



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case Number: JR 11/2015

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION

First Respondent

N.C. HLABA N.O.

Second Respondent

GERMAN INNOCENT SHIBIRI

Third Respondent

Heard: 7 July 2016

Delivered: 20 July 2016

Summary:

JUDGMENT

MYHILL AJ

Introduction

[1] This is an application, *inter alia*, to review and set aside the arbitration award issued by the Second Respondent, dated 27 October 2014, under case number GAJB 17729-14. The application is brought in terms of sections 145 and 158 of the Labour Relations Act 66 of 1995 ("the Act").

[2] The application is not opposed.

Condonation

[3] The Applicant has applied for condonation for filing this application 37 days late. It is not opposed. Having considered the submissions made by the Applicant in this regard, I am satisfied that it did not wilfully fail to comply with the time period required and that it is in the interests of justice to condone the late filing.

Background

[4] The Applicant was employed by the Third Respondent as a security guard from 19 July 2006 to 24 July 2014. He was charged with:

4.1 Fraud in that [he] falsified an OB to launch a pay query;

4.2 Alterations of an OB or removal from the site without permission;

4.3 Breach of trust in that [he] phoned the CEO in regards to false

information about a pay query.

- [5] After a disciplinary hearing, he was dismissed on 24 July 2014. From the evidence led at the arbitration on 15 October 2014, it appears that he was dismissed for fraud in that it was found that he had falsified an OB to launch a pay query.
- [6] The Second Respondent found that the dismissal was substantively unfair and ordered the Applicant to pay the Third Respondent compensation.

Grounds of Review

- [7] These are set out in the founding affidavit of Johan Pansegrouw as well as his supplementary affidavit submitted after he had considered the transcript of the arbitration proceedings.
- [8] He submitted that the Second Respondent failed to properly apply her mind and her actions constituted serious unreasonableness and/or gross irregularities.
- [9] He stated that the Second Respondent incorrectly interpreted the charges for which the Third respondent was dismissed in that she incorrectly stated that the Third respondent was dismissed for breach of trust as a result of making contact with the CEO. He stated that the breach of trust was caused by the Third Respondent conveying false information to the CEO during his communication with CEO.
- [10] The Second Respondent did not find that the Third Respondent was dismissed for breach of trust in this regard. She stated that he was charged with breach of trust for phoning the CEO in regards to false information about the pay query. She stated, in her award, that the dismissal letter only stated that the Third Respondent was dismissed for fraud in that he falsified the OB to launch a pay query. This has not been challenged in this review and it is consistent with the evidence of both Schlebusch (Respondent's witness) and the Third

Respondent at the arbitration. This charge is also vague in that it does not identify what the “false information” was or how it was false. It was not proved at the arbitration that he conveyed false information to the CEO. The Third Respondent just testified that after his query about his pay had not been dealt with, he sent an sms to the CEO in this regard.

- [11] Pansegrouw submitted that the Second Respondent erred in simply dismissing the Third Respondent’s failure to lead evidence and witnesses as simply being unnecessary. He does not specify what he is referring to. In her award, she stated that it was not necessary for the Applicant to call Mr Tiya to the arbitration because the onus was on the Respondent to prove that the dismissal was fair. In paragraph 19 of the supplementary affidavit, it was submitted that the Third Respondent should have called Mr Tiya because he alleged that Mr Tiya wrote on the OB and that a negative inference should have been drawn. At page 12 of the transcribed record (p.13 of Bundle 1), it was Schlebusch who claimed that Mr Tiya was writing on page 12 (p.113 of Bundle 2). There was thus no need for the Third Respondent to call Mr Tiya as a witness.
- [12] When it was put to Schlebusch that there was no falsifying of the OB copies, he said that there were differences in the handwriting on pages 9 and 10 of the OB but he then said he was not an expert in handwriting (p.27 of Bundle 1) so his observations in this regard have no cogent value.
- [13] Pansegrouw submitted that the Third Respondent never called Schlebusch to confirm that he was the last person handling the OB book and made copies or Brenda who had purportedly received the copies. He criticised the Second Respondent for finding that Schlebusch was the last person to handle the OB when it was the Third Respondent who was the last person to handle the OB book; that the Third Respondent bore the onus to prove that he took the OB book back to the guardroom; and that he failed to discharge this onus.
- [14] There was no need for the Third Respondent to call Schlebusch as a witness because his representative put his version to him that he (Schlebusch) was the

last person that he saw in possession of the OB book after he had made copies of the pages he required. It is nonsense to say that the Third Respondent bore the onus to prove that he took the OB book back to the Guardroom. It is trite that the onus was on the Applicant to prove its case.

- [15] Pansegrouw criticised the Second Respondent for finding that there was no probable evidence that the Third Respondent took the OB and stated that the Third Respondent conceded to taking it and had testified that he returned it. This is not what the Third Respondent testified. He testified in his evidence-in-chief that Schlebusch made copies of the pages that he required from the OB; gave these to him and remained with the original OB.
- [16] I agree with the Second Respondent that there was no probable evidence that the Third Respondent took the OB book. He asked Schlebusch for copies of the pages he had marked so that he could follow up on his pay query. These were supplied to him by Schlebusch and the Applicant gave them to Brenda. There was no probable need for the Third Respondent to take the OB book.
- [17] In any event, the Third Respondent was not dismissed for removing the OB without permission but for fraud in that it was alleged that he falsified the OB to launch a pay query.
- [18] He further criticised the Second Respondent for speculating that there may have been a genuine mistake made by Mr Tiya who then should have been called as a witness to explain. The Second Respondent was referring to the alterations made to page 10 of the OB (p.149 of Bundle 2). The representative of the Third Respondent had put to Schlebusch during cross-examination that normally in January people make mistakes by still thinking that they are in the year before e.g. In January 2014, they still write 2013. The comment of Schlebusch was meaningless because he said: '... yes, it can be possible or, yes, it cannot be possible'. The representative was referring to the alteration on page 12 of the OB (page 113 of Bundle 2) in which it seems that someone changed 2013 to 2014. When one considers that the dates filled in on the OB are all in January 2014, it is probable that the date at the top of the page was

corrected by Mr Tiya because he wrote the first entry “Duty On” and it is consistent with the evidence-in-chief of Schlebusch (page 13 of Bundle 1) and confirmed by the Third Respondent. The criticism of the Second Respondent in paragraph 14.7 of the founding affidavit is baseless.

- [19] The Applicant’s case is that the Third Respondent fraudulently altered the OB but its own witness, Schlebusch, gave inconsistent evidence in this regard. During cross-examination, he initially agreed that the Third Respondent was dismissed because he fraudulently altered or falsified the OB Book (page 15 of Bundle 1). Later, however, he denied that the alterations were made by the Third Respondent (page 25 of Bundle 1). He said that his evidence was that it was the Third Respondent who handed the copies in to Payroll. The latter is common cause. When it was later put to Schlebusch that, if the OB was falsified, he did not know who falsified it he said:

‘Madam my comment on that is that he is the one who handed it in so he was the one who committed it.’

- [20] In the context, by saying ‘he was the one who committed it’, he probably meant that the Applicant falsified the OB. This is inconsistent with his evidence on p.25 of Bundle 1.
- [21] The case of the Applicant is that, owing to the Third Respondent handing in copies of the OB that he altered to make a pay query, he committed fraud.
- [22] Having carefully considered the evidence, however, I am not persuaded that the Applicant proved, on a balance of probabilities, that the Third Respondent either altered the copies of the pages of the OB that he submitted or that he was guilty of fraud.
- [23] It is common cause that the Third Respondent made marks on the relevant pages of the OB to indicate when he had worked so that it could be checked whether he had been paid on these days. He did this on the original pages of the OB and these are not the “alterations” that the Applicant was concerned

about.

- [24] The definition of fraud in Hunt South African Criminal Law and Procedure (vol.2) at 714 is:

‘Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.’

- [25] Even if it had been proved (which was not the case) that the Third Respondent made the alterations referred to e.g. changing 2013 to 2014 and crossing out “Saturday” and writing “January” above it, there is no evidence that these were misrepresentations or that they caused actual prejudice or which were potentially prejudicial to the Applicant. The altered date of “12 January 2014” on page 9 of the OB (page 110 of Bundle 2) is consistent with the dates of the entries that follow on that page; the corrected date of 11 January 2014 on page 10 of the OB (p.111 of Bundle 2) is consistent with the entries that follow on that page; and the altered date of 5 January 2014 on p.12 of the OB (page 113 of Bundle 2) is consistent with the entries that follow on that page.
- [26] I thus agree with the finding of the Third Respondent that the Applicant failed to prove, on a balance of probabilities, that the Third Respondent fraudulently altered the copies of the OB that he handed in to Payroll in the course of following up on a pay query.
- [27] A further criticism in the supplementary affidavit is that the Third Respondent testified that Mr Mpisani wrote on page 10 of the Bundle (page 111 of Bundle 2) and that he failed to call him as a witness. However, when the Third Respondent’s representative asked Schlebusch what his comment on this was, he said he could not comment. He thus did not dispute the Third Respondent’s evidence in this regard so there was no need to call Mr Mpisani.
- [28] In paragraph 14 of the supplementary affidavit, it is alleged that the Applicant led evidence that the only reason why the OB was taken was to make copies illegally and not to return it, if the OB was taken legally then its whereabouts

would be known to the Applicant but that is not the case. It was contended that as the Third Respondent was the only employee with a pay query at that time, no other employees would have had an interest in the OB. It was also contended that it is common cause that the Third Respondent had possession of the OB last. This is not common cause. During cross-examination, it was put to Schlebusch that after and he had not attended to his original query, the Third Respondent came to his office and asked him to make copies of the said pages so that he could submit them himself and he made copies for him and he (Applicant) submitted them to Payroll. This was denied by Schlebusch. The Applicant's representative at the arbitration was incorrect when he put to the Third Respondent, when he cross-examined him, that he had not put this version to Schlebusch (page 61 of Bundle 1).

- [29] There is no cogent evidence that the Third Respondent removed the OB – it was mere speculation of the part of Schlebusch. During his evidence-in-chief, the Third Respondent confirmed this version (page 54 of Bundle 1). During cross-examination, it was also never put to the Third Respondent that he was the only employee with a pay query at that time. He thus did not have the opportunity to dispute it so the Applicant cannot use that as part of its argument.
- [30] In paragraph 15 of the supplementary affidavit, it is submitted that a large part of the Third Respondent's evidence-in-chief was not put to the Applicant's witness so his evidence should have been disregarded by Second Respondent yet she still took it into account.
- [31] Firstly, in fact, the Applicant's representative put it to the Third Respondent that his entire version in chief was not put to Schlebusch. The Third Respondent correctly objected because that is not true. There were some details added when the Third Respondent gave his evidence-in-chief but the substance of his version was put to Schlebusch. The Third Respondent did not say in his evidence-in-chief that Schlebusch "took the OB and didn't return it". He said that Schlebusch made copies of the OB book; gave him copies; and remained with the OB. This accords substantially with the version that was put to

Schlebusch.

- [32] In paragraph 17 of the supplementary affidavit, the Applicant claims that the pay query arose in January 2014 yet he only raised this with the Applicant during May/June 2014. The Third Respondent, however, testified that he did bring this issue to the attention of Schlebusch during January 2014 and was waiting for feedback. He said that when this did not happen he followed up during May/June 2014. I find that to be a plausible explanation for the delay.
- [33] It is contended in paragraph 18 of the supplementary affidavit that the Second Respondent was illogical in inferring from the fact that he was removed from site after he sent the CEO an sms that there was no probable evidence that was led to suggest that the Third Respondent took the OB. The use of “therefore” does seem to suggest that the Second Respondent reached this conclusion from the fact that Third Respondent was removed from the site. I agree that this does not necessarily follow – it is not inconceivable that he could have taken it before he was removed. I do, however, agree with the Second Respondent that no probable evidence was led to suggest that he did take the OB. This error in logic falls far short of persuading me that the decision that she made was one that no reasonable decision-maker could reach.
- [34] I have already dealt with the objections expressed in paragraph 19 of the supplementary affidavit.
- [35] I have already dealt with the issue of breach of trust raised in paragraph 20 of the supplementary affidavit. The Applicant did not prove, on a balance of probabilities, that the Third Respondent provided false information to the CEO. The Second Respondent suggested that the Third Respondent may have been guilty of failing to follow protocol by phoning the CEO when his pay query was not dealt with but that was not part of the charges against him. I do not find this to be illogical.
- [36] I have already dealt with the alleged failure to call Mr Tiya as raised in paragraph 21 of the supplementary affidavit.

Evaluation

[37] Having considered the record of the arbitration and the award of the Second Respondent and the submissions of the Applicant, I disagree with the Applicant's contentions that the Second Respondent erred in coming to the conclusion that she did; that she did not consider all the evidence of the Applicant; that she misunderstood and/or failed to apply her mind to the evidence before her; that she incorrectly analysed the facts; and that her award is one that a reasonable commissioner could not have come to under the circumstances.

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

38.1 The application is dismissed.

38.2 There is no order as to costs.

Myhill, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Instructed by:

For the Respondent: Not opposed

LABOUR COURT