



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR 78 /2016

In the matter between:

PARMALAT SA (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

R DE LANGE N.O

Second

Respondent

FAWU obo ROBERTO COOK

Third Respondent

Heard: 20 June 2018

Delivered: 23 November 2018

Summary: Review application. Arbitrator's findings that dismissal was unfair is to be interfered with on review. Arbitrator failed to determine the dispute.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 23 March 2016 under case number ECPE4286-15 wherein the Second Respondent (the arbitrator) found Mr Cook's (the employee) dismissal substantively unfair and ordered his reinstatement.
- [2] The application is opposed by the Third Respondent.

Background facts

- [3] The employee commenced employment with the Applicant in September 1989 and he was employed as a checker at the distribution fridge, situated at the Applicant's Port Elizabeth plant.
- [4] The employee was dismissed on 16 July 2015, following a disciplinary hearing where he was found guilty of misconduct. The charge levelled against the employee was 'gross negligence in that on 29 June 2015 he disregarded the practice within the operations by not locking the fridge which resulted in stock being stolen.' It is common cause that five boxes of cheese were stolen from the fridge where the employee was counting stock.
- [5] The Third Respondent subsequently referred an unfair dismissal dispute to the First Respondent and the matter was arbitrated on various dates between November 2015 and March 2016.

The evidence adduced

- [6] The issue to be decided by the arbitrator was whether the employee's dismissal was substantively fair in that he had to decide whether or not the employee transgressed the workplace rule for which he was dismissed and if the sanction of dismissal was appropriate. There was no challenge in respect of procedural fairness.
- [7] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to consider the reason the employee was dismissed for, namely gross negligence, and the evidence adduced at the arbitration proceedings.
- [8] The Applicant's first witness, Mr Sydney Titus (Mr Titus), is the fleet manager and he was the chairperson of the employee's disciplinary hearing. He testified

that he found the employee guilty of misconduct and dismissed him because the employee had been warned previously by his supervisor not to leave the fridge doors open, but he kept on doing that. Furthermore, the employee was not honest regarding whether there was a truck in front of the fridge door at the time of the incident. The employee's version was that there was no truck, but in fact there was a truck loading at the time and it was possible for somebody to go into the fridge as the door was not locked. The employee should not have left the door unlocked or the fridge unattended.

- [9] Mr Titus testified that dismissal was an appropriate sanction as evidence was presented that the trust relationship between the Applicant and the employee was broken because there were numerous previous discussions with the employee not to leave the fridge door open or unattended. In cross-examination Mr Titus confirmed that the issue was not whether the employee was able to see what was happening in the fridge behind him, but the fact that the fridge door was left open and unattended.
- [10] The employee's version put to Mr Titus was that it was a common practice to leave the fridge door open. This was disputed by Mr Titus as the Applicant's version was that employees should not break the cold chain and by leaving a fridge door open, the cold chain is broken.
- [11] Mr Titus explained that he found the employee guilty of gross negligence because the employee was entrusted with responsibility and he had to ensure that the Applicant's products were kept safe, there is a lot of expensive products in the storeroom and by leaving the door open, the employee created an opportunity for people to enter the fridge and steal products. Furthermore, by leaving the door open, the employee was not doing his job and he failed to protect the Applicant's products.
- [12] Mr Titus confirmed that the boxes of cheese that were stolen, did not leave the Applicant's premises as the thieves were stopped at security and the boxes were confiscated.
- [13] It is evident from the transcribed record that in the arbitrator's engagement with Mr Titus, he (the arbitrator) was of the view that there is a significant difference between 'negligence' and 'gross negligence' and that the fact that

the boxes of cheese were confiscated and that the Applicant ultimately did not suffer a real loss, played a significant role.

- [14] Mr Jacques Basson (Mr Basson), the Applicant's warehouse co-ordinator, testified in respect of the Applicant's products and where the products are produced at the different Parmalat sites. He explained that cheese is not produced at the Port Elizabeth site, but elsewhere and transported to the Port Elizabeth site, where it is offloaded, checked by the checkers and moved to the refrigerated area where it is stocked.
- [15] On the day of the incident, 29 June 2015, Mr Basson was called by Ms Coleen Else to go with her to the security. There they found a driver Enoch, with his truck at the security gate and they were informed that the security found five boxes of cheese underneath the truck in a tool box. The cheese was identified as coming from the Applicant's fridge. Mr Basson explained that the said truck is not a fridge truck and it is not used to transport cheese, as cheese can spoil easily and has to be refrigerated all the time to maintain the cold chain to ensure the lifespan of the product.
- [16] Mr Basson subsequently asked the employee to do a stock count and he confirmed that five boxes of cheese were missing from the East London stock that was in the fridge.
- [17] Mr Basson testified that the employee was not charged with theft, as the Applicant could not prove that he was involved in the theft, but he was charged with gross negligence, because the fridge door was left open and unattended.
- [18] The witness explained that the Applicant provides its employees with refrigerator clothing to keep them warm in the areas where they are working and there is no need for the employee when he had to work in the fridge, to come out every few minutes to warm up. This is indicative of the fact that he broke the cold chain every few minutes, which impacts on the life span of the produce. He further testified that the employee had a set of keys to lock the fridge because he had reported that somebody was stealing cheese and he had to control the area to keep the cheese safe.
- [19] Mr Basson testified about the breakdown in the trust relationship and he stated that the employee had no regard for the Applicant's products and the need to

safeguard them and to maintain the cold chain. The employee created opportunities for somebody to steal the products and this would result in losses for the Applicant. If the door had been locked as it was supposed to be, it would not be possible for anyone to gain access and to steal the products. The issue about the closing of the fridge door had been discussed at management meetings. In cross-examination Mr Basson confirmed that he discussed the closing of the door and maintaining the cold chain with the employee and he trusted that the employee would comply, yet the employee left the door open and failed to lock it, notwithstanding the discussions they had. The trust relationship was broken because even after discussions with the employee, he still did what the Applicant did not want him to do and he could do that again.

- [20] In cross-examination, Mr Basson conceded that the lock of the fridge door was a bit stiff and it made it difficult to open it. The rollers on top of the door had since been adjusted and it is easier to open and close the door. He specifically testified that the procedure was to close the fridge door to maintain the cold chain and it was not allowed for the door to be left open, even slightly so.
- [21] The employee testified that on the day of the incident, he went to store number 3, he unlocked the door, went inside and left the door slightly open for safety. He testified that the practice was to leave the door open for safety reasons. Whilst inside, he counted the pallets with cheese and after a few minutes, he came outside and closed the door, where after he repeated this by going inside, counted the pallets and went outside to warm up. He testified that when he worked inside the fridge or store room, he closed the door and the door was only locked when he left the area. The employee disputed that he left the fridge unlocked and explained that whilst he was working inside, he closed the door but did not lock it.
- [22] The employee confirmed in cross-examination that cheese was the Applicant's most expensive and most stolen product. He further conceded that the cheese went missing while he had the key to the storeroom in his possession and whilst the store room was under his control.

- [23] Mr Lungisani Sebezela (Mr Sebezela) testified for the employee. He is a full time shop steward and represented the employee at his internal disciplinary hearing.
- [24] Mr Sebezela testified that the employee was not guilty of 'gross negligence' as the Applicant's disciplinary code stipulates that 'gross negligence' is total negligence due to disregard of policies and procedures within operations and the employee did not disregard any policies and procedures. He testified that there was no procedure in place to control the fridge and that all the employees working in the fridge, do not close the door completely as the practice was to leave the door open when they work inside the fridge. The reason being that something could happen with the employees inside the fridge and it would be very difficult for them to open the door under such circumstances. He however conceded that he was not aware of any injury an employee sustained in the fridge for the past 18 years.
- [25] Mr Sebezela testified that dismissal was a sanction too harsh and that the Applicant should have given the employee a corrective penalty instead.

The arbitrator's findings

- [26] In his analysis of the evidence, the arbitrator focussed on the two substantive issues that he was required to decide firstly; whether the employee committed misconduct in the form of gross negligence and secondly whether the sanction of dismissal was appropriate.
- [27] In respect of the first issue, the arbitrator accepted that the employee left the fridge door open whilst busy working inside the fridge and that there was a need to keep the fridge door closed to ensure product quality within the concept of a cold chain. The charge for which the employee was dismissed concerned the requirement that the fridge door be locked at all times and the basis for this requirement was primarily to prevent theft from the fridge.
- [28] The arbitrator rejected the employee's reason for failing to close the fridge door and locking it, to wit his safety concerns, as unconvincing and unreasonable. He found that a reasonable person in the employee's position would have been aware of the requirement that the fridge door should be kept locked, even when working inside it, and would have taken steps to ensure

that it remained locked. The employee has a lengthy service with the Applicant, he is an experienced worker and it could reasonably have been expected of him to understand the concept of cold chain and the potential effect on product quality. The employee was aware that cheese was the most stolen product and potential theft of cheese was a real concern of which the employee was aware.

- [29] The arbitrator found that a reasonable person in the employee's position would have foreseen the risk of shrinkage and would have taken the appropriate step of locking the fridge to prevent that. The employee has reasonably and objectively failed to comply with the duty of care required from a person in his position.
- [30] The arbitrator however did not view the employee's actions as being so serious as to be regarded as 'gross negligence'. This is so, the arbitrator found, because the employee was not previously disciplined for not locking the fridge door, this was a first act of this nature by the employee, the Applicant did not suffer loss of the cheese as the security prevented the completion of the theft and there was no evidence of product loss that occurred as a direct result of the fridge door not being locked. The arbitrator found the employee guilty of 'ordinary' negligence as opposed to 'gross' negligence. The employee was negligent by not locking the fridge door, but he was not 'grossly' negligent.
- [31] In respect of the second issue, the arbitrator held that the Applicant was entitled to expect a duty of care and diligent conduct from the employee and there was a real potential of financial loss if the perpetrators were able to leave the Applicant's premises with the stolen cheese. Although the employee was only found guilty of negligence, as opposed to gross negligence, this, by no means, detracted from the seriousness of negligence in the workplace in general.
- [32] The arbitrator considered the Applicant's version that the trust relationship had broken down because the employee failed to carry out an instruction to keep the fridge door closed or locked and the employee can no longer be trusted to execute instructions. He held that this evidence should be weighed against the provisions of the Applicant's disciplinary code, which provides for a sanction of a warning or final warning in respect of a first transgression of the rule to obey

an instruction. Dismissal for a first transgression of the rule against negligence was not appropriate, more so where there was no evidence that the employee would not reform if he were subjected to progressive discipline and where it was very likely that had progressive discipline been applied, the employee would have rehabilitated.

[33] The arbitrator concluded that because the employee was not dishonest but negligent, he should have been afforded the opportunity to correct his behaviour and a final written warning would have been more appropriate in the circumstances. The trust relationship had not irretrievably broken down in the absence of an opportunity for the employee to rehabilitate. The arbitrator also considered that the Applicant took further steps, subsequent to the employee's dismissal, to ensure the safety of the products in the fridge.

[34] The sanction of dismissal was found to be too harsh and the employee was re-instated retrospectively, with the payment of back pay, limited to four months' salary. This relief was granted in view of the arbitrator's finding that the employee did not approach the CCMA with 'clean hands' and that he was guilty of a serious offence.

The grounds for review

[35] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[36] In its founding and supplementary affidavits, the Applicant raised a number of complaints and grounds for review. In my view the gist of the Applicant's case is threefold. First, that the arbitrator misconceived the nature of the enquiry, second, that the arbitrator failed to apply his mind to material facts placed before him and lastly the issue of reinstatement as relief.

[37] In my view there is merit in the grounds for review.

¹ 2007 28 ILJ 2405 (CC) at para 110.

[38] The first main ground for review is that the arbitrator misconceived the nature of the enquiry when he found that the employee was guilty of 'ordinary' negligence as opposed to 'gross' negligence.

[39] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others*² the Labour Appeal Court (LAC) held that:

'It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.'

[40] In making the finding on the employee's guilt as the arbitrator did, he changed the case the employee faced at the disciplinary hearing and made findings in respect of a charge the employee was not charged with in the main or in the alternative.

[41] In *Head of the Department of Education v Mofokeng*³ the LAC provided the following exposition of the review test:

'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'. (My emphasis)

[42] This Court has to consider whether the error or irregularity had a distorting effect upon the arbitrator's conception of the enquiry, the issues to be determined and the ultimate outcome. *In casu*, the arbitrator's findings on the employee's guilt of 'ordinary' negligence as opposed to 'gross' negligence had

² (2008) 29 ILJ 964 (LAC)

³ [2015] 1 BLLR 50 (LAC), para33.

a distorting effect on the arbitrator's conception of the enquiry and the ultimate outcome.

- [43] The second main ground for review relates to the evidence that was presented and how the arbitrator dealt with the evidence placed before him. There are many instances where the arbitrator disregarded material evidence or considered irrelevant evidence and I do not intend to deal with each and every instance, as those instances are sufficient to justify the review and setting aside of the arbitration award.
- [44] To illustrate this, I will refer to one instance where the arbitrator disregarded material or considered irrelevant evidence, which had a distorting effect upon the ultimate outcome. The Applicant's case was that the employee was entrusted to secure the products and he was expected to lock the fridge to prevent theft. The employee was aware that cheese was the most stolen product and potential theft of cheese was a real concern for the Applicant's business. The arbitrator found that a reasonable person in the employee's position would have been aware of the requirement that the fridge door should be kept locked, even when working inside it, and would have taken steps to ensure that it remained locked as he should have foreseen the risk of shrinkage and taken the appropriate step of locking the fridge to prevent that. The arbitrator found the misconduct serious. These findings were reasonable and in accordance with the evidence presented.
- [45] In the same breath however, the arbitrator found that the misconduct was not particularly serious because the employee was not previously disciplined for not locking the fridge door, the Applicant did not suffer loss of the cheese and there was no evidence of product loss that occurred as a direct result of the fridge door not being locked. The arbitrator considered the fact that no loss was suffered as a determining factor. The arbitrator in finding as such, lost sight of the issue he had to determine and attached undue weight to evidence not relevant to the issue before him.
- [46] The last ground for review relates to the issue of relief and the fact that the arbitrator re-instated the employee. The Applicant's case is that if the arbitrator had assessed the facts placed before him, the only reasonable conclusion he could have come to was that a continued employment relationship is

intolerable. The arbitrator failed to properly consider whether reinstatement was an appropriate remedy, given the Applicant's evidence on the trust relationship.

[47] It is evident from the arbitrator's findings that in considering the Applicant's version that the trust relationship had broken down, he made the leap that this evidence should be weighed against the provisions of the Applicant's disciplinary code, which provides for a sanction of a warning or final warning in respect of a first transgression of the rule to obey an instruction. This finding is disconnected with the evidence, disregarded the Applicant's evidence in respect of the trust relationship and misconceived the issue to be decided.

[48] In summary: I must ascertain whether the arbitrator considered the principal issue before him, evaluated the facts presented and came to a conclusion that is reasonable. Viewed cumulatively, the arbitrator's failure to apply his mind to issues, which as demonstrated above, were material to the determination of the dispute, led him to misconceive the nature of the enquiry. It cannot therefore be said that the arbitrator's decision was one that a reasonable arbitrator could have reached on the full conspectus of all the facts before him.

[49] Based on the above, I am persuaded that this award cannot stand and should be interfered with on review.

[50] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that the employee's dismissal was fair and that his case be dismissed. Alternatively, the Applicant seeks an order remitting the matter for a hearing *de novo*. The same relief was sought in the Applicant's heads of argument. However, in Court, Mr Cokile for the Applicant, submitted that this Court should not remit the matter but substitute the award.

[51] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.

[52] *In casu*, the arbitrator failed to decide the very reason why the employee was dismissed in the first place. Instead, the arbitrator made findings on a lesser form of negligence, something the employee was never charged with and that was not the reason for his dismissal. The arbitrator failed to determine the real dispute and in those circumstances it is not appropriate to substitute the

award, but rather to remit the matter for a hearing *de novo*. I am not inclined to substitute the award where the principal issue was not properly determined. I am of the view that it would be in the interest of the parties and of justice to have the matter properly ventilated and decided *de novo* at the First Respondent.

[53] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.

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

Order

1. The arbitration award issued on 23 March 2016 under case number ECPE 4286-15 is reviewed and set aside;
2. The dispute is remitted for a hearing *de novo* before an arbitrator other than the Second Respondent;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Cokile of Siya Cokile Inc Attorneys

For the Third Respondent: Mr S Mhlahlo of FAWU