

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case no: JR 266/17

NOT REPORTABLE

In the matter between:

**CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

First Applicant

and

**SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING
COUNCIL**

First Respondent

ADVOCATE T L MABUSELA N.O.

Second Respondent

SAMWU obo KGOMOTSO BANDA

Third Respondent

Heard: 14 August 2019

Delivered: 19 August 2019

Summary: (Review – reasonableness – arbitrator could only have arrived at findings by ignoring critical relevant evidence – arbitrator misconstruing requirement of confession in employment context)

JUDGMENT

LAGRANGE J

Background

- [1] This is a review application of an arbitration award in which the arbitrator found the third respondent's dismissal was substantively unfair. Essentially the review is based on unreasonableness.
- [2] The third respondent ('Banda') was found guilty during his disciplinary inquiry of acting in concert with one other employee to defraud the Tshwane municipality by performing illegal transactions on the SAP system after gaining access to it unlawfully using the login credentials and passwords of three other employees. The three employees in question did not use the PC used by Banda and were not even working on the same premises. Banda shared the PC with one other employee. The fraudulent transactions consisted of closing certain customer's municipal rates debtor accounts and creating new accounts for them thereby extinguishing the debt and causing the municipality a loss of approximately R 168,000-00.

The award

- [3] The arbitrator hearing the case was "not convinced" that Banda had committed the misconduct. In summary, his account of the evidence was as follows:
 - 3.1 The arbitrator accepted that the passwords and credentials that were used to open and close accounts belonged to employees who did not work on the PC which Banda and one other employee ('Mavuso') shared at a different physical location.
 - 3.2 The investigator testified that Banda had confessed to the activities and that he obtained the credentials used to access the system from another employee [Makoka] working at the same premises as the employees whose credentials were used.
 - 3.3 The investigator testified that Banda also identified two other employees who had assisted him, and both of these employees resigned when the allegations were brought to their attention.
 - 3.4 The investigator eliminated other employees who had used the same PC as suspects because there was no evidence linking them with the

fraudulent transactions. An alternative suspect identified by Banda was not one of the employees whose profile was identified as using the PC in question.

3.5 The other employee who use the PC in question had no knowledge of the SAP system, which was used to perpetrate the fraud.

3.6 Banda admitted being trained on the SAP system.

3.7 Banda claimed to be ignorant about the reasons why the other two employees implicated had resigned. He admitted to requesting the name of one employee from Makoka but claims his interest was in making contact with the employee, apparently as he supposedly had romantic designs on her. He claimed he hardly used his own work email because he uses his personal one.

[4] The arbitrator reached his conclusion that he was not “convinced” the third respondent had committed the alleged misconduct on the following basis:

4.1 The evidence against the applicant was circumstantial consisting *inter alia* of the evidence of the two persons using the computer, he was the only one trained to open and close accounts on the SAP system.

4.2 Although the chairperson of the inquiry said his decision would have been influenced if he had known that there were eight other employees using the PC in question, one of whom had SAP training, the arbitrator could find no reason why it was Banda’s ID that was used to open and close accounts even if his version was that it could be anyone who knew his credentials.

4.3 The arbitrator accepted that the other two employees had resigned when confronted by the investigator because they knew that was the only option, but that did not make Banda guilty.

4.4 The fact that the third respondent contacted Makoka to obtain the details of someone who was not on duty did not mean he did so for ulterior motives.

- 4.5 There was nothing wrong with the disciplinary chairperson's conclusion that Banda was guilty except that the chairperson did not know there were other persons using the PC.
- 4.6 Even though the investigator said that he was only able to track the other employees who were implicated because of Banda's confession, the confession was disputed by Banda and there was no evidence corroborating the existence of the confession, nor did it comply with the requirements of a confession, which the arbitrator did not identify. In this regard it appears that the arbitrator would only have been prepared to accept that a confession was made if there was a formal written statement to that effect. In the absence of corroboratory evidence that the alleged confession was made, there was nothing in the investigator's evidence that could assist the arbitrator in making an informed decision.

Grounds of review:

- [5] Essentially, the applicant contends that the decision is not one that a reasonable arbitrator could have reached on the evidence before the arbitrator. Amongst the specific reasons advanced are:
 - 5.1 The evidence was not circumstantial but direct.
 - 5.2 The arbitrator improperly disregarded the investigator's evidence even though he testified that he would not have been able to identify two other employees who were implicated without Banda's confession and that those employees resigned when confronted with the information provided by Banda.
 - 5.3 The arbitrator committed an error of law in deciding that only a formal confession would carry any weight.
 - 5.4 In assessing Banda's evidence, the arbitrator ignored that despite Banda's denial, it was established that he had received SAP training and knew how to open and close accounts.

- [6] A number of other generally stated grounds of review were raised by the municipality but without providing factual substratum for making those claims. Accordingly, these have not been considered.
- [7] Banda argues that the failure of the applicant to provide evidence how the other eight employees who might have used the PC could not be linked to the misconduct justified the arbitrator's conclusion. He also argues that the applicant failed to show how the alleged irregularities in the award affected the outcome.

Evaluation:

- [8] It is true that much of the case against Banda was circumstantial, or indirect, evidence of his involvement. But the mere fact that it was circumstantial does not mean it could not be compelling.
- [9] The arbitrator completely failed to have regard to the investigator's evidence that he was only able to identify to other persons implicated in the fraudulent scheme based on the information provided by Banda. The arbitrator simply avoided the inescapable fact that, on the evidence the only explanation how the investigator came by this information was that it was provided by Banda himself. In contending that in the absence of corroboratory evidence that Banda made a confession, the investigator's evidence could not be relied on, the arbitrator completely ignored the corroboratory evidence that other persons involved could not have been identified without Banda providing that information.
- [10] In taking into account that other people had used the computer used by the Banda, the arbitrator also ignored the evidence that the investigator found that none of the others could be linked to the fraudulent transactions and the alternative suspect mentioned by the third respondent did not have a user profile on the computer at all. In this regard what was particularly telling was a series of emails sent from Banda's municipal email address to the persons whom the investigator claimed Banda had identified as helping him close and open accounts. In the arbitration, the arbitrator was plainly aware of the difficulty this presented to Banda, and then suggested to Banda that someone else may have used his email

address when he was not using the PC, even though Banda had not advanced this explanation himself. The arbitrator then ought to have considered that the emails in question amounted to a lengthy to and fro conversation which was not confined to a few minutes of the day as might be expected if someone opportunistically took advantage of Banda's temporary absence from his workstation. Even more remarkably, the arbitrator ignored the utterly incredible evidence of Banda that he was aware of the emails which were sent in his name but that even though he claims not to have sent them, it did not alarm him that his email was being abused by an unknown third party in this way.

[11] In discounting the information provided to the investigator, the arbitrator was also able to avoid dealing with the investigator's evidence that the names that the third respondent claims were given to him by Makoka were the very persons whose computer identities were used to open and close accounts when they were absent from work. Similarly, the only explanation provided in the evidence for the investigator to contact Makoka about the provision of names to the third respondent was that the third respondent said he received the details from Makoka. In this regard the arbitrator also failed to consider the conflicting versions about why Banda claimed he contacted Makoka. Makoka was very clear that he wanted to know the identity of someone who was absent from work, whereas Banda claimed he was trying to get hold of someone. The arbitrator failed to reconcile the evidence of Makoka that Banda did not ask if a particular person was at work, but asked for the name of a person who was not, whereas Banda was essentially claiming he was trying to get hold of someone he had identified.

[12] The pattern of the arbitrator simply turning a blind eye to evidence contrary to his conclusions is so obvious it is strongly suggestive of bias on his part, apart from the fact that his findings were irrational because he could only have reached them by ignoring such evidence. I am satisfied on the evidence that no reasonable arbitrator could have arrived at his findings on the evidence before him. On the contrary had he dealt with the

inconvenient evidence he ignored he would have been compelled to conclude that the only reasonable inference to draw was that Banda was guilty as charged. The fraudulent misconduct being of a very serious nature his dismissal was justified.

Order

- [1] The second respondent's finding in the arbitration award in case PMD 111312 dated 9 January 2017 handed down under the auspices of the first respondent that the dismissal of Mr K Banda was substantively unfair and the relief awarded in paragraph 6 of the award is reviewed and set aside, and substituted with a finding that he was guilty as charged and his dismissal was fair.
- [2] No order is made as to costs.

R G Lagrange
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: W Bekker instructed by Gildenhuis Malatji Inc.

THIRD RESPONDENT: L Tooka of M S Molebaloa Attorneys Inc.