



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2173/13

In the matter between:

SOUTH AFRICAN POST OFFICE (SOC) LIMITED

Applicant

and

AZWINDINI JAMES MPFUMBA

First Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

SILAS RAMUSHOWANA N.O

Third Respondent

Heard: 14 March 2017

Delivered: 17 November 2017

Summary: When the arbitration award of a commissioner of the CCMA is not connected to the evidence tendered at arbitration, the award is rendered unreasonable and therefore reviewable.

JUDGMENT

LALLIE, J:

Introduction

- [1] The applicant seeks an order reviewing, setting aside and substituting the arbitration award of the third respondent who will be referred to as the commissioner in this judgment. The application is opposed by the first respondent. Subsequent to his dismissal for misconduct, the first respondent referred an unfair dismissal dispute to the second respondent which will be referred to as the Commission for Conciliation, Mediation and Arbitration (CCMA) in this judgment. The first respondent's dispute was arbitrated by the commissioner who issued an award in which he found his dismissal substantively unfair and ordered the applicant to reinstate him. It is that award which the applicant seeks this Court to review and set aside. The applicant filed this review application late and applied for condonation. In the answering affidavit, the first respondent opposed the condonation application. I have considered it and noted that the extent of the delay is not excessive and the applicant proffered reasonable explanation for it. It showed prospects of success in the review application and I am, for those reasons, satisfied that the applicant has shown good cause. Condonation should therefore be granted.

Factual background

- [2] The first respondent was employed by the applicant in 1982 as a teller until he was dismissed for fraud on 8 March 2013 while posted at the Sibasa Post Office which will be referred to as the post office in this judgment. The facts of this matter are that at about 10h00 on 9 February 2012, while the first respondent was performing his duties, he served a customer who had visited the post office to claim his lottery prize money in the amount of R8 340.00. The customer gave the first respondent the winning ticket and the first respondent deposited, at the customer's request, the amount of R8 340.00 into the customer's Mzansi account. The same amount was paid out for the second time on the same day. The applicant's version was that after paying the customer, the first respondent made a payment of the same amount

without supporting documents. He subsequently signed an acknowledgement of debt. The first respondent's version was that he paid the R8 340.00 into the customer's Mzansi account. Just before taking his lunch break and handing over to his colleague who was relieving him, he cleared the amount and made a payment at the Post link without supporting documents.

The award

- [3] Giving reasons for his decision, the commissioner recorded the definition of fraud provided in the applicant's disciplinary code. It is "any wilful and unlawful misrepresentation by any employee in whatever form that will have the effect of damaging/harming or potentially damaging/harming the company". He noted that in principle, both parties were in agreement that there was a second transaction that the first respondent performed. The applicant referred to the transaction as fraud but the first respondent saw it as clearing the system. The commissioner noted the applicant's evidence that the first respondent pleaded guilty by signing an acknowledgement of debt. He however found no evidence proving that the first respondent gained any money from the transaction. He made a finding that the respondent led no evidence proving that it suffered loss as a result of the first respondent's actions. A further finding was that the first respondent did not dispute making the second transaction he performed with the ticket which was claimed earlier but claimed that he did not intend committing fraud. He denied that the acknowledgement of debt was tantamount to a plea of guilty. The commissioner took into account the first respondent's long service and his clean disciplinary record. He noted that fraud is a very serious offence which cannot be tolerated in the workplace and in the country. He accepted that the first respondent was wrong in making the payment but found that there was no intention on his part. He found that the gravity of the misconduct did not justify dismissal and concluded that the dismissal was substantively unfair but procedurally fair. He ordered the applicant to reinstate the first respondent.

Grounds for review

- [4] The applicant submitted that the commissioner committed misconduct in relation to his duties as an arbitrator. His decision is not rationally connected to the evidence tendered at the arbitration and he failed to apply his mind to the evidence before him. His decision was grossly irregular. He misconstrued the evidence before him and reached an unreasonable decision. He erred in downplaying the gravity of fraud and finding the sanction of dismissal harsh. He further erred in concluding that the applicant did not suffer financial loss in the face of evidence that the applicant suffered loss in the amount of R8 340.00 and an acknowledgement of debt by the first respondent. The applicant also submitted that the commissioner further erred in attaching a lot of weight to the first respondent's length of service and clean disciplinary record. The first respondent opposed the application mainly on the grounds that the award constitutes a decision that a reasonable decision-maker could arrive at on the evidentiary material before the commissioner. He submitted that the grounds the applicant sought to rely on are not supported by the record. The commissioner so went the averment, correctly concluded that no evidence was placed before him to prove that the first respondent committed fraud. The applicant failed to discharge the onus of proving the substantive fairness of the first respondent's dismissal and the appropriateness of the sanction of dismissal. He expressed the view that the applicant disclosed no grounds for this Court to interfere with the commissioner's decision.

Test for review

- [5] The applicant's case is that the award is defective as envisaged in section 145 (2) of the LRA. The test for review is expressed in the following words in *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*¹

"That test involves the reviewing court examining the merits of the case "in the round" by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator".

¹ [2013] 11 BLLR1074 (SCA) at para 12:

It is further elucidated as follows in *Head of the Department of Education v Mofokeng and others*²

"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 to enquiry. 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 enquiry, the delimitation of the issues to be determined and the ultimate outcome."

- [6] The applicant submitted that the commissioner misconceived the dispute before him. A commissioner misconceives a dispute if in determining the fairness of the dismissal of an employee, the commissioner conducts the wrong enquiry, alternatively, the commissioner conducts the correct enquiry in the wrong manner. The commissioner had to determine whether the applicant's conduct of dismissing the first respondent for the reason he was dismissed for, was fair. When the evidence tendered at arbitration is considered in its totality it reflects that the commissioner accepted that the first respondent paid out the amount of R8 340.00 for the same lottery ticket twice. Firstly, in the presence of the customer and also a few hours later after the customer had left the post office. It is also common cause that the first respondent made the second payment without supporting documents. He later signed an acknowledgement of debt and made an undertaking to repay the second payment. In conducting the enquiry to determine whether the first respondent made himself guilty of fraud, the commissioner considered whether the applicant suffered any loss and whether the first respondent gained from the transaction.
- [7] The commissioner found that no evidence was tendered to prove that the applicant suffered financial loss and that the first respondent gained money as a result of the first respondent's conduct. This finding is factually incorrect because evidence was led on behalf of the applicant to the effect that it

² [2015] 1 BLLR 50 (LAC) at para 33:

suffered financial loss in the amount of R8 340.00 because the post office paid twice for the same lottery ticket. The second payment was effected without supporting documents and was unjustified. The commissioner conducted the enquiry in the wrong manner. Firstly, by determining whether there was any financial loss or gain. The definition of fraud he relied on did not require the applicant's conduct to result in actual loss and actual benefit. It refers to damage, harm and potential damage or potential harm. Secondly, he concluded that the applicant failed to prove that it suffered financial loss as a result of the first respondent's conduct when such evidence was led. The applicant was harmed by the first respondent's conduct. The commissioner failed to state expressly whether he found that the first respondent had made himself guilty of the act of misconduct which led to his dismissal. He conceded that fraud constitutes serious misconduct which should not be tolerated at the workplace. He issued the first respondent with a final written warning valid for 12 months. A final written warning is a sanction. It should be preceded by a finding of guilt. The finding that the first respondent did not commit fraud is inconsistent with the issuing of the final written warning because punishment cannot be meted out to an innocent employee. The commissioner committed gross irregularities in making the above errors and contradictory findings. The irregularities led the commissioner to reach an unreasonable decision.

- [8] The applicant sought an order substituting the arbitration award. Evidence which is mostly common cause proves that the first respondent made himself guilty of fraud. When his misconduct was discovered he made an acknowledgement of debt. I have no reason to reject the applicant's evidence that the misconduct led to the breakdown of the trust relationship between the parties. The record shows that the first respondent's misconduct was deliberate and he attempted to exonerate himself dishonestly when giving an explanation for making two payments for the same lottery ticket. That is not the conduct of an employee who expresses remorse for his or her misconduct. The gravity of the fraud he committed outweighs his length of service and clean disciplinary record by far. The rule against fraud at the applicant is reasonable as some of its employees handle substantial amounts of money. The first respondent's conduct caused harm to the applicant to the

effect that the applicant suffered financial loss in the amount of R8340.00. The first respondent is responsible for the hardship he is suffering as a result of his dismissal. The sanction of dismissal is, in the circumstances, appropriate for the misconduct of fraud which the first respondent committed.

Order

[9] In the premises the following order is made:

1. The late filing of the review application is condoned.
2. The arbitration award issued by the third respondent under case number LP 2110-13 and dated 28 June 2013 is reviewed and set aside and substituted with the following:
 - 2.1 The dismissal of the first respondent was substantively fair.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Advocate J Malane

Instructed by: Nozuko Nxusani Incorporated

For the First Respondent: Mr A Ramaano of Anton Ramaano Inc.

LABOUR COURT