IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2039/16

In the matter between:

SATAWU obo PETRUS MPOKO AND 1 OTHER	**Applicant**
and	
NATIONAL BARGAINING COUNCIL FOR THE ROAD AND FREIGHT AND LOGISTICS INDUSTRY	**First Respondent**
COMMISSIONER N A MNISI NO	**Second Respondent**
FREIGHTMAX (PTY) LTD	**Third Respondent**

Heard: 11 July 2018

Delivered: 15 August 2019

JUDGMENT

MOSEBO, AJ

Introduction

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[1] This is an application for review brought in terms of s 145 of the Labour Relations Act[1] (the LRA). The applicants seek an order reviewing and setting aside the arbitration award issued by the second respondent (the arbitrator) on 10 August 2016 under case number GPRFBC38674.

[2] In her arbitration award, the arbitrator found that the dismissal of the individual applicants was substantively fair and that the individual applicants were not entitled to any relief. The applicants have launched the instant application for review as they are not satisfied with the conclusions reached by the arbitrator.

<u>Background Facts</u>

[3] The individual applicants, Mr Petros Mpoko (Mpoko) and Mr Samuel Maleka (Maleka) were employed by the third respondent (Freightmax) as driver and assistant driver respectively. On 19 October 2015, the individual applicants were instructed by their superiors to deliver 54 drums of oil at Arnot Power Station (Eskom) in Mpumalanga. The instruction was given by the controllers, Patrick Maswanganyi and one Gavi.

[4] After the instruction has been issued, the individual applicants were required to report themselves at the security and the driver was required to produce his driving licence and the assistant his ID and these would be recorded by the security and the driver would be issued with an invoice. The individual applicants were then required to approach the store manager with the invoice and the store manager would show them the relevant truck already loaded by a different group of employees called pickers and already checked by another set of employees called checkers. The individual applicant's responsibility was simply to verify the contents of the load by comparing same with the invoice and the security would also do the same.

[5] The individual applicants would leave the premises once they and the security had satisfied themselves that there were no discrepancies. The individual applicants testified that the procedure set out above was duly followed on 19

[1] Act 66 of 1995 as amended.

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October 2015 and that they left the premises of Freightmax with 54 drums of oil as indicated in the invoice. It is apparent from the procedure set out above that the chances of the individual applicants loading additional 5 drums of oil at Freightmax are almost close to zero.

[6] The individual applicants testified that upon their arrival at Eskom, they produced the invoice and were required to write down their personal details on the security booklet and were thereafter permitted to enter the premises. They proceeded to an area called drum-yard where they found a forklift driver by the name of Solomon Mahlangu (Mahlangu) who told them that he could not offload the drums with a forklift because they were not loaded on the pallets. As a result, the individual applicants had to offload the drums using their hands and by rolling the drums into a tail lift or skyjack.

[7] Thereafter, the individual applicants and Mahlangu counted the number of the drums that have been offloaded and they all proceeded to the store manager, Mr Lucas Chiloane (Chiloane) who confirmed with Mahlangu and them that the number of the drums written on the invoice correlated with the number of the drums offloaded at the drum-yard and this was duly confirmed by the individual applicants and Mahlangu.

[8] Chiloane signed and stamped the invoice[2] and then released the individual applicants. It is apparent from the facts set out above that Chiloane relied on the information received from the individual applicants and Mahlangu without any verification of his own.

[9] It turned out that one employee Johannes Masemola (Masemola)[3] got suspicious of the interaction between individual applicants and Mahlangu at the drum-yard as according to evidence, Mahlangu is known for his ill-behaviour. The said employee tipped off the investing officer, Mr Dick Mochitele (Mochitele) and Mochitele instructed security officer, Mr Botati

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[2] Record at p 130.

[3] Record at p53, l 10-20

Sekharume (Sekharume) to thoroughly search the applicant's truck when it returned from the drum-yard.

[10] As the individual applicants drove back to the gate, it is common cause that before exiting the gate, Sekharume pulled the truck off the road and informed the individual applicants that he had received instructions to search the truck. Sekharume was later joined by his superior, Mochitele. It is also common cause that the individual applicants were made to wait by the gate for about 50 minutes.

[11] However, there was a dispute that the arbitrator had to determine at the arbitration. This related to exactly what was found in the truck when it was searched. At the arbitration, Sekharume and Mochitele testified that they found five drums of different colours loaded in the truck. Upon enquiry, the individual applicants told them that they were going to deliver the drums to a client at Anglo Gold Limited in Evander.

[12] Sekharume and Mochitele testified that the individual applicants produced Freightmax waybill as a proof[4] to support their claim. At that time, Mpoko was on the phone with someone. Mpoko gave the phone to Mochitele and said he should speak to their controller from Freightmax. The 'controller' enquired from Mochitele as to why he was delaying these people as the client was waiting for the drums at Evander. Upon enquiry, the 'controller' was able to name all five drums according to their brands as set out in the waybill. As a result of this call, Mochitele released the truck together with its consignment and the individual applicants left Eskom premises accordingly.

[13] Despite admitting that they were delayed for about 50 minutes by the security personnel at Eskom, the individual applicants denied that the security found anything in the truck. Mochitele's version was that even after releasing the truck he still had doubts as to the authenticity of the waybill because it was handwritten while the invoice for the delivery of the initial 54 drums was

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[4] Record at p112.

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computerised. He then called Freightmax offices and spoke to the transport manager, Mr Dave Bailey (Bailey) who asked him to fax the waybill to him.

[14] Bailey informed Mochitele that the truck was supposed to leave Eskom premises empty and therefore, the individual applicants must have stolen the 5 drums from Eskom. In other words, Freightmax had no consignment scheduled to be delivered to Evander. He told Mochitele that the waybill was fraudulent but he also told him to leave the matter with him and he would conduct the investigations going forward. This information was confirmed by the controller, Mr Patrick Maswanganyi (Maswanganyi) who testified at the arbitration.

[15] It is also common cause that after the truck was released by the security personnel and after it had left Eskom's premises, it stopped at Holfontein road for about 11 minutes and 10 seconds. There is again a dispute as to exactly what happened when the truck had stopped. That also is a dispute that the arbitrator had to determine.

[16] The applicant's case at the arbitration was that Maleka had a stomach-ache and the driver stopped on the side of the road, N12, for Maleka to relieve himself while the driver remained in the vehicle and thereafter they drove off to their destination.

[17] Freightmax called Mr Tullio Alteri (Alteri) from Altech Netstar who testified that according to the GPS signal from the satellites, the vehicle stopped at the corner of Pansy and Holfontein Road and it was idling for 11 minutes and 10 seconds.[5]

[18] Freightmax also called Mr Willington Mkhize (Mkhize) who testified that as he was outside his house, at the squatter camp situated along N12 national road, on 19 October 2015, he saw a white half truck stopping there. Around 30 minutes later, a green truck arrived and two people stepped out of the green

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[5] Record p114.

truck and off loaded a green drum into the white half truck and thereafter the trucks drove away in different directions.

[19] It is also common cause that upon arrival at Freightmax, on 19 October 2015, the individual applicants were confronted by the transport manager, Bailey, about the Freightmax waybill that had been telefaxed to him by Eskom security. The individual applicants denied any knowledge of the waybill. They were instructed to furnish written statements about the events of that day and they were placed on suspension the following day.

[20] Thereafter the following charges were levelled against the individual applicants:

> "1. Gross misconduct/Gross dishonesty in that on the 19th of October 2015 you deliberately and unlawfully removed the client's products from the customer's premises, Eskom Arnot Power Station, namely, 1 x 210L Delo Gold +5W40, 1x 210L Spirax 86090, 1x 210L Omela 320 and 2 x 210L Perfecto TH246 and presented a fraudulent waybill to the customer's security personnel in an effort to mislead them to allow you to leave with the said products, and/or
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> 2. Gross misconduct in that on the 19th of October 2015 at around 17:40 whilst driving vehicle fleet 35098, registration number ND108336 which was assigned to you and under your control, you diverted from your designated route and made an unscheduled and unauthorised stop at an identified location in Holfontein Road, Welgedacht for approximately 11 minutes and 10 seconds, and act that did not only placed the company property at risk but also your life and that of your co-worker's life at risk; and/or
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> 3. Gross misconduct in that you failed to act in the best interest of the company brought the company's name into disrepute and placed the contract between the company and its client in jeopardy when you involved yourself in above stated unacceptable and elicit activities."

[21] At the end of the disciplinary hearing the individual applicants were found guilty as charged and were dismissed. They referred the dispute to the first respondent for conciliation and arbitration. The arbitration was scheduled for hearing before the arbitrator on 20 April and 27 July 2016. The arbitrator delivered her arbitration award on 10 August 2016 wherein she found that the

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dismissal of the individual applicants was substantively fair and that they were not entitled to any relief.

[22] The individual applicants are not satisfied with the outcome of the award and have launched the instant application to review and set aside the award.

Grounds for review

[23] The arbitration award is attacked on various grounds. The first ground is that the arbitrator should have found that Eskom security personnel should have called South African Police Services for the alleged theft or they should have called the relevant official, Mr Chiloane, from Eskom, who would have been able to give clarity about the alleged drums.

[24] In response, Mr Mabaso who appeared on behalf of Freightmax submitted that the individual applicants are challenging the correctness of the award as they suggest that the arbitrator should have found in a certain way, but they are not disputing the evidence that was presented before the arbitrator. I agree with this submission.

[25] In her award, the arbitrator stated that the evidence that criminal proceedings have been instituted against them remains uncontested in spite of their contention that the matter was not reported to the police.[6] This indicates that the arbitrator considered whether or not the matter was reported to the police. Further, I am of the view that this ground of review has no merit in that it is trite in our law that criminal proceedings constitute separate process from the internal disciplinary hearings.[7]

[26] In addition, this ground of review fails to take into account that Mochitele released the individual applicants after the telephone call with 'the controller' who later turned out to have been a fake. In other words, Mochitele was reasonably convinced after speaking to 'the controller' that the individual

[6] Record, p68 para 19 of the arbitration award.

[7] See: *Moshela v CCMA and Others* (2011) 32 ILJ 2692 (LC) paras 29-32:

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applicants had a legitimate reason for having the consignment and that they had to deliver same to a client in Evander in accordance with the waybill. It was only after his discussion with Bailey that Mochitele realised that he had been misled. At that time the individual applicants had already left the premises with the consignment. Therefore, this ground of review must fail.

[27] The second ground of review is that the arbitration award is contradictory in that the commissioner indicated that she had serious doubts about the respondent's case in that Mochitele's allegation that the drums had been removed from Eskom was not supported by any relevant facts as Eskom never reported any form of theft or shrinkage but at the same time the arbitrator found that there was documentary evidence supportive of Mochitele's testimony concerning the fraudulent waybill.

[28] It was further submitted that the commissioner found that the third respondent had failed to prove that the individual applicants had removed the drums from Eskom but she found their dismissal fair based on the evidence of Mkhize which was found to have discrepancies and based on the individual applicants' testimony which were found to be deceptive and unreliable.

[29] In order to address this submissions properly, it may be appropriate to refer to paragraph 18 of the award, where the arbitrator stated the following:

> "The circumstantial and documentary evidence tendered by the Respondent to substantiate its case goes no further than to establish the probability that the Applicants had been found in possession of the consignment and that they diverted from the designated route. The difficulty with Mr Mochitele's allegation that the drums had been removed from Eskom is that it was not supported by relevant facts. It remains a mystery as to where the consignment cane from or how it landed onto the Applicant's vehicle in the first place. What is also apparent from the facts is that no corrective measures were taken against Mr Mahlangu who was implicated as an accomplice in that regard, which raises some doubts as to whether the drums had indeed been unlawfully removed from the client's property. The Respondent also confirmed that the client did not report any form of theft or shrinkage of any kind. Clearly some overt explanation is required than a mere suspicion to

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> substantiate these allegations. The Respondent also led insufficient evidence to validate its claim that the waybill document had been fraudulently attained."[8]

[30] It is apparent from the preceding paragraph that the arbitrator found that there was no conclusive evidence presented at the arbitration to establish that the drums had been removed from Eskom and she concluded that it remained a mere suspicion because even Mahlangu who was implicated as an accomplice was not disciplined by Eskom and no theft or shrinkage of any kind was reported by Eskom to Freightmax. I may add that I also find it inexplicable as to why no statement was taken from Chiloane and/or why was Chiloane not called to testify in his capacity as the store manager and to shed light on this aspect. But, that is not the end of the matter.

[31] At paragraph 19 of the award, the arbitrator continued and stated that despite the missing pieces of relevant factors in the respondent's case, the events giving rise to the suspicion are demonstrative of the fact that something amiss indeed occurred on the particular day because it was common cause that the individual applicants were only authorised to deliver 54 drums at Arnot, Eskom.

[32] The arbitrator found that the fact that their vehicle was searched more than once and that they were even prohibited from leaving the client's premises negated the individual applicant's claim that nothing was found in their vehicle. She also found that the individual applicants were delayed by the security officials for an inordinate amount of time and were only released after a cell phone conversation with the mysterious controller.

[33] At paragraph 21 of the award, the arbitrator took into account the irreconcilable versions between Maleka and Mpoko wherein in his written statement[9], Maleka corroborated the respondent's version that they made a call to the controller when, on the other hand, Mpoko denied this fact. The arbitrator further found that there was documentary evidence supporting

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[8] Record at p67 para 18.

[9] Record at p118.

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Mochitele's testimony that the alleged fraudulent waybill was indeed transmitted to the respondent for verification, via fax at 15h08, at which point the individual applicants had been waiting to be released. I find no contradiction in this conclusion.

[34] At paragraph 22, the arbitrator found that although the respondent's evidence was inconclusive to prove allegations of fraud and unlawful removal of Eskom's products, they presented coherent and sufficient evidence to justify a reasonable suspicion that the individual applicants were dishonest about the actual events forming the basis of their dismissal.

[35] In other words, the fact that there is no conclusive proof to establish that the consignment was removed from Eskom premises does not excuse the individual applicants from providing an exculpatory explanation of where they got the drums and how they ended up with the 5 drums in their vehicle including a fraudulent waybill which incidentally had Maleka's signature affixed on it. The arbitrator found that the individual applicants proffered elusive, irreconcilable and contradictory versions in this regard.

[36] Mr Mabaso who appeared on behalf of Freightmax referred this Court to the decision in *Woolworths (Pty) Ltd v CCMA and Others*[10] a case where the Labour Appeal Court (LAC) held that a DVD footage presented as evidence, where the employee was seen placing some of her employer's merchandise under her breast, established a *prima facie* case of 'concealment' and, therefore, an element of dishonest intention on the part of the employee, which then shifted the evidentiary burden to her to present such evidence as would exonerate her from blame in that regard. The LAC had relied in that regard on the decision in *Federal Cold Storage Co Ltd v Angehrn C amp Piel*[11] where the court had stated the following:

> "But the burden of proving to be honest what admittedly on its face looked dishonest rested upon the respondents themselves, not upon the appellants.

[10] (2011) 32 ILJ 2455 (LAC).

[11] 1910 TS 1347.

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> Once the appellants had proved a prima facie case of misconduct on the part of the respondents in taking, in violation of their duty, a secret profit of the kind described, the dismissal stood prima facie justified, the burden of proof was shifted, and it lay upon the respondents, as it does upon all agents in a fiduciary position who deal with their principals, to prove the righteousness of the transaction. If they failed to discharge that burden satisfactorily, then the prima facie case against them must prevail and their guilt, justifying dismissal, must be taken to be established. With all respect to the learned Judges of the Supreme Court, they seem to their lordships to have failed to keep steadily before their minds this shifting of the burden of proof, and to have erred in consequence. They seem to have thought that the respondents were entitled to the benefit of any doubt, as to the convincing nature of the explanation and justification of their own action."

[37] It was submitted on behalf of Freightmax that as the individual applicants were found in possession of drums of oil that they should not have been in possession of, then, Freightmax had established a *prima facie* case of misconduct on the part of the individual applicants and therefore the evidentiary burden had shifted to them and they were therefore expected to present such evidence as would exonerate them from blame, in particular, the individual applicants were expected to provide an exculpatory explanation as to where they got the drums of oil and what ultimately happened to them. If they failed to discharge that burden satisfactorily, then the *prima facie* case against them must prevail and their guilt, justifying dismissal, must be taken to have been established.

[38] I agree with these submissions and it follows from the authorities referred to above that the conclusions reached by the arbitrator in this matter are reasonable in that she found the individual applicant's testimony to be deceptive and unreliable in particular concerning both the consignment, the mysterious controller and the fraudulent waybill. She found that they proffered elusive, irreconcilable and contradictory versions.

[39] In other words, the individual applicants have failed to discharge the evidentiary burden that has shifted to them, then, the *prima facie* case against

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them must prevail and must be taken to have been established[12]. In addition, there was no accusation made by the individual applicants that the security personnel at Eskom had a reason to falsely implicate them. In my view, the arbitrator's conclusions in this regard cannot be faulted.

[40] The other ground of review is that Mochitele gave testimony that the eye witnesses (which were not even present at the arbitration hearing and as such the evidence should have been classified as hearsay) saw Mahlangu, the forklift driver of Eskom, placing five drums in the individual applicants' truck. It was then submitted that the statement was contradictory and that the arbitrator should have disregarded that evidence as hearsay.

[41] I have perused the record and found no area where Mochitele gave the evidence that is being ascribed to him as set out in the preceding paragraph. I also perused the arbitration award and could not find an area where the arbitrator referred to this evidence that is being ascribed to Mochitele in her award. I find this ground of review to have no merit.

[42] The final ground of review is that the arbitrator failed to consider that the testimony of Mkhize may have been manufactured in that the incident occurred on 19 October 2015 and the arbitration hearing sat on 27 July 2016 approximately 9 months after the incident which is a long period for a person to produce conclusive and trustworthy evidence about one particular vehicle and incident when he resides five minutes away from a national road where thousands of vehicles pass every day and every time.

[43] I have again perused the record and I have found no area where Mkhize was cross-examined about him having manufactured his evidence nor was he cross-examined about his memory. On record,[13] the arbitrator asked Mkhize whether he still remembered the date on which he was approached by the investigators and he responded by saying that he did not remember the date very well. In my view, that was an opportune moment to cross-examine

[12] See: *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) paras 31-33

[13] Record part B at p28 ll 10-20.

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Mkhize about the issues raised in this ground of review but instead the individual applicants' representative referred Mkhize to his written statement[14] and rested his case without testing his memory.

[44] It appears that Mkhize made his statement on 08 December 2015. This was two months after the incident, not nine months referred to in this ground of review. It is apparent therefore that the individual applicants did not challenge Mkhize's evidence, at the arbitration, on the basis of the issues raised in this ground of review. In other words, the issues raised in this ground of review were not pursued by the individual applicants at the arbitration. In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*[15] the LAC stated the following:

> "…Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. . ."

[45] In my judgment, the issues that have been raised in this ground of review were not properly made available before the arbitrator at the hearing for her determination. Therefore, it is inappropriate for the individual applicants to challenge this award based on these issues that were not properly presented at the arbitration. Despite the above, in paragraph 20 of her award, the arbitrator stated the following:

> "Irrespective of the discrepancies in Mr Mkhize's testimony in terms of the details, which are immaterial in my view, all the key factors coupled with the unauthorised diversion links the applicants to the suspicious behaviour and supports the finding of misappropriation."

[46] This indicates that the arbitrator was alive to the discrepancies in Mkhize's testimony but she considered them as immaterial because there was other corroborating evidence presented by Alteri that the vehicle stopped at the

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[14] Record at p126-128

[15] (2008) 29 ILJ 964 (LAC) at para 103.

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area identified by Mkhize on the particular date and that evidence was not disputed by the individual applicants. The individual applicants actually confirmed that their vehicle stopped at the area identified by Mkhize though according their evidence, it was for Maleka to relieve himself. Mkhize was just a by-stander and had no reason to falsely implicate the individual applicants. In my view, the arbitrator's conclusions in this regard are reasonable. Therefore, this ground of review must fail as well.

[47] On the issue of costs, this Court has a discretion in terms of section 162 of the LRA, to award costs having regard to the requirements of law and fairness. I am of the view that no order as to costs should be made.

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

Order

[20] The application for review is dismissed.

[21] There is no order as to costs.

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PM Mosebo

Acting Judge of the Labour Court of South Africa

Appearances

For the applicants: Union official

For the third respondent: Mr S Mabaso of Mabaso Attorneys

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