THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1343/2019

In the matter between:

IMPERIAL RETAIL LOGISTICS (PTY) LTD Applicant

and

THEMBA CEDA, *N.O.* First Respondent

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY Second Respondent

INQUBELAPHAMBILI TRADE UNION Third Respondent

LEWIS MAGAULA Forth Respondent

Heard: 15 August 2023

Delivered: 16 August 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 16 August 2023.)

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JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to review and set aside an arbitration award issued by the first respondent (the arbitrator). In his award, the arbitrator held that the fourth respondent (the employee) had been unfairly dismissed by the applicant and ordered his reinstatement with retrospective effect.

[2] The employee was employed as a driver. He was dismissed in February 2017 for damage to property, after he was alleged to have reversed a truck into a stationary truck, causing damage in the amount of some R12 000. The employee disputed the fairness of his dismissal, and referred the dispute to the bargaining council.

[3] At the arbitration hearing, the applicant's site security supervisor, a Mr Wilkie Hilmer, testified that on 4 December 2016, the employee reversed the truck he was driving into a stationary truck ordinarily driven by a driver named Mr Lucas Leope. The incident occurred a time when both trucks were part of a dispatch to a client. Hilmer testified that he obtained a written statement from the employee regarding the incident. The statement was read into the record at the arbitration hearing. At the head of the statement, the employee is identified by reference to his name and ID number. In the statement, the employee records that he was reversing his truck and accidentally bumped the other truck. Hilmer also took photographs at the scene, which were admitted into evidence. Hilmer completed an incident report in which he described the accident and the actions that he took thereafter. It warrants mention that in the report, the employee is recorded as having conceded that he was driving the truck in question, that he reversed the truck into the other vehicle, that the other vehicle was stationary when the accident occurred and that the driver of the other vehicle was not present. The employee's testimony was that he did not reverse into the truck as alleged, that he did not sign any statement, and that he did not see Hilmer. Mr Lucas Leope testified that on

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the day in question, that his truck bumped into the truck ordinarily driven by the employee because he thought he had applied the handbrake, but hadn't.

[4] The arbitrator summarised the evidence and concluded, on a balance of probabilities, that the applicant had failed to establish that the employee had committed an act of misconduct.

[5] The applicant seeks to review and set aside the arbitrator's decision on the basis that the only reasonable conclusion, on a proper evaluation of the evidence, is that the employee had committed the misconduct with which he had been charged. In particular, there was no conceivable reason why Hilmer would have fabricated an elaborate version relating to his investigation, the signed statements he obtained and the written incident report, nor was there any basis to question his credibility as a witness particularly given the fact that he is employed by an independent security company. Further, the signature on the statement is identical to the test signatures before the arbitrator and he ought properly to have concluded that the employee drafted and signed the statement admitted in evidence, particularly in the light of Hilmer's corroborating evidence. Further, Hilmer's evidence that the usual driver of the truck into which the employee had reversed, Lucas, was not in his truck, was not contested. It was only at the arbitration hearing and when the employee opened his case, that Leope stated that it was he who had driven into the employee's truck. An accident in these terms have never been reported, and Leope had never disclosed prior to the arbitration that it was he who was at fault.

[6] In these circumstances, the applicant contends that the arbitrator failed to apply his mind to the evidence and to properly determine the probabilities and credibility of the witnesses in circumstances where his conduct constituted a grace irregularity and a misconception of the nature of the inquiry.

[7] In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1

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BLLR 20 (LAC)), the Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The LAC has cautioned against adopting a piecemeal approach, since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). When an arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[8] To summarise: the threshold to be met by an applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first stage is to determine the existence or otherwise of any error or irregularity on the part of the arbitrator. If the applicant is unable to establish any error or irregularity, that is the end of the enquiry. The second stage is one in which the review court must establish whether despite any retrievable irregularity, the award nonetheless falls with a band of decisions to which a reasonable decision – maker could come on the available material.

[9] In their seminal work, *Reviews in the Labour Courts* (Lexis Nexis 2016), at p 262, Myburgh and Bosch discuss at some length the applicable guidelines, adopted by this court and the LAC, in relation to an arbitrator's duties in respect of the resolution of factual disputes. Both courts have found that the technique described by the *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) applies. In broad terms, a commissioner seeking to resolve a factual dispute is required to make findings on the credibility of the various factual witnesses, their reliability, and the probabilities. In regard to credibility, relevant factors as candour and demeanour, any bias, internal and external contradictions in the evidence, the probability or improbability of particular aspects of the witness's

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version and of the calibre and cogency of the witness's performance compared to that of other witnesses testifying about the same incident or events. In regard to reliability, relevant factors extend to the opportunities that the witness had to experience or observe the event in question, and the quality, integrity and independence of the witness's recall. As to the probabilities, what is required is an analysis of the probability and improbability of each party's version. The commissioner must then, in the light of its assessment of the credibility of the various witnesses, their reliability, and the probabilities of each party's version, and as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The question to be asked is whether the arbitrator's preference for the version put forward by the employee's witnesses over that of the applicant was a decision that a reasonable decision-maker could not reach.

[10] In my view, the arbitrator committed a reviewable irregularity when he, having recognised the material dispute of fact, failed to apply the proper approach to the determination of that dispute. Without giving any substantive reasons, the arbitrator clearly preferred the version put forward by the employee and his witnesses. There is no proper interrogation of the evidence, nor is there any reasoned assessment of the credibility of the witnesses concerned, or the probabilities of the competing versions that served before him. Had the arbitrator embarked on a proper inquiry and had he properly assessed the evidence to determine the balance of probability, he would have found that in the course of his examination in chief, the employee's version was a blunt denial that he had reversed his truck into the truck driven by Leope and an assertion that he was 'going forward'. The arbitrator would also have been aware that this was the first occasion on which the supervision had been proffered. Further, Leope's version that it was he and not the employee who had caused the accident was yet another version in an obviously contrived attempt to exculpate the employee. What the arbitrator ought to find startling is that neither of these visions were put to the applicant's witnesses during cross-examination. Had the arbitrator considered for a moment the issue of credibility, he would have dismissed the employee's version for want of credence not only on account of the inherent contradictions and mutations in

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that division as the proceedings continued, but also because these aversions had never been put to the applicant's witnesses. This was archetypical case in which the version changed as the proceedings progressed, and ought to have raised severe doubts in the arbitrator's mind about the reliability of the testimony. Further, had the arbitrator properly considered the issue of credibility, he would have observed that neither the employee nor Leope had ever independently reported the accident, nor had they at any stage prior to the arbitration hearing disclosed that it was Leope who was at fault. On the contrary, Hilmer testified that he had witnessed the employee reversing into the other truck, and had immediately taken pictures of the damage and prepared a written incident report after having obtained a signed statement from the employee, who had admitted in writing and under his own signature to reversing into the truck. Had the arbitrator considered this evidence for even a moment, he would have concluded that it was highly improbable that an employee of an independent security company would collude with the applicant to create a fictitious version that extended to the drafting of a fictitious statement and fabricating a signature, simply to dismiss the employee.

[11] In short, in relation to his assessment of the evidence, the arbitrator was simply out of his depth. He had no understanding of how to determine a material dispute of fact, and the application of the rules that concern the determination of credibility and probability. The reviewable irregularity on his part had a distorting effect on the outcome and resulted in an outcome to which no reasonable decision maker could come on the available evidence. The arbitrator's award thus stands to be reviewed and set aside.

[12] In so far as remedy is concerned, there is little point in remitting the matter for rehearing. The record is complete and the court is in as good a position as any arbitrator to make a determination. In any event, it is not disputed that the applicant has retired. In these circumstances, I intend to substitute the arbitrator's award for a ruling to the effect that the employee's dismissal was fair.

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I make the following order:

1. The arbitration award issued by the third respondent on 10 May 2019 under case number GPRFBC 46727 is reviewed and set aside.

2. The award is substituted by the following:

   'The applicant's dismissal was substantively and procedurally fair'.

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André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: R J C Orton, Snyman Attorneys

For the respondent: T Bolani, Tshepo Bolani Inc

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