



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR1163/17

In the matter between:

**TSEBO OUTSOURCING GROUP**

**Applicant**

and

**COMMISSIONER: SILAS SEGOLE**

**First Respondent**

**COMMISSION FOR CONCILIATION**

**MEDIATION AND ARBITRATION**

**Second Respondent**

**NASECGWU obo CECILIA DIEKETSENG SENATSI**

**Third Respondent**

**Heard: 7 November 2018**

**Delivered: 30 April 2019**

---

**JUDGMENT**

---

LALLIE, J

- [1] This is an application to review and set aside an arbitration award of the first respondent who will be referred to as the commissioner in this judgment. It is opposed by the third respondent.
- [2] The factual background to this dispute is that the individual third respondent who will be referred to as the third respondent in this judgment, was employed by the applicant as an Assistant Catering Manager. She performed her duties

at Cairn Hall Hospital. Her responsibilities included being in charge of stock. In October 2016, Mr Schmitt, the applicant's District Manager noticed discrepancies in stock levels and variances that were unacceptably larger than usual in the third respondent's area of responsibility. The third respondent was asked to find out the cause and report it to the applicant. As stock taking was conducted weekly, the third respondent did not report on the reasons for the variances which continued to show in her stock taking documents. The applicant suffered a R5000.22 stock loss.

- [3] The applicant took a decision to institute a disciplinary enquiry against the third respondent on the following charge:

'Attempt to defraud Tsebo on any inconsistencies relating to stock taking or stock sheets which lead to a loss for Tsebo or the client in that during the months of October you had numerous variances to the amount of R3046,36 after being given enough time to look for the problem in which you failed'.

The chairperson of the disciplinary enquiry, Mr Mahlangu, found that the third respondent had displayed negligent behaviour and found her guilty of what he referred to as 'a component verdict of gross negligence'. He recommended the sanction of dismissal which the applicant implemented.

- [4] The third respondent challenged the applicant's decision to dismiss her at the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA). The dispute was arbitrated by the commissioner who found the third respondent's dismissal both substantively and procedurally unfair and ordered the applicant to reinstate her. It is that award that the applicant seeks this Court to review and set aside. The applicant's main grounds for review are that the commissioner failed to properly apply his mind to the evidence before him, misconstrued the evidence and reached an unreasonable decision which is disconnected from the evidence. The applicant submitted that it led evidence and proved that the third respondent made herself guilty of misconduct. The commissioner, however, unreasonably

found that the applicant had dismissed the third respondent unfairly for misconduct that she was not charged with.

- [5] Giving reasons for his decision, the commissioner made a finding that the third respondent did not contravene any rule because the applicant had failed to prove its case against her. He found no evidence linking the third respondent to the charge which she faced at the disciplinary enquiry and concluded that the third respondent did not contravene the rule but that she was dismissed on a charge based on the chairperson's perception. The third respondent opposed the application on the basis that the award is both reasonable and correct.
- [6] The applicant's argument is correct that the relevant test to determine a review application based on errors made by a commissioner in the conduct of an arbitration is that set out in *Head of the Department of Education v Mofokeng and Others* as follows<sup>1</sup>:

'...To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'

- [7] An assessment of the totality of the evidence tendered at arbitration and the arbitration award supports the applicant's version that the commissioner misconstrued the dispute before him. As the dispute before him concerned an alleged unfair dismissal for misconduct, the commissioner was required to

---

<sup>1</sup> (2015) 36 ILJ 2802 (LAC) at para 32.

determine the fairness of the applicant's conduct of dismissing the third respondent for gross negligence, the misconduct she was dismissed for and not for the misconduct she was charged with. The commissioner therefore conducted an incorrect enquiry, thus misconceiving the dispute before him.

- [8] The manner in which the commissioner dealt with the applicant's conduct of charging the third respondent with one act of misconduct and dismissing her for another, rendered his award defective as envisaged in section 145 of the Labour Relations Act<sup>2</sup> (the LRA). In *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*, the Labour Appeal Court (LAC) held that<sup>3</sup>:

"Unlike in criminal proceedings where it is said that 'the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient', the misconduct charge on and for which the employee was arraigned and convicted at the disciplinary enquiry did not necessarily have to be strictly framed in accordance with the wording of the relevant acts of misconduct as listed in the appellant's disciplinary codes, referred to above. It was sufficient that the wording of the misconduct alleged in the charge-sheet conformed, with sufficient clarity so as to be understood by the employee, to the substance and import of any one or more of the listed offences. After all, it is to be borne in mind that misconduct charges in the workplace are generally drafted by people who are not legally qualified and trained".

- [9] The commissioner's award that the third respondent's dismissal was substantively and procedurally unfair resulted from his misconception of the dispute before him. The award is therefore unreasonable. The applicant sought an order substituting the award. I have read the record of the arbitration proceedings and am not convinced that it contains sufficient information on which a decision on the fairness of the third respondent's dismissal can be made.

---

<sup>2</sup> Act 66 of 1995 as amended.

<sup>3</sup> (2011) 32 ILJ 2455 (LAC) at para 32.

[10] In the premises, the following order is made:

Order:

1. The arbitration award issued by the first respondent under case number FSBF5232-16 dated 20 April 2017, is reviewed and set aside.
2. The matter is remitted to the second respondent to be arbitrated *de novo* by a commissioner other than the first respondent

---

Z. Lallie

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Mr Postuma of Snyman Attorney

For the Third Respondent: Mr Tshabalala Representative of NASECGWU

LABOUR COURT