

IN THE LABOUR COURT OF SOUTH AFRICA

Held at JOHANNESBURG

Case No: JR1353/04

In the matter between:

CHARLES SENAMA

APPLICANT

And

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

FIRST RESPONDENT

RUSSELL MOLETSANE

SECOND RESPONDENT

COCA COLA CANNERS OF

SA (PTY) LTD

THIRD RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction,

[1] This is an application to review and set aside the arbitration award issued by the second respondent (the Commissioner) under case

number GA28085-03 dated 28 April 2004. The review application was dismissed by this court with costs on the 23rd November 2007. The applicant has now requested reasons for the order. The reasons are set out hereunder.

The ground

[2] The applicant, the former employee of the respondent was charged and found guilty in that during December 2002, he unlawfully entered the premises of the respondent with his blue Isuzu van registration number JHF 848 GP and removed the stock belonging to the applicant without authority. He was found not guilty of the second charge of damaging the company property with “*intent to commit an act of theft*”.

[3] The case of the third respondent during the arbitration hearing was that it lost about R4238.00 of stock during the month of December 2002. As a result of this loss the respondent conducted an investigation which pointed out that on 25th December 2002, a blue Isuzu van registration number JHF 848 GP entered the warehouse of the respondent and collected stock. The investigation further revealed that the vehicle in question was registered in the applicant’s name.

[4] The case of the applicant is that during the dates when it is alleged that the stock was removed from the warehouse he was on leave which commence from 20 December 2002 to the 13 January 2003.

[5] In relation to the ownership of the Isuzu van in question the applicant

testified that he purchased the van on behalf of Mr Mogofe (Magofe). However during cross examination he testified that the first time he heard that the van was registered in his name was at the disciplinary hearing. The explanation he gave for not putting the record straight as far as the ownership of the car was concerned at the disciplinary hearing was that he was confused. He further conceded that for Mogofe to transfer the vehicle registered in name he would have been required to produce his identity document. Later on and during the cross examination he testified that Magofe went to his home and obtained his identity document from his wife to register the car in his name.

[6] Mogofe testified that he had been the owner of the van since August 2001 and he never or at any stage gave the van to the applicant. He further testified that on the 24 and 25 December 2002, the day on which the respondent alleges that the van was seen at the scene of the theft he was in Zuurbekom in Gauteng. He claims to have left Zuurbekom on the 26 December at 14h00 at night for Durban. He also testified that when he got the car he found that it was already registered in the applicant's name.

[7] During cross examination Mogofe disputed the allegation of the applicant that he took his identity document from his wife and then registered the van in his name. According to Magofe he took the identity document for the purposes of paying for the licence of the

vehicle. He further testified that during July 2003 the ownership of the van was transferred to a certain Andries Thobejane and when asked why it was not registered in his name he indicated it was due to domestic problems.

Ground for Review and the Award

[8] The grounds for review are set out at the end of the founding affidavit of the applicant as follows:

“The commissioner failed to apply his mind to the relevant evidence. Considered evidence not placed before him and failed to attach sufficient weight to certain evidence.

“The commissioner committed misconduct in relation to his duties as a commissioner and further more exceeded his powers in making findings that were not justifiable on the material before him. The commissioner erred in law in failing to apply the civil burden of proof in determining the fairness of the dismissal of the applicant”.

[9] During argument the representative of the applicant argued that the commissioner misdirected himself in placing too much emphasis on the evidence of the disciplinary hearing but placed no weight on the evidence presented during the appeal hearing. It was further argued

that the commissioner placed undue emphasis and weight on the fact that the applicant was at the time of the commission of the offence the registered owner of the car. It was argued in this regard that this evidence was inadequate to prove on the balance of probability that the applicant was guilty of theft. To this extent reliance was placed on the case of **Prins v CCMA & Others (2005) 2 BLLR 159 (LC)** where it was held that a commissioner misconducted himself or herself as an arbitrator in basing a conclusion that an employee was guilty of theft on inadequate and contradictory evidence.

[10] Further reliance was placed in the case of **National Union of Security Officers and Guards & Another v Minister of Health and Social Welfare Services, Western Cape & Others 205 5 BLLR 373 (LC)** where it was held that where a commissioner rejects an employees evidence on the basis of an adverse credibility finding and ignoring material facts before him, that will constitute misconduct on the part of the commissioner.

[11] I invited the applicant representative, during argument, to address me on the finding of the commissioner relating to the failure by the applicant to disclose the ownership of the car during the disciplinary hearing. The applicant's representative gave two reasons for failure to disclose the ownership of the van. The first reason is that which the applicant gave during the arbitration hearing that he was confused because the charge did not stipulate which car had entered the

premises of the applicant, and the second that he was advised by his union not to discuss the issue of the ownership of the van. Nothing in the record reveals why the union had advised him not to disclose the ownership of the van.

[12] Turning to the arbitration award, the commissioner firstly found that the dismissal was procedurally unfair because the respondent failed to follow its own disciplinary procedures and in this regard ordered payment to the applicant in the amount of R9321.00 which is equal to one month compensation.

[13] In as far as substantive fairness is concerned the commissioner rejected the version of the applicant and found that he had failed to provide a plausible reason as to why he only disclosed the issue of the ownership of the van at the arbitration hearing. The commissioner reasoned that the reason why the applicant did not disclose the true ownership of the van is that he was an accessory to the theft. In finding against the applicant the commissioner relied on the evidence of Nkabinde, the security officer who testified that he had seen the van in question collecting stock and leaving the premises. The commissioner found him to be a reliable witness.

[14] The commissioner further found that the case of the applicant was weakened by his own witness, Mogofe who testified that the applicant got married on the 27 December 2002 in Zuurbekom Gauteng

whereas the applicant testified that he was in Limpopo during that period. The commissioner also found that there was collusion between Magofe and the applicant.

Evaluation

- [15] It is apparent from the reading of the award that in finding the dismissal to be substantively fair, the commissioner drew an adverse inference against the applicant. In other words the commissioner was satisfied that the third respondent had discharged its burden of showing that dismissal was fair.
- [16] It is an established principle of our law that the court of review should be reluctant to interfere with the credibility findings made by the commissioners, as tiers of facts. **See Cose v CCMA & Others (2001) 21 ILJ 137 (LC) and City Lodge Holds Ltd v Geldenhuys N.O & Others (1999) 20 ILJ 2332 (LC).**
- [17] The test for determining whether or not to interfere with the award of a commissioner has been set out in **Sidumo & Others v Rustenburg Platinum Mines (2007) 12 BLLR 2405** as being that of a “reasonable decision maker.” In terms of this test this court is entitled to interfere with an arbitration award only if the commissioner makes a decision that a reasonable decision maker could not reach.
- [18] A reasonable decision is reached when a commissioner in performing

his/her functions as an arbitrator applies the correct rules of evidence, and if there is to be deviate it is not of such a nature that it materially denies any party a fair hearing.

- [19] It is also required of the commissioner to weigh all the relevant factors and circumstances of the case before him or her to ensure that his decision is reasonable. In this regard the Labour Appeal Court in **Edcon Limited v Pillemar N.O. & Others (unreported DA4/06)** the court held:

“The court’s function primarily is to ensure that decision made by arbitrators exercising their functions under the Labour Relations Act fall within the bounds of reasonableness”

See also Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490.

- [20] In the present case, the commissioner’s finding that the dismissal of the applicant was substantively fair, is based on the proper evaluation of the circumstances and the evidence that was led during the arbitration hearing. The commissioner has given the reason why he accepted the version of the respondent and rejected that of the applicant.

- [21] It is therefore, my view that the applicant has failed to show the basis upon which this court should interfere with the decision of the commissioner.

[22] For the above reasons the application stands to be dismissed. In my view the dictates of law and fairness do not require that costs should follow the results.

[23] I accordingly, make the following order:

1. The application to review and set aside the award dated 28 April 2004 and issued under case number GA28085-03, is dismissed.
2. There is no order as to costs.

Molahlehi J

Date of Hearing: 18 September 2007

Date of Judgement: 12 May 2008

APPEARANCES

For the Applicant: Mr. Piet Mothapo instructed by FOOD ALLIED WORKERS UNION

For the Respondent: Mrs. K. Ainslie instructed by DENEYS REITZ