

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1247/16

In the matter between:

THE RAND MUTUAL ADMIN SERVICES (PTY) LTD

Applicant

and

MOTLAGOILE DINTOE

First Respondent

COMMISSIONER LAZARUS MATLALA N.O.

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: 25 June 2019

Delivered: 28 June 2019

JUDGMENT

MAHOSI.J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act (LRA)¹ to review and set aside the arbitration award issued by the second respondent (the commissioner) under the auspices of the third respondent under case number NWRB1-16 dated 21 June 2016.

¹ Act 66 of 1995 as amended.

- [2] The issue is whether the commissioner, on the evidence before him, came to a conclusion that no reasonable decision maker could come to.

Summary of salient facts

- [3] The applicant employed the first respondent as a branch manager of its Rustenburg branch with effect from 1 May 2015. In terms of the contract of employment, the first respondent was required to compile and submit a month end report on the basis of which the applicant would invoice its client. It is not in dispute that, once the month end report is compiled, it must be loaded on the SharePoint Server within three days. The Regional Manager: Claims Mr Rhulani Mackauckau (Mackauckau), would thereafter access the reports that were uploaded on the SharePoint Server by the branches, collate information and submit the consolidated report to the Executive Manager for review by the Executive Board.

- [4] On 4 November 2015, the first respondent uploaded the August month end report on the SharePoint system. The following day, on 5 November 2015, the third respondent accessed the system and renamed the August month end report to "Rustenburg Branch Month End 2015." While perusing the report submitted by the first respondent, Mr Mackauckau noticed that the report had been previously submitted as for the month of August 2015. An explanation was sought from the first respondent. In his letter of explanation dated 12 November 2015, the first respondent stated that he uploaded the report while testing the system.

- [5] This resulted in the first respondent's suspension and he was subsequently issued a notice to attend a disciplinary hearing to answer to the following allegations:

2.1 Dishonesty

In that on the 4th November 2015, you conducted yourself in a deceitful manner when you changed the date on the August 2015 monthly Report cover page and submitted the report as a newly compiled October 2015 Monthly Report. Such action is in breach of the trust relationship between yourself and the company

2.2 Insubordination

In that on the 26th October 2015, you failed to follow a lawful and reasonable instruction when you left the office for almost two hours for personal reasons without prior permission and/or authorization as previously discussed.'

- [6] Following the disciplinary hearing the first respondent was found guilty on charge 1 and the sanction of dismissal was imposed with effect from 10 December 2015. Dissatisfied with his dismissal, the first respondent referred an unfair dismissal dispute to the third respondent challenging both the procedural and substantive fairness of his dismissal. The dispute was conciliated unsuccessfully and it was referred to arbitration that was held on 14 March 2016, 22 April 2016 and 3 June 2016.
- [7] On 21 June 2018, the commissioner issued an arbitration award in terms of which he found that the first respondent's dismissal was substantively unfair and ordered the applicant to reinstate him retrospectively. It is this award that is the subject of this application.

The arbitration and the award

- [8] The commissioner recorded the issue to be decided at paragraph 4 of his award that reads:
- 'The issue concerns the dismissal of the applicant on 14 December 2015. I was called upon to decide whether the dismissal was substantively unfair. The issue in dispute was whether the applicant acted purposely in this matter.'
- [9] The applicant led oral evidence of five witnesses and submitted a bundle of documents as part of the evidence. Its case was that the first respondent conducted himself in a deceitful manner when he changed the date of the August 2015 report. The applicant submitted that by altering the cover of the August report, the first respondent intended to mislead the employer in believing that the report was for October 2015.
- [10] The first respondent's case was that he uploaded the month end report with an intention to test the system as he was not properly trained to compile and upload same on the system.

[11] The commissioner recorded, as common cause facts, that the first respondent was aware of the rule that he was required to submit accurate monthly reports within three working days of the new month; arrangements were made for Ms Segopotso Kgatle to assist the applicant in compiling such reports; the first respondent was counselled for poor work performance on 21 October 2015 concerning timeous submission of monthly reports and further that the first respondent uploaded the report in the 2014/2015 folder instead of 2015/2016 folder.

[12] Having done so, the commissioner firstly considered whether the first respondent was properly trained on completion and uploading of the monthly report and found that the applicant failed to provide proper training. It was on this basis that he accepted the first respondent's version that in October 2015, he did not know how to complete and upload the monthly reports.

[13] The commissioner then considered whether the first respondent acted in a deceitful manner as charged by the applicant and arrived at the finding that appear in his award as follows:

'My findings are that had to the applicant intended to deceive the respondent, he could have amended all the dates in the report, but he did not do so. The applicant only uploaded the month end report of August 2015 which was the report used by Segopotso Kgatle in her illustration on how to upload such a report. According to the applicant he uploaded the August 2015 report while he was learning how to upload files on the system. He described that as a test document and not as an authentic October 2015 report as alleged by the respondent. I am unable to find any intention by the applicant to deceive the respondent in this case but his conduct demonstrates that he was reckless in sending the report, but not dishonest.'

[14] It was on the basis of the above finding that the commissioner found the first respondent's dismissal to have been substantively unfair. The applicant brought this application on the grounds that are considered below.

The grounds for review

- [15] The applicant seeks to review the award on a number of grounds. However, the challenge is mainly that the commissioner misconstrued the nature of the dispute before him, failed to take into account the applicant's evidence and further misconstrued and/or disregarded the important evidence of witnesses which resulted in him arriving at an award that no reasonable decision-maker could arrive at.
- [16] In opposition, the first respondent contends that the analysis of the transcript and the award does not support the applicant's contention that there was misconduct or gross irregularity on the part of the commissioner. Further that the commissioner considered all the relevant facts and circumstances properly presented during the arbitration proceedings and reached a decision that fell within a band of decisions that could be considered as reasonable.

The applicable law

- [17] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*² is a test for the substantive reasonableness of the outcome or result of an arbitration award, which is an outcome based enquiry³, entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.⁴
- [18] In *Bestel v Astral Operations Ltd and Others*⁵ the Court stated as follows:

'It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz, supra*, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'⁶

² [2007] 12 BLLR 1097 (CC).

³ *Ellerine Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 2899 (LAC) at 2906H-I.

⁴ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 100; *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) at para 13.

⁵ [2011] 2 BLLR 129 (LAC).

⁶ *Id* fn 5 at para 18.

[19] For the applicant to succeed with the review application, it must be established that the commissioner's decision fell outside the bounds of reasonableness based on all the material that was before the commissioner, including for the reasons not considered by the commissioner.⁷

Analysis

[20] The question is whether the commissioner addressed the questions raised for determination, evaluated the facts presented before him and arrived at a conclusion that is reasonable.⁸

[21] The commissioner seems to have been unsure of what the issue before him was. Although at the beginning of his award, he recorded that the issue to be decided was whether the dismissal was substantively fair and whether the first respondent acted purposely in uploading the August 2015 report, it is not clear why he considered whether the third respondent was properly trained to upload the report on the SharePoint system. The issue before him was that of misconduct and not poor work performance. In so doing, he committed a material gross irregularity.

[22] The main question the commissioner was required to consider was whether the applicant committed the misconduct he was charged with, namely whether he acted in a deceitful manner when he changed the date on the August 2015 and submitted the report as a newly compiled October 2015 monthly report. In determining this, the commissioner was faced with two mutually destructive versions. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*⁹ the Court had the following to say in regard to the way in which a decision-maker has to make a finding on disputed issues:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.'

[23] The undisputed evidence before the commissioner was that, as a branch

⁷ *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) at para 103.

⁸ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at para 16.

⁹ (427/01) [2002] ZASCA 98 (6 September 2002).

manager, the first respondent was required, in terms of his contract of employment, to submit monthly reports on the third day of every month. On 21 October 2015, the third respondent attended a poor work performance counselling session during which one of the issues raised was his failure to submit the month end report timeously. On 4 November 2015, which was the last day to submit the month end report for October 2015, Ms Kgatle demonstrated to the third respondent how to upload the report on the SharePoint system and further created a folder in which the third respondent could save all his reports. This was done upon the third respondent's request. Later that day, the first respondent uploaded the report that was previously uploaded in August 2015 on the system. On 5 November 2015, the third respondent accessed the August 2015 report he submitted the previous day and renamed it to "Rusternburg Branch month-end October 2015." Further to that, the first respondent edited the cover page to make it read October 2015. This report was left on the system until 12 November 2015 when he was requested to provide an explanation for his conduct.

[24] In explaining his conduct, the record evidences that the first respondent proffered different versions. The first one was that he uploaded the August 2015 report in a process of testing the system as he was not properly trained¹⁰. The second one was that he made an honest mistake.¹¹ The third version was that he had the intention to alter the inside document to reflect the October report.¹² Notwithstanding the first respondent's evidence that was riddled with inconsistencies and contradictions, the commissioner accepted his version without giving reasons for doing so. His decision to choose the first respondent's version over the applicant's when there were conflicting versions is so implausible as to render the award unreasonable.

[25] Not only that, the commissioner also made a finding that had the first respondent intended to deceive the applicant, he would have amended all the dates in the report, which he did not do. It is not clear what the commissioner based this finding on because firstly, he failed to assess the basis on which the first

¹⁰ Transcribed record at page 254, line 5

¹¹ Transcribed record at page 306 line 4-7

¹² Transcribed record at page 314, line 11-13

respondent made the amendments on the August 2015 report. Secondly, as earlier intimated, the record evidences that one of the first respondent's versions was that he had the intention to alter the inside document to reflect the October 2015 report. Of importance, is that the first respondent did not voluntarily declare that, while he was testing the system, he mistakenly submitted the amended August 2015 report. Instead, he waited until Mr Mackauckau realised that the report he submitted as one for October 2015 resembled the one previously submitted for August 2015.

[27] It is clear from the reading of the award that, in accepting the first respondent's version, the commissioner was influenced by his finding that the he was not properly trained to complete and upload the monthly reports. Had the commissioner not accepted the first respondent's version, he surely would not have found that his dismissal was substantively unfair.

[27] In light of the above, the applicant succeeded in making out a case that the commissioner's decision was unreasonable and that he committed a gross irregularity in misconstruing the nature of the enquiry before him and in disregarding material evidence. I do not deem it wise to remit the dispute to the CCMA for fresh arbitration. I will determine the dispute in terms of section 145(4)(a) of the LRA.

[28] The first respondent was not charged and dismissed for failing to upload the monthly report. The issue was that he was dishonest in changing an existing report of August 2015 and submitting it as a report for the month of October 2015. It is apparent from the record that the first respondent committed the misconduct he was charged with and further that his justification was highly improbable.

[29] With regard to costs, I am of the opinion that the requirements of law and fairness dictate that there should be no order as to costs.

[30] In the circumstances, I make the following order

Order

1. The arbitration award issued by the second respondent under the auspices of the third respondent under case number NWRB1-16 dated 21 June 2016 is reviewed and set aside and substituted with the following order.

1.1 The dismissal of the first respondent was substantively fair.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate Xolani Matyolo

Instructed by: Mervyn Taback Incorporated

For the third respondent: Mr Parsons of Parsons Attorneys