinary enquiry on the following charges:

'Theft in that on the 18th October 2013 the Applicant stole the municipal money amounting to (R2160.00) that was paid by Fani Gaqa Primary School.

Gross dishonesty in that:

- a) On the 18th October 2013 Applicant concealed the payment of R2160 made by the Fani Gaqa Primary School and lied to her supervisor Mr Kopp about the payment method that it was done via the internet.
- b) On the 18th October 2013 the Applicant participated and/or failed to disclose or report the conduct of Ms Keens and Mr Makhaba in relation to manipulation and methods of replacing the money to distract or deceive the investigation.'

She was found guilty and dismissed. Her trade union, SAMWU, referred an unfair dismissal dispute on her behalf to the first respondent (the bargaining council). The dispute was arbitrated by the second respondent (the arbitrator) who found Spilito's dismissal substantively unfair and ordered the applicant to reinstate her. In this application the applicant seeks an order reviewing and setting aside the arbitration award. The application is opposed by the third respondent.

- [2] The applicant filed the review application late and sought condonation. The condonation application is unopposed. Having considered the applicant's submissions on condonation, I am satisfied that the applicant has shown good

cause. Condonation should, in the circumstances be granted. Spilito filed an application for condonation of the late filing of her answering affidavit. It was opposed by the applicant. She proffered valid reasons for the substantial delay and refusing her application would have constituted denying her access to justice as a result of her inability to pay her attorney's fees at a time she was not generating an income. Her application should also be granted.

- [3] In his reasons for finding Spilito's dismissal substantively unfair, the arbitrator noted that the applicant did not lead evidence proving that Spilito stole the R2160.00. He found that the only evidence which linked Spilito to the incident was the evidence to the effect that at the disciplinary enquiry Spilito said that the money was paid by Fani Gaqa Primary School (the school) by internet and at arbitration she said that the payment was made in cash. Spilito denied the contradiction. The arbitrator accepted her version on the grounds that on verification it appeared that the applicant did not make the statement at the disciplinary enquiry or that allegation did not appear in the disciplinary enquiry record. A further reason was that Mr Kopp's evidence that Spilito made the statement at the disciplinary enquiry was not corroborated.
- [4] A further reason for the arbitrator's conclusion on the substantive fairness of the dismissal was that Mr Makhaba (Makhaba) who confessed that the amount of R2160.00 that was found in the applicant's safe on 18 October 2013 was given to him by Ms Keens (Keens) who was Spilito's colleague, at a restaurant in East London made no mention of Spilito. He also found that Makhaba did not say Spilito was present when her colleagues were allegedly discussing how the money should be paid. Another reason was that the investigator on whose report Spilito's charges were based did not lead evidence and assist by illustrating at the arbitration how Spilito was linked to the theft. The arbitrator further found that as Spilito did not lie and say the money was paid by the school via internet, she could not have been expected to disclose or report wrong-doing that she was neither aware nor part of.
- [5] The applicant's main ground for review is that the arbitrator erred in finding that it failed to lead evidence proving that Spilito committed the misconduct which led to her dismissal. In the answering affidavit Spilito denied the

allegations made by the applicant to the effect that sufficient evidence proving the substantive fairness of her dismissal was led. She, however, provided no answer to specific allegations the applicant made in support of its case in the supplementary affidavit. An arbitrator's failure to take into account material evidence renders his or her award reviewable if it results in a misconceived inquiry or a decision which no reasonable decision maker could reach on all the material that was before the arbitrator¹.

- [6] An arbitrator's decision must be based on the evidence before him or her and when there is no connection between the evidence and the decision, the decision becomes unreasonable. In his reasons for finding Spilito's dismissal substantively unfair, the arbitrator made a finding that the only evidence that was led through two witnesses for the applicant links Spilito in so far as it relates to her saying at the disciplinary enquiry that the money was paid by internet and at arbitration she indicated that it was paid in cash. A verification exercise the arbitrator conducted disproved the applicant's allegation. A further reason was that Kopp's evidence that Spilito initially told him that the school paid via internet was not corroborated. He found that it was not established at the arbitration hearing that Spilito had indicated that the money was paid via internet. Arbitrations are hearings *de novo*. The arbitrator was required to determine the substantive fairness of Spilito's dismissal on the evidence before him. The applicant correctly submitted that Kopp's unchallenged evidence was that on 11 October 2011 Spilito did not issue a receipt for the payment the school made. On 11 October 2013 the applicant had no record of the payment. When Spilito presented the cash analysis sheet on 11 October 2013, Kopp refused to sign it because it reflected two amounts, the R200.00 float and a payment of R476.00. The reason for his refusal was that the payment was not consistent with the high number of children who used the swimming pool that day. Spilito told him that the school had paid via internet. His evidence was corroborated by Mr Ngcobo (Ngcobo),

¹ *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC).

the applicant's second witness who testified that when Spilito was quizzed by Mr Dwane (Dwane), a member of the Hawks a few days after the incident, she said that the school had paid via internet. Both witnesses testified that Dwane produced proof of payment Spilito had issued to the school which turned out to be a payment advice, a document the applicant used for banking money. It was not intended to be used as a receipt. He also told them that the school did not pay via internet but in cash. The information was later confirmed by Spilito.

[7] Further evidence that was disregarded by the arbitrator was that after Kopp's refusal to sign the payment analysis sheet a meeting about the amount of the money recorded on 11 October 2013 was held and Spilito complained that Kopp was accusing her. In terms of the applicant's standard procedure, at the end of the business day Kopp cashed up with the cashier on duty and the money would be kept in a safe in the supervisor's office. Spilito conceded that the school paid in cash on 11 October 2013 and could give no valid explanation why the payment was neither recorded nor put in the safe. She also did not explain why she did not issue the school with a proper proof of payment. All this evidence was tendered at arbitration and supports the applicant's case that it proved that Spilito's dismissal was substantively fair. Also the totality of the evidence tendered at arbitration supports the applicant's version that the arbitrator failed to take it into account material and relevant evidence. The failure led him to reach a decision a reasonable decision maker could not reach.

[8] The evidence before the arbitrator proved that Spilito committed serious misconduct which involved dishonesty. She showed no remorse for her misconduct but denied it. The gravity of the misconduct in the circumstances warranted the sanction of dismissal.

[9] In the premises, the following order is made:

Order:

1. The late filing of the application for review is condoned.
2. The late filing of the answering affidavit is condoned.

3. The arbitration award issued by the second respondent under case number ECDO71409 and dated 3 March 2015 is reviewed and set aside and substituted with the following:

3.1 The dismissal of Ms S Spilito was substantively fair.

Z Lallie

Judge of the Labour Court of South Africa

Appearances

For the Respondent: Advocate Schultz

Instructed by: Smith Tabata Inc

For the Third Respondent: Advocate Nzuzo

Instructed by: Godongwana Ngonyama Pakade Attorneys

LABOUR COURT