Not reportable

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 740/14

In the matter between:

AIR CHEFS (PTY) LTD	**First Applicant**
and	
BARGAINING COUNCIL FOR THE RESTAURANT, CATERING AND ALLIED TRADES	**First Respondent**
NHLAKANIPHO MPANZA *N.O.*	**Second Respondent**
MARIA MABOKELA	**Third Respondent**

Heard: 12 May 2016

Delivered: 17 May 2016

Summary: (Rule 11- dismissal of review application. Review – dismissal – unauthorised possession – award unreasonable)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant has applied to review and set aside the award of the second respondent ('the arbitrator') in which she found that the third respondent ('the employee') was not guilty of being in unauthorised possession of approximately 42 items belonging to the applicant, nor was she guilty of failing to report the existence of the property at her house, if she was not responsible for it being there. Her daughter, who could also have been responsible for the items being found in the employee's house, as she was also employed by the applicant lived with her mother, had been charged with the same misconduct but was acquitted in a separate inquiry under a different chairperson.

[2] The application for review was filed on 14 April 2014. On 22 February 2015, the employee applied to dismiss the review application on the basis that the applicant had not yet filed the record of the proceedings. The applicant claims that it only became aware that the bargaining Council had not filed the record in October 2014 and it began to track down the record from the date. At the end of October, the bargaining Council sent a letter claiming that the record had been lodged with the registrar in June that year, but the applicant could not obtain any confirmation of this from the labour court, nor did the bargaining Council provide a copy of the notice it should have issued at the time of lodging the record in terms of rule 7A(3). It seems somewhat doubtful that the record had in fact been lodged with the registrar in June. On 10 November 2014 the applicants instructed transcribers to transcribe the record it had received from the bargaining Council on 30 October 2014 on an expedited basis. The record and the applicant's notice under Rule 7A(8) was filed on 6 February 2015.

Dismissal application

[3] I agree with the employee that the applicant was slow to take steps to ensure that the record was transcribed. On the other hand, it appears that the Council had failed

to lodge the record and it was not a case where the applicant was aware the record had been lodged with the registrar and had done nothing to uplift it and have it transcribed. Once the applicant was aware of the fact that the record had not been lodged it acted with reasonable speed to obtain a copy and to have it transcribed. There is no evidence that the employee had taken any steps prior to launching her application to dismiss the matter to put the applicant on terms to file the record. When she did launch the dismissal application, the review was in fact virtually ripe for hearing by that stage.

[4] In ***Nedcor Bank Ltd v Harris and Others*** **(JR927/01) [2009] ZALC 123 (14 December 2009)** Molahlehi J, summarised the principles applicable in considering such applications:

> "[17] It is trite that the Court has the power to grant an indulgence for the defaulting party once good cause is shown for the unreasonable delay. The authorities indicate that in assessing whether to grant the indulgence the Court will take into account the prejudice that the other party may have suffered as a result of the delay in the prosecution of the claim."

He further noted with approval the following statement by Van Niekerk J:

> "It seems to me that the approach adopted both in the Bezuidenhout and Sishuba cases requires that a respondent party confronted by an unreasonable delay on the part of an applicant ought at least to place the offending party on terms, or to seek the intervention of the Registrar or file an application to compel (when these steps are appropriate), prior to filing an application to dismiss."

Lastly, Molahlehi J considered the merits of the review application before him.

[5] Applying those principles to the employee's rule 11 application in this case I am satisfied that:

5.1 The applicant was dilatory in not making enquiries about the lodging of the record but the bargaining Council also did not comply with its obligations in that regard.

5.2 As soon as the applicant was aware that the record had not been lodged it took steps to rectify the situation.

5.3 The employee, for her part, never appears to have put the applicant on terms prior to filing the dismissal application and, if the applicant had been dragging its heels somewhat, her application had the desired effect because the record in rule 7A(8) notice was filed a few days afterwards. As things stood, the matter was ripe for hearing within a week of the applicant launching her dismissal application, except for the filing of answering and replying affidavits.

5.4 Obviously the employee was prejudiced by the delay, but on the other hand did nothing to speed up the process herself during 2014.

5.5 On the question of the merits of the review application, I am persuaded that they are good for the reasons set out in the analysis below.

[6] Accordingly, considering all the factors above I believe this is a case where the delay in filing the record ought to be condoned and the review application should be heard.

The review application

The Award

[7] The arbitrator considered the following factors material in arriving at the finding that the employee was not guilty:

7.1 Although two witnesses, including a policeman, conducted the search of the house and prepared a detailed list of the items found, which they said were in plain view and not concealed, the arbitrator felt that in the absence of one of the residents of the house confirming what was found, the presence of the articles in the employee's house was not corroborated.

7.1 The employee's daughter could equally well have been responsible for the items belonging to the applicant being in the applicant's house, which was why she had been charged with the same conduct and yet she had been acquitted.

Grounds of review

[8] The main grounds of review raised by the applicant were that:

8.1 The arbitrator misconstrued the evaluation of the evidence by concluding that because no resident in the house confirmed the points found during the search, the arbitrator could disregard the evidence of the two witnesses who conducted the search.

8.2 Moreover the arbitrator disregarded their evidence which corroborated each other's, without making any adverse credibility finding.

8.3 The arbitrator failed to even consider the second charge to the effect that, even if the employee was not personally responsible for the goods being in her house, she never reported them in circumstances where she could hardly have been unaware of their presence.

8.4 The arbitrator failed to appreciate that the fact that the daughter was acquitted by another chairperson, apparently on the basis that it was very difficult to steal items from the airport premises where the applicants worked, did not mean that the applicant was being inconsistent in dismissing the employee, but merely that this was a consequence of different chairperson's hearing each case.

8.5 To the extent that the arbitrator seemed to believe it was necessary to prove that the employee had actually removed the items, because the arbitrator appeared to accept that it would have been very difficult to do so, the arbitrator failed to appreciate that the offence the employee was charged with was not theft, as such.

[9] In evaluating the grounds of review, a couple of observations about the evidence are pertinent. Firstly, there was simply no evidence to rebut the evidence of the witnesses who conducted the search of the employee's house as to what they found and where they found it. The employee's response was simply a bald denial that she had ever seen such items at her house. Interestingly, her initial response was to emphasise the fact that she could never have taken the goods because of the strict security measures at the premises where they worked, rather than focusing on the discovery of the items at her house. No credible evidence was advanced why the witnesses who went to search her house after receiving a tipoff would have tried

to falsely implicate her. When she did suggest this under cross-examination, she quickly withdrew the claim when challenged. The evidence of the discovery of a relatively large quantity of airline catering and cabin items at her house, and given also the nature of her job which gave her access to such items, called for more than a bald denial from her to rebut the strong *prima facie* evidence that she was in possession of such items without an innocent explanation or, was at the very least aware that such items were being kept at her house and did not report the presence thereof, despite not having any legitimate reason for believing that everything was above board.

[10] I am satisfied that the arbitrator sought to avoid the obvious inference of the evidence of the employer's witnesses who searched the applicant's house and the absence of any plausible motive why they would falsely have implicated her as well as the absence of any plausible explanation offered by her for the presence of the goods. The evidence of the employer heavily implicated the employee and cried out for an explanation from her.

[11] In my view, this was a clear case where, on the evidence the arbitrator ought to have concluded at the very least the employee was aware that cabin and catering items from airlines were being kept at her house and she ought to have reported that if she was not responsible for the items being there. As such, the arbitrator's finding that the applicant was not guilty on both charges was one that no reasonable arbitrator could have come to on the evidence.

[12] At the hearing of this matter, the employee's representative, *Mr Luthuli*, argued *inter alia* that in the absence of the 42 items found and removed from the applicant's house being presented in evidence at the arbitration there was insufficient basis for the arbitrator to conclude that the search had indeed resulted in the confiscation of the items mentioned. The witnesses who conducted the search gave detailed evidence of what they found and where they found items at the applicant's house. A very detailed list of the items was also provided. In the circumstances, in the absence of a good reason to believe that their evidence was concocted and in the absence of evidence being led disputing that the items were recovered in the search,

I believe that was more than sufficient to establish the presence of the items at the premises.

[13] In the circumstances, I am also satisfied that given that the employee occupied a supervisory position, it is difficult to understand how the employer could reasonably be expected to trust her in future. Accordingly, even if she was only guilty of the second charge, dismissal was not an inappropriate sanction.

Order

[14] In light of the above:

14.1 The rule 11 application is dismissed.

14.2 The arbitration award issued under case number DSP 10/02/13 by the second respondent is reviewed and set aside.

14.3 The second respondent's findings are substituted with a finding that the third respondent was guilty of gross dishonesty for failing to report to the company that there was property of the applicant's clients at the house she lived in and that her dismissal was substantively fair.

14.4 No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Mr Steenkamp instructed by Jacobs Gonyara Inc

THIRD RESPONDENT: Mr Luthuli of Inqubelapambili Trade Union